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CRIMINAL LAW

*Jyoti Dogra Sood**

I INTRODUCTION

TO DEFINE precisely what constitutes 'crime' is almost impossible in this age and times when myriad activities come within the statutes dealing with crimes. However, what must always be kept in perspective, while defining crime or while decriminalizing an act, is that criminal law is the most formal condemnation of a conduct that the state is capable of inflicting on the population. It also happens to be the most censuring and stigmatizing. Professor Hart puts this aspect succinctly when he asserts that "the method of criminal law, of course, involves something more than the threat (and on due occasion, the expression) of community condemnation of anti social conduct. It involves, in addition, the threat (and, on due occasion, the imposition) of unpleasant physical consequences called punishment".[1] And hence, while defining crimes, certain principles must be kept in mind. Andrew Ashworth argues and rightly so that there cannot be a single value or purpose or principle that the criminal law espouses but there may be multiplicity of values that the state may want to protect, there may be plethora of purposes that the criminal law works towards and multiple principles that it must operate within. He nonetheless proposes that the "ambit of criminal law should be minimum". He cautions that "even if it appears to be justifiable in theory to criminalize certain conduct, the decision should not be taken without the assessment of the probable impact of criminalization, its efficacy, its side effects, and the possibility of tackling the problem by other form of regulation and control".[2] The year witnessed many important cases with far reaching repercussions and the judiciary filled in for the lapses and inertia of the legislation when it pronounced its verdicts on sections 377 and 496 of the Indian Penal Code,1860 (IPC). The court perhaps took baby steps as far as section 377 is concerned but it did take them!

The judiciary also has been very proactive and has engaged in periodically interrogating the judicial process to make it more and more justice oriented. Thus the

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1 Henry M. *Hart* Jr., "*The Aims of the Criminal Law*" 23 *Law and Contemporary Problems* 401-44. *Available at*: https://scholarship.law.duke.edu/lcp/vol23/iss3/2.(last visited on Feb. 20, 2019).

2 Andrew Ashworth, *Principles of Criminal Law* 53(Oxford University Press, 2009).

court in *Mahendra Chawla* v. *Union of India*[3] dealt with in detail the woes of witnesses in India which form the backbone of the criminal justice system. It spelt out the Witness Protection Programme 2018, which it declared should be considered as law under article 141 of the Constitution until a suitable law is framed. And interestingly, keeping pace with the internet age, the court deliberated on the scope of live streaming of cases and observed that "Live streaming as an extension of the principle of open courts will ensure that the interface between a court hearing with virtual reality will result in the dissemination of information in the widest possible sense imparting transparency and accountability to the judicial process".[4]

The present survey examines some interesting IPC related cases decided by the Supreme Court in the year 2018.

II UNNATURAL OFFENCES

The survey regarding *Suresh Koushal* judgment[5] was concluded by arguing that "a larger bench would have at least ensured that the judicial process does not become a reflection of two judges' ideology and prejudice".[6] The wish came true when the writ petition challenging the constitutionality of section 377 in *Navtej Johar* v. *Union of India*[7] was placed before the constitution bench which gave a unanimous verdict.

In *Koushal,* the apex court had, *inter alia*, faulted the High Court of Delhi and had argued that *Naz* judgment[8] erroneously relied on international precedents in its anxiety to protect the "so called" LGBT rights.[9] The *Navtej* court had no such reservations regarding foreign precedents and quoted extensively from foreign jurisdictions. It was also categorical in asserting[10] that privacy rights are real rights, and even if a matter involves a small minority of the population, they nonetheless will have to be guaranteed. The court through a voluminous judgment decriminalized section 377 as far as consenting adults are concerned, while also dealing extensively with aspects like constitutional morality, gender, sexual orientation, categories like gay, lesbians, *etc.*, which will be examined in the respective surveys in this volume dealing with Constitution, women, *etc*.

As far as criminal law is concerned, it is interesting to note that to decriminalize section 377 the Dipak Misra J judgment took help from the 2013 amendment of the IPC by engaging in an analysis of sections 375(amended) and 377, basically to

3 2018 SCC Online SC 2679.

4 *Swapnil Tripathi* v. *Supreme Court Through Secretary General* (2018) 10 SCC 639 at 641.

5 *Suresh Kumar Koushal* v. *Naz Foundation* (2014) 1 SCC 1.

6 See Jyoti Dogra Sood, 'Unnatural offences' in "Criminal Law" XLIX *ASIL* 415-417(2013).

7 *Navtej Singh Johar* v. *Union of India*, 2018 SCC OnLine SC 1350.

8 *Naz Foundation* v. *Government of NCT, Delhi*, 2009 SCC OnLine Del 1762.

9 *Supra* note 7, para 165.

10 The boldness perhaps came through the Puttaswamy judgment – *K.S. Puttaswamy* v. *Union of India* (2017) 10 SCC 1.

11 *Supra* note 7, paras 205-212.

12 *Id*., paras 213-221.

establish the issue of consent[11] and the issue of "against the order of nature".[12] The court, in its investigation, drew an analogy after the 2013 amendment in rape provision that if "consensual carnal intercourse between a heterosexual couple does not amount to rape, it definitely should not be labelled and designated as unnatural offence under section 377 IPC". The court was focused on the issue of consent and in spite of the fact that it did reproduce the marital rape exemption, it did not occur to the court that the marital rape exemption itself stands amended from "sexual intercourse by a man with his own wife" to "sexual intercourse *and sexual acts* by a man with his own wife".[13] 'Sexual acts', it is submitted, includes, the ones referred to as 'against the order of nature" of section 377.[14] Had the court also examined section 377 via the amended marital rape exemption, things would have been more clear to them and may be married women 'rights' may also have been brought to focus!

Interestingly, Misra J judgment gives a right to choose a 'sexual partner'[15] but does not specify or engage in a discourse whether India as a polity is ready to engage and endorse choosing sexual partners outside the institution of marriage. Or, was this particular right etched out specifically for the homosexual community? If yes, they already stand alienated as the court has 'othered' them.

Nariman J dwelled on fraternity and concluded thus:[16]

> We may conclude by stating that persons who are homosexual have a fundamental right to live with dignity, which, in the larger framework of the Preamble of India, will assure the cardinal constitutional value of fraternity that has been discussed in some of our judgments (See (1) Nandini Sundar v. State of Chhattisgarh, (2011) 7 SCC 547 at paragraphs 16, 25 and 52; and (2) Subramaniam Swamy v. Union of India (2016) 7 SCC 221 at paragraphs 153 to 156). We further declare that such groups are entitled to the protection of equal laws, and are entitled to be treated in society as human beings without any stigma being attached to any of them. We further declare that Section 377 insofar as it criminalises homosexual sex and transgender sex between consenting adults is unconstitutional.

Chandrachud J relied, *inter alia,* on young Indian scholars to deal with the issue[17] and discussed at length issues of privacy and autonomy. Ironically the judge also quoted from *Shakti Vahini* v. *Union of India*[18] which majorly dealt with honour killings as a result of choice of 'marriage partners.' He quoted from the judgment that

13 Emphasis added.

14 By virtue of this amendment, the legislature has *normalized* the sexual acts and is perhaps no more 'against the order of nature'. This is the only reading of the amended exception, it is submitted. Otherwise, there was no reason to amend the marital rape exception! See Jyoti Dogra Sood, "Understanding the amended marital rape exception" 5 *Bangalore University Law Journal* (2015)

15 *Supra* note 7, para 230.

16 *Id.*, para 97.

17 Shubhankar Dam, Tarunabh Khaitan, Nivedita Menon, Uday S. Mehta *et al.*

18 (2018) 7 SCC 192.

"the choice of a partner whether within or outside marriage lies within the exclusive domain of each individual". It is indeed interesting that the judge quoted passages from a heteronormative judgment to conclude as follows:[19]

> We hold and declare that:
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> (i) Section 377 of the Penal Code, in so far as it criminalises consensual sexual conduct between adults of the same sex, is unconstitutional;
>
> (ii) Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution;
>
> (iii) The choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation;
>
> (iv) Members of the LGBT community are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of law;

It is submitted that mere decriminalization will not be of much help unless overall reforms are ensured.

Indu Malhotra J was of the opinion that:[20]

> History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality.

If this is true, then overhauling of all laws – be it marriage, adoption, succession – needs to be done.

III OFFENCES AGAINST HUMAN BODY

Culpable homicide

Realist school judge Justice Jerome Frank in his *Courts on Trial,* suggested that at the end of the day, in a case what we have is educated guesses about what really happened. He likened the judges to historians and suggested that just like them the judges excavate the truth and witnesses help the courts in this job. Jerome Frank opines that 'facts are guesses' – judicial guesses about what really happened.[21] And how do the judges 'guesstimate' - by sifting through the evidence, the account of eyewitnesses and other circumstantial evidence produced before them by the prosecution. Conviction can only be where the prosecution is able to prove a case beyond a reasonable doubt.[22] However, "reasonableness of a doubt must be a practical

19 *Supra* note 7, Chandrachud J judgment, para 156.

20 *Id*., Indu Malhotra judgment, para 20.

21 Jerome Frank, *Courts on Trial* 14-36 (Princeton University Press, 1948).

22 See also *Bannareddy* v. *State of Karnataka* (2018) 5 SCC 790.

one and not based on abstract theoretical hypothesis".[23] Oral evidence must necessarily be independently corroborated. Further, different people react differently in similar situations. It may happen that the names of accused are not specified in the FIR and it is only subsequently when the initial shock is settled that supplementary statement may be given. All these human emotions and behaviour needs to be factored in by the courts while 'guesstimating' and deciding a conviction. Each case, however, would depend on the circumstances of the case and the courts' interpretation of the same. In cases of circumstantial evidence the chain has to be complete and must unequivocally point towards the guilty. "In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof". [24] The recovery evidence which has been made admissible by virtue of section 27 of the Evidence Act, 1872 must be scrutinized carefully as it may well be planted by the police.[25] And for that a clear connection between the thing recovered and the crime must be established. [26] The gap between 'may be' and 'must be' is very wide[27] and must always be kept in perspective.

Murder

In a dacoity cum murder case,[28] the informant was aware of the names of the alleged dacoits who killed the deceased but did not name them in the FIR. The FIR was registered after three hours and there was enough time to gather information. The court reiterated that "FIR need not be an encyclopedia of the crime, but absence of certain essential facts, which were conspicuously missing in the present FIR, point towards suspicion that the crime itself may be staged."[29]

In *Imtiyaz A. Rahiman Inamdar* v. *State of Maharashtra,*[30] the deceased had an injury which, though from the back, was inflicted with such force that it penetrated so deep that his lung was perforated. As such the court held that the case stood covered under thirdly of section 300 and life imprisonment under section 302 was imposed. In a case where the accused had a *danda* in one hand and *drat* in another and he used the *danda* to hit – the high court, on this fact, declared that he did not have the requisite intention to commit murder. However, the apex court,[31] taking into consideration the force with which the hit was accomplished opined that he must be attributed "the knowledge, if not the intention, that injuries caused by him are sufficient in the ordinary

23 *Latesh* v. *State of Maharashtra* (2018) 3 SCC 66 at 83, para 46.

24 *Navneethakrishnan* v. *State* (2018) 16 SCC 161 at 170.

25 For recovery evidence see *State of Karnataka* v. *A.B. Mahesha* (2018) 9 SCC 612 where serious doubt were raised regarding alleged recovery and hence acquittal was upheld.

26 For complete connect of circumstantial evidence see *Surendra Singh* v. *State of Uttarakhand*, 2018 SCC OnLine SC 2738

27 *Uppala Bixam* v. *State of Andhra Pradesh,* 2018 SCC Online SC 2193.

28 *Amar Nath Jha* v. *Nand Kishore Singh* (2018) 9 SCC 137

29 *Id.* at 142,para 11.

30 2018 SCC On Line SC 3238. See also *Gorusu Nagaraju* v. *State of A.P.,* 2018 SCC On Line SC 266where no inconsistency was found in the evidence produced and the appellant kept mum when asked to explain – the conviction under s. 302 was upheld.

31 *State of H.P.* v. *HansRaj*, 2018 SCC On Line SC 273.

course of nature to cause death and hence altered the conviction from 304 part II IPC to section 302 IPC.

In cases of homicide at public places, lot of witnesses are present. However, given the technicalities of criminal law and hostility from the accused, and with no state protection, more often than not the witnesses remain wary of deposing before the courts. Some who do gather courage in the heat of the moment develop cold feet later and become hostile. In such circumstances independent witnesses are impossible to get. But that does not mean that culprits will go scot free. In a case of hostility between two families; threats given in the presence of police and other medical evidences, and witnesses testimonies establishing a clear circumstantial link, the accused were convicted under section 302 IPC. In appeal before the apex court in *Ganapathi* v. *State of Tamil Nadu,*[32] it was contended that the witnesses being the father and brother of the deceased, their testimony must be discarded as they are interested witnesses. The court drawing a distinction between interested witness and related witness held thus:[33]

> "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of litigation, in the decree in a civil case or in seeing on accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be "interested"
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> In a case[34] where injury and subsequent death was due to bomb attack, the witness who also got hurt and was hospitalized put a seal on his presence. Hence his evidence, being the eye witness evidence, was very important and the trial court convicted the accused. The high court in appeal did not consider this evidence with the seriousness that it deserved and acquitted the accused. The apex court faulted the high court and remarked that the latter's "reasons are incorrect and completely against the record". While restoring the conviction under section 302/149, the court also castigated the state that acquittal of nine persons by trial court was never challenged by the state. The court, admonishing the state, observed that the "state must be vigilant in such matters and ought to have taken proper steps in this behalf".[35]

In *Jayaswamy* v. *State of Karnataka,*[36] two women died as a result of assault and another was injured who became the eye-witness and supported the prosecution. Accused 2 and 3 in this case were allegedly responsible for assaulting. The trial court and the high court acquitted accused 2 to 5 and accused no. 1 was held guilty under

32 (2018) 5 SCC 549.

33 *Id.* at 555,para 14. See also *State of Rajasthan* v. *Mada*, 2018 SCC OnLine SC 2462 para 25 *Sudhakar* v. *State* (2018) 5 SCC 435 at 440**.**

34 *Rojina Begum* v. *Firoz Munshi,* 2018 SCC OnLine SC 2462.

35 *Id*., para 19.

36 (2018) 7 SCC 219.

section 302. The state did not file any appeal against acquittal and hence gained finality! In appeal the apex court found that the sole appellant had no role in the death of the two deceased and altered his conviction from section 302 to section 326 as he had assaulted the complainant (who was also the eye witness). The issue in such cases remains as to the purpose of a case – is it justice to the victim or is it just an adversarial contest between the state and the accused with no sense of justice? Otherwise, what happens to the killers of these two? Should the court take *suo motu* cognizance and challenge the acquittal – which is essentially a state prerogative? In *Farida Begum* v. *State of Uttarakhand,*[37] while dealing with a case under section 302 read with 149, the apex court in appeal came to a conclusion that one of the original accused needs to be acquitted as his case was similar to another accused who was acquitted. His conviction had been upheld by both the courts below and he had not preferred any appeal. The court in this case took *suo motu* cognizance and directed his acquittal by giving him the benefit of doubt. So in effect, the court is vigilant that innocent is not held guilty but remains passive when the guilty go scot free and the victim is left doubly victimized.

In *Dev Kanya Tiwari* v. *State of U.P.,*[38] a man died at his in-laws place. The wife filed a report of suicide claiming that the deceased had consumed poison while the brother of the deceased filed a case of homicide by strangulation. The post mortem report did mention ligature injury on the neck but viscera was not preserved for further investigation regarding poisoning. In view of this and other discrepancies in investigation, *viz*., the doctor was not cross-examined, *etc.,* the accused mother-in-law was acquitted on the basis of benefit of doubt (the co-accused - the wife - had died, hence the case stood abated against her).

In *Motiram Padu Joshi* v. *State of Maharashtra,*[39] the trial court acquitted the accused persons in a case of culpable homicide though the medical evidence and the recovery evidence corroborated the evidence of the eye witnesses. The trial court faulted and thereby discarded the evidence, that the eye witness who was a brother, ran inside out of fear while the assailants attacked his brother with dangerous weapons like sword. The apex court while upholding the conviction given by the high court quoting *Rana Pratap* v. *State of Haryana*[40] underlined the behavioural reactions of different people in the same kind of situations. The apex court addressing the sessions court reasoning that the conduct of the witnesses was unnatural inasmuch as they did not go to rescue the deceased, underlined that every individual witnessing a murder reacts in his or her own way. Some may be paralyzingly stunned, others may become hysterical; some may run away while some may rush in to aid the victim. So the courts cannot impose a set pattern of reaction to approach evidence.[41] Similarly, in *Kameshwar Singh* v. *State of Bihar,*[42] the court reasoned that "behaviour of the

37 (2019) 2 SCC440.

38 (2018) 5 SCC 734.

39 (2018) 9 SCC 429.

40 (1983) 3 SCC 327.

41 For interested/related witness, see also *Sudhakar* v. *State* (2018) 5 SCC 433.

42 (2018) 6 SCC 433.

witnesses or their reactions would differ from situation to situation and individual to individual. Expecting uniformity in their reactions would be unrealistic, and no hard and fast rule can be laid down to the uniformity of the human reaction". In this case the eyewitnesses had run away from the scene of the crime and the defense had sought to assail the evidence on that count.

Shoddy investigation

In the case of *Kumar* v. *State*,[43] the appellant-accused was held guilty of culpable homicide amounting to murder under section 302 and voluntary causing hurt by dangerous weapons under section 324 IPC. The apex court, on reappreciation of facts, came to the conclusion that the prosecution case suffered from various infirmities which cast a cloud of suspicion over the case. FIR was delayed, the appellant-accused was unauthorizedly discharged from the hospital and kept illegally confined for a day. The court observed: [44]

> In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences :
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> (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
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> (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore, their evidence is unreliable".
>
> …
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> 29. In the case on hand, admittedly, the accused—appellant was also injured in the same occurrence and he too was admitted in the hospital. But, prosecution did not produce his medical record, nor the Doctor was examined on the nature of injuries sustained by the accused. The trial Court, instead of seeking proper explanation from theprosecution for the injuries sustained by the accused, appears to have simply believed what prosecution witnesses deposed in one sentence that the accused had sustained simple injuries only.

The apex court refused to endorse the concurrent findings of the courts below and acquitted the accused of all charges.

In *Mohd. Akhtar* v. *State of Bihar,*[45] the trial court acquittal was upheld by the apex court reversing the high court conviction due to untrustworthy eyewitnesses who identified the accused in lantern light, which seemed highly improbable. There were glaring lacunae in the investigation and hence acquittal by the trial court was upheld.

43 (2018) 7 SCC 536.

44 *Id*. at 544, para 30 quoting *Lakshmi Singh* v. *State of Bihar* (1976) 4 SCC 394 at 401.

45 (2019) 2 SCC 513.

Last seen together

"Last seen together" becomes a very relevant factor in the case of homicidal death. For example, if the time when the deceased was last seen with the accused and the recovery of *corpus delicti* are in close proximity, the last seen together theory may become a very cogent evidence and the burden is cast on the accused under section 106 of the Evidence Act to explain the circumstances under which death may have taken place.[46] However, the mere invocation of the last seen theory, sans the fact and the evidence in a case, will not suffice to shift the onus upon the accused under 106 of the Evidence Act, 1872 unless the prosecution first establishes a *prima facie* case. [47] In *Reena Hazarika* case,[48] both the trial court and the high court also put too much emphasis on the accused person's unnatural behaviour of not crying. The apex court once again cautioned that reaction of each individual is different. Hence, last seen together by itself does not conclusively establish that it is the accused alone who is responsible for the crime. It is only one of the circumstances in the chain.[49]

It is essential that the time lag between the homicidal death and last seen together have to be reasonably close to draw an inference of guilt.[50] In a case[51] where the woman was last seen alive with the accused and was staying with him in the same house, it was for the accused to explain how the woman died. His failure to report her missing and his failure to offer any explanation became strong militating circumstances against him. He was convicted under section 302 IPC by the apex court, thereby affirming the trial court verdict and discarding the high court verdict of acquittal. In another case,[52] a woman died of burns and she was in the house with her husband. The dying declaration (third in number)[53] was duly recorded and she blamed the appellant-husband. The husband was absconding for three months after the incident. The court upheld the conviction under section 302 IPC.

Motive

Motive does not have much relevance where direct evidence is available. In *Khurshid Ahmad* v. *State of J&K*,[54] the court held the accused guilty in view of direct evidence coupled with medical evidence pointing at the guilt of the accused. Motive could not be proved and the court refused to give it any significance in the facts of the case.

The factual matrix of *State of U.P.* v. *Mahipal*[55] revealed that two children were murdered in a case of serious objection to property being bequeathed to the

46 *Satpal* v. *State of Haryana* (2018) 6 SCC 610.

47 *Reena Hazarika* v. *State of Assam* (2019) 13 SCC 289.

48 *Ibid*.

49 *Lavkumar Bhardwaj* v. *State of Chhattisgarh*, 2018 SCC OnLine SC 3250.

50 *Ravi* v. *State of Karnataka* (2018)16 SCC 102.

51 *State of H.P*. v. *Raj Kumar* (2018) 2 SCC 69.

52 *Bhagwat* v. *State of Maharashtra*, 2018 SCC OnLine SC 1892.

53 For veracity of multiple dying declarations also see *State of Rajasthan* v. *Ganwara,* 2018 SCC OnLine SCC 1566.

54 (2018) 7 SCC 429.

55 (2018) 14 SCC 111.

grandmother of these children. The high court, assailing the trial court verdict, opined that this could not be taken as the motive since the "murder of the two children would not have benefited him to get the property in any manner".[56] For that the entire line of descendants would have to be wiped out. The apex court, however, upholding the trial court order, *inter alia,* held that "the respondent accused had entertained a strong grudge against the family and the act of disappearance of the children and their death was to wreak vengeance on the family".[57]

In a case[58] where the son nursed a grudge against the father regarding agricultural land, the motive stood proved. With the presence of the accused in the agricultural field where the father lay murdered, and blood on his clothes which were recovered at his behest, the circumstantial evidence pointed unequivocally to the guilt of the accused. He was also absconding and did not attend his father's funeral which made the case stronger against him.

Culpable homicide not amounting to murder

In *Pradeep Bisoi* v. *State of Odisha,*[59] the entire discussion was regarding the dying declaration. Surprisingly, the state did not go in appeal against conviction under section 304 part II IPC. It was a case which involved hurling of bombs, throwing acid, use of sharp edged weapons for assault, etc., which clearly made out a case under section 302 of the IPC.

In a case[60] where there was already a civil dispute pending between the families, a verbal altercation transformed into a physical attack and hence the case fell within exception 4 of section 300. Therefore, the conviction was altered from section 302 to section 304 part I of IPC.[61]

Sudden fight

A quarrel escalating into an altercation with temper rising high may not come within the contours of murder. In *Tularam* v. *State of M.P.,*[62] the factual matrix proved that the fight was sudden and not premeditated and Tularam, who was carrying a *balem,* struck a blow to Bhadri which resulted in his death. The apex court, after a detailed analysis, altered the conviction from section 302 to section 304 part II.[63]

In another case where the accused party was armed with a twelve bore gun and *lathis,* and deceased suffered a gunshot injury on the back of the left thigh, it was held that if the intention was to kill then the injury could have been caused on upper limb,

56 *Id*. at 112-113, para 7.

57 *Id*. at 113, para 11.

58 *Basvaraj* v. *State of Maharashtra* (2018) 18 SCC 128.

59 2018 SCC Online SC 1866.

60 *Manoj Kumar* v. *State of H.P.* (2018) 7 SCC 327.

61 See also *Sh. Khabir* v *State of West Bengal,* 2018 SCC OnLine SC 2274 wherein conviction was converted from s. 302 IPC to s. 304 part II of IPC.

62 (2018) 7 SCC 777.

63 For sudden fight see also *Bhagirath* v. *State of M.P*., 2018 SCC OnLine SC 2177.

above waist. Since it was the thigh, the conviction under section 304 part I was upheld in *State of MP* v. *Gangabishan.*[64]

The fact that six knife blows were inflicted will not *ipso facto* make it a case of culpable homicide amounting to murder under section 302. All the surrounding circumstances, *viz.,* there was a party where they were drinking, on realization that the person was injured, the accused took him to hospital, informed the parents and was there all through, will have to be considered. Having been proved that the assault was the result of a sudden fight, the benefit of exception 4 to section 300 must be given which the High Court of Himachal Pradesh erred in. The apex court, in appeal in *Atul Kumar* v. *State of H.P.,*[65] upheld the trial court conviction under section 304 part II[66] but enhanced the punishment from five years to ten years.

In *Manoj Kumar* v. *State of H.P.,*[67] the conviction was altered from section 302 to 304 part II as the court got convinced that the appellants had no intention to cause death, though there was knowledge that the weapon used to inflict injury on the scalp might cause death. On the contrary, in *State of Rajasthan* v. *Leela Ram,*[68] where the assault was with an axe right in the centre of the skull with such force that the cranium and the spinal cord and the parietal bone had been fractured the apex court altered the conviction from section 304 part II to section 302, as fourthly of section 300 stood proved, according to the court.

Similarly, in *Hansaram* v. *State of Chhattisgarh,*[69] there was no evidence that culpable homicide was intentional, thus, not falling in the category of culpable homicide amounting to murder. The weapon, by chance came in the hands of the accused, and he swung it around thereby hitting one person on the head resulting in his death. The court in para 7 of the judgment, explained the situation thus: "there is no evidence to show that the murder of Ram Kumar Sahu was a premeditated one". It is submitted that for law persons all culpable homicides are not murders though in common parlance the word used is 'murder'. The conviction was, thus, altered from section 302 to 304 part II IPC, with imprisonment of seven years.

Sudden and grave provocation

In *Lavghanbhai Devjibhai Vasava* v. *State of Gujarat,*[70] delay in preparing food by the wife for the husband was taken as a sudden provocation and the court matter of factly declared that in a heat of passion the husband struck a *lathi* blow without taking undue advantage. It is submitted that it is not that conviction in this case should necessarily have been under section 302 - the surveyor is also of the opinion that it was a case of culpable homicide not amounting to murder as *lathi* - a non lethal

64 (2018) 9 SCC 574.
65 (2018) 2 SCC 496.
66 See also *State of M.P.* v. *Abdul Lalit* (2018) 5 SCC 456.
67 (2018) 7 SCC 327.
68 2018 SCC Online SC 312.
69 (2018) 16 SCC 614.
70 (2018) 4 SCC 329.

weapon - was used and so on and so forth;[71] but the court's rendition of the facts, in a way, normalises this violent behaviour of husbands, which is disturbing. In such husband-wife cases, the court does not engage - at all - at least theoretically, with the explanation to the exception of grave and sudden provocation which mandates that "whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact". The court assumes for itself that wife not cooking for the husband is a sudden and grave provocation! However, in *Madan* v. *State of Maharashtra*,[72] a man enraged by woman not making meals for him, poured kerosene and set her on fire with matchstick. The court convicted him under section 302 IPC. This was done, probably, as unlike in the former cases, the relationship was not of husband and wife but as per the court - "illicit relationship". It is submitted that the only factor, apart from the relationship status, which merited different convictions in the two cases of not preparing meals is that in one case *lathi* was used and in the other she was burnt alive. Hence it could be argued that the latter case of *Madan* merited a murder conviction. However, in 2014, in *K. Ravi Kumar* v. *State of Karnataka,*[73] the wife was burnt alive for refusing to visit the ailing mother and exception was granted and it was held to be culpable homicide not amounting to murder by this very apex court. So it ought to be presumed that the court looks into the relationship status of 'licit' and 'illicit' to decide provocation! And invariably wives are at the receiving end.

In *State of Maharashtra* v. *Vikram Rangnath*,[74] the high court convicted a man, who poured kerosene and burnt a woman (not mentioned, but surveyor is assuming that it was the wife) to death on coming to know of her extra-marital affair, under section 304 part I of IPC. The apex court restored the conviction under section 302 IPC. So the fact of grave and sudden provocation in a man-woman case remains enigmatic.

A mentally unstable boy threw stones at a house and the house mate beat up the boy black and blue. A special police officer also joined them and they chased him beating him repeatedly resulting in his death. The conviction under section 302 was upheld as it was not merely a case of provocation, but the accused had chased the victim and "repeatedly assaulted mercilessly" which exhibited an intention to cause death.[75]

Irked by the loud playing of the tape recorder, the accused entered into an altercation and things became so heated that he ran back to his house and got a sword and hit the other one. The hit landed on the ribcage area and he soon left threatening that he would come back after a while. The entire episode lasted about half to two

71 S. 300 thirdly of IPC could have been invoked. See BB Pande , Limits on objective Liability" 16(3) *Journal of Indian Law Institute* 469-482(1974).

72 2018 SCC Online SC 354.

73 (2015) 2SCC 638. See Jyoti Dogra Sood "Criminal Law" L *ASIL* 419-420(2014)

74 2018 SCC OnLine SC 3252.

75 *Ramji* v. *State of Punjab,* 2018 SCC Online SC 2562.

minutes and the apex court rightly altered the high court conviction under section 302 to 304 part II IPC.[76]

Mob lynching

Mob lynching is the worst kind of homicide where the mob frenzy brutally takes away human life. Its brutality is worse than murder perhaps. The country of late was witnessing cases of cow vigilantism resulting in mob lynching in certain cases. Social activists approached the court through a writ petition.[77] The petitioners along with mob lynching also sought other declarations, *viz.,* section 12 of the Gujarat Animal Prevention Act, 1954; section 13 of the Maharashtra Animal Prevention Act, 1976 and section 15 of the Karnataka Prevention of Cow Slaughter and Cattle Preservation Act, 1964 to be declared unconstitutional. The court, however, without getting into the constitutionality of these provisions, in very strong words, denounced all forms of violence by self styled vigilantes, appointed through the provisions of these Acts or otherwise. The court took a very serious view of lynching, which they reminded the people, was a relic of a pre-legislative era and was totally unacceptable in civilized times governed by rule of law. The court reminded the vigilantes that "[imposing punishment] is the role and duty of the law enforcing agencies known to law. No one else can be permitted to expropriate that role. It has to be clearly understood that self-styled vigilantes have no role in that sphere. Their only right is to inform the crime, if any, to the law enforcing agencies".[78] Law and order being a state subject, the court reminded the state governments that mob violence in all its forms must be curbed by the state with immediate effect and the state is duty bound to do it and can in no circumstance abdicate this duty. The court was alive to the fact that the law enforcers tacitly approve of mob violence, subsequently leading to lynching. The court directed that departmental inquiry must be held and that too a serious one which fixes accountability and not the routine one prescribed under service rules.[79]

Honour killings

Honour killings are a blot to our constitutional ethos and our stature as a country slated to be the next super power. The apex court, in very strong words, had remarked more than a decade ago that "there is nothing honourable about honour killings and they are nothing but barbaric and brutal murder by bigoted persons with feudal minds".[80] The present surveyor had submitted that "given the peculiar caste dynamics in India … like the *D.K. Basu* guidelines, the directions in *Lata Singh* must be mandatorily put in all police stations".[81] However, in spite of the observations of the apex court and academic writings, the pernicious practice of honour killings continued unabated in certain states. The National Commission for Women mandated study

76 *Deepak* v. *State of U.P.* (2018) 8 SCC 228.

77 *Tehseen S. Poonawala* v. *State of India,* 2018 (13) SCALE 323.

78 *Id*., para 34.

79 For detailed comment see Jyoti Dogra Sood, "Case Comment" XX(III) *ILI Newsletter* (2018).

80 *Lata Singh* v. *State of U.P*. (2006) 5 SCC 475 at 480.

81 See Jyoti Dogra Sood, 'Honour killing' in "Criminal Law" XLVII *ASIL* 283(2011).

conducted by an organization called Shakti Vahini revealed in their research that such killings were on the increase and "such killings have sent a chilling sense of fear amongst young people who intend to get married but do not enter into wedlock out of fear".[82] Based on this study the organization filed a writ petition under article 32 of the Constitution seeking directions to central and state governments to take immediate steps to combat honour crime.[83] The court gave a very detailed judgment wherein it also traced honour killing in some other jurisdictions. It also engaged with case to case directions given by it earlier as also the law commission reports on the issue. *Khap panchayats*, which play a dubious role in not only condoning but actually authorizing this practice was also in the line of attack by the court. The criminality of mob lynching finds resonance in the working of *khap panchayat* as well and the following observation of the court rings true for the criminality in both the situations:[84]

> Khap Panchayats' or such assembly should not take the law into their hands and further cannot assume the character of the law implementing agency, for that authority has not been conferred upon them under any law. Law has to be allowed to sustain by the law enforcement agencies. For example, when a crime under IPC is committed, an assembly of people cannot impose the punishment. They have no authority. They are entitled to lodge an FIR or inform the police. They may also facilitate so that the accused is dealt with in accordance with law. But, by putting forth a stand that they are spreading awareness, they really can neither affect others' fundamental rights nor cover up their own illegal acts. It is simply not permissible. In fact, it has to be condemned as an act abhorrent to law and, therefore, it has to stop. Their activities are to be stopped in entirety. There is no other alternative. What is illegal cannot commend recognition or acceptance.

The apex court issued a slew of directions which included preventive measures, remedial measures and punitive measures and the same were mandated to be followed within six weeks.[85] Given the kind of attitude that the state and the law enforcement agencies display as regards honour crimes, following these directions, in letter and spirit, seems a tall order.

Abduction

Each offence of the penal code is sufficiently explained so as to include the physical element and the fault element required for the offence. Since criminal law is stigmatizing and has penal consequences, the principle of legality demands that the penal code must be constructed strictly. Hence, mere abduction of a woman does not satisfy the ingredients of section 366 of the IPC. In the case of *Kavita Chandrakant* v.

82 *Shakti Vahini, supra* note 18.

83 *Ibid.*

84 *Id.* at 213, para 48.

85 *Id.* at 218, para 56.

State of Maharashtra,[86] the first ingredient was satisfied, that is, the person must be carried off illegally by force or deception. However, the offence is complete once the intention to forcibly marry or illicit intercourse is established. The requirement of the offence is not that the accused must succeed in performing marriage or illicit intercourse, what is required is establishment of the requisite fault element, this could not be conclusively proved in the instant case.

Hurt

A school teacher hit a student with a stick for not wearing uniform shoes in the year 1996. As a result of the injury the student lost vision in his left eye. Keeping in mind the passage of time and other facts and circumstances, the apex court modified the conviction from section 326 to 325 and reduced the sentence of imprisonment to one year. Fine of Rs.50,000 was imposed which was to be paid to the injured student. After 22 years the school boy got compensation of such princely amount![87]

Custodial deaths

Police atrocities have been a major concern and a gross violation of human rights. Custodial death needs to be dealt with sternly as upholders of the law become the violators. In spite of stern warnings by the apex court, issuance of guidlines in *D.K. Basu*[88] and *Arnesh Kumar*[89] and subsequent amendments in arrest laws, police have been callously ignoring all of them. Every police station has *DK Basu* guidelines posted on its walls but it makes little sense when the accused is picked from home at 00: 45 hours and then tied to electric pole and beaten.[90] It could be because *DK Basu* guidelines were given in 1996 and this person died in custody in 1993! What is problematic is that the apex court started off brilliantly by saying that with greater power comes great responsibility and so on and so forth. However, in the final analysis complete reliance has been put on the doctors evidence that death was due to asphyxiation which was result of vomiting. The factual details of liquor, the tuberculosis, the beatings, the choking all have been obliterated! The case of *Yashwant* v. *State of Maharashtra*[91] again falls into this trap and exonerates the police merely on the 'expert evidence.'[92] What is heartening is that section 330 of IPC has been taken seriously and the apex court, rising to the occasion, enhanced the punishment from 3 years to 7 years.

86 (2018) 6 SCC 664.

87 *C.K. Kariyappa* v. *State of Karnataka* (2018) 18 SCC 801.

88 *D.K. Basu* v. *State of W.B*. (1997) 1 SCC 416.

89 *Arnesh Kumar* v. *State of Bihar* (2014) 8 SCC 273.

90 *State (Govt. of NCT of Delhi)* v. *Pankaj* ,2018 SCC OnLine SC 2256.

91 2018 SCC OnLine SC1336.

92 See *Bhagwan Dass* v. *State of Haryana* (2018) 9 SCC 227 which was a conviction under section 323 IPC in a case where the incident of custodial violence took place in 1992 and the final verdict by the apex court was given in 2018 when one of the accused (SHO at that time) was 80 years old and the other accused (also an SHO at that time) was 70 years old. The sentence was reduced to imprisonment already undergone which was about fifteen months.

IV GENERAL DEFENCES

Right of private defence

Self defence is a natural instinct of a human being and the Penal Code recognises this by providing a right of private defence. However, it is only in a few enumerated cases that the right of private defence extend to causing of death. In a case, two Punjab Home Guard volunteers got into an altercation over a borrowed sum of Rs. 100. Eye witnesses confirmed an altercation for about 15 minutes and since both of them were armed - the guard who shot was granted the right of private defense. However, since he shot at the vital part of the body he was not covered under chapter IV of IPC, but was given the benefit of exception II under section 300 IPC and was convicted under section 304 part I.[93] When the injuries sustained by the accused persons is not explained by the prosecution, then a suspicion arises and the plea of self defence finds favour by the courts. Hence, conviction was altered from section 302 to section 304 part II IPC in *Manphool Singh* v. *State of Haryana*.[94]

Unsoundness of mind

The defence of insanity is given when at the time of the commission of offence the person is incapable of knowing that what he is doing is either wrong or contrary to law. One must keep in mind that impoverished persons find it difficult to make both ends meet and are so steeped in meeting their life necessities that it cannot be expected of them to keep medical records. In *Devidas Loka Rathod* v. *State of Maharashtra,*[95] the accused person used a sickle to assault one person and when another intervened he rained blows on him and fled from there throwing the sickle enroute. The trial court and the high court denied the plea of insanity and convicted him under section 302 IPC. The apex court was mindful of the fact that the case was not contested ably, one reason being the poverty of the accused. The prosecution withheld very relevant and important information regarding hospitalization of the accused after the assault, the diagnosis and the treatment given. Had the prosecution and the investigation come clean in their duty, the result possibly might have been the same. But since proper appreciation of evidence was not done, the apex court gave him the benefit of doubt and directed that further directions under section 335 and 339 of the Cr PC be given so that he receives proper care and support.

V OFFENCES AGAINST WOMEN

Causing miscarriage

The facts of *Prabhu* v. *State of Tamil Nadu*[96] reveal a case of premarital sexual relations resulting in pregnancy. The charge of rape on false promise of marriage was held not tenable in the high court but charges under sections 417 and 313 IPC were upheld. The ingredients of section 313 mandate causing of miscarriage without the consent of the woman. In this case the apex court relied on the statement of the doctor

93 *Jangir Singh* v. *State of Punjab,* 2018 SCC OnLine SC 2722.

94 (2018) 18 SCC 531.

95 (2018) 7 SCC 718.

96 (2018) 18 SCC 798.

that she was brought to the hospital when she was already bleeding and had lower abdominal pain. The doctor, in order to save her life after obtaining her consent, medically terminated the pregnancy. It is submitted that if termination was to save her life then it is a different issue. But as far as consent of this kind is concerned when the woman is not married and is under medical stress, consent may have to be decoded with a discerning eye.

Acid attack

The criminal law Amendment Act, 2013 introduced section 326A to the IPC to deal with acid attacks. The fact that acid was used in the attack is enough to invoke charges under section 326A IPC and it is irrelevant whether the subsequent injury which is caused is simple or grievous. The main ingredient for attracting section 326A is use of acid.[97]

Female genital mutilation

In *Sunita Tiwari* v. *Union of India,*[98] the court was of the opinion that the issue of female genital mutilation needs to be decided by a larger bench. The court acknowledging it as a brutal practice, was also mindful that it is a 1400 years old practice connected to religious beliefs.

Rape

In *Rajak Mohammad* v. *State of H.P.,*[99]a man was acquitted of rape charges on the ground of benefit of doubt as the age of the girl was not conclusive and the prosecution could not prove her to be minor. The evidence produced before the court was such that there was a strong possibility of the prosecutrix being a consenting party. In another case, a girl of 12 years(as per school record) was raped in 1993 and since *Lilu* judgment[100] had not come, two finger test was conducted. The doctor opined that "though vagina of the prosecutrix was admitted two fingers easily, the prosecutrix felt pain and the doctor (PW-6) has opined that the prosecutrix was subjected to sexual intercourse within 2-3 days of examination".[101] The trial court convicted the accused under section 376 and sentenced him to seven years imprisonment. Shockingly, the high court reversed the conviction as no external injuries were found thereby hinting at a consensual sexual intercourse, ignoring the fact that the girl was a minor and so fell within the limits of statutory rape. In the apex court, the appeal was heard and judgment delivered in 2018 (25 long years since the incident). The court ruled that "having regard to the passage of time and other facts and circumstances of the case, the sentence of imprisonment of seven years imposed on the respondent-accused is reduced to a period of four years". Passage of time is clear but "other facts and circumstances" is perhaps left to the reader's imagination. In *Sham Singh* v. *State of*

97 *Maqbool* v. *State of U.P.* 2018 SCC OnLine SC 1930.

98 2018 SCC Online 2667.

99 (2018) 9 SCC 248.

100 *Lillu* v. *State of Haryana* (2013) 14 SCC 643, para 14.

101 *State of M.P.* v. *Preetam* (2018) 17 SCC 658, para 5 . The factum of two finger test gets again recorded in the high court judgment – para 7(ii).

Haryana,[102] the court in the judgment, quoting the doctor's report, mentioned that "the vagina of the victim permitted two finger". It is submitted that whatever may be the final verdict in the case (acquittal in the instant case), the apex court and other courts must be mindful of the fact that two-finger test violates the dignity of the prosecutrix.

Maintaining insensitivity and problematic rhetoric, the court in *Ajay* v. *State of Haryana,*[103] upholding rape conviction, made an observation that "in Indian Society no lady of virtue is supposed to invite unnecessary criticism for herself by alleging forcible rape upon herself". The court then qualified it by saying that only in two scenarios it may otherwise happen, and the language of the court is quite disparaging, when it observes thus "no lady of virtue would *like rape upon her body* unless the offence actually has been committed or if the victim is to take revenge of any other bigger enmity with the accused".[104]

Every episode of sexual intercourse, not resulting in marriage (where the woman is keen on marriage), cannot be contested as rape. The courts must be wary of this tendency. An assistant nurse who was a widow got into a relationship with a married medical officer. When she got some news of his marriage to another woman she filed an FIR. The accused filed an application for quashing of FIR which got dismissed and hence he came before the apex court in *Dhruvaram Murlidhar Sonar* v. *State of Maharashtra.*[105] The court, elaborating on the distinction between rape and consensual sex, held that "she had taken a conscious decision after active application of mind to the things that had happened. It is not a case of a passive submission in the face of any psychological pressure exerted and there was a tacit consent and the tacit consent given by her was not the result of a misconception created in her mind".Hence, the charge sheet under sections 376(2)(b), 420 read with 34 of the IPC and section 3 (1)(x) of the SC/ST Act was quashed. [106]

Disclosure of identity

In 1983, when rape laws were being rewritten as an aftermath of the *Mathura* case,[107] a very significant addition was made in the IPC by way of insertion of section 228A. This section made disclosure of identity of the victim of rape an offence which had penal consequences. To further protect the identity of the rape victims, sub section (2) was added in section 327 Cr PC, which mandated *in camera* trials in cases of rape. All this was to prevent further victimization of the rape victim. Court spaces which dispense 'justice' could become sites of violence for the victim, and this necessitated

102 (2018) 18 SCC 34.

103 (2018)17 SCC 99 at 100.

104 Emphasis added.

105 2018 SCC OnLine SC 3100.

106 The court in *Shivashankar* v. *State of Karnataka*, 2018 SCC Online SC 3106 efused to hold sexual intercourse as rape in face of complainant's own admission that they lived together as man and wife. In *Dola* v. *State of Odisha* (2018) 18 SCC 695 the prosecutrix version of rape did not inspire confidence and hence the accused was acquitted (business rivalry perhaps).

107 *Tuka Ram* v. *State of Maharashtra* (1979) 2 SCC 143.

the amendments. So it was mandated that not only the letter but also the spirit of section 228 A must be complied with in all situations.[108] However, mere lip service was being paid to this provision of 228-A IPC until the court, speaking through Deepak Gupta J, busted the facade when it was pointed out that identity is more often than not revealed by various means without naming the victim. The judge, to make his point clear, mentioned that in a particular case the name of the state was mentioned in which the alleged rape took place and it was declared that the victim was a state topper. This was a clear identifier mark. The court took a stern view and held that "no person can print or publish the name of the victim or disclose *any facts* which can lead to the victim being identified and which should make her identity known to the public at large".[109] The court did not buy the argument that the "victim becomes a symbol of protest or is treated as an iconic figure". The interest of "next of kin" and the interest of the victim may not converge and so the competent court must decide the matter.[110] Further, speaking of POCSO victims, the judge flagged a very important issue - that of next of the kin of the victim giving an authority to the Chairman or the Secretary of a recognized welfare institution to disclose the identity. The bench was not at all convinced by the argument that the name and face of the "victim can become a rallying point to prevent other such sexual offences".[111] The court, alive to the fact of violent familial spaces, categorically refused such disclosure without permission of the competent authority. The court, through this judgment sought to uphold the privacy and dignity of the girl child and the woman not only in letter but also in spirit.[112]

Parental control

Parents often invoke kidnapping charges against the love interests of their girl children, and sadly the POCSO provisions are very stringent and make no room for love or romance cases. In *Suhani* v. *State of U.P.,*[113] the girl had categorically stated that she had married the petitioner. A radiological examination was conducted at AIIMS which pegged her age between 19-24 and hence the court quashed the charges against the boy under sections 363 and 366 IPC.

Familial settlement

A woman consumed rat poison and died within six months of her marriage. Dowry demand and cruelty was proved. Shockingly, the question of sentencing under sections 306 and 498-A was deliberated in a rather bizarre manner. The punishment,

108 *Lalit Yadav* v. *State of Chhattisgarh* (2018) 7 SCC 499.

109 *Nipun Saxena* v. *Union of India* (2019) 2 SCC 703 at 712.

110 For detailed discussion see Jyoti Dogra Sood "Case Comment" XX (IV) *ILI Newsletter* (2018).

111 *Supra* note 109 at 713, para 15.

112 See also *Sangitaben Shailash Bhai Datana* v. *State of Gujarat*, 2018 SCC Online SC 2300 where the high court grossly erred in disclosing the name of the victim who was a child of seven years and shockingly got the complainants (grandmother and parents of the victim) and the accused to undergo scientific tests *viz*., lie detector, brain mapping and narco-analysis.

113 2018 SCC OnLine SC 781.

as far as the surveyor understands, is always given for the act committed and not based on the subsequent conduct and life decisions of the guilty person. Surprisingly, in the instant case[114] the fact that the guilty husband had remarried and that too from the family of the deceased was taken as a relevant factor and his sentence was reduced from five years to two years under section 306. The mother-in-law's age of 75 years and her not keeping well moved the court to punish her for the period already undergone, *i.e.*, nine months.

Sexual violation

A very disturbing incident was before the apex court in *Nivedita Jha* v. *State of Bihar,*[115] wherein investigation of sexual violation of girls in shelter home, as reported by TISS, was under scrutiny. The court took note of the fact that Brijesh Thakur, the person in charge of the infamous Sewa Sankalp Evam Vikas Samiti, was an influential person and people dared not to complain against his nefarious deeds. The court also directed the Income Tax Department to investigate his assets and income. The local police was also directed to investigate the possession of illegal ammunition and illegal weapons, if any, by a couple who may be involved in the case. The court also noted that the Social Welfare Department of the Government of Bihar was not totally oblivious of the nefarious activities of this NGO and hence the CBI was directed to seize its record. It seems that the State of Bihar had totally failed in its duty to protect its young girls housed in shelter home and granted money worth crores. It is hoped that with strict monitoring of the court the guilty NGO and all its staff, including its in charge as well as the government officials who either were party to this or turned a blind eye, are held guilty and given exemplary punishment.

Cruelty under section 498-A

Section 498-A was enacted to deal with cruelty associated with dowry demand. A narrative was created that women (mis)use section 498-A to harass the in-laws. Such assertion had no statistical basis. And the courts, shockingly pandering to this narrative, issued a slew of directions in *Rajesh Sharma* case[116] which went beyond the scope of Cr PC and would have ended up diluting the rigour of section 498-A. A writ petition was filed by the Social Action Forum - *Manav Adhikar* v. *Union of India*[117] seeking directions for uniform policy of registration of FIR, arrest and bail in cases relating to section 498-A. Dipak Misra J, in a very comprehensive judgment which is an encyclopedia of arrest provisions, held that *Rajesh Sharma* dictum of the court entered the legislative domain and so the judge struck down the highly controversial family welfare committees envisaged therein. The elaborate judgment categorically underlined that *D.K. Basu*,[118] *Joginder Kumar*[119] and *Arnesh Kumar*[120] judgments have enough principles for arrest which must be scrupulously followed.

114 *Anusuiya* v. *State of M.P.* (2018) 7 SCC 327.
115 2018 SCC OnLine SC 1616.
116 (2018) 10 SCC 472.
117 (2018)10 SCC 443.
118 *Supra* note 88.
119 *Joginder Kumar* v. *State of U.P.* (1994) 4 SCC 260.
120 *Supra* note 89.

Dowry death

A woman died an unnatural death within seven years of marriage. The trial court and the high court convicted the accused-husband under section 304-B, and dowry demand "soon before death" stood proved. In appeal, the apex court spent paras discussing the contours of the jurisdiction of the Supreme Court in appeal and a whole lot of cases were marshaled and relevant portions reproduced. And then "soon before death" was deliberated upon in great length. It is submitted that the courts must not waste its precious time in shouting out the already settled positions. The apex court ultimately upheld the verdict of the lower courts.[121]

Adultery

A gendered and grossly problematic offence of adultery was there in the statute book. The ingredients of the offence were such that though ostensibly it seemed to treat a woman as a victim, once the husband consents, then it reduces a woman to a chattel. There had been a strong demand for its deletion from the statute book but legislature showed no will to do so. As such it fell on the judiciary in the case of *Joseph Shine* v. *Union of India*[122] where the constitutionality of section 497 was under scrutiny. The court referred the matter to the Constitution bench with the observation that given the sensitivity to gender equality this provision seems quite archaic, thereby implying that it has no place in the present time and age.

The five judges constitution bench finally in very detailed individual judgments unanimously declared section 497 of IPC as unconstitutional.[123] It overruled the *Sowmithri Vishnu*[124] verdict where this highly problematic, regressive, discriminatory and anti-woman law was upheld taking recourse to articles 14 and 15 of the Constitution! The individual judgments are a case study in themselves and make interesting reading and give an insight into the judicial mind, given the fact that each judge has given his/her own reasoning and arguments to declare the section unconstitutional.[125]

VI JOINT LIABILITY

Common intention

To invoke section 34, it is necessary that some tangible material is placed before the court to enable it to hold persons accused of an offence constructively liable for the same. The mere fact that relations were strained within the family and evasive replies were given regarding a homicide cannot be a basis for constructive liability under section 34.[126] It may happen that the overt acts of each assailant are different. In a case, a person was convicted for murder with the aid of section 34 where he held

121 *Jagjit Singh* v. *State of Punjab* (2018) 10 SCC 593.

122 (2018) 2 SCC 189.

123 *Joseph Shine* v. *Union of India,* 2018 SCC OnLine SC 1676.

124 *Sowmithri Vishnu* v. *Union of India* (1985) Suppl. SCC 137.

125 See for a detailed feminist perspective on Chandrachud J judgment see Latika Vashist, "Case Comment" XX(III) *ILI Newsletter* (2018).

126 *Tapan Sarkar* v. *State of West Bengal* (2018) 18 SCC 772.

the person when he was being assaulted and then put his severed head in a plastic bag.[127]

However, once the person has been convicted with the aid of section 34, there is then no justification for a differential treatment for sentencing (unless special reasons are stated). And hence in *Shamim* v. *State,*[128] one of the accused who was given 25 years of imprisonment without remission was set aside by the apex court.

Unlawful assembly

Fundamental rule of an unlawful assembly is that it must be an assembly of five or more persons with specified objectives as mentioned in section 141 IPC. Hence, if six accused are acquitted and only one is left and there is no factual scenario that unknown persons were present at the time of occurrence, then the conviction of one is not tenable in law and is liable to be set aside.[129] "As far as the issue of unlawful assembly and common object of the unlawful assembly is concerned, the court generally could determine those aspects based on the evidence on record". [130] The prosecution need not lead separate evidence for unlawful assembly and common object.

In *Usmangani* v. *State of Gujarat,*[131] the court opined that in a crowd of 1000-1500 gathered together for an unlawful assembly, fixing liability for murder becomes a Herculean task. The court categorically iterated that for conviction under section 149, "it must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all these stages".[132] And if it happens to be a case of rival factions the endeavour is to implicate as many people as possible from the opposite party. In a case[133] which took place in 1994 and many died due to bomb blasts, the trial court, after sifting through the evidence, held 30 accused persons liable for offences out of the 47 who were charge sheeted. The accused persons filed appeals before the high court and got an acquittal as the evidence was by relatives. The state appealed against the acquittal. The apex court, faulting the high court in discarding evidence of relatives, held thus:[134]

> In faction ridden villages, even if some independent or impartial witnesses were present at or near the scene of the incident they are not likely to volunteer to give evidence and it is only the relatives who would be willing to tender evidence.

127 *Subhash Mahto* v. *State of Bihar* (2018) 18 SCC 680.

128 (2018) 10 SCC 509.

129 *Ranvir* v. *State of U.P.* (2019) 2 SCC 237.

130 *Menoka Malik* v. *State of West Bengal*, 2018 SCC Online SC 1196, para 25. The apex court was critical of lower courts that they concentrated only on murder charge and overlooked other charges like unlawful assembly, burning of property *etc*.

131 2018 SCC Online SC 3270.

132 *Id*., para 7.

133 *State of A.P.* v. *Pullagummi Kasi Reddy* (2018) 7 SCC 623.

134 *Id*. at 633,para 8.5.

The court also held that in a case where no overt act has been attributed to some of the accused, they are entitled to the benefit of doubt and others can be held liable under section 302 IPC. Interestingly, section 149 has not been invoked in the final judgment and there is no discussion around it.

In *Prabhu Dayal* v. *State of Rajasthan,*[135] the court held that "in as much as he is one of the members of the unlawful assembly who had come to the scene of occurrence with the common object of committing murder", the conviction under section 302 was justified.[136] Similarly, in *Bhaskar Rao* v. *State of Maharashtra,*[137] (the court held that the accused is vicariously liable even if he has not directly indulged in the commission of the offence perpetrated by other accused, in case he is proved to be a member of the unlawful assembly sharing its common object.[138]

VII OFFENCES AGAINST PROPERTY

Dacoity

Dacoity and robbery are aggravated forms of theft and are dealt sternly by the law, more so when the dacoits are armed. In case the dacoits are not armed, lot of discretion is vested in the courts to impose a penalty lesser than death or imprisonment for life for conviction under section 396 IPC.[139]

In one case of dacoity, the trial court and the high court gave a verdict of guilty. Challenging the verdict in the apex court in *Raju Manjhi* v. *State of Bihar,*[140] the appellant contended that the evidence on record did not establish the motive of the accused and that a test identification parade was not conducted. The court, upholding the conviction, held that motive becomes secondary when direct evidence is available on record and that the test identification parade is not a mandate of Cr PC and does not constitute substantive evidence.[141] The court held that "failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact".[142] Recovery evidence under section 27 was primarily considered to nail the accused in this case.

Forgery

Penal statutes need to be constructed strictly. Forgery is an offence which is defined in section 463 of the IPC. Section 464 elaborates as to when a false document could be said to have been made for the offence of forgery under section 463 IPC, and

135 (2018) 8 SCC 127.

136 *Id*. at 137, para 22.

137 (2018) 6 SCC 590.

138 *Id*. at 606,para 45.

139 *Shajahan* v. *State* (2018) 13 SCC 247 ten years imprisonment was given.

140 2018 SCC OnLine SC 778.

141 For test identification parade, see also *Navneethakrishnan* v. *State* (2018) 16 SCC 161 at 16, para 21.

142 *Supra* note 140, para 15. The court in *Shanker* v. *State of M.P.* (2018) 15 SCC 725 stressed on the TIP as one of the key witnesses had stated that "he could recognize the accused only by face".

section 465 provides punishment for the offence of forgery. For punishing a person under section 465, it is essential that the ingredients of section 463 are satisfied and not merely that of section 464.[143]

VIII INCHOATE OFFENCES

Abetment

To lend money to a person in need is a noble thing. And to expect repayment is also a very logical expectation. And if the borrower fails to do so for various reasons *viz.,* financial distress or loss in business, etc., does not lessen the expectation of the lender. And it is but natural for the lender to repeatedly ask for his money and in the process use harsh or abusive words. In such circumstances if the borrower decides to end his life, the lender will not be held liable unless there is a clear proof between the suicide and the instigation to commit suicide. Demanding such money repeatedly does not make one liable for abetment.[144] It is true that abetting suicide is to be taken seriously. However, there has to be a clear connect between the suicide and the instigation. It also must be kept in mind that different individuals react differently to pressure. In work places, pressure is inevitable, and it may be more in certain work situations. Hence, if the work demand is from 10a.m.-10p.m. and one is required to work during holidays or salary is withheld for a month, it does not tantamount to abetment to commit suicide making superior officer liable for offence under section 306 IPC.[145]

In *Narayan Malhari Thorat* v. *Vinayak Deorao Bhagat,*[146] the apex court allowed the appeal against quashing the proceedings under section 306 wherein a suicide note had allegedly named the accused responsible for the suicide as he used to constantly harass the deceased's wife over phone. In familial settings where the husband and the wife are supposed to give each other companionship, the husband's illicit relationship with another woman after having agreed before the Panchayat to part company with the other woman, was taken to be abetment to commit suicide.[147]

Conspiracy

Conspiracy is heavily mental in its composition and what is required is that two or more persons must have agreed to do an illegal act. The word 'act' may entail commission of a number of acts and only the actors needed in a particular act may be present in the commission of a particular act like in a drama – different scenes in different Acts. Meaning thereby that conspirators may not know each other and may not know each and every detail of the conspiracy, yet they may be part of the conspiracy.

143 *Sheila Sebastian* v. *R. Jawaharaj* (2018) 7 SCC 581.

144 *M Arjunan* v. *State* (2019) 3 SCC 315.

145 *Vaijnath Knodiba Khandke* v. *State of Maharashtra* (2018) 7 SCC 781. See also *State of Madhya Pradesh* v. *Shrirar,* 2018 SCC On Line SC 1885 where it was held that in case of woman consuming poison at her in-laws place/matrimonial home, would not itself lend to the presumption that deceased was subjected to physical –mental cruelty, so as to force her commit suicide cogent evidence will have to be put forth by the prosecution.

146 2018 SCC OnLine SC 2571.

147 *Siddaling* v. *State* (2018) 9 SCC 621.

For instance, at the time of murder, it is not necessary that all the conspirators must be present for conviction under section 302 read with section 120-B IPC.[148]

Attempt to murder

Lot of discretion is given to the courts in most of the cases as far as sentencing is concerned. In an ordinary situation where an attempt to murder under section 307 is concerned, the discretion is to award short term imprisonment or life imprisonment, in case hurt is caused. As such, when the victim is left in a vegetative state, justice demands that life imprisonment be given. And this is what the High Court of Bombay gave in the case of a jilted lover in *Pranjay Purushotambhai Goradia* v. *State of Maharashtra.*[149] The apex court, however, taking into consideration that the accused was of 21 years of age (immature – more prone to risk taking) and that the incident occurred in 1990 altered the sentence of imprisonment to the period already undergone and raised the amount of compensation from two lacs to 10 lakhs.

IX SENTENCING

Discretion is an important facet of sentencing and serves a very useful purpose of tempering punishment to the particular fact situation of the case. However, discretion has to be judicious if, for example, a case under section 300 is made out and does not fall within any of the exceptions then, the punishment has to be either life imprisonment or in rarest of rare cases, death penalty. The courts cannot reduce it to 10 years or so - on their own whims.[150] Furthermore, the duty of the courts is to see that no innocent person is punished but it is equally important in a society governed by rule of law that the guilty person does not escape the clutches of law.[151]

The *Sriharan*[152] dictum has been applauded by the courts. The abolitionist streak in the bench gives weightage to the mitigating circumstances like the fact that the murders, though brutal (including killing three minors while sleeping), the accused is not a professional killer or a previous convict and so on and so forth. And they assuage their guilt by awarding life imprisonment with a condition that for a specified period say 20, 25 or 30 years the convict will not be eligible for remission. This is starkly in contrast with the reformatory jurisprudence evolved for punishment. In *Vijay Kumar* v. *State of J&K,*[153] the high court's verdict, which was affirmed by the Supreme Court, gave life imprisonment without remission! The court cryptically remarked: "It is specifically clarified that the appellant shall not be entitled to remission".[154] The courts have discretion in deciding the punishment but while exercising discretion, the judges may have to keep all aspects, *i.e.*, proportionality, deterrence, reformation and rehabilitation, in perspective.[155]

148 *Bilal Hagar* v. *State* 2018 SCC OnLine SC 1863.
149 (2018) 14 SCC 58.
150 *Bharat Kumar Ramesh Chandra Barot* v. *State* (2018) 18 SCC 388.
151 *Shamim* v. *State (NCT of Delhi)* (2018) 10 SCC 509.
152 *Union of India* v. *Sriharan* (2016) 7 SCC 1.
153 2018 SCC Online SC 2646.
154 *Id*., para 12.
155 See *State of Rajasthan* v. *Mohan Lal* (2018) 18 SCC 535.

However, the principle that the judges follow while deciding conviction under part I and part II of section 304 IPC is not easily discernable. In *Lakshmi Chand* v. *State of U.P.,*[156] the conviction under section 304 part II IPC was altered from eight years to two years by the apex court. Conviction under section 304 part I resulted in modification of sentence from life imprisonment to seven years in *Gurwinder Singh*[157] and in 304 part II in *Lavghanbhai*[158] for period already served, *i.e.*, nine years and three months. In the former case the accused were in jail for 10 years. In *State of M.P.* v. *Abdul Lalit,*[159] where a husband killed his wife, the trial court gave life imprisonment under section 302 IPC; the high court altered the conviction to section 304 part I and the apex court upheld the high court conviction. However, since the convict was in custody for about 10 years and five months as on the day of the judgment, he was sentenced for the period already undergone.[160]

Death penalty

The issue in *Babasaheb Maruti Kumble* v. *State of Maharashtra*[161] was whether the case of rape and murder of a girl merits death penalty. The court, without going too much into the oft repeated nuances of rarest of rare category, opined that rigorous imprisonment with a rider of 20 years (*i.e.*, no remission till 20 years) was adequate punishment. The court gave a very flimsy parting justification for the same by saying that "the appellant who is at present more than 60 years of age, and has no history of any other criminal activity, possibility of reform, as the learned counsel for respondent state could not point out blameworthy conduct depicted by him in jail". In another rape case, where the accused was only 22 and had raped and murdered a 13 year old girl, the trial court and high court awarded death penalty as they opined that the offence was committed in a brutal and diabolic manner. The apex court in appeal in *Viran Gyan Lal Rajput* v. *State of Maharashtra,*[162] was of the view that the appellant was not "such a menace to society that he cannot be allowed to stay alive".[163] Interestingly, the court also mentioned that the prosecution did not establish that the appellant was beyond reform, and in the former case when antecedents and repeated sexual assaults were attributed to the accused, the court took recourse to the Evidence Act,1872 to counter that past history has no place in convicting the accused. The moot point is, how does one come to a conclusion or lead evidence to prove or disprove scope of

156 (2018) 9 SCC 704.

157 *Gurwinder Singh* v. *State of Punjab* (2018) 16 SCC 525.

158 *Supra* note 70.

159 (2018) 5 SCC 456.

160 See also *Sangita* v. *State of Maharashtra* (2018) 17 SCC 385 where the sentence of the appellant was reduced to two years under s. 306 due to peculiar facts and circumstances of the case (which perhaps were that "she was a married lady and by and large residing *only* with her husband at Nasik is having two grown up children to be taken care of and her family.

161 2018 SCC OnLine SC 2767.

162 (2019) 2 SCC 311.

163 *Id*. at 319, para 25.

reformation? The accused was awarded life imprisonment for a period of 20 years without remission.[164]

Kidnapping for ransom is a very serious offence and murdering the kidnapped aggravates it further, ensuring no leniency in sentencing. In *Swapan Kumar Jha* v. *State of Jharkhand,*[165] the chain of circumstantial evidence was complete and the charges stood proved, and hence the apex court concurred with the decision of the high court. Out of the three accused, the high court sentenced two to life imprisonment and awarded death penalty to the third accused. As per the high court, the latter merited a death penalty as he was the cousin brother of the victim. Putting a premium on family ties, the high court viewed his guilt more profound *vis-à-vis* the other accused. The apex court, invoking the rarest of rare category, decided that his case does not come within its ambit and awarded life imprisonment with a rider of 25 years without remission.

Review petition

In a review petition before the apex court in *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra,*[166] a three judge bench, speaking through Madan Lokur J, deliberated extensively on the death penalty given to a repeat sex offender who, in the instant case, had raped and murdered a three year old girl child. The judge extensively dealt with the issue of death penalty in cases resting on circumstantial evidence; whether antecedents of the accused should be taken into consideration and the possibility of reformation and rehabilitation. What is perhaps fascinating in the case is the discourse on reformation and rehabilitation. It is indeed astounding that now since *Sriharan,* life imprisonment could well be qualified to mean till the very end of a person's life without the possibility of remission, does reforming the convict serve any purpose? Hypothetically, if he/she remains a menace to the society, it may not matter as he/she would, by such punishment, forever be banished from the society to which he poses a threat. The court pontificated on the issue of reformation in the following words:[167]

> The law laid down by various decisions of this Court clearly and unequivocally mandates that the probability (not possibility or improbability or impossibility) that a convict can be reformed and rehabilitated in society must be seriously and earnestly considered by the Criminal Appeal Nos. 1482-1483 of 2018 [Arising out of S.L.P. (Criminal) Nos. 5898-5899 of 2014] Decided on November 28, 2018 courts before awarding the death sentence. This is one of the mandates of the "special reasons" requirement of Section 354(3) of the Cr.P.C. and ought not to be taken lightly since it involves snuffing out the life of a person. To effectuate this mandate, it is the obligation on the prosecution to prove to the court, through evidence, that the probability is that the convict cannot be reformed or rehabilitated. This can be

164 See also *Jitendra* v. *State of M.P.,* 2018 SCC Online SC 2787.

165 2018 SCC Online SC 2550.

166 (2019) 12 SCC 460.

167 *Id.* at 483, para 45.

> achieved by bringing on record, inter alia, material about his conduct in jail, his conduct outside jail if he has been on bail for some time, medical evidence about his mental make-up, contact with his family and so on. Similarly, the convict can produce evidence on these issues as well.

The bench commuted the sentence of death to custody for the rest of his natural life. It is submitted that an abolitionist bench would lead such arguments which can go either way. It is a difficult proposition to gauge whether a person is capable or incapable of reformation. We are yet to come up with a principled opposition to death penalty. In contradistinction to Madan Lokur J's rendition of reformation, the bench of Sikri J, in a review petition by Mukesh[168] in the infamous *Nirbhaya* case, spent considerable time and portion of the judgment in elucidating the purpose of review and distinguishing it from appeal, its maintainability, ambit and scope. The court then entered into a detailed discussion on evidence and grounds taken in the review petition, and came to the conclusion that no ground was disclosed wherein review jurisdiction could be exercised.

There was no mention of death penalty or any discussion around sentencing whatsoever in Mukesh's review petition. Yet, in another review petition regarding death penalty in the same case,[169] the court entered into a lengthy discussion regarding the review jurisdiction of the court, and then gave a brief discourse on abolition of death penalty, before demolishing step by step the claim of the petitioner that he had been wrongly implicated. In this review the issue of reformation and rehabilitation was not contested by the lawyer. It would have been really interesting to engage with this issue given the fact that (given the public pressure) death penalty was the desired verdict.

Babasaheb Maruti Kamble v. *State of Maharashtra*[170] was a shocking case where the accused was given death penalty by the trial court, which was affirmed by the high court. The special leave petition in the apex court was dismissed *in limine* with one word, without giving any reasons. Howsoever gruesome the case be, if life has to be taken by the state, justice demands that there be extensive engagement with the issue and a reasoned order be given, as they say, justice should not only be done but seem to be done. The counsel for the petitioner contended that "in those cases where death sentence is imposed, the court should summon the final order even at the stage of special leave petition". The counsel marshaled the judgments in *Kasab,*[171] and *Mohd. Arif* [172] to bring home this point. The review bench was convinced that in death sentence cases even if SLP is to be dismissed *in limine,* it should be a reasoned order atleast on the issue of sentencing and hence it recalled the order given by the same court. After hearing the parties, the court, speaking through Sikri J, altered the

168 *Mukesh* v. *State (NCT of Delhi)* (2018) 8 SCC 149.

169 *Vinay Sharma* v. *NCT of Delhi* (2018) 8 SCC 186.

170 2018 SCC OnLine SC 2545.

171 *Mohd. Ajmal Amir Kasab* v. *State of Maharashtra* (2012) 9 SCC 1.

172 *Mohd. Arif* v. *Supreme Court of India* (2014) 9 SCC 737.

death penalty to life imprisonment along with a caveat that the appellant shall not be entitled to make any representation till 20 years of rigorous imprisonment.

In *Ambadas Laxman Shinde* v. *State of Maharashtra,*[173] the apex court allowed reopening of the review petition in the light of the constitution bench decision in *Mohd. Arif* .[174] The court also took note of the fact that the three accused who were sentenced to death were not represented. Hence, the court ordered a recall of the order and judgment, and execution of the sentences of other three was also suspended pending the disposal of appeals. The abolitionist bench again pontificated on reformation analysis and, *inter alia,* gave the below given reason for commuting death penalty to life imprisonment: [175]

> In a matter of probability and possibility of reform of a criminal, we do not find that a proper psychological/psychiatric evaluation is done. Without the assistance of such psychological/psychiatric assessment and evaluation it would not be proper to hold that there is no possibility or probability of reform.

Judicial hierarchy

The court in *Nitin Balkisan Gaikwad* v. *State of Maharashtra*[176] castigated the high court for putting in a cap of 30 years without remission and deleted that order and restored life imprisonment under section 302.

Protection of Children from Sexual Offences Act, 2012 (POCSO)

In *Prahlad* v. *State of Rajasthan,*[177] a minor girl of eight years was killed by an acquaintance whom she treated as her maternal uncle. Charges under sections 2 and 3 of POCSO Act and section 302 IPC were framed and the accused was given death penalty. On reappreciation of evidence, the apex court gave him the benefit of doubt as regards sexual assault under the POCSO Act and hence awarded life imprisonment under section 302 IPC. It is submitted that the POCSO provisions leave no scope for judicial discretion and that may be one of the reasons for the courts to be really sceptical while upholding the POCSO convictions.

Concurrent sentencing

In *Jitendra* v. *State,*[178] the apex court reiterated the *Muthuramalingam*[179] dictum that if life sentences for two distinct offences separately tried and held proved, the sentences cannot be directed to run consecutively. The court also made a very important observation that if any court (in this case the high court) realizes a mistake in the judgment it cannot make amends by correcting it. It can only be done in appeal in the higher court.

173 (2018) 18 SCC 788.

174 *Supra* note 172.

175 See *Chhanu Lal Verma* v. *State of Chhattisgarh* (2019) 12 SCC 438 at 451, para 16.

176 (2018) 7 SCC 685

177 2018 SCC Online SC 2548

178 2018 SCC Online SC 2198.

X MISCELLANEOUS

Destruction of evidence

A wife committed suicide and her family was informed. The last rites were performed in the presence of the family members which included a doctor. The husband was convicted under sections 498-A and 201 of IPC on a complaint lodged four months after the incident. The high court on appeal acquitted him of section 498-A while upholding the conviction under section 201 on the reasoning that no post-mortem was got conducted and the last rites were performed. The apex court in appeal[180] held that unnatural death alone cannot be a reason for invoking section 201 IPC. What needs to be established is that the accused knew or had reason to believe that an offence had been committed and then caused the commission of evidence to disappear. Mere suspicion alone cannot be the reason for conviction under section 201 IPC. Destruction of evidence requires a cognitive awareness (which has to be proved) that evidence is being erased, otherwise in case of death - natural or unnatural - the body has to be cremated. Another very disturbing fact in this case was that the appeal against the conviction of the husband under sections 498 A and 201 IPC was filed in 1995 and was heard in 2015, and the final acquittal was given in 2018 by the apex court.

Compounding

The power under section 482 of the Penal Code is different from powers under section 320 Cr PC. If the proceedings are at a nascent stage then, the courts must quash the proceeding to secure ends of justice or to prevent abuse of the process of any court. However, in heinous or serious offences, such power is not to be exercised.[181] On the basis of compromise, in *Sajid* v. *State of Uttarakhand,*[182] where the conviction was under sections 363 and 366 IPC, the court modified the sentence to imprisonment already undergone and two lacs rupees as compensation to be paid. However, the conviction was confirmed.[183]

Medical evidence

The apex court categorically iterated in *Palani* v. *State of T.N.*[184] that medical evidence is only opinionated and held thus: [185]

> When the opinion given is not inconsistent with the probability of the case, the court cannot discard the credible direct evidence otherwise the administration of justice is to depend on the opinionative evidence

179 *Vinay Sharma*, *supra* note 169.

180 *Dinesh Kumar Kalidas Patel* v. *State of Gujarat* (2018) 6 SCC 204.

181 *Anita Maria Dias* v. *State of Maharashtra* (2018) 3 SCC 290. See also *Raj Sharma* v. *State of U.P.* (2018) 9 SCC 660.

182 (2018) 9 SCC 159.

183 See also *Mohd. Abrahaim* v. *State of Karnataka,* 2018 SCC Online SC 1514.

184 2018 SCC OnLine SC 2560. See also *Menoka Malik* v. *State of U.P.,* 2018 SCC Online SC 1196, para 27, where it was held that ocular testimony prevails over medical evidence.

185 *Id*., para 16.

> of medical expert. The medical jurisprudence is not an exact science with precision; but merely opinionative.

In *Gupteshwar Behera* v. *State of Odisha,*[186] the court relied on the medical opinion that the injuries were such that the deceased may not have survived for more than ten minutes after receiving such injuries. Hence, the court debunked the prosecution version and the prosecution witness who may have taken half an hour to reach the spot. The accused was given the benefit of doubt. It is submitted that it is highly questionable to say with authority that a patient cannot survive for more than ten minutes in a given scenario. Each body reacts differently.

Compensation

In a case under sections 304 and 279 IPC, the accused was sentenced to simple imprisonment for three months in *K. Jagadish* v. *State of Karnataka.*[187] The appellant came before the apex court by way of special leave petition. He persuaded the court to reduce his sentence by compensating the widow and the minor children left behind by the deceased by paying four lacs rupees (in addition to five lacs awarded in the MACT matter in Lok Adalat settlement). On his depositing the required amount his sentence was reduced to two weeks already undergone.

The fine amount was enhanced from Rs.800 to 15000 in a case under sections 353, 504 and 294 IPC in *Haribhan* v. *State of Maharashtra*[188] and the sentence of imprisonment was reduced to one month keeping the age of the convicted and his impeccable career in context.[189]

XI JUSTICE DELAYED

The court in *Krishnakant Tamrakar* v. *State of M.P.,*[190] deliberated at length on this issue of delay. It was observed that it is essential that a non-mandatory time frame be established for different cases and decongestion of the constitutional court.[191] In a case of conviction under sections 302/34 IPC for an incident which happened in 1981, the final appeal and verdict was delivered in 2018 holding the accused persons guilty and thus upholding the concurrent finding of both the courts below, after 37 years![192] In a murder case in *Ranvir* v. *State of U.P.,*[193] the sessions court gave its judgment on 15-7-1983 and final appeal before the apex court was decided on 26.10.2018![194]

186 2018 SCC OnLine SC 2831.

187 2018 SCC Online SC 2489.

188 (2018) 18 SCC 43.

189 See also *State of Karnataka* v. *Kaisarbaig* (2018) 4 SCC 403.

190 (2018) 17 SCC 27.

191 Cases like *Bipin Kumar* v. *State of Bihar* 2018 SCC Online SC 1334 also reach the apex court.

192 *Chandra Bhawan Singh* v. *State of U.P.* (2018) 6 SCC 670.

193 (2019) 2 SCC 237.

194 See also for delay, *Subhash Chander Bansal* v *Gian Chand* (2018) 2 SCC 291 incident occurred in 1988 and the final appeal was heard in 2018; *State of M.P.* v. *Abdul Lalit* (2018) 5 SCC 456 where a husband killed his wife was also of 1996 and the final judgment came out in 2018. These are only illustrative, such examples galore in our judicial system!

A woman died due to burn injuries within three and half years of marriage. The incident happened in 1992.[195] The order mentions that "the high court after invoking Section 113-A of the Indian Evidence Act, 1872 convicted the appellant under section 302 IPC, and sentenced him to undergo rigorous imprisonment for four years".[196] The appeal before the apex court was for quantum of sentence and the court stated thus:[197]

> After hearing learned counsel for the parties and after close analysis of the evidence on record it appears that the appellant has already undergone about 15 months of imprisonment *without remission*. Having regard to the offence, said to have been proved and the time lag in between and the period already undergone, coupled with the submission at the bar that the children are of marriageable age, we consider that the ends of justice would be met if we reduce the sentence awarded to the appellant, to the period already undergone while maintaining the conviction.

A rape case of 1997 ended in conviction by the trial court on proper appreciation of evidence, including the doctor's report, external injuries *etc.* However, the high court, on reappreciation of evidence, acquitted the accused and faulted the police officials and directed proceeding under sections 193 and 195 IPC. In appeal before the apex court (the judgment was delivered in 2018), it found the accused guilty of rape and sentenced them to 10 years imprisonment. The direction to lodge complaint against the police officials was also set aside.[198]

Bhopal gas tragedy had many lessons to teach. But none of the lessons were taken seriously and India has been witnessing many such incidents, and the country still remains lax in dealing with them. In 1996 a blast occurred in a factory premises and seven workers died in the stampede that ensued. FIR under section 302 IPC was registered against the persons who were responsible for the affairs of the company. The legality of the FIR was challenged by the officials before the high court which altered the charges to section 304 IPC. The apex court found no fault in the alteration and directed the Sessions Judge to try the case and complete the trial within a year. Interestingly, it took our judicial system 22 years to decide the issue.

It is submitted that what is needed is some kind of a filtering mechanism along with a time frame to complete the trial. In the absence of this, very ordinary cases, not meriting the indulgence of the apex court, are clogging the system and adding to the backlog.[199]

195 *Devinderpal* v. *State of Punjab,* 2018 SCC Online SC 3231. See also *Naresh* v. *State of Uttarakhand* (2018) 6 SCC 404 where a criminal case of 1998 was being heard in 2018 by the apex court; *Devi Sing*h v. *State of M.P.* 2018 SCC OnLine SC 1459 where the incident was of 1995 and apex court gave its judgment after 23 years in 2018.

196 *Id*.,para 5.

197 *Id*., para 8.

198 *State (Govt. of NCT of Delhi)* v. *Pankaj,* 2018 SCC OnLine SC 2256.

199 See *Sharanappa* v. *State of Karnataka* (2018) 17 SCC 88 - the lower courts including the high court had "committed legal error and wrongly convicted the appellant" in a case of ss.420 and 468 read with s, 34 IPC

XII CONCLUSION

The year was marked by some landmark decisions including decriminalizing very regressive law of adultery, and recognizing homosexuality as a normal sexual orientation and thereby holding section 377 as unconstitutional as far as consenting adults are concerned. The *Navtej*[200] judgment has been hailed as a very bold judgment, but in certain ways it also seems to be a very privileged one in the sense that it probably caters to homosexuals with privileges like the present petitioners and will not really help a lesbian or a gay who lives on the streets.[201]

Mob lynching[202] and honour killings[203] were dealt seriously by the court, and elaborate directions were given. But since law enforcers are of the same mindset as the perpetrators, and are seldom held accountable, it may not mean much as the court itself acknowledged that such crimes enjoy the tacit support of the law enforcers. So departmental inquiries, as mandated by the court, will prove to be a deterrent is perhaps wishful thinking at play.

Sentencing remains a fertile area for discussion. When a wife fails to cook- her killing by the husband is not dealt as murder, as not cooking (wifely duty) becomes a provocative factor in the patriarchal psyche of the society of which court is a part.[204] If another woman (who is not a wife) fails to cook and is killed then it is murder![205] Death penalty remains a largely problematic issue. The whole discourse around reformation seems so futile given the fact that the competence of who decides whether the person can be reformed or not is never tested or questioned. Adding to this is the incompetence of our prisons to facilitate reform. So why do we at all get into the whole reformation discourse? It is clear that in situations where the bench is unwilling to give death penalty, the discussion is around possible reformation. And where, given the media hype and the public pressure, the bench is wary of commuting death penalty, the reformation discourse is conveniently missing. It needs to be investigated whether this engagement with reformation is a principled engagement or just a way out for an abolitionist bench. The reformation has, as far as I understand, nothing to do with the brutality or the gruesomeness of the act committed. The very fact that the case is one of 'rarest of rare' means it was brutal and grotesque. But can one then infer that the person cannot be reformed and he/she continues to be a threat and menace to the society? This may somewhat be true for repeat offenders, wherein it may be argued that punishment and institutional confinement has failed to reform them. But can it be said in a post *Sriharan*[206] era where some of the convicts may end

200 *Supra* note 7.

201 This is so as the judgment is based on right to privacy and does not go beyond that in terms of recognition of rights.

202 *Supra* note 77.

203 *Supra* note 18.

204 *Supra* note 70.

205 *Supra* note 72.

206 *Supra* note 152.

up spending their entire life behind bars with no scope of remission? Mukesh and Vinay's review petition leaves us confounded on the issue of reformation.[207]

Keeping the philosophy behind Juvenile Justice Act that young minds are immature and prone to risk taking and need to be dealt compassionately, the court in *Pranjay Purushotambhai Goradia*,[208] reduced the punishment of a young offender to imprisonment already undergone. But it may also be that the delay worked more rather than the young age.

Rape cases throw a challenge in times of live-in relationships. Though the rape provisions peg 'consent' as the deciding factor, the courts play around the fact that the complainant and the accused live together as man and wife and so it cannot be rape.[209] This reasoning of the court stems from a highly problematic marital rape exception that continues to be part of the Penal Code in spite of demands - including very strong recommendation to revoke that exception by the Justice Verma Committee as well. As far as section 498 is concerned, the court in *Manav Adhikar*[210] undid the mischief of *Rajesh Sharma*.[211] Another pernicious practice of female genital mutilation was referred to a larger bench with a observation that it is a 1400 year old practice with religious connotations. Is it not true that all problematic and regressive practices involving women have the same characteristics? Medical opinion was shown its place and it is hoped that courts need to internalize this in each and every case.[212]

Justice delayed is justice denied and the Indian criminal justice system is blighted with this delay, and all stakeholders must take immediate remedial steps before people lose faith in it!

207 *Supra* note 168 and 169.
208 *Supra* note 149.
209 *Supra* note 106.
210 *Supra* note 117.
211 *Supra* note 116.
212 *Supra* note 184.