9

CRIMINAL LAW

*Jyoti Dogra Sood**

I INTRODUCTION

CRIME IS a term which is familiar to all yet is difficult to define. One easy way is to define crime as an act which is made punishable by the penal statutes of the country. Response to a crime involves actions of an array of institutions – the police, the investigation wing, the prosecution and finally the court system. Judiciary, in the backdrop of formal definitional norms and procedural requisites, adjudges guilt or innocence of the alleged perpetrator of the named offence(s). The present survey is an attempt to carefully look at prominent judicial pronouncements of the Supreme Court of India delivered in the year 2017, adjudging guilt or innocence of the persons involved and the principles/propositions emerged therefrom. For convenience the survey is divided into various heads; however, two cases – *Nirbhaya*[1] and *Independent Thought* v. *Union of India*[2] have been separately analysed, given the attention that these two cases garnered when they were decided.

II THE INFAMOUS NIRBHAYA CASE

December 16th 2012 will always be remembered for the infamous *Nirbhaya* case where a young woman was brutally gang raped and sexually assaulted in the most barbaric manner, resulting in her death. The apex court had the opportunity to deal with this horrific crime in the case of *Mukesh* v. *State (NCT of Delhi)*.[3] The facts of the case are chilling - a paramedical student had gone with a male friend to watch a movie and boarded a public transport (bus) to get home. There were ostensibly other passengers in the bus – all male. The occupants of the bus wanted to know what she

* Associate Professor, Indian Law Institute. The surveyor is thankful to KI Vibhute for his critical comments on the first draft of the Survey. All errors and opinions remain that of the Surveyor.

1 *Mukesh* v. *State (NCT of Delhi),* (2017) 6 SCC 1.

2 (2017) 10 SCC 800.

3 *Supra* note 1.

was doing with a boy at that point of time and on their objection to such an outrageous query, they beat up the boy, took the girl to the rear of the bus and took turns to sexually and physically assault her. The prosecution case, which was supported by medical evidence, was that the girl was brutally raped by the accused persons, subjected to unnatural sex, and physically assaulted - there were bite marks all over her face and breast. The depravity did not end there and her private parts and internal organs were seriously injured by inserting iron rod from either the rectal or vaginal region. Such horrific acts cannot be, it is submitted, just for satisfying sexual lust. It was as if they wanted to sexually, physically and mentally brutalize her. This kind of behavior is too scary and we must, as a society, also ponder as to what could be the reason for this kind of brutality.

However, that was not the court's concern; it concerned itself with the conviction and appropriateness of the extreme punishment of death which was awarded to all the accused persons by the lower courts. The accused persons had their lawyers defending them and the court appointed Sanjay Hegde and Raju Ramachandran as *amicus* in the case - both known abolitionist lawyers. The entire evidence was scrutinized to minutest detail starting from the registering of FIR – the delay in registration, the non-mentioning of assailants, etc. The court, with the help of precedents, ruled out these objections. The next step was to appreciate the evidence which at the very outset, the court declared, was obtained by scientific methods - there were dying declarations which were corroborated by eyewitness evidence; medical reports and recovery evidence. However, what was little surprising in the entire narrative of the apex court judgment was that Sanjay Hegde, who should have been helping the court in giving a just decision(since he was the *amicus* – friend of court), seemed keen on raising doubts even where none existed. He fitted the role of the lawyer of the accused persons who, invariably raise objections where none exist to prove them innocent. For example, Sanjay Hegde was even doubtful of the male friend's testimony[4] and the court had to spend considerable time reiterating what is a settled principle that injured eyewitness is to be accorded a special status in law and the deposition must be relied on ignoring minor contradictions and discrepancies.

The recovery evidences under section 27 of the Indian Evidence Act, 1872 was also under scrutiny. No doubt that there have been instances of misuse but the recoveries made in the instant case have been proved by the testimonies. The case, apart from the prosecution witness, was also supported by dying declarations of the prosecutrix. When the prosecutrix was brought to the Gynae casualty, her statement was recorded by the doctor in the casualty/GRR report. What is bizarre about the recording is the last statement in the record "she has history of intercourse with her boy friend about two months back (wifully)". Why would a woman who has been sexually and physically assaulted and miraculously is still alive (the assailants had inflicted such grave injuries that her being alive is in itself a miracle) would talk about her past sexual encounter

4 *Id*., para 70-71 at 74.

with her boyfriend? It may have been the case that the doctor asked a leading question to which the prosecutrix responded. The past history is of no relevance in rape cases and in this case it could have had no bearing, so why were the doctors asking such questions? And why did the courts, including the gender sensitive apex court, not expunge these remarks?

The veracity of the dying declarations was also challenged and Sanjay Hegde contended that the subsequent dying declarations could not be relied upon. Given the fact that one of the accused Mukesh's case was slightly on a slippery slope compared to other accused inasmuch that he no doubt was liable for gang rape but given the need for individual sentencing the *amicus* could have helped the court distinguish one case from the other. The court again quoted extensively from precedents to put forth the point that some contradictions in dying declarations do not mar the veracity of the same (which again is settled)—perhaps only *Sandeep* v. *State of Haryana*[5] was enough to establish the sanctity of dying declarations. The DNA evidence along with medical reports had confirmed the insertion of iron rod. Other scientific analysis was done to match finger prints, bite marks, etc.

The trial court and the high court had also charged the accused persons under section 120A, IPC and confirmed conviction under section 120B, IPC. The court, for reasons best known to it, entered into almost a standard text book analysis of the offence of conspiracy starting from its insertion in the IPC,[6] discussion in *Russell*[7] and listing of cases – *Murphy,*[8] *Mulcahy*[9]to *Quinn*[10] to *Yusuf Momin*[11] etc. In any standard text book for LL.B. students the ten points from *State* v. *Nalini*[12] are quoted to explain the nuances of the offence of conspiracy and the court included the same. The exercise was totally pointless.

It goes to the credit of Raju Ramachandran (the other *amicus*) who pointed out a major anomaly in the judgment of the trial and high court that pre- sentence hearing, which is very fundamental to our criminal jurisprudence, was not given and which negated the possible application of aggravating and mitigating circumstances. If the accused was not heard, how did the court make a balance sheet between aggravating and mitigating circumstances? One may recall that in *Santosh Kumar* (Priyadarshini Mattoo case)[13] one of the mitigating circumstances was that the accused was married and had a girl child! He was, on a balancing of both aggravating and mitigating circumstances, spared the noose. Given the fact that death penalty was given to the accused persons, this was a very serious omission by the courts.

5 (2015) 11 SCC 154.
6 *Supra* note 1 at 148.
7 *Russell on Crimes* (12th edn.) Vol.1 at 202.
8 *R.* v. *Murphy,* 173 ER 502.
9 *Mulcahy* v. *R,* 1868 LR 3HL 306. (Ed. note at 149).
10 *Quinn* v. *Leathem,* 1901 AC 495 (HL).
11 *Noor Mohammad Mohd. Yusuf Momin* v. *State of Maharashtra* (1970) 1 SCC 696.
12 (1999) 5 SCC 253.
13 (2010) 9 SCC 747.

Nevertheless, the apex court took it upon itself to rectify this glaring omission and asked the accused persons to file affidavits. On a perusal of affidavits as mentioned in the judgment, it is submitted, that they were nothing but the routine ones which the accused persons, with the help of any ordinary lawyer, would have submitted. Given the fact that two leading abolitionist lawyers were assisting the court, should they not have, in the interest of justice and to help the court to deliver justice, given some principled arguments to try and take them out of the death penalty realm? Mukesh in his affidavit in the apex court again reiterated that he did not commit rape.[14] The offence of conspiracy and gang rape stood proved in the case and the presence of Mukesh also was confirmed and hence his conviction in the case was sealed. However, the courts are under an obligation to give individual sentencing and so the court should have dispelled all doubts regarding Mukesh's direct involvement meriting death penalty. It may be that the courts, which are, after all, presided by humans, may have got swayed by the public emotions demanding death penalty and so it fell on the *amicus* to help the court to distinguish the case of one accused from the other. The *best* argument that Sanjay Hegde could put forth in the words of the court was as follows: [15]

> Mr Hegde, learned friend of the Court, canvassed that the theory of reformation cannot be ignored entirely in the obtaining factual matrix in view of the materials brought on record. The learned Senior Counsel would contend that imposition of death penalty would be extremely harsh and totally unwarranted inasmuch as the case at hand does not fall in the category of the rarest of rare cases. That apart, it is contended by him that the entire incident has to be viewed from a different perspective, that is, the accused persons had the bus in their control, they were drunk, and situation emerged where the poverty-stricken persons felt empowered as a consequence of which the incident took place and considering the said aspect, they may be imposed substantive custodial sentence for specific years but not death penalty. Additionally, it is submitted by him that in the absence of premeditation to commit a crime of the present nature, it would not invite the harshest punishment.

Should not have an abolitionist lawyer taken a more nuanced stand against imposition of death penalty? Raju Ramachandran wanted the court to exercise its discretion and give a punishment innovated in *Swamy Shraddananda* (2)[16] which has been upheld by a constitution bench decision in *Union of India* v. *Sriharan*[17]

14 *Supra* note 1, para 483 at 243.
15 *Id*., para 336 at 180.
16 (2008) 13 SCC 767.
17 (2016) 7 SCC 1.

The court also did not fail to surprise by its stand on death penalty as it quoted a whole lot of precedent to justify capital punishment in this case. Most of the judgments that were marshaled where death penalty was awarded were related mainly to rape of minor girl child (*Laxman Naik* v. *State of Orissa,*[18] *Kamta Tiwari* v. *State of M.P.,*[19] *Bantu* v. *State of U.P.,*[20] *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra* ;[21] *State of Maharashtra* v. *Bharat Fakira Dhiwar;*[22] *Vasanta Sampat Dupare* v. *State of Maharashtra*[23]) Another case which figured was that of *Dhananjoy Chatterjee*[24] which involved a security guard whose "sacred duty was to ensure the safety of the inhabitants". The court also did not fail to sneak a very problematic paragraph from *Shyam Narain*[25] where the court, through Dipak Misra J, asserted that " She [8 years old rape victim] may not be able to assert the honour of a woman for no fault of hers". It is submitted that the courts need to re examine and reconsider their use of precedents.

Banumathi J, concurring with Dipak Misra J, gave a separate judgment. The judge put forth a question with multiple answers – three of them[26] as to what should be the appropriate punishment in the case at hand – "death sentence", "life sentence commutable to 14 years" or "life imprisonment for the rest of the life". The judge then effectively dealt only with death penalty and opined that "Factors like young age of the accused and poor background cannot be said to be mitigating circumstances. Likewise, post-crime remorse and post-crime good conduct of the accused, the statement of the accused as to their background and family circumstances, age, absence of criminal antecedents and their good conduct in prison, in my view, cannot be taken as mitigating circumstances to take the case out of the category of "*the rarest of rare cases*".[27]

It is submitted that the general public who reads the judgment must know, if not these, what else are the mitigating circumstances? The judge was categorical that post-crime remorse or post crime conduct is of no help to the accused. This leaves one wondering as to the efficacy and practicality of reformation(which is always post crime), that has always been the main discourse and judicial concern.[28]

18 (1994) 3 SCC 381.
19 (1996) 6 SCC 250.
20 (2008) 11 SCC 113.
21 (2012) 4 SCC 37.
22 (2002) 1 SCC 622.
23 (2015) 1 SCC 253.
24 *Dhananjoy Chatterjee*, v. *State of W.B.,* (1994) 2 SCC 220.
25 *Shyam Narain* v. *State (NCT Delhi),* (2013) 7 SCC 77.
26 *Supra* note1, para 510 at 258.
27 *Id*., para 517 at 261.
28 One may recall that Muralidhar J in *Bharat* v. *State (NCT) of Delhi*, decided on Oct. 31, 2014 had asked for a social investigation report to assess whether the accused was capable of reformation and on the basis of that report commuted death penalty to life imprisonment.

It is submitted that in spite of a very detailed and lengthy judgment,[29] the court got swayed by retributive emotions of the public (may be public had all the reasons for it) and failed in its duty to give the judgment some semblance of individualized sentencing. Banumathi J in her judgment does record that "in his affidavit, accused Mukesh reiterated his innocence and pleaded that he is falsely implicated in the case".[30] The *amicus* also failed in their duty to push the court into engaging with individualized sentencing considering the fact that it was not only sexual lust but something more diabolic and perverse in the society. Banumathi J in her concluding paragraphs does point out the malaise in the society and advocates an in depth study of the root of the problem and exhorts each individual to be sensitive to gender justice.[31] But in her engagement with the case in hand, the judge does not deal with these aspects at all.

III MARITAL RAPE

The issue of marital rape has been a contentious one. It evokes mixed reactions from both sexes, some approving it while some not approving it, may be because some women have internalized their subordination. Hence, it is highly controversial, Sexual intercourse *per se* is not an offence. It becomes an offence when the consent of the woman is not there. The pre 2013, criminal law did not define consent but post 2013, it means "unequivocal voluntary agreement" which is to be communicated either through words or gesture'. However, the amendment while making very significant changes in the rape provisions (by including oral, object along with penile penetration and defining consent) chose to retain the marital rape exemption. It declared not only sexual intercourse but "sexual acts by a man with his own wife" will not be considered rape. The wives below 15 years of age (in a country where there is Child Marriage Restraint Act) were the only ones exempted from the exception. When Macaulay drafted the Penal Code, it was assumed that once a woman consents for marriage she no longer has a right of bodily autonomy. As Sir Mathew Hale C.J. pontificated "by their Mutual Matrimonial consent and contract the wife hath given up herself in this kind into her husband, which she cannot retract".[32] It is axiomatic to mention that this notion that consent on marriage is irrevocable was done away with in its country of origin[33] on Oct. 23, 1991 in *R* v. *R*.[34]

29 The judgment which runs into 250 pages at the very outset proclaims that "the narrative is long, the investigation has been cautious and to bring home the charge, modern and scientific methods have been adopted." *Supra* note 1, para 3 at 36.

30 *Id.,* para 514 at 260.

31 *Id*., para 521 at 262.

32 Sir Mathew Hale, C.J., *History of the Pleas of Crown* as quoted in Carol Smart, *Law, Crime and Sexuality* 41(1995).Also quoted in para 73 of the judgment.

33 *Supra* note 2, para 73.

34 1992 1 AC 599.

In India, in the pre-2013 position, only penal /vaginal penetration was exempted and that leads to the conclusion that procreative logic of marriage was taken seriously. But now, the rape definition is not constricted to penile penetration but extends to non-procreative sexual acts as well. And so, the bodily autonomy and dignity rights of married women have been totally negated in the amended Act, The apex court of the country had the chance to set things right (as unlike the legislators it does not have to pander to vote bank politics). The opportunity came in the form of a writ petition – *Independent Thought* v. *Union of India* [35] - 'whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape.' Two issues need to be highlighted. Firstly, the issue was only sexual intercourse and not 'sexual acts which the exception provides. Secondly, the marital rape exception was not challenged but the age factor of exemption, i.e., 15 years was under scrutiny.

The court, benevolently taking help of the POCSO Act, 2012, declared that the IPC creates "an unnecessary and artificial distinction between a married girl child and an unmarried girl child'. The court kept reiterating that it is not dealing with the wider issue of "marital rape" and not even collaterally adverting to the issue. But if one reads the judgment all arguments are against the wider exemption. For example, Hale's principle has been derided which considered woman as chattel and it "was presumed that on marriage, a woman had given her irrevocable consent to have sexual intercourse with her husband". The privacy argument was put forth by the intervener and the court almost apologetically confessed that it has "purposely not gone into this aspect of this matter." Why it did not is a big question. Why did the court then enter into this matter at all? The justification is to bring it in consonance with the Constitution and the POCSO. As far as the Constitution is concerned, the entire marital rape exemption is violative of articles 14, 15 and 21; so how did the court sever an exemption and dealt with only one part when it is empowered to do "complete justice". And as far as the POCSO is concerned, one may argue that you cannot of harmonious construction of different Acts as each Act has its own statement of object and reasons. The court has put a stamp on Saptarshi Mandal's assertion that "the law kicks in to regulate sexual violence in marriage only in cases when it is accompanied by extreme physical violence or when the health and safety of the wife in endangered as in cases of minor wives."[36] It is submitted that the judgment needs to be appreciated for saving girls below 18 who are coerced into sex within the institution of marriage, which is in the domain of parental control. But alongside this is the big question as to why did the (otherwise) proactive court, shy away from going beyond the relief sought in the interest of gender justice. Adolescent sex does not figure in the discourse of the court at all and it once again underlined complete negation of sexual agency of young girls and dealt with the issue entirely within the institution of marriage. The issue was also reduced to social cost involved. The court remarked that "the social cost of a

35 *Supra* note 2.

36 Saptarshi Mandal, "Impossibility of Marital Rape" *Australian Feminist Studies* 29:81,259 (2014).

child marriage(and therefore of sexual intercourse with a girl child) is itself quite enormous and not even *worth it*!"[37] The court weighing its options also contemplated reducing the age of consent from 18 to 15 years but quickly added that "this too is not a viable option and would ultimately be for Parliament to decide".[38] It is submitted that the sexual agency of a child is totally negated both by the legislators and now by the court. It is convenient for the court to put the ball in the hands of legislators when it suits them!

IV OFFENCES AGAINST WOMEN

According to the World Economic Forum's Gender Gap Report (2016) India ranks last among 144 countries in the category of health and survival which includes resorting to domestic violence. The violence that was inflicted on women within the domestic sphere has been socially and culturally almost normalized for centuries. Things began to change and section 498A was inserted in the Penal Code to deal with violence within marriage. Law is seen as a "legitimating discourse" and criminalizing domestic violence surely was norm creating besides helping women to raise their voice against cruelty in the private sphere. When there was a spate of dowry deaths and it was being passed off as accident cases, section 304B was added to IPC to deal with this menace. It is seen that convictions under section 304B are quite quick, however, what still remained unaddressed was the antecedent violence which section 498A took care of but is sadly ineffective since a whole narrative is created around misuse of section 498A.

To make things worse, the narrative almost gained judicial recognition in *Rajesh Sharma* v. *State of U.P.*[39] where justice in cruelty cases was made a domain of family committee before cognizance by the court! The constitution of the committee was in itself highly problematic. The judgment mandates that "The Committee may be Constituted out of para legal volunteers, social workers, *retired persons*, wives of working officers/other citizens who may be found suitable and willing".[40] This kind of privatization of justice is totally shocking to say the least. Not only does the judgment give enough time and scope for the guilty party to abscond, but it also reduces the complaint of a woman to a family dispute which needs mediation and it's anybody's guess as to who will be at the receiving end. It is axiomatic to mention here that Srimati Basu conducted an ethnography study in 2006 in family courts and women's grievance cells of the police in Kolkata and reached a conclusion that "… when judges, counselors and police dealt with cases under section 498A they were often not managing, punishing violence per se, but rather negotiating a range of issues related

37 *Supra* note 2, para 27 at 829 (emphasis added).
38 *Id*., para 107 at 855.
39 2017 SCC OnLine SC 821: (2018) 10 SCC 472.
40 *Id*., para 19.2 at 480 (emphases added).

to the social and legal entitlements of marriage".[41] Rather than dealing with this familial treatment of an offence, the court not only legitimized it but it also went much beyond that. The court in its magnanimity added that "these directions will not apply to the offences involving *tangible physical injuries or death."*[42] The courts, it seems, share this mindset along with the society that till the time the violence is not visible in its brutality the woman must suffer it as normal concomitant of marriage! The paradigm of violence within marriage was totally socially determined till the enactment of section 498A and the judiciary seemed to have pushed us back to the same position.

However, good sense finally prevailed and when the court was petitioned to implement the directions rendered in the above case, a bench of three judges - Dipak Misra, A.M. Khanwilkar and D.Y. Chandrachud JJ - were categorical that they were not in agreement with the decision as it will result in curtailment of the rights of women harassed under section 498A. They also underlined the fact that it tell within the legislative domain.[43]

In *Heera Lal* v. *State of Rajasthan*,[44] a woman committed suicide and in her dying declaration implicated her in-laws for harassment. The charges were under sections 498A and 306. The trial court and the high court exonerated the accused persons under section 498A but convicted them under section 306. The apex court, using the exoneration under 498A, held that since section 498A charges could not be proved, conviction under section 306 is not tenable. However, the surveyor would like to submit that if the case was under section 304B, the reasoning of the court would have been justified. But section 306 is a gender neutral section and only abetment needs to be proved. In the instant case the continuous harassment, the husband being away and the specific incident on that particular day may have incited the deceased to commit suicide and this was what had to be examined by the courts (and then perhaps the accused merited an exoneration) which ostensibly was not done in the present case.

The court made it abundantly clear in *Sarada Prasanna Dalai* v. *Inspector General of Policy, Crime Branch, Odisha*[45] that in case of dowry death section 304B is generally invoked, but if the factual matrix discloses a *prima facie* case of murder then the courts should not shy away from framing additional charge under section 302 IPC.[46]

41 Srimati Basu, "Judges of Normality: Mediating marriage in the family court of Kolkata, India" 47(2) *Signs* 469-492(2012).

42 *Supra* note 39, para 19 (emphasis added).

43 *Nyayadhar* v. *Union of India Ministry of Home Affairs,* 2017 SCC OnLine SC 1648.

44 (2018) 11 SCC 323 decided on Apr. 24, 2017.

45 (2017) 5 SCC 381.

46 In *Amar Singh* v. *State of Rajasthan,* (2010) 9 SCC 64. there was no charge under s. 302 and the apex court was constained to reduce the punishment to ten years on the ostensible reasoning that he was not charged with the offence of murder under section 302 IPC. See Jyoti Dogra Sood, "Criminal Law" XLVII *ASIL* 266(2010).

Rape

State of Maharashtra v. *Bandu*[47] is a case of rape of a deaf and dumb and mentally challenged girl. Rape was confirmed on medical evidence but the high court reversed the conviction "since the victim herself was not examined, the factum of rape and involvement of the accused could not be held to have been proved."[48] It is highly problematic and unjust when the victim is denied justice due to shoddy investigation and lapses on the part of the criminal justice administration. The apex court, on re appreciation of evidence, restored the sentence of seven years imprisonment. However, what is little disturbing is that a sentence of seven years was given which, it is submitted, was a lenient one given the fact that the girl was minor, was known to the perpetrator. More importantly, she was deaf and dumb and could not have raised an alarm as she was also mentally challenged. The man aware of her condition and took advantage of her vulnerability, deserved a harsher punishment. The court took note of the vulnerability in terms of directing all the high courts to adopt the directions of Delhi High Court for setting up special centres for vulnerable witnesses.

Statutory rape

The provision of statutory rape totally fails to engage with love elopement cases and ignores, rather negates, child's sexual agency. The sexuality of a child particularly a girl child is always sought to be controlled by the parents through guardianship sections of IPC like kidnapping . In a love elopement case in *Mahendra Subhashbhai Vankhede* v. *State of Gujarat,*[49] the trial court sentenced the accused (a young boy of 19) to simple imprisonment of two years and six months and a fine of Rs.100. On an appeal by the complainant and the state, the high court enhanced the sentence of imprisonment to seven years and imposed additional fine of Rs.5000. The apex court, sympathetic with the adolescent lovers, taking note of the fact that the accused and the girl had a love affair and the sexual intercourse was consensual was of the opinion that the trial court sentence was right and directed the appellant to be released. It is submitted that the court could do so as the incident was prior to the amendment of IPC which has taken away the discretion of the courts of giving lesser punishment in appropriate cases like the present one.

Honour killing

India has been grappling with crimes against women – first it was dowry death and now honour killings are being repeatedly reported. The pernicious caste system and *gotra* are mainly responsible for honour killings. In *Gandi Doddabasappa* v. *State of Karnataka*[50] the father enraged on his daughter marrying had vowed to finish her for bringing dishonor to the family by marrying into a lower caste. She was pregnant

47 2017 SCC OnLine SC 1255.
48 *Id*., para 4.
49 (2017) 15 SCC 591.
50 (2017) 5 SCC 415.

at the time of the incident and had gone to the bathroom where she was allegedly killed by the father, The sessions court acquitted the father as most of the witnesses had turned hostile (except the mother-in-law) and also, according to the court, the circumstantial evidence was not enough to convict the accused. In appeal the high court on re-appreciation of evidence found the father guilty but convicted him under section 304 part I and not section 302 on a spurious reasoning that the "accused was frustrated because his daughter abruptly left him to marry a man of low caste. Resultantly, the bottled up emotion and turmoil erupted on the day of the incident". The apex court upheld the guilt of the father and went into a detailed examination of section 300 and the exceptions enumerated therein. The court castigated the high court for not attempting to explain as to how the case could be covered under one of the five exceptions given in section 300 IPC. It is submitted that the high court almost seemed to share the loss of honour of the father! And probably what the court was thinking of was provocation which through catena of judgments is settled that it has to be grave and sudden whereas this case involved planning and enough cooling period to come to terms with the alliance. The apex court gave a well reasoned judgment and altered the conviction to section 302 and gave life imprisonment.

Acid attack

The court taking account of repeated acid attacks held thus:[51]

> — [A] acid attack has transformed itself as a gender based violence. Acid attacks not only cause damage to the physical appearance of its victims but also cause immense psychological trauma thereby becoming a hurdle in their overall development. Although we have acknowledged the seriousness of the acid attack when we amended our laws in 2013… It must be recognised that having stringent laws and enforcement agencies may not be sufficient unless deep-rooted gender bias is removed from the society.

In the instant case, *the* woman had complained of rape against one of the two men and both these men, allegedly to teach her a lesson, threw acid on her and she died after 26 days due to shock and sepsis. The trial court convicted the accused but the high court exonerated them. The case had its peculiarities. She was from an impoverished family consisting of a 'moron husband' and two children and so there was a delay in filing FIR and such other infirmities along with shoddy investigation which did not go well with the high court. Castigating the approach of the high court the apex court reminded that "it is almost impossible to come across a single case where the investigation was completely flawless or absolutely fool proof". On re appreciation of evidence the court held one of them guilty under section 302 and

51 *Suresh Chandra Jana v. State of W.B.*, (2017) 16 SCC 466 (para 30 at 480).

awarded life imprisonment and exonerated the other. N.V. Ramana J. concurring with Prafulla C. Pant J, added:[52]

> Criminal justice system is not only about infrastructure or surveillance, rather it is how we protect our countrymen, it is how we recuperate after loss, it is how we show faith in our Constitution and how we uphold the values of justice, fairness and equality. … I am of the opinion that traditional roles played by the stakeholders in criminal justice system would revolutionise, if there is an increased awareness of the victim rights. Emphasis on the victim rights would bring about public trust in our criminal justice system.

On the omission of recording a dying declaration, the judge cautioned that "every stakeholder is expected to be aware of their responsibility and work towards achieving ends of criminal justice system". It is submitted that the courts have been working within the constraints of shoddy investigation; in some cases they find ways to convict and in some others they let the accused go scot free.

In another case of acid attack, the trial court, convicted the accused under sections 326 and 448 IPC, and sentenced him to one year rigorous imprisonment and ordered Rs.5000 as compensation. In appeal, the high court altered the sentence to period already undergone which was just a month! In an SLP before the apex court in *Ravada Sasikala* v. *State of A.P.*[53] the court through Dipak Misra J, while denouncing the sentence passed by the high court engaged in a long discourse on sentencing:[54]

> We are at a loss to understand whether the learned Judge has been guided by some unknown notion of mercy or remaining oblivious of the precedents relating to sentence or for that matter, not careful about the expectation of the collective from the court, for the society at large eagerly waits for justice to be done in accordance with law, has reduced the sentence. When a substantive sentence of thirty days is imposed, in the crime of present nature, that is, acid attack on a young girl, the sense of justice, if we allow ourselves to say so, is not only ostracized, but also is unceremoniously sent to "Vanaprastha". It is wholly impermissible.

The court restored the trial court sentence. And keeping the judgment of *Laxmi* v. *Union of India*[55] and other cases[56] (where compensation was awarded) in perspective

52 *Id.*, para 27 at 479.
53 (2017) 4 SCC 546.
54 *Id*., para 23 at 556.
55 (2014) 4 SCC 427.
56 *State of M.P*. v. *Mehtab,* (2015) 5 SCC 197; *Suresh* v. *State of Haryana,* (2015) 2 SCC 227; *State of Himachal Pradesh* v. *Ram Pal,* (2015) 11 SCC 584.

and the victim compensation scheme, the court directed the accused to pay Rs.50,000 as compensation and asked the state to pay Rs. 3 lac. This was done in spite of the fact that it was brought to the notice of the court by the counsel for the defendant that they were leading individual separate married lives and the incident had occurred quite some time back[57] and the accused was already reformed.

V OFFENCES AGAINST PERSONS

Hooch tragedy

In a shocking incident in *State of Haryana* v. *Krishan,*[58] 36 persons lost their lives and 44 persons lost their sight permanently after consuming spurious liquor containing methyl alcohol from a licensed vendor. So it was not a case where people had concocted this potion in their houses or elsewhere and it was being sold at an unlicensed shop. The incident was widely reported by the media. Investigation agencies, as is common in India, goofed up on various fronts. During investigation, sampling, testing, sealing was not done as would ideally form part of such investigation. However, there was enough and more clinching evidence that the tragedy was due to intake of methyl alcohol and the vendors immediately tried to destroy the stock to escape liability and so on and so forth. The trial court in a well reasoned order held the contractors guilty under section 302 IPC read with section 120B and sentenced them to life imprisonment. They were also held guilty under section 328 IPC read with section 120 B IPC for which they were sentenced with five years' imprisonment and a fine of Rs.5000. Both sentences were to run concurrently. Surprisingly, the high court took a very serious note of the trial court's castigation of state instrumentalities that their negligence is also a contributing factor and the full bench of the court directed the state to pay compensation to the families of victims. It, however, exonerated the accused on the basis of inadequate or shoddy investigation. The high court is the highest court as far as reappreciation of evidence is concerned but, in the instant case, it laid more stress on the infirmities in the investigation at the cost of evidence which was before the trial court. When the matter came before the apex court the amount of compensation had already been dispersed so they did not deal with it but dealt with the reversal of conviction and restored the trial court conviction holding thus:[59]

> Once it is shown that the spurious liquor was sold from the local vends belonging to the respondents coupled with the fact that after this tragedy struck, the respondents even tried to destroy remaining bottles clearly establishes that the respondents had full knowledge of the fact that the bottles contain substance methyl and also had full knowledge about

57 Contrast this case with *Baldev Singh* v. *State of Punjab* , Cr. App. No, 749 of 2007.
58 (2017) 8 SCC 204.
59 *Id*., para 33 at 219.

> the disastrous consequences thereof which would bring their case within the four corners of Section 300 Fourthly.

It is submitted that compensatory jurisprudence has to be invoked alongside the punitive criminal justice administration and not in lieu of it, as perhaps, was made out by the high court.

In *Sanjay Khanderao Wadane* v. *State of Maharashtra,*[60] while upholding the conviction under section 302, the court underlined a very important point that medical evidence is like any other evidence and there is no hard and fast rule with regard to application of the same. The court importantly cautioned that medical evidence is not to "be treated as sacrosanct in its absolute terms".[61]

Murder

A gruesome murder, where the head was decapacitated from the body and put in a gunny bag and thrown into a canal, was under scrutiny in *Parasa Koteswararao* v. *Eede Sree Hari.*[62] The trial court had convicted the respondent accused on the basis of motive and last seen together theory. However, the high court reversed the conviction as the chain of circumstantial evidence was not complete. The last seen together theory was based on hearsay and not "seen". There were other anomalies found in the evidence and the apex court also endorsed the high court acquittal. In contrast, in *Sonu* v. *State of Haryana,*[63] the court admitted that there was no direct evidence of kidnapping and the murder of the deceased but the circumstantial evidence was complete and incapable of any other hypothesis than that of the guilt of the accused persons. The contention that CDRs which formed a part of the evidence was not admissible under section 65B of the Evidence Act on the basis of a three judge bench judgment in *Anvar P.V.* v. *P.K. Basheer,* [64] the court took the stand that "an objection relating to the mode or method of proof has to be raised at the point of marking the document as an exhibit and not later."[65] It is submitted that the court took the right approach as this was technicality which on objection could have been directed to be cured.

In the case of *State of U.P.* v. *Ram Kumar,*[66] a man was sitting with his wife outside the house when the assailants came armed with fire arms and one of the assailants exhorted others to kill the man sitting out. He ran for his safety but was injured and his wife also sustained injury and subsequently died. The other family members locked themselves in out of fear and when they did not open the door the

60 (2017) 11 SCC 842.
61 *Id.*, para 18 at 850.
62 (2017) 11 SCC 52.
63 (2017) 8 SCC 570.
64 (2014) 10 SCC 473.
65 *Supra* note 63, para 32 at 584.
66 (2017) 14 SCC 614.

assailants put the house on fire as a result of which three human lives, including that of a child and one animal life was lost. The trial court finding the accused guilty gave death penalty. The high court reversed the conviction doubting the date and time of lodging FIR; the fact that there was no light and so accused could not have been recognized; the injured eyewitness was unconscious and so how could he dictate the FIR. The apex court, on reappreciation of evidence, held that "minor contradictions and omissions cannot be the basis for rejecting the prosecution theory". The high court tried to dig out the minor contradictions and omissions on the basis of which acquittal is sought to be made which is clearly against the settled law" [67] The court set aside the high court judgment and upheld the trial court judgment except capital punishment which was converted to life imprisonment. Surprisingly, the year did not see sentences of *Shraddananda*[68] league, i.e., life imprisonment for specific years without remission. If one may recall, post *Shraddananda,* there were a spate of such punishments.[69] Even in this case where the act was barbarous, the court converted death penalty to life imprisonment. And in spite of *Sriharan*[70] approval, the court did not get into negation of remission. This trend is little hard to explain since the pre *Sriharan* era was marked by imprisonments without remissionwhich was problematic[71] and now when it has legal sanctity in terms of a constitutional bench decision, the courts are not using it.

In *Rajkumar* v. *State (NCT of Delhi),*[72] a woman was found murdered and the ornaments from the almirah were also missing, which were found as recovery evidence in the possession of the accused persons. Murder was attributed to these accused along with robbery based on circumstantial evidence. Conviction on both the counts was given, both by the trial court and the high court. The apex court, in appeal, was of the view that there is a strong suspicion but even with the aid of presumption under section 114 of the Evidence Act, the charge of murder cannot be brought home unless there is some evidence to show that the robbery and the murder occurred in the same transaction. It is submitted that Indian investigation is lax and relies on primitive methods of confession in police custody. It is high time that scientific techniques are widely used so as to nail the culprits. The evidence put forth is not mentioned as the apex court ordinarily does not appreciate evidence and so it is not clear what kind of evidence was produced before the court. The crime scene needs to be scientifically scrutinized to nail the guilty persons which perhaps was not done and this has been the bane of our investigation team, case after case.

67 *Id*., para 13.6 at 620.
68 *Shraddananda (2)* v. *State of Karnataka,* (2008) 13 SCC 767.
69 Jyoti Dogra Sood, " Criminal Law" *ASIL* 440-441(2014).
70 *Union of India* v. *V. Sriharan @ Murugan,* (2014) 11 SCC 1.
71 *Supra* note 69 at 451.
72 (2017) 11 SCC 160.

Culpable homicide not amounting to murder

In *Suresh Singhal* v. *State (Delhi Admn.),*[73] homicide was under scrutiny and there was a discrepancy as far as the witnesses account was concerned. The court believed the version that there was a scuffle and the accused took out his revolver and shot and the case was covered under exception 4 to section 300. On the argument that right of private defence was exceeded, as the deceased and his brothers were unarmed, the court endorsed the view that it is "unrealistic to expect the appellant to modulate his defence step by step with any arithmetical exactitude" and altered the conviction from section 302 to section 304. The court did not go into the nuances of part I and part II probably because they had spent 13-1/2 years in prison so in terms of punishment it did not matter. And given the factual situation, it fell well within part I and were sentenced to punishment already undergone.

Sudden fight

To invoke exception 4 to section 300 the following pre-requisites need to be satisfied:

(i) it was a sudden fight;
(ii) there was no premeditation;
(iii) the act was done in a heat of passion; and
(iv) the assailant had not taken any undue advantage or acted in a cruel manner.

Quoting the above requisites from *Surinder Kumar* v. *U.T., Chandigarh*[74] the court in *Arjun* v. *State of Chhattisgarh*[75] held that the incident of killing occurred due to a sudden fight. The (now) deceased along with his labourers had come to the field to cut a tree. The appellant-accused came and stopped them from doing so which resulted in a fight and the assailants assaulted them with *katta*, *gandasa* and stone which resulted in serious head injuries so much so that the brain had come out and he died on way to the hospital. The injuries indicated that the appellant had intention and knowledge to cause the injuries. The conviction was altered from section 302 to section 304 part I. The court reasoned that if it is knowledge and intention then the case falls under part I but if it is only knowledge the case falls under part II. The court pronounced sentence of imprisonment already undergone which was 9 years and 11 months. In *Surain Singh* v. *State of Punjab,*[76] the parties had come to the court to attend proceedings and a fight ensued with one side objecting to the presence of a person not party to the proceedings. The appellant-accused took out his *kirpan* and gave *kirpan* blows which resulted in two persons succumbing to injuries. The court

73 (2017) 2 SCC 737.
74 (1989) 2 SCC 217.
75 (2017) 3 SCC 247.
76 (2017) 5 SCC 796.

again discussed part I and part II of section 304 and convicted the accused under part II. In this case 10 years imprisonment was awarded. In *Vijay Pandurang Thakre* v. *State of Maharashtra,*[77] the trial court and the high court upheld the conviction under section 302 IPC read with section 149 apart from other minor charges. The apex court on reappreciation of evidence converted the conviction into section 304 part II and held thus:[78]

> We, thus, hold that there was no preconceived common object of eliminating the members of Deshmukh family and group and the assembly was not acquired (sic possessed) with any deadly weapons either, as held by the High Court. Even the High Court has not pointed out any such evidence. These findings are hereby set aside. The conviction of the appellants under Section 302 IPC is converted into Section 304-II IPC for which the appellants are sentenced for rigorous imprisonment of seven years each. We were informed that all the appellants have already undergone sentence of seven years or more.

In *Deo Nath Rai* v. *State of Bihar,*[79] the accused while being held liable under section 304 part II was given two years imprisonment (already undergone) by the high court. The apex court while upholding the conviction under section 304 part II was of the opinion that since a sword blow on the right shoulder of the deceased going up to the chest resulted in death, imprisonment of five years should be given. In all these cases, the conviction is under section 304 IPC. But what is interesting is that part I which ideally should merit an enhanced punishment – the punishment of 9 years and 11 months was given ; in case under part II, punishment of ten years was given followed by seven years and five years respectively. The surveyor has been reiterating that the first part has a mandatory sentencing of imprisonment ranging from "imprisonment for life, or imprisonment of either description for a term which may extend to ten years and shall also be liable to fine…" whereas the second part which has the ingredient of knowledge stipulates a punishment of "imprisonment of either description for a term which may extend to ten years or fine or both"[80] Hence, it is imperative that the term of imprisonment be commensurate with the guilt of the accused.

VI JOINT LIABILITY

In a case of constructive liability under section 149 the onus is on the prosecution to prove the existence of a common object of the unlawful assembly and that the

77 (2017) 4 SCC 377.
78 *Id*., para 21 at 385.
79 2017 SCC On Line SC 1279.
80 Jyoti Dogra Sood, "Criminal Law" XLIX *ASIL* 449(2013).

accused persons acted in prosecution of the common object. It is also axiomatic to mention that if the members of the unlawful assembly *know* that an offence different from the common object is likely to be committed, then also they come within the ambit of section 149. It may happen that murder is committed by a member of the unlawful assembly and if other members are not liable for murder they can still be held guilty of commission of offence like grievous hurt under section 326.[81]

In *Joseph* v. *State,*[82] the court made its hierarchical positioning again very clear by categorically stating that the high court is the final court for appreciation of evidence. And the apex court does not by special leave convert itself into an appellate court to appreciate evidence for the third time. However, in the interest of justice the court may have to do so if a serious infirmity or perversity in appreciation of evidence is seen. In the instant case not all the members of the unlawful assembly could be conclusively held liable for murder since they inflicted injuries with sticks and the ones who participated actively in hurling bombs were held guilty of murder for sharing the common intention. As far as individual member's liability is concerned, the court's view is that if the intention of the unlawful assembly is to kill then "without evidence that the accused had no knowledge of the unlawful object of the assembly or without evidence that after having gained knowledge, he attempted to prevent the assembly from accomplishing the unlawful object, and without evidence that after having failed to do so, the accused disassociated from the assembly, the mere participation of an accused in such an assembly would be inculpatory.[83]

In *Ganga Ram Sah* v. *State of Bihar,*[84] the accused had gone to the house of the victim armed with guns and *lathis* and attacked them. It was inferred that the common object of the unlawful assembly was not only to cause grievous hurt but the intention was to kill. The settled position was reiterated by the court that once the case falls under the section, the mere fact that the member did nothing with his own hands does not matter. Each one is then taken to have intended the probable and natural result of the combination of the acts in which he joined. A specific overt act is not a necessity.[85]

For a case to fall under section 34, there must be two or more persons. And through a catena of cases, it has become a settled principle of law that if one or more accused persons had acted in concert with other persons not named or identified, the liability under section 34 would still be attracted. In *Killer Thiayagu* v. *State,*[86] the deceased died due to multiple injuries including one on the neck. The prosecution

81 See *Najabhai Desurbhai Wagh* v. *Valerbhai Deganbhai Vagh,* (2017) 3 SCC 261 (para 17 at 271).

82 (2018) 12 SCC 283 decided on Dec.14, 2017.

83 *Kattukulangara Madhavan* v. *Majeed,* (2017) 5 SCC 568 (para 23 at 577-78).

84 2017 SCC OnLine 65.

85 *Iqbal* v. *State of U.P.,* (2017) 11 SCC 93 see also *Rajkishore Purohit* v. *State of Madhya Pradesh,* (2017) 9 SCC 483.

86 2017 SCC On Line SC 180.

case was against the accused and three other persons. The trial court convicted all the four under section 302 IPC read with section 34. However, the high court found an infirmity in the case that in the FIR the name of the three were not mentioned and only one name was mentioned and so it amounted to exaggeration and embellishment and hence the three were acquitted. What is little surprising is that the leg injury has been attributed to the first accused but death probably was due to the injury in the neck. Now either the court could have assumed that there were others also who inflicted the neck injury but were unnamed or attributed all injuries to the sole accused. The court, however, attributed only the leg injury (the post mortem report, though not very explicit, does record an injury on the leg) to the accused and held him guilty under section 324 IPC and since he was in custody for seven years, no further sentence was imposed. What is little baffling in the order is the court's observation that "it is not the prosecution case that apart from A-2, A-3 and A-4, there were other persons who had acted in commission of the crime". But isn't the prosecution case that there were more than one person involved and so constructive liability could be imposed. The 'Order' is not very clear. Similarly, in *State of Rajasthan* v. *Hazi Khan*[87] a man was assaulted in the dead of night by a group of ten men – some with sharp weapons and some with *lathis* and he died. The court held them liable for the offence under section 326 read with section 149 IPC. Again this is an 'Order' and the likelihood of death is not discussed and it is mentioned that "no charge insofar as the substantive offence under section 302 IPC or section 307 IPC with the aid of either section 34 IPC and section 149 IPC has been framed".[88]

Further, dwelling on constructive liability under section 34, the court in *Vijendra Singh* v. *State of U.P.,*[89] reiterated the stated principle that "it may be difficult to distinguish the acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them".[90] The court countering the assertion that no injury was attributed to *lathi* and *ballan* which the appellants were carrying held that there was enough evidence that "the appellant-accused had accompanied the other accused persons who were armed with gun and they themselves carried lathi and ballam respectively. The carrying of weapons, arrival at a particular place and at the same time, entering into the shed and murder of the deceased definitely attract the constructive liability as engrafted under Section 34 IPC" [91] This perhaps is the correct position in cases of joint criminal enterprises as the only way to secure conviction is through constructive liability.

87 2017 SCC OnLine SC 1183.
88 Also see *Vijay Pandurang Thakre* v. *State of Maharashtra,* (2017) 4 SCC 377.
89 (2017) 11 SCC 129.
90 *Id*., para 28 at 144.
91 *Id*., para 29 at 145.

VII INCHOATE OFFENCES

Attempt to murder

Whether it will be attempt to murder under section 307 or a case of causing grievous hurt under section 326 is a very difficult inquiry. The courts have to be circumspect while deciding the same and the nature and the circumstances of the case would have to be carefully scrutinized. If several persons attack an unarmed person with deadly weapons, it is reasonable to presume that they had the intention or knowledge that such attack would result in death and hence the Supreme Court in *Vineet Mahajan* v. *State of Punjab*[92] quashed the finding of the high court that it was a case under section 326 and ordered it to be tried under section 307.

Attempt to commit suicide

Satish Nirankari v. *State of Rajasthan*[93] is a love story gone horribly wrong. The boy and the girl were in love and wanted to get married but there was opposition from the girl's family and they decided to end their life. Both of them consumed copper sulphate. Perhaps, the girl had consumed little more quantity and she started vomiting. The boy went out seeking help and by the time he got back she was found hanging. The boy brought her down with the help of neighbours. The prosecution put up a story of murder and the boy was held liable for murder by the trial court and shockingly also for attempt to commit suicide by holding that "since the appellant had himself admitted that he had consumed copper sulphate with the intent to commit suicide, offence under section 309 also *stood proved.*"[94] The high court dismissed the appeal. It is strange that his guilt stood proved on his admission that he consumed copper sulphate but his statement that the girl also did so was not held trustworthy despite a suicide note in the girl's handwriting was found. The apex court found glaring infirmities in the version of the prosecution and set aside the conviction under section 302 IPC. The high court, speaking the language of the parents as to how could a girl aspiring to be an IPS officer want to marry the appellant and in their *parens patria* mode, perhaps forgot the requirement of clinching evidence required in cases of circumstantial evidence.

Abetment to suicide

Pawan Kumar v. *State of H.P.*[95] was a case of eve teasing resulting in a loss of life. In the instant case a girl ended her life after allegedly being teased and harassed by a boy. The parents had also repeatedly complained to the *pradhan* of the village. Though there were certain infirmities regarding the dying declaration the high court,

92 2017 SCC Online SC 637.
93 (2017) 8 SCC 497.
94 *Id*., para 3 at 502 (emphasis added).
95 (2017) 7 SCC 780.

on an overall analysis of the case, overturned the acquittal by the trial court. It held thus:[96]

> The active acts of the accused have led the deceased to put an end to her life. That apart, we do not find any material on record which compels the Court to conclude that the victim committing suicide was hypersensitive to ordinary petulance, discord and difference in domestic life quite common to the society to which the victim belonged. On the other hand, the accused has played active role in tarnishing the self-esteem and self-respect of the victim which drove the victim girl to commit suicide. The cruelty meted out to her has, in fact, induced her to extinguish her life spark.

The apex court while upholding the conviction and seven years imprisonment for abetting suicide spoke against the pernicious practice of eve teasing and it being violative of articles 14, 15 and 21 of a woman. Dipak Misra J, in a very strongly worded judgment, held that a woman has an absolute right to reject anyone and that no one can compel a woman to love anyone.

Conspiracy

The court in *State* v. *Anup Kumar Srivastava*[97] reiterated, quoting from precedents, that evidence to prove conspiracy is rarely available and it has to be inferred from circumstances before and after the occurrence. The court also cautioned that even when acts are proved to have been committed, it must also be proved they were in pursuance of an agreement between persons who are allegedly the conspirators. It is submitted that this becomes very necessary since conspiracy is an offence which is heavily mental in its composition and so this abundant caution must always be kept in mind.

In *Charandas Swami* v. *State of Gujarat*,[98] the high court just established the connection and declared that "there was clear evidence warranting inference of conspiracy hatched amongst the accused to commit the murder of the accused".[99] The apex court concurred with the high court and agreed that there need not be any direct evidence to establish conspiracy and inferences may have to be drawn from the available evidence "and no other conclusion except that of the complicity of the accussed to have agreed to commit on offence is evident".[100]

96 *Id*., para 44 at 800.
97 (2017) 15 SCC 560.
98 (2017) 7 SCC 177. Contrast the discussion on conspiracy with that of *Mukesh's* case, *supra* note 1.
99 *Id*., para 27.16 at 192.
100 *Id*., para 79 at 219.

VIII CUSTODIAL VIOLENCE

In a case of custodial death the police is the prime suspect and it is the duty of the courts to deal with the same sternly as the upholders of the rule of law. When the police act like criminals, the whole edifice of criminal justice administration gets shaken. In *State* v. *Sanvlo Naik*,[101] one Abdul Gaffar Khan was arrested by the appellants who were police officers at that relevant point of time. The arrested person was hale and hearty when arrested and he died at night as the hospital recorded the fact of "brought dead". Post mortem revealed 14 fresh injuries which could cause death. This is a clear case of section 302 but the trial court convicted the accused under section 304 part II read with section 34 and sentenced them to undergo *simple* imprisonment of three years and two years respectively. The high court overturned the conviction and strongly opined that fudging of general diary was a trivial matter. The apex court restrained itself from questioning the legality of acquittal under section 302 (which in the interest of justice they should have, given the fact that it was dealing with criminality of men in *khakhi*) and upheld the conviction under section 304 part II but modified and enhanced the sentence to ten years rigorous imprisonment . The men in khakhi more often then not are dealt leniently by the courts – be it planting evidence in Adambhai's case[102] or fake encounters.[103]. Since they are custodians of law and order any dereliction of that duty should be dealt severely and exemplary punishments given.

Police atrocities

In *Monica Kumar* v. *State of U.P.*[104] the police high handedness and its colonial legacy again manifested. The petitioners who were siblings did their MBBS and had some issues with the Chairman of Maharaji Educational Trust under which the medical college was established from where they did their MBBS. There was alleged collusion between the chairman and the police and they petitioned the highest court that immediate police reforms were needed so as to sensitize the police about the rights of the citizens. An order of service of *dasti* notice was passed and when the petitioners went to police station to serve the notice they brutally beat them up. This was in 2009 and disciplinary proceedings were initiated against the police officers. There were again allegations of harassment by the police and counter allegations by the police that they were obstructing the police in discharge of their duties. An investigation was ordered which revealed that though the allegations of the duo were exaggerated but nonetheless not false in its entirety. The court opined thus: [105]

101 (2017) 16 SCC 54.
102 *Adambhai Sulemanbhai Ajmeri* v. *State of Gujarat,* (2014) 7 SCC 716.
103 *Rohtash Kumar* v. *State of Haryana,* (2013) 14 SCC 290.
104 (2017) 16 SCC 169.
105 *Id*., para 24 at 185.

> Police needs to be sensitised about the rights of citizens and the civilised manner in which police is required to maintain law and order in this country … In this context, there is also a need to deal with erring police officials by taking stern measures whose actions amount to "misconduct" or may even be "criminal" in nature. Letting these erring officials lightly, as has been done in the instant case, by only administering a warning may not be appropriate. We hope that desired attention shall be given at the right quarters from the perspective of human rights of innocent and hapless citizens, so that following words of Thomas Bernhard's become a reality:

"The anger and brutality against everything can readily from one hour to the next, be transformed into its opposite."

IX SENTENCING

The sentencing is prescribed by the legislature after due deliberations. It generally mandates imprisonment and fine for serious offences and imprisonment or fine for other offences. Reiterating this principle the court held thus: [106]

> — [T]he Penal Code contains a well thought and carefully considered regime of punishment. For graver offences, severe punishments have been provided, where it was thought to provide lesser punishment, option of imprisonment or fine has been provided for as noted, in the scheme of Section 309 IPC. The punishments provided in Sections 307, 328 and 392 IPC are those which have been provided for serious offences and it cannot be countenanced that the offence having been proved the punishment can only be a fine.

The mandatory sentencing mentioned in the Code must be given its due by the judiciary. Judicial discretion is an important facet in the sentencing jurisprudence. But where imprisonment is prefixed by "shall", the courts will have to give a sentence of imprisonment and it cannot be substituted by fine. Section 428 Cr PC will come handy only to set off the imprisonment which has already been served during trial or investigation.[107] And where alternate punishments are provided and judicial discretion may be exercised, the courts must exercise this discretion judiciously and the same is to be guided by the nature of offence, manner in which it was committed, nature of injuries sustained and so on and so forth.[108] However, the criminal antecedents may

106 *State of H.P.* v. *Nirmala Dev,* (2017) 7 SCC 262 (para 54 at 292).
107 *State of U.P.* v. *Tribhuwan,* (2018) 1 SCC 90 decided on 6-11-2017.
108 *Ahsan* v. *State of U.P.,* 2017 SCC OnLine SC 1012.

not guide the sentencing if the facts of the case and classification are not supported by evidence. An accused with criminal antecedents does not mandatorily be given a higher punishment unless the Act mandates it in cases of repeat offenders.[109]

In a case of gunshot injury in *Shyam Sharma* v. *State of M.P.,*[110] conviction was altered from section 307 to section 324 IPC based on the factual matrix. However, what is little disturbing is that the appellant had served imprisonment of four months and the court reduced the punishment to the period already undergone. Given the severity of the offence the Criminal Law Amendment Act, 2005 has made this offence non-compoundable and hence a very lenient sentence does not match with the intent of the legislature (notified with effect from 31.12.2009).

A review petition was filed in the case of *Assn. of Victims of Uphaar Tragedy* v. *Sushil Ansal,* [111] when sentence of jail was substituted with fine. The majority judgment, exhorting the (in) famous BMW case, brought in the vague concept of "larger public interest" to justify the order. It is submitted that the court has been interpreting "public interest" "collective conscience" to suit its sentencing requirement, which does not augur well for sentencing jurisprudence. Goel J, in his dissenting opinion held that "it is not a case of higher default sentence being awarded but of giving option to pay higher for reduced sentence". This does not augur well for a sound sentencing jurisprudence where what should matter is not the capacity to compensate but the guilt of the accused.

In *Devendra Nath Srivastava* v. *State of U.P.*,[112] a husband, in a fit of anger, beat his wife with a brick. The post mortem report showed multiple injuries resulting in death. The conviction was held under section 304 part I and ten years imprisonment was given. The cruel and unusual manner of hitting with the brick was not even considered to enhance punishment. Whereas in *Padmini Mahendrabhai Gadda* v. *State of Gujarat,*[113] in an offence under section 201 against the wife ten years imprisonment was given by the high court. The analysis of these cases sends out a disturbing message of gender bias in the courts! Husband's violence against wife or father's angst against the girl child is more often than not sought to be normalized. But when the offender is a woman who doesn't conform to the court's image of ideal wife or daughter higher punishment is sought to be imposed. It is humbly submitted that the gender of the accused must have no bearing on the guilt and the subsequent punishment and the courts must remain conscious of it at all times and in all situations.

And if the offence is one which has no bearing on the gender roles then the courts are at times more lenient than required. In *State of H.P.* v. *Nirmala Devi,*[114] the woman

109 See *Birbal Choudhary* v. *State of Bihar,* (2018) 12 SCC 440 decided on Oct. 6, 2017.
110 (2017) 9 SCC 362.
111 (2017) 3 SCC 788.
112 (2017) 5 SCC 769.
113 (2017) 14 SCC 587.
114 (2017) 7 SCC 262.

along with her accomplice was found guilty under sections 328, 392, 307 read with section 34 IPC. She was awarded two years simple imprisonment for all the three serious offences and the sentence was to run concurrently. The high court modified the sentence by setting aside imprisonment and imposing a fine of Rs. 30,000. The apex court held that the modified sentence was unsustainable and held that the trial court punishment which took into account that the woman had three minor sons out of which two were mentally retarded was the appropriate punishment and restored the same.

In a review petition in *Vasanta Sampat Dupare* v. *State of Maharashtra,*[115] the court, while dealing with submissions that the accused is on his way to reformation and so must be spared the death penalty, held that there should be no attempt to "fetter the judicial discretion by attempting to make excessive enumeration, in one way or another". The court ,acknowledging that the prison record is blemishless, held that it could not take an alternate view on death penalty given the extreme barbarity and depravity of the crime.

In *State of Maharashtra* v. *Nisar Ramzan Sayyed,*[116] the court, while deliberating on death penalty, did not talk about "barbarity" "depravity" and the like but referred to the Law Commission Report No. 262 and held thus:[117]

> The next question, however, is as to whether in a case of this nature death sentence should be awarded. A life is at stake subject to human error and discrepancies and therefore the doctrine of "rarest of rare cases", which is not res integra in awarding the death penalty, shall be applied while considering quantum of sentence in the present case. Not so far but too recently, the Law Commission of India has submitted its Report No. 262 titled "The Death Penalty" after the reference was made from this Court to study the issue of death penalty in India to "allow for an up-to-date and informed discussion and debate on this subject". We have noticed that the Law Commission of India has recommended the abolition of death penalty for all the crimes other than terrorism related offences and waging war (offences affecting National Security). Today when capital punishment has become a distinctive feature of death penalty apparatus in India which somehow breaches the reformative theory of punishment under criminal law, we are not inclined to award the same in the peculiar facts and circumstances of the present case. Therefore, confinement till natural life of the respondent-accused shall fulfil the requisite criteria of punishment in peculiar facts and circumstances of the present case.

115 (2017) 6 SCC 631.
116 (2017) 5 SCC 673.
117 *Id*., para 17 at 681-82.

Victims and their families are left in the lurch when after years they realize that investigation was wrongly conducted under TADA and should have been done under ordinary law and hence the trial is pronounced vitiated.[118]

Age

In *Baleshwar Mahto* v. *State of Bihar* [119] the conviction under section 302 was upheld and the court even though conscious of the fact that the appellant was 80 years of age and the incident took place 34 years ago was constrained to give life imprisonment with the advice that he may prefer a representation to the state for remission.

X MISCELLANEOUS

Timely justice

The apex court, recognizing the importance of timely justice, more so, in criminal matters where the accused person's personal liberty is seriously compromised gave a slew of directions in *Hussain* v. *Union of India* .[120] The court exhorted the high courts to frame an annual "action plan fixing a tentative time-limit for subordinate courts for deciding criminal trials of persons in custody and other long pending cases and monitor implementation of such timelines periodically." The court underlined the fact that "judicial service as well as legal service are not like any other services. They are missions for serving the society." The proactive court also gave a slew of directions with timelines to make roads safer and to implement road safety action plan. The court gave a very detailed plan but it is upto the governments both Central and State to implement it. [121]

Defamation

The question before the court in *Mohammed Abdulla Khan* v. *Prakash K.* [122] was whether there could be "vicarious liability" of the owner of the newspaper for defamatory content. The apex court was of the view that "the extent of the applicability of the principle of vicarious liability in criminal law particularly in the context of defamation" needs a detailed critical examination. This becomes necessary as balancing between freedom of speech and expression and defamatory content is a very tricky issue.

118 *Seeni Nainar Mohammed* v. *State,* (2017) 13 SCC 685.
119 (2017) 3 SCC 152.
120 (2017) 5 SCC 702.
121 See also *S. Rajaseekaran* (II) v. *Union of India,* 2017 SCC OnLine SC1392.
122 (2018) 1 SCC Online 615.

Compounding

In *Unnikrishnan* v. *State of Kerala,*[123] the court allowed the application seeking permission to compound the offence under section 394 IPC. The court in order to keep the sanctity of compounding, should have used its discretion and punished him for period already undergone if he had been in prison rather than invoking article 142 of the Constitution (Para 8)![124] This invocation of article 142 may set a bad precedent and courts may get a free hand to compound non-compoundable cases at their whims.[125]

Section 295A

Section 295A needs to be strictly interpreted and it is not every insult or attempt to insult that is criminalized.[126] The court made it clear that the parameters of criminality of the offence are set and it is only when insult or attempted insult is done with the necessary fault element. The section itself very categorically specifies the fault element required and that is deliberate and malicious intention.[127] India being a multi religious and multi community country must define and construct the sections of the criminal statute strictly lest it becomes a tool of harassment.

Destruction of evidence

In *Padmini Mahendrabhai Gadda* v. *State of Gujarat,*[128] a man was murdered due to an illicit affair between the deceased's wife and the accused. The wife was acquitted of murder but was held liable under section 201 IPC for disappearance of evidence and an intention to screen the offender. The two judges of the apex court were divided in their opinion. Ramana J, was of the view that the guilt has not been proved beyond reasonable doubt. However, Pant J, was sure of the guilt. The surveyor sides with Pant J judgment as the facts reveal that she was a party in the attempt to erase the evidence. She perhaps did it under duress and the same could have been a circumstance relevant during pre sentence hearing. Because of the divided opinion the matter was referred to a larger bench and the decision is awaited. A very striking thing in the case was that the trial court had given a sentence of two years imprisonment to the accused wife under section 201 IPC. Strangely the high court *suo motu* increased it to seven years.

Juvenility

Sri Ganesh v. *State of Tamil Nadu,*[129] was a case under section 376 IPC. The appellant raised the plea of juvenility and the trial court relying on documentary

123 2017 SCC OnLine SC 437.
124 *Id*., para 8.
125 See also *Ningappa* v. *State of Karnataka,* 2017 SCC OnLine 1744.
126 *Mahendra Singh Dhoni* v. *Yerraguntla Shyamsundar,* (2017) 7 SCC 760.
127 *Id*., para 6 at 764.
128 *Supra* note 113.
129 (2017) 3 SCC 280.

evidence transferred the case to the juvenile board. In appeal the high court remitted the matter back to the trial court on the point that it, *inter alia,* had not determined the correct age of the accused as it relied only on documentary evidence and did not seek medical opinion. The apex court restored the order of the trial court and underlined the fact that the JJ Act does not contemplate a roving enquiry and documentary evidence is enough unless they are found to be manipulated or fabricated.

Medical negligence

Doctors to be held liable under section 304-A must be shown to have been grossly negligent. An error of judgment can, by no stretch of imagination, be covered under section 304-A.[130]

The court in *Bijoy Sinha Roy* v. *Biswanath Das,*[131] also asserted that concept of negligence differs in civil and criminal law. The court was of the opinion that "in criminal law, element of mens rea may be required". It is submitted that this is an erroneous assumption probably because section 304A deals both with rash and negligent act. Otherwise negligence is a blank state of mind and *mens rea* cannot be brought in.

Perverse

Generally the superior courts are to re appreciate the facts and evidence before they arrive at their own judgment and it is not their wont to cast aspersions on the judgments of the other courts from where the appeal has come. However, in *P. Eknath* v. *Amaranatha Reddy,*[132] the court called the high court order, reversing the conviction in murder trial, as 'perverse'. Rohington J, concurring with Pinaki Chandra Ghose J, observed that "Perverse" is not a happy expression particularly when used for a judgment of a superior court of record … I entirely agree that this judgment is perverse. This was a case of double murder and an attempted murder and the apex court calling it "perverse on all counts"[133] restored the trial court conviction.[134]

Review

The courts, recognizing that they are not infallible, have devised a mechanism of review petition. Review is authorized by the Constitution under article 137 and order 40 of the Supreme Court Rules, 1966. But it must be underlined that it is a serious step and unless there is a glaring omission or patent mistake or grave error in the earlier judgment, the courts would not review their earlier order. If a different counsel merely repeats and twists what was earlier argued, it will be of no use rather judicial time will be wasted.[135]

130 *Jay Shree Ujwal Ingole* v. *State of Maharashtra,* (2017) 14 SCC 571.
131 (2017) SCC OnLine SC 1101.
132 (2017) 12 SCC 731.
133 *Id*., para 34 at 739.
134 Also see *Ganesh Shamrao Andekar* v. *State of Maharashtra,* (2017) 13 SCC 187.
135 *Vikram Singh* v. *State of Punjab,* (2017) 8 SCC 518.

Prisons

Madan Lokur J in *Inhuman Conditions in 1382 Prisoners, In re*[136] dealt with the deplorable state of Indian prisons. The *amicus* in the case drew up lot of suggestions which could be implemented for better and humane prison management. The open prison in Shimla was taken note of and the apex court expected that their direction would be implemented by the governments .The court along with prisons also directed its attention towards condition of homes for children and directed necessary steps including a Manual to be made.

Prison transfer

Asha Ranjan (and others) preferred writ petitions for transferring the entire proceedings and trial in murder and conspiracy cases from Siwan to Delhi.[137] The petitioners had suffered immensely at the hands of gangster turned RJD leader Mohammed Shahabbudin (Asha Ranjan's journalist husband was murdered and other petitioner Chandrakeshwar Prasad's three sons were murdered in cold blood), and now feared for their own lives as the writ of the accused ran even from behind the prison walls. Such was his control in the area. They sought his transfer from Siwan Jail in Bihar to Tihar Jail in Delhi. There was no such provision in the prison manual. The petitioners invoked article 21 to stir the 'judicial conscience' to direct such transfer. The accused also sought refuge in article 21 to stall the transfer! The court termed it as "intra-conflict" within a fundamental right where two contesting parties lugged on to the same fundamental right to further their cause. Balancing the rights of the victims with that of the accused, the court ruled that the balancing or resolution of 'intra-conflict' must be done within the parameters of constitutional norms and sensibility and larger public interest. The court was alive to the fact that article 142 must not be used to curtail fundamental rights; but, was conscious of the fact that it was a case where competing claims within the same fundamental right had to be adjudicated by the constitutional court. And the court rose to the occasion and upheld the rule of law by ordering his transfer from Siwan jail to Tihar jail.

XI CONCLUSION

The year as usual witnessed cases where investigation was found wanting. In other cases like *Mukesh*,[138] however, scientific investigation was done maybe because crime happened in the heart of the country and it had caught media attention and so all the agencies were cautious. But in spite of the lengthy judgment (which could have been avoided)[139] the court fell short of making a case of individualized sentencing

136 (2017) 10 SCC 658.

137 *Asha Ranjan* v. *State of Bihar,* 2017 SCC OnLine SC 140.

138 *Supra* note 1.

139 A very cryptic judgment is given in *Ishwar Yadav Patil* v. *State of Maharashtra,* (2017) 11 SCC 79 . It is submitted that much judicial time will be saved if the judges refrain from writing long judgments.

which is the hallmark of good criminal justice administration. In cases of culpable homicide not amounting to murder, it is submitted, that cases falling under part I or part II of section 304 are distinguishable by the punishment that is prescribed.[140] However, the pattern of cases in the year show that the apex court either was oblivious of this or did not bother to justify its sentencing which should be done in reportable cases. For example, in *Arjun*[141] the conviction was under part I and the sentence awarded was nine years and six months, whereas in *Surain Singh*[142] the conviction was under part II and the sentence given was ten years!

As far as judicial response to crime against women is concerned the *Rajesh Sharma*[143] judgment sticks out as an eyesore. The apex court has not been consistent as the highest court of the country probably because it operates as various courts of two judge benches. It may be recalled that in *SPS Rathore* v. *CBI,*[144] only a few months imprisonment was given when the girl committed suicide and the case was dealt as outraging the modesty of a woman.[145] Age is another factor which is responded to in varied ways. In *Sushil Ansal* v. *State,* [146] which resulted in the death of 59 persons, age became a determining factor to tone down the imprisonment but in 2017 the age of 80 years did not deter the court from giving a sentence of life imprisonment for an incident which was more than 30 years old.

If one was to analyse the sentencing pattern, it is somewhat strange that the high court increased the sentence from two years to seven years for destruction of evidence. The surveyor had pointed it out in *Shabnam's*[147] also that the court has its own image of a wife, a daughter and in cases where the women do not conform to the imagination of the court – the court comes down heavily on them and gives more punishment than the one which would have been given if the husband was the culprit. And as mentioned earlier, if the offence is one which has no bearing on the gender roles then the courts are at times more lenient than required as was witnessed in *State of H.P.* v. *Nirmala Devi,* [148] wherein the high court bypassed the mandatory sentencing. It is heartening to note that the courts took into account three minor children including two who were mentally retarded but it is submitted that the court had other options like declaring the children as children in need of care and protection and so on and so forth. This kind

140 The surveyor has repeatedly reiterated that there is disparity in part I and part II and the courts remain blissfully oblivious of the disparity or do not bother to justify the sentence – either of the two scenarios is unfortunate.

141 *Supra* note 75.

142 *Supra* note 76

143 *Supra* note 39.

144 (2017) 5 SCC 817.

145 Jyoti Dogra Sood, "Criminal Law" *ASIL* 361 (2016).

146 (2015) 10 SCC 359.

147 *Shabnam* v. *State of Uttar Pradesh,* (2015) 6 SCC 632.See Jyoti Dogra Sood, "Criminal Law" *ASIL* 414(2015).

148 *Supra* note 114.

of patronizing in some cases and harsh treatment in gender defined assumptions does not augur well for the judiciary as well as the cause of gender justice.

The social justice bench, keeping up its reputation, took a serious note of inhuman conditions in prisons and gave directions not only for prisons but also for juvenile homes. Overall, the apex court, as the upholder of justice not only overturned the judgments of the lower courts but also did not shy away from speaking its mind against the judgment of other benches and reminded them of separation of power.[149]

149 *Nyayadhar, supra* note 43.