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CRIMINAL LAW

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I INTRODUCTION

CRIMINAL LAW and its administration is a complex phenomenon and it is designed to perform myriad functions. For the victim, perhaps it is a form of institutionalized vengeance; for the accused it is a safeguard against the tyranny of the state. And, as far as the state is concerned, it is a very important tool to create an impression that misconducts are being taken seriously and dealt with enhanced punitive measures.[1] While engaged in this impressionist exercise the state pays scant attention to causes and prevention of crime which will result in lower crime and safer state. The state further abdicates its duty by totally ignoring areas which need priority while legislating on crime and, that is, competent human resources, corresponding financial resources, sufficient physical resources, training, preparation and management which are so essential for a sound criminal justice administration. Andrew Ashworth, a leading scholar of criminal law laments that "principled view point as to how criminal law ought to be shaped, of what its social significance should be, of when it should be used and when not – which are simply not being addressed in the majority of the instances"[2] And if one examines this statement in the Indian context it often leads to scapegoating of the impoverished and the vulnerable sections of the society. At other times, after a case has dragged on for years, the final verdict is that the investigation was faulty[3] and the accused go scot free. If that is not all, the overburdened judiciary takes decades to finally adjudicate a case resulting in failure of justice. It is with this complexity of criminal law, the present survey examines Indian Penal Code, 1860 (IPC) cases decided by the apex court in the year 2019.

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1 The ruthless media tirade against failing criminal justice system goads the state to go for an empowered criminal justice system with enhanced penalties for infraction. The Nirbhaya case got so much media attention and the result was the 2013 amendments which are quite stringent. Similarly Protection of Children against Sexual Offences Act, 2013 (POCSO) was enacted with scant regard to fundamental principles of criminal law *e.g.* presumption of innocence *etc.*

2 Andrew Ashworth, "Is the Criminal Law a Lost Cause" 116 *The Law Quarterly Review* 225(Apr. 2000).

3 Shoddy investigation resulting in acquittals in homicide cases see *Jai Prakash* v. *State of U.P.*, 2019 SCC OnLine SC 1525; *Pavan Vasudeo Sharma* v. *State of Maharashtra* (2019) 13 SCC 54.

II WRONGUL PROSECUTION

Ankur Maruti Shinde[4] is a case involving rape, dacoity and murder. The factual matrix reveals that on June 5, 2003, at night seven-eight men entered a hut, took money and valuables and departed. They then returned with weapons, assaulted the inmates, raped the women and left after believing that all of them were dead. However, a mother and a son survived the deadly assault. The state machinery swung into action – a case was registered, evidence was collected from the crime scene and dispatched for analysis and investigation started. Five accused were held for the crime. Medical examination revealed injuries which almost corresponded to have been inflicted around the time of the crime. Test Identification Parade (TPI) was conducted and all but one accused was identified.[5] The trial court found all the six accused persons guilty under sections 395, 302 read with 34 IPC, 376(2), 307 read with 34 IPC and death penalty was awarded subject to confirmation by the high court. After scrutiny of evidence the high court upheld the death penalty of three of the accused and sentenced other three to life imprisonment.[6] The state appealed in the Supreme Court against the alteration by the high court with respect to the three accused and the other three filed appeals challenging their conviction. The apex court disposed of all these appeals by a 15 page common judgment dated April 4, 2009 and ended by awarding death penalty to all - "In essence all the six accused persons deserve death sentence".[7]

The three accused persons, whose punishment of life imprisonment was enhanced to capital punishment, filed a review petition on the ground that they were not given an opportunity to be heard by the bench before it enhanced the punishment. The review bench decided to recall the entire judgment and since the judges who had decided the case had retired, directed that the appeals be placed before the appropriate bench to be heard afresh.[8] The fresh hearing provided an opportunity to the defense counsel to show glaring infirmities in the prosecution story. The TIP which was relied on by all the three courts was derided by the defense counsel who argued that there was no way that the eye witnesses could have identified the accused since there was no light at the time of the offence and the whole nefarious operation was carried out in torch light. If this was not all, the eye witness had identified different accused from the photo album of history sheeters who were not even made a party of the TIP. The accused as per the witnesses were Hindi speaking whereas the persons ordered to be hanged were Marathi speaking like the victims. More shocking was the role of the prosecution who must have been well aware, *inter alia*, that the DNA samples that were collected from the scene of crime did not match with those of the condemned

4 *Ankur Maruti Shinde* v. *State of Maharashtra*, Sessions Case No. 43 of 2004 decided on June 12, 2006.

5 In *Raja* v. *State* 2019 SCC OnLine SC 1591 a very detailed analysis of test identification parade was undertaken to hold the accused guilty. See also *Basavarj* v. *State of Karnataka* 2019 SCC OnLine SC 343.

6 *Ankur Maruti Shinde* v. *State of Maharashtra* 2007 SCC OnLine Bom 1483.

7 *Ankur Maruti Shinde* v. *State of Maharashtra* (2009) 6 SCC 667.

8 *Ankur Maruti Shinde* v. *State of Maharashtra* 2019 SCC OnLine SC 317.

persons;[9] slippers left behind by the perpetrators of the crime did not fit these persons and shockingly, the injuries found on the accused persons were the kinds which could have also been caused while doing agricultural work. It was not only the prosecution, who have gained notoriety case after case, but in this case, the trial court, the high court and the Supreme Court miserably failed in their duty and abdicated their duty to discern the falsehood from the truth. It is important to note that no new fact was marshaled before the review bench but what was done was to show the falsity of the evidence and the dubious TIP on the basis of which the death penalty was awarded! For a long 16 years, innocent people were behind bars with the threat of being hanged to death looming large. The state and the investigating agencies not only allowed the real criminals to be at large and thereby rendering the victims unredressed but also creating another set of victims! The review bench was aghast by the way innocent persons belonging to nomadic tribes were roped in and made to spend 16 years in jail facing the "hanging sword of death penalty". Exercising its powers under article 142 of the Constitution, the review bench ordered the state to give a sum of Rs. 5,00,000 to each of the accused as compensation to rehabilitate them. The Chief Secretary, Home Department, State of Maharashtra was directed to identify erring officials involved in this case and initiate departmental proceedings against them.

Compare this case with a robbery and murder case where death penalty was given by the trial court and the high court. In appeal in *Digamber Vaishav* v. *State of Chhattisgarh,*[10] the apex court was very suspicious of the evidence relied on. For example, buttons were found and the court rejected it by saying the evidence was not unique recovery and a pair of silver patti was not identified by any witness; finding of hair analysis was also found to be inconclusive. The only thing credible found was the last seen together which alone was not sufficient and the appellants were acquitted of all offences: Could this be a case where the legal representation at the appeal stage made the difference?

III OFFENCES AGAINST HUMAN BODY

Murder

Strangely in this day and age, people still continue to perform occult rituals. A young boy and girl were sacrificed by a couple to attain 'Sidhi'. The conviction under section 302/34 IPC was based on extra judicial confession. The court upholding the murder conviction iterated that extra-judicial confession is a weak piece of evidence but if corroborated by other evidence on record, the same becomes important to establish the guilt of the accused. The skeletal remains of the body were found buried in the accused couple's house and all these circumstances led the court to convict the couple under section 302/34 IPC in *Ishwari Lal Yadav* v. *State of Chhattisgarh.*[11] The same couple was convicted in another similar case.[12] The couple was given death sentence and others were given life imprisonment without parole or remission. The

9 *Id*., para 5.32-5.34.

10 (2019) 4 SCC 522. See also *Ashish Jain* v. *Mekrand Singh* (2019) 3 SCC 770.

11 (2019) 10 SCC 423.

12 *Ishwari Lal Yadav* v. *State of Chhattisgarh* (2019) 10 SCC 437.

three judge bench upheld the death penalty, given the nature of the offence and treating the earlier conviction as an aggravating factor:[13]

> In this case it is clear from the evidence on record, the main accused, namely, Ishwari Lal Yadav and Kiran Bai have committed the murder of the two-year-old child Chirag as a sacrifice to the God. It is to be noticed, they were having three minor children at that time. In spite of the same, they committed the murder of the deceased, a child of two years of age brutally. The head of the helpless child was severed, his tongue and cheeks were also cut. Having regard to age of the accused, they were not possessed of the basic humanness, they completely lacked the psyche or mindset which can be amenable for any reformation. It is a planned murder committed by the aforesaid two appellants.

Reiterating that single blow may also invite conviction under section 302 IPC, the court in *State of Rajasthan* v. *Kanhaiya Lal*[14] altered the conviction from section 304 part I IPC to section 302 IPC, thereby restoring the trial court conviction calling the high court judgment 'manifestly perverse' as there was no evidence of any altercation and hence intention to kill stood proved by single blow of the axe on the head.

The apex court underlined that "merely because the accused assaulted the deceased on his head once or twice only, it cannot be said that the offence committed by him is under section 304 part I IPC inasmuch as the incident had not occurred on the spur of the moment",[15] and convicted him under section 302 IPC.

In a case where death was a result of firing from a close range, the high court altered the conviction from section 302 IPC to section 304 part I IPC invoking exception 4 to section 300 IPC. The Supreme Court in *Awadesh Kumar* v. *State of U.P.,*[16] restored the trial court murder conviction under section 302 IPC as the court underlined that "by the accused firing from such a close range, the accused was supposed to know that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death".[17]

Husband-wife cases continue to be contentious. On a provocation for refusing to go to see the ailing mother, the husband poured kerosene on the wife and lighted a match and set her on fire resulting in homicide and the court accepting the defence of provocation termed the act culpable homicide not amounting to murder.[18] The court

13 *Id*. at 435-36.

14 (2019) 5 SCC 239. See also *Karuppanna Gounder* v. *State* (2019) 8 SCC 673, where the conviction, on benefit of doubt, was altered from section 302 to section 324 IPC.

15 *Sudhir Kumar* v. *State of Haryana* (2019) 14 SCC 387 at 389, para 7. See also *Nandlal* v. *State of Maharashtra* (2019) 5 SCC 224 where the accused went inside the house to get "gupti" and assaulted the deceased.

16 (2019) 10 SCC 323.

17 *Id*. at 328, para 16. Similarly in *State of U.P.* v. *Faquirey* (2019) 5 SCC 605 the trial court convicted under s. 302 IPC, the high court altered it to s. 304 part I and Supreme Court restored the trial court conviction

18 *K. Ravi Kumar* v. *State of Karnataka* (2015) 2SCC 638.

in another situation[19] (where a similar case of *Kalu Ram*[20] was brought to the notice of the court) distinguished the two acts - one of pouring the kerosene and second of lighting a matchstick. It is interesting how the reasoning can be tweaked to suit the conviction proposed. The court observed thus:[21]

> It is submitted that the act of pouring kerosene, though on the spur of the moment, was followed by lighting a matchstick and throwing it on the deceased and thereby setting her ablaze, are intimately connected with each other and resulted in causing death of the deceased. It is submitted that the act of the accused falls under Section 300 Fourthly and, therefore, the death of the deceased can be said to be culpable homicide amounting to murder. It is submitted that every person of average intelligence would have the knowledge that the pouring of kerosene and setting a person on fire is so imminently dangerous that in all probability such an act would cause injuries causing death. It is submitted, therefore, that Section 300 Fourthly shall be attracted and not Exception 4 to Section 300 IPC as submitted on behalf of the accused.

The accused was rightly held guilty under section 302 IPC as the act clearly was covered under fourthly of section 300 IPC.

A husband reported his wife's death and produced a poison bottle which he alleged his wife had consumed. However, the post mortem report showed 13 injuries which were less than 12 hours prior to death. There were 19 linear abrasions and five contusions and it was opined that it was a case of "violent asphyxial death in the form of suffocation by use of hands, causing smothering".[22] The appellant-husband was present at the place of occurrence and he himself confirmed this fact by handing over the poison bottle. The circumstantial chain was complete and hence the conviction under section 302 stood confirmed.

Medical evidence

Though scientific investigation is of utmost importance, the courts have time and again cautioned that expert is not a witness of fact. So, the doctor's opinion which is an expert opinion is 'evidence of opinion and not of fact".[23] It is a corroborative piece of evidence and the testimony of the witnesses cannot be doubted merely on the ground of its inconsistency with medical evidence.

Culpable homicide not amounting to murder

Part I and part II of section 304 IPC, the surveyor has been pointing out, remains a very tricky proposition.[24] In a case the trial court and the high court convicted the

19 *Suraj Jaganath* v. *State of Maharashtra* (2020) 2 SCC 693.

20 *Kalu Ram* v. *State of Rajasthan* (2000) 10 SCC 324.

21 *Supra* note 19 at 695, para 5.

22 *Vijay Nathalal Gohil* v. *State of Maharashtra* (2019) 8 SCC 663 at 664, para 4.

23 *Mallikarjun* v. *State of Karnataka* (2019) 8 SCC 359 at 368, para 20.

24 The surveyor has repeatedly pointed out this anomaly in earlier surveys.

accused under section 304 IPC without specifying the part! Interestingly the trial court gave life imprisonment which the high court altered to 14 years imprisonment. The apex court,[25] while calling out the courts below that they "did not point out under which "part" of the section 304 IPC the conviction of the appellants are to be maintained"[26] The apex court modified the conviction to section 304 part II IPC and reduced the sentence to 10 years imprisonment.

Sudden fight

The two parts of section 304 IPC are differentiated by specific fault elements – intention in part 1 and knowledge in part II. In *Mani* v. *State of Kerala,*[27] while converting murder conviction to conviction under 304 part I IPC the court gave the following reasoning:[28]

> In view of sudden fight without any premeditation, the conviction of the appellant for an offence under Section 302 is not made out. The cause of death of the deceased is knife-blow on the chest of the deceased Soman. Such injury is with the knowledge that such injury is likely to cause death, but without any intention to cause death. Thus, the death of Soman is culpable homicide not amounting to murder as the death has occurred in heat of passion upon a sudden quarrel falling within Exception 4 of Section 300 IPC. Therefore, it is an offence punishable under Section 304 Part I IPC.

Sentence of seven years already served was held sufficient.

In another case of a free fight one of the accused gave a *farsa* blow on the head of the deceased resulting in conviction under sections 302/149 IPC by the trial court. The high court altered the conviction to section 304 part II IPC and sentenced the accused to five years imprisonment. In appeal by the state in *State of M.P.* v. *Kalicharan,*[29] the court altered the conviction to section 304 part I on a reasoning that, "merely because the accused caused the injury on the head by the blunt side of the farsa, the High Court is not justified in altering the conviction to section 304 Part II IPC." The court altering the conviction to part I sentenced the accused to eight years imprisonment.

In a fight between a husband and wife, the sister-in-law intervened and threw burning kerosene stove on the woman and her clothes caught fire and she died of burns. The trial court and the high court convicted the accused sister-in-law under section 302 IPC. In appeal, in *Kalbai* v. *State of M.P.,*[30] the apex court was of the view that the case does not satisfy the ingredient of section 300 IPC and altered the conviction to section 304 part II IPC and awarded five years rigorous imprisonment.

25 *Nazir Malita* v. *State of W.B* (2019) SCC OnLine SC 708.
26 *Id*., para 9.
27 (2019) 4 SCC 360.
28 *Id*., para 23.
29 (2019) 6 SCC 809.
30 2019 SCC OnLine SC 621.

Section 300 thirdly has to be satisfied for a conviction of murder in the case of bodily injury. And if there is any doubt whether the bodily injury which was intended to be inflicted was sufficient in the ordinary course of nature to cause death or not, the benefit would go to the accused. And in such a scenario the conviction was altered to section 304 part I in *Satish Kumar* v. *State of Haryana*.[31] And since the accused had served a sentence of seven years they were sentenced to the period already undergone.

In a sudden fight between two brothers where none of them was armed, one of the brothers hit the other with a stone resulting in head injuries. The post mortem report also showed fracture of ribs which, it was opined, could have been caused due to falling. The case, according to the court in *Udiya* v. *State of M.P.,*[32] fell within exception 4 to section 300 IPC. The conviction was under section 304 part I IPC; however, imprisonment of six years already undergone was held sufficient as the offence was committed in the year 1999.[33]

The accused husband strangulated his wife with an iron rod.[34] The apex court gave him the benefit of exception 4 to section 300 IPC. The court held that "since the occurrence was in sudden quarrel and there was no premeditation, the act of the appellant-accused would fall under Exception 4 to section 300 IPC". What is disconcerting, as always in husband-wife cases, is the scant regard to the expression "acted in a cruel or unusual manner." It was not a case where the 'saria' was handy and he gave a blow with it – he actually compressed her neck forcefully with it! The conviction was altered to section 304 part II IPC and 10 years imprisonment was awarded.

In yet another case a husband who was drunk attempted to attack his wife with an axe and his friend intervened and the axe fell on him and he died. The attack was a result of quarrel between them and it is assumed that the axe was handy though no such mention has been made in the case. The conviction was under section 304 part I IPC entailing imprisonment of 10 years. Part I and part II in most of the cases is sans any discussion and sentencing years continue to be enigmatic.[35] Contrast it with the factual matrix in *State of M.P.* v. *Mohar Singh*[36] where death took place during an altercation. But the accused went inside the house to get a gun and shot at the deceased. The trial court convicted the accused under section 302 IPC but the high court, with which the apex court concurred, held that the "entire incident occurred when there was heated altercation between both the parties and resultantly the respondent had fired a gunshot injury on the deceased."[37] The expression 'gunshot injury' is indeed interesting to alter the conviction from murder to culpable homicide not amounting to murder.

31 (2019) 9 SCC 529.

32 (2019) 15 SCC 65.

33 Compare the facts with *R. Jayapal* v. *State of T.N.* (2019) 8 SCC 342 where conviction was under part I of s. 304 IPC.

34 *Rambir* v. *State (NCT) of Delhi* (2019) 6 SCC 122.

35 See also *Kishan Singh* v. *State of Uttaranchal* (2019) 11 SCC 807

36 (2019) 15 SCC 57.

37 *Id*. at 58, para 5

In *Sita Ram* v. *State (NCT of Delhi),*[38] the homicide was as a result of a sudden fight. In this case while altering the conviction from section 302 to section 304 part II IPC giving the benefit of exception 4 the court did consider that "considering the nature of the injuries sustained by deceased Mangal Singh, it cannot be said that the appellant … and the other accused have taken undue advantage of deceased Mangal Singh in attacking him,"[39] and eight years imprisonment was awarded.

For a fight, two parties are required but when it is a case of caste hegemony, the courts, it is submitted, must be little cautious while giving benefit of sudden fight. Grazing of cattle became an issue of contention between two parties and the SC/ST Act was also invoked. The appellants who belonged to a higher caste took their buffaloes to graze in the field of the deceased. And obviously, the buffaloes were driven away by the owner of the field which led to an altercation. The trespasser (higher caste) in this case got so furious that he hit the field owner with an axe on the spur of the moment resulting in his killing.[40] The ingredients of section 300 thirdly clearly stood proved. The trial court and the high court gave a conviction under section 302 IPC. The apex court held thus:[41]

> The sudden quarrel arose between the parties due to trivial issue of grazing the buffaloes of the appellant for which, the deceased raised objection. In a sudden fight, the appellant had inflicted blows on the head of the deceased with an axe which caused six head injuries. Though the weapon used by the appellant was axe and the injuries were inflicted on the vital part of the body viz. head, knowledge is attributable to the appellant-accused that the injuries are likely to cause death. Considering the fact that the occurrence was in a sudden fight, in our view, the occurrence would fall under Exception 4 to Section 300 IPC. The conviction of the appellant-accused under Section 302 IPC is therefore to be modified as conviction under Section 304 Part II IPC.

The issue of grazing buffaloes may seem trivial on the face of it but if one reads it with caste dynamics the entitlements speak for itself. The court itself calls it 'trivial'. If that was so, then six head injuries by axe clearly merit a "cruel and unusual manner" epithet. Yet, the court altered the conviction to section 304 part II IPC!

A daughter and her father entered into a heated argument over a bulb connection and the father, on the spur of the moment, threw a chimney lamp on his daughter resulting in severe burns leading to her death in *Govind Singh* v. *State of Chhattisgarh*[42] The conviction was altered to section 304 part II IPC from section 302 IPC.

A knife blow inflicted in the back of the deceased was such that it cut the aorta resulting in his death. Had it missed the aorta he would have survived. The court took

38 (2019) 7 SCC 531.

39 *Id*. at 534, para 12.

40 *Khuman Singh* v. *State of M.P.*, 2019 SCC OnLine SC 1104.

41 *Id*., para 17.

42 2019 SCC OnLine 617.

note of the fact that it was a single blow and no evidence was put forth to show that the appellant was prevented from giving another blow which indicated "that his intention was not to kill the deceased". The court in *Amiruddin* v. *State (Delhi Admn.),*[43] altered the conviction from section 302 IPC to 304 part II IPC and seven years imprisonment already undergone was considered sufficient incarceration to meet the ends of justice. In a case of fight the high court altered the conviction from section 302 to 304 part II IPC and sentenced the accused to five years imprisonment. In appeal in *State of Madhya Pradesh* v. *Kalicharan*[44] the apex court, keeping in perspective that the blow was on the head – a vital part of the body - altered the conviction to part I and enhanced the sentence to eight years imprisonment.

Sudden and grave provocation

The apex court iterated in *State of U.P.* v. *Faquirey*[45] that to avail the defence of exception 1 to section 300 IPC, it is necessary that "the provocation should be one which is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person."[46] In the instant case there was no evidence of any overt act by the deceased by which it could be stated that he was provoked.

Kidnapping

A case of kidnapping and murder of a three and half year old girl came to naught due to faulty investigation. The trial court affirmed conviction under sections 364-A, 201 and 302 read with section 34 of IPC. However, in appeal in *Baiju Kumar Soni* v. *State of Jharkhand*[47] the court found glaring gaps in the circumstantial evidence. For example, the mobile numbers subscriber identity was not established (which perhaps was the easiest of all); the victim child's drawing book and scarf *etc.*, were found as recovery evidence but shockingly they were not sent for forensic examination, *etc*. The court acquitted the accused giving them the benefit of doubt! It is not to say that they were the real culprits but the point is that wherever the culprit was, the law could not catch up with them due to shoddy investigation and shockingly this callousness is displayed case after case.

In an appeal against the conviction under section 364-A IPC[48] the court held that the failure of the police to recover *corpus delicti* is not of much consequence if other evidence unequivocally points to the guilt of the appellant – last seen together coupled with recovery from appellant's house of belongings of the deceased.

Abduction

The factual matrix of *R. Rajagopal* v. *State of T.N.*[49] is a sordid saga of a rich man used to having his way. He took fancy on a young girl who was the daughter of

43 2019 SCC OnLine SC 1295.
44 (2019) 6 SCC 809.
45 (2019) 5 SCC 605.
46 Id. at 608, para 9.
47 (2019) 7 SCC 773.
48 *Sanjay Rajak* v. *State of Bihar* (2019) 12 SCC 552.
49 (2019) 5 SCC 403.

one of his employees and harboured thoughts of having her as his third wife. He bestowed money and gifts and favours on the family. However, the young girl married a Christian boy of her choice and all hell broke loose. He tried all tactics to separate the girl from her husband by alleging that he has HIV positive and when that didn't work out he threatened the couple. When all this did not give him the desired results the girl, her husband and her parents and brother were forced into a car and taken to a place where the accused along with his henchmen assaulted the young girl's husband. The girl was constantly threatened by the accused to marry him or he would kill the husband. The family was sent back later that day but continued to be guarded all the time by the accused's men. The girl and the husband somehow made it to the police after a few days. The trial court and the high court convicted the accused under sections 365 and 352 of IPC. The apex court on reappreciation of evidence upheld the verdict of the courts below and confirmed the conviction. The matter did not end and the besotted lover conspired to kill the girl's husband and employed his henchmen and after many twists and turns they managed to kill the husband. A second FIR was filed for this separate and distinct offence. After a detailed analysis the court found the motive for the commission of the offence as, the last seen together circumstance as well as the identification of the dead body through scientific evidence to be consistent with the case of the prosecution and upheld the conviction of the appellant accused for murder in *Pattu Rajan* v. *State of T.N.*[50]

IV GENERAL DEFENCES

Intoxication

The court in *Suraj Jagannath Jadhav* v. *State of Maharashtra*[51] rejected the defense of intoxication and upheld the conviction under section 302 IPC and stated thus: [52]

> Applying the law laid down by this Court in *Bhagwan* [*Bhagwan Tukaram Dange* v. *State of Maharashtra*, (2014) 4 SCC 270 : (2014) 2 SCC (Cri) 302] and *Santosh* [*Santosh* v. *State of Maharashtra*, (2015) 7 SCC 641 : (2015) 3 SCC (Cri) 276] to the facts of the case on hand and the manner in which the accused poured kerosene on the deceased and, thereafter, when she was trying to run away from the room to save her, the accused came from behind and threw a matchstick and set her ablaze, we are of the opinion that the death of the deceased was a culpable homicide amounting to murder and Section 300 Fourthly shall be applicable and not Exception 4 to Section 300 IPC, as submitted on behalf of the accused. We are in complete agreement with the view taken by the learned trial court as well as the High Court convicting the accused for the offence punishable under Section 302 IPC.

50 (2019) 4 SCC 771.
51 (2020) 2 SCC 693.
52 *Id*. at 699.

Right of private defence

Sukumaran v. *State*[53] involved a case where the appellant – a forest ranger, used his gun to kill an alleged sandalwood smuggler. The incident as per the appellant occurred when he was on duty and patrolling the place. A lorry was intercepted by him and on his signal to stop, the lorry veered to the left and the respondents – four in number - got down from the lorry and allegedly started pelting stones at the official car and one of them (now deceased) had a pistol and they shouted 'shoot them' and the forest officer moved with alacrity and shot the person with the gun on the back and he instantly died. The others ran away and the forest ranger took the pistol which had fallen and went to the police station to report. The trial court convicted the forest ranger under section 302 IPC and on appeal the high court altered it to section 304 part II IPC. In appeal the apex court examined in detail the defence pleaded, that of right of private defence. The court reiterated the essential conditions of right of private defence and upheld the same in the case and exonerated the accused. What is little disturbing is that the court relied too heavily on the accused's version even when the factual situation was such that the bullet was hit at the back and the court picked up a narrative *inter alia* "that" the deceased party consisted of four persons with weapon gun with them whereas the appellant and his driver were two." The fact is that the forest official also had a gun with him and right of private defence is not about 4:2 kind of situation. The surveyor is not arguing that it cannot be a case of private defence at all but what is little disturbing is that people who are trained to use arms must obviously be trained in target shooting. But strangely, they end up shooting on the upper part of the body leading to death instead of incapacitating the alleged wrong doer by aiming at the legs or the hip! The court had repeatedly mentioned that the alleged sandalwood smugglers were shouting "shoot them" which again seems like the accused's version (as no eyewitness is mentioned) which should be taken with a pinch of salt. It may be true that there were glaring discrepancies in the trial court and the high court judgment which has not been mentioned in the Supreme Court judgment.[54]

V OFFENCES AGAINST WOMEN

The court, alive to the sexual offences, gave detailed directions for filing of status report on various aspects of the 2013 amendment.[55] Apart from other issues, the court also took serious note of the fact that in spite of the specific amendment that the past sexual history is of no relevance, the medical reports invariably note that the "victim is habitual of sexual intercourse".[56] The court sought status report on a host of issues including fraud, mandate of section 164A IPC, directions regarding doing away with two finger test *etc*., in assessment of the criminal justice system

53 (2019) 15 SCC 117.

54 It is always a challenging task to pin liability on the law enforcers – whether they exceeded their power or acted well within their powers. See also discussion regarding police role in *V. Rajaram* v. *State* (2020) 3 SCC 200, para 35.

55 *Sexual offence, In re,* 2019 SCC OnLine SC 1654.

56 *Id*., para 13.

Homicidal death

In a case where a young woman died of burn injuries within 17 months of marriage the court, on a detailed re-appreciation of evidence, debunked the trial court version that it was an accidental death and upheld the high court verdict of "murder".[57] The court took note of, *inter alia,* unreasonable demands of the husband, her complaints to the parents and smell of kerosene from her body to come to a conclusion that it was no accident but a homicidal death.

A woman died of burns and she gave an initial statement that it was an accident; subsequently in her dying statement before a metropolitan magistrate she blamed her husband and he was charged under section 302 read with section 34 IPC, section 498-A, 304B read with section 34 IPC, and sections 3, 4 and 6 of the Dowry Prohibition Act, 1961. The trial court acquitted the accused on the specious reasoning that the original statement was of accident and discarded the dying declaration giving benefit of doubt to the accused. The high court on reappreciation of evidence held the accused husband guilty of offences punishable under sections 302 and 498-A IPC and sentenced him to life imprisonment. The apex court, which generally does not enter into scrutiny of evidence, engaged itself in a meticulous scrutiny of evidence since it was a case of reversal of acquittal in *Vijay Mohan Singh* v. *State of Karanataka.*[58] It upheld the high court conviction and found fault with the trial court acquittal as "patently erroneous and the conclusions arrived at by it wholly untenable".[59]

The husband put out a story of suicide by the wife. However, the trial court and the high court gave a verdict of homicidal death after scrutiny of evidence. The apex court in appeal in *Kalu* v. *State of M.P.,*[60] upholding the verdict of the lower courts, held that once the prosecution was able to establish a *prima facie* case, the husband had to either give some explanation under section 313 CrPC with regard to the circumstances in which his wife met with an unnatural death in the house where both the husband and the wife lived with their minor child. The husband's failure to offer any explanation left no doubt about his guilt and conviction under section 302 IPC was sealed.

A woman died of burns and the story concocted by the husband was that while he was lighting a matchstick for smoking, the petrol tank of the motorcycle, which was leaking caught fire and the woman sustained thermal burns. The woman also gave a dying declaration to that effect. However, her clothes smelled of kerosene and half can of kerosene was seized by the police from the house. The woman gave the dying declarations in the presence of her husband confirming the husband's story and exonerated him. However, in the third dying declaration the woman, *inter alia,* stated that her husband poured kerosene on her and a little on himself and he ignited the matchstick and her clothes caught fire. The husband then pulled out the pipe of the petrol tank of the motorcycle and it caught fire. She mentioned that the husband had

57 *Mahadevappa* v. *State of Karnataka* 2019 SCC OnLine SC 38.

58 (2019) 5 SCC 436.

59 *Id*. at 450, para 34.

60 (2019) 10 SCC 211.

threatened her and so she could not speak the truth and now she was narrating the true sequence of events in the presence of her mother and brother-in-law. This dying declaration was compatible with the evidence before the court and after a very detailed discussion the court upheld the guilt and convicted the husband under section 302 IPC.[61]

Dowry death

Dowry is often asked as an entitlement by the groom's family and more often than not the demand cannot be proved before a court of law since these demands are privately done and the girl's family is wary of involving others lest the marriage gets in trouble. And shockingly even in this age and times the girl's family keep trying the send the girl to her matrimonial home in the face of glaring harassment hoping for things to get better. And criminal law which is totally evidence based does not come to the rescue as how do you prove dowry demand and that also "soon before death".[62] Section 304-B IPC is to be invoked only in relation to dowry and not other factors like father in law, asking the woman to sleep with him which caused mental cruelty![63] But where the husband asks for financial assistance to extend his clinic or demand of a car is made then that comes within the ambit of dowry demand.[64] The court quoting from *Rajiinder Singh* v. *State of Punjab*[65] reiterated that "any money or property or valuable security demanded by any of the persons mentioned under section 2 of the Dowry Prohibition Act, 1961 at or before or at any time after the marriage which is reasonably connected to the death of a married, would necessarily be in connection with or in relation to the marriage unless, the facts of the given case clearly and unequivocally point otherwise." [66]

Rape

Cases against women are on the rise and the punishment also has a deterrent motive apart from assuaging the retributive rage of the victim. In a case of gang rape,[67] the appeal was for quantum of sentence. The court invoking the phrase "adequate and special reasons" warranting exercise of discretion to reduce the sentence of imprisonment in the pre 2013 legislation reduced the sentence to eight years on a spurious reasoning:[68]

> It is stated that at the time of occurrence, Appellant 1 was working as a police driver and Appellant 2 was a singer having good reputation, performing as a singer on the stage and both the appellants were aged about 24-25 years, at the time of the occurrence. It is also stated that

61 *Jagbir Singh* v. *State (NCT of Delhi)* (2019) 8 SCC 779.

62 See *Mahesh Kumar* v. *State of Haryana* (2019) 8 SCC 128. Also see *State of Haryana* v. *Angoori Devi*, 2019 SCC Online SC 1152.

63 *Girish Singh* v. *State of Uttarakhand* , 2019 SCC OnLine SC 897, para 53.

64 *Jatinder Kumar* v. *State of Haryana,* 2019 SCC OnLine SC 1628.

65 (2015) 6 SCC 477.

66 *Supra* note 64, para 7.

67 *Thongam Tarun Singh* v. *State of Manipur* (2019) 18 SCC 77.

68 *Id*. at 80, para 13.

> both the appellants have no criminal antecedents and they hail from backward area. The learned counsel for the appellants have also produced certificate issued from the jail authorities to show that the conduct of the appellants (post-conviction) is very good and satisfactory and they have been participating in the sports/garden activities and other programmes of the jail. Considering the facts and circumstances of the case and that the appellants have no criminal antecedents and also the conduct of the appellants in the jail (post-conviction), the sentence of imprisonment of fifteen years [for the conviction under Section 376(2)(*g*) IPC] and sentence of imprisonment of ten years (for the conviction under Section 120-B IPC) is reduced to eight years.

Will this not be true for many offenders? is the moot question.

Promise to marry

A man kept talking of marriage to a woman and cajoled her to have sex despite her unwillingness. The facts reveal that all along he had another girl in mind for marriage. The prosecutrix, who was resisting physical relation was promised marriage, and based on the false promise of marriage she consented. Relying on the facts and circumstances of the case the court in *Anurag Soni* v. *State of Chhattisgarh*[69] held that the consent was vitiated as it was based on misconception of fact as per section 90 IPC. The court also engaged in a discussion around section 114 A of the Evidence Act, 1872 which was not at all applicable in this factual matrix as 114 A relates to section 376(2) IPC. The apex court upheld the conviction under section 376 IPC and on the plea of the accused that since both the parties to the case were married to their respective partners he may not be convicted, the patriarchal and masculine psyche of the court resurfaced and rather than putting up a narrative of rape being a serious crime and hence like other serious crimes not included in the compoundable offences commented thus:[70]

> [W]hile a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called accomplice. Rape leaves a permanent scar on the life of the victim. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, the rape tantamounts to a serious blow to the supreme honour of a woman, and offends both her esteem and dignity.

The case law over the years has made a distinction between false promise to marry and breach of promise. Inducing a girl to have sex in the former category comes under the ambit of rape as consent defined in section 90 IPC in the pre 2013 era comes into play. In *Pramod Suryabhan Pawer* v. *State of Maharashtra,*[71] the girl

69 (2019) 13 SCC 1.

70 *Id*., para 15

71 (2019) 9 SCC 608.

insisted that she agreed for sexual intimacy only after the promise of marriage. It was on the boy's refusal to marry the FIR for an offence under section 375 IPC was filed. The girl belonged to the SC/ST category and the two sides had known each other since 1990 and were sexually intimate since 2009. They visited each other and continued to have sexual intimacy over the years. It was only in 2014 that the boy raised some apprehensions about their marriage due to caste considerations. They, however, continued their sexual intimacy and it was only when the appellant got married on May 1, 2016 that the complainant filed the FIR. The apex court held that the factual matrix of the case did not indicate that the initial promise was false, or that the complainant engaged in sexual relation to just on the basis of that promise and hence no offence under section 375 IPC was made out. It is submitted that these cases do present difficulties and are complex cases and these contractual terms – breach of promise and false promise – may not always give the best results.

VI JOINT CRIMINAL ENTERPRISE

Section 34 IPC is a rule of evidence. It is "intended to meet a situation in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention".[72] The common intention can be formed at the spur of the moment. Both the sections, 34 and 149 IPC, deal with constructive liability. Though both the sections are different – one is a substantive offence and the other is a rule of evidence, they do overlap and "it is a question to be determined on the facts of each case whether the charge under section 149 IPC overlaps the ground covered by section 34."[73]

Common intention

Mere presence at the scene of crime cannot be a basis for conviction applying section 34 IPC.[74] But if common intention is proved in a case then it does not matter as to who fired the gunshot or the final blow. Both would be equally liable for the offence.[75] What needs to be proved by the prosecution is simultaneous conscious mind of persons participating in the criminal action.[76] For this it is not only necessary that the persons are known to each other (as otherwise it could be a case of similar intention) but also that "clear and unimpeachable evidence" is present to justify the inference. The courts must be cautious as cases involving similar facts and circumstances cannot be used as a precedent. Each case is to be evaluated on its own merits.[77]

72 *Palakom Abdul Rahiman* v. *State of Kerala* (2019) 4 SCC 495.

73 *Mala Singh* v. *State of Haryana* (2019) 5 SCC 127 at 139, para 43.

74 See *Bikash Bora* v. *State of Assam* (2019) 4 SCC 280. S. 34 cannot be invoked merely on conjectures and surmises, see *Virender* v. *State of Haryana* (2020) 2 SCC 700. See also *Asif Khan* v. *State of Maharashtra* (2019) 5 SCC 2010, where s. 302 read with s. 34 IPC was upheld.

75 See *Rameshwar* v. *State of M.P.* (2019) 8 SCC 303.

76 See *Balvir Singh* v. *State of M.P.* (2019) 15 SCC 599.

77 See *Ezajhussain Sabdarhussain* v. *State of Gujarat* (2019) 14 SCC 339.

Unlawful assembly

It is not a case that section 141 IPC[78] should be specifically invoked for conviction under section 149 IPC. "The actions of an unlawful assembly and the punishment thereafter are set out in the subsequent provisions, after Section 141 IPC, and as long as those ingredients are met, section 149 can be invoked".[79] So what necessarily needs to be proved is the common object of the unlawful assembly. In *Bal Mukund Sharma* v. *State of Bihar*[80] the murder could not be attributed to the common object of the unlawful assembly and hence individual liability was imposed for the murder. However, when five persons, all armed, entered a house at night and only two of the five accused used deadly weapons which caused death, the other three would be constructively liable for the death under section 149 IPC. The high court reasoning absolving the three accused on the basis that the three did not use their weapons was clearly held to be erroneous.[81]

In *Mahendran* v. *State of T.N.*,[82] the common object of the unlawful assembly was to burn the hut and engage in a murderous assault on the deceased in view of his role in the affairs of a *Panchayat* against caste Hindus. The apex court held that since the common object was established by both the trial court and the high court, the appellants could not be treated differently and be convicted under section 326 read with section 149 IPC. As all of them were part of the unlawful assembly which was involved in a murderous attack they were all convicted under section 302 read with 149 IPC. The law on unlawful assembly is clear that the determinative factor is the "common object" as specified in section 141 IPC. It is not that an overt act has to be necessarily proved against a person, who is alleged to be a member of the unlawful assembly. The sharing of the common object is a mental process which is to be discerned for the act of a person and result thereof.[83]

VII OFFENCES AGAINST PROPERTY

Criminal breach of trust

The courts must be circumspect in dealing with criminal complaints in property cases of civil nature involving, for example, breach of promise. If a person is unable to repay the loan amount that does not *ipso facto* give rise to criminal prosecution unless the fault element of 'fraud' or 'dishonest intention' is present right from the beginning of the transaction. Hence in *Satish Chandra Ratanlal Shah* v. *State of Gujarat*[84] the apex court, quashing the FIR and the proceedings under sections 406

78 What constitute unlawful assembly see *Manjit Singh* v. *State of Punjab* (2019) 8 SCC 529. See also *Dauwalal* v. *State of M.P.* (2019) 4 SCC 438 See also *Munishamappa* v. *State of Karnataka* (2019) 3 SCC 393.

79 *Dev Karan* v. *State of Haryana* (2019) 8 SCC 596 at 604, para 21.

80 (2019) 5 SCC 469.

81 See *State of M.P.* v. *Killu* 2019 SCC OnLine SC148. See also *Amrika Bai* v. *State of Chhattisgarh* (2019) 4 SCC 620.

82 (2019) 5 SCC 6.

83 See *State of U.P.* v. *Ravindra*, 2019 SCC OnLine SC 1651.

84 (2019) 9 SCC 148.

and 420 IPC, iterated that "the legislature intended to criminalize only those breaches which are accompanied by fraudulent, dishonest or deceptive inducements, which resulted in involuntary and inefficient transfers under section 415 IPC."[85] Similarly, a 'mere breach of a promise, agreement or contract does not, *ipso facto*, constitute the offence of criminal breach of trust contained in Section 405 IPC without there being a clear case of entrustment". [86]

Theft

Theft is always of movable property and replication of documents and their contents have physical presence and so come well within the definition of "corporeal property" and hence can be stolen and come within the definition of theft. However, what is important is the fault element of the offence of theft and that is "dishonest intention" which further implies that it must include an intention of causing wrongful gain to one person or wrongful loss to another person. It is a contentious issue whether documents used in dishonest intention come under the definition of theft and will depend on the facts and circumstances of the case. In *Birla Corpn Ltd.* v. *Advent Investment,*[87] it was held that documents were filed to substantiate the case of oppression and mismanagement and this did not come within the purview of dishonest intention to attract prosecution for theft. It might have a bearing on its evidentiary value but could not come under the rubric of theft.

VIII INCHOATE OFFENCES

Abetment

Abetment to commit suicide

In order to attract the ingredients of abetment, the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary.[88] And presumption as to abetment of suicide by a married woman with seven years of marriage is 'not a mandatory; it is only permissive as the employment of expression "may presume" suggests'.[89] The court has underlined the fact that 113-A of the Evidence Act, 1872, ought not to be pressed into service once charge under section 498-A IPC is established. What is then required is a "cause and effect relationship between the cruelty and the suicide for the purpose of raising the presumption".[90] But, in *Rajesh* v. *State of Haryana,*[91] where a man committed suicide as a result of repeated threats of false implication in dowry case the court held that "the evidence does not disclose that the appellant instigated the deceased to commit suicide. There was neither a provocation nor encouragement by the appellant to the deceased to commit an act of suicide".[92]

85 *Id.* at 152-153, para14.

86 *Id*. at 152, para11.

87 (2019) 16 SCC 610.

88 *Wasim* v. *State (NCT of Delhi)* (2019) 7 SCC 435.

89 *Gurjit Singh* v. *State of Punjab*, 2019 SCC OnLine SC 1516 para 13.

90 *Id*., para 33.

91 2019 SCC OnLine SC44.

92 *Id*., para 13. See also *State of W.B.* v. *Indrajit Kundu* (2019) 10 SCC 188 – the girl was caused a call girl by her parents and she committed suicide the next day. Charge under s.306 failed.

This narrative almost suggests that the incitement has to be very direct for a charge of abetting the suicide and not a "cause and effect" kinds.

Eve teasing is a menace and young girls are repeatedly made victims of this. A young girl being repeatedly taunted by young men and referred to as 'wife', 'bhariya' and 'chachi' was too tormenting and insulting for a girl of tender age. She decided to end her life as she was 'provoked' into doing so because of the continuous harassment she faced day after day living in the same village. The court engaging with the psyche of the victim made very insightful observations which need to be mentioned:[93]

> Taking an overall view of the matter, we are satisfied that the present one had not been a case of a mere eve teasing, insult or intimidation but the continuous and repeated acts and utterances of the accused persons were calculated to bring disgrace to the village girl and to destroy her self-esteem; rather the acts and utterances were aimed at taking her to the brink of helplessness and to the vanishing point of tolerance. It had not been a case of mere intimidation or insult. The incessant intimidation and insult of the innocent girl had been of instigation; and such instigation clearly answers to the description of abetment of suicide. Therefore, in our view, Accused 1 and 3 have rightly been held guilty of offence of abetment of suicide.

The court put the record straight that they may not have instigated suicide but pushed her to the brink by making her a soft target to settle score with the parents.

Attempt

A man in a drunk state entered the house of the complainant and pounced on her, sat on her and lifted her petticoat and at that time the daughter intervened and freed her mother. The accused was convicted under section 511 read with section 376 IPC as the court held that "had there been no intervention, the accused-appellant would have succeeded in executing his criminal design" of raping.[94]

Attempt to murder

Attempt to murder and causing hurt by dangerous weapons or means are two distinct offences and the courts have to be very cautious while upholding one offence over the other. In a case where wounds were inflicted by fire arm the high court altered the conviction from section 307 to section 324 IPC. The apex court in appeal in *State of M.P.* v. *Kanha*[95] made it very clear that for a conviction under section 307 the criteria is not that a bodily injury capable of causing death should have been inflicted. Attempt need not be the penultimate act. What brings about a conviction is the intention and the weapon used, severity of the blow and other such evidence can be considered to infer intent. The court was categorical that "the presence of punctured and bleeding wounds as well as the use of a fire arm leaves no doubt that there was an

93 *Ude Singh* v. *State of Haryana* (2019)17 SCC 301 at 324.

94 *Chaitu Lal* v. *State of Uttarakhand* , 2019 SCC OnLine SC 1496 para 10.

95 (2019) 3 SCC 605.

intention to murder"[96] and hence restored the trial court conviction under section 307 IPC. It is submitted that offence under section 307 IPC is a serious offence and is to be treated as an offence against the society at large.[97]

In a case where the accused assaulted the complainant with a four inch long knife and inflicted multiple injuries on his chest, scapula, back and buttocks, the court was categorical that "stabbing a person with a knife near his vital organs would in most circumstances lead to the death of victim; thereby falling squarely within the meaning of section 307".[98]

Conspiracy

Conspiracy is intent loaded and hence difficult to prove. It is mostly proved by "Circumstantial evidence taking into account the cumulative effect of the circumstances indicating the guilt of the accused." The act or conduct of the individual involved must be conscious and clear, giving inference of a concurrence of a common design to be held guilty of conspiracy.[99]

IX SENTENCING

The court in *State of Arunachal* v. *Ramchandra Rabidas*[100] underlined the fact that IPC "is punitive deterrent in nature". The principal aim and object is to punish the offenders for offences committed under IPC. The courts try to balance the rights of the accused on one hand and the interest of the victim and society on the other.[101] And if the allegations against the accused are serious in nature then it does not matter if the complainant and accused have settled the dispute – law will take its course.[102]

In *State of M.P.* v. *Udham*[103] the apex court pontificated on the sentencing guidelines and observed thus:[104]

> Sentencing for crimes has to be analysed on the touchstone of three tests viz. crime test, criminal test and comparative proportionality test. Crime test involves factors like extent of planning, choice of weapon, modus of crime, disposal modus (if any), role of the accused, anti-social or abhorrent character of the crime, state of victim. Criminal test involves assessment of factors such as age of the criminal, gender of the criminal, economic conditions or social background of the criminal, motivation for crime, availability of defence, state of mind, instigation by the deceased or any one from the deceased group,

96 *Id*. at 601, para 19.

97 See *State of M.P.* v. *Laxmi Narayan* (2019) 5 SCC and *State of M.P.* v. *Dhruv Gurjar* (2019) 5 SCC 570.

98 *State of M.P.* v. *Harjeet Singh*, 2919 SCC OnLine SC 231, para 5.

99 *State (NCT of Delhi)* v. *Shiv Charan Bansal* (2020) 2 SCC 290 at 303, para 45. Ssee also *Rajender* v. *State (NCT Delhi)* (2019) 10 SCC 623.

100 (2019) 10 SCC 75.

101 *Suryakant Buburao* v. *State of Maharashtra* 2019 SCC OnLine SC 944.

102 See *State of Madhya Pradesh* v. *Kalyan Singh* (2019) 4 SCC 268.

103 (2019) 10 SCC 300. The court did not engage with the 'comparative proportionality test'!

104 *Id*. at 303, para 12.

> adequately represented in the trial, disagreement by a Judge in the appeal process, repentance, possibility of reformation, prior criminal record (not to take pending cases) and any other relevant factor (not an exhaustive list).

Section 304 part I and part II IPC entails different punishments. But the judicial trend has been that there is no consistency is found in the judgments and more often than not similar punishments are given under both the parts. In a conviction under part II the trial court gave punishment of three years which was reduced by the high court to period already undergone *i.e*., three months and 21 days. The apex court in *State of M.P.* v. *Suresh*[105] frowned upon this sentence and quoted paras after paras on proportionality and deterrence. It found fault with the marshaling of mitigating factors like young age, incident at the spur of the moment, the accused son taking the father to the hospital *etc*., and restored the trial court sentence. It is submitted that this was an apt case where the court could have explained the different sentences of two parts and then justified conviction of three years.

The code has specific offences which are compoundable and the courts give due deference to the legislative mandate. However, in cases where the factum of compromise is put forward before the court in non compoundable offences the court may consider the relationship between the parties (for example brothers), and other circumstances and may take the compromise into account while fixing the quantum of sentence.[106]

Sentencing in cases of rash and negligent driving remains a very controversial area. Negligent and rash driving resulted in four deaths and one injured and the punishment was four months imprisonment! The apex court dealing with the issue in *Thangasamy* v. *State of T.N.*[107] held that "the punishment awarded in this matter has been rather on the lower side. There being no appeal for enhancement of sentence and looking to the time that has elapsed, we would not be making any further comment in the matter. Suffice it to conclude that no case for reducing the punishment awarded to the appellant is made out."[108] If the appellant could be contesting a four month imprisonment for years and the apex court was convinced with the guilt, then how should the long time frame really bother the court? Sentencing is also a deterrent apart from other things.

In *Nawaz* v. *State*[109] the accused were convicted under sections 304 part I and 201 IPC as they burnt the body and abandoned the body elsewhere to conceal the offence. The punishment of 10 years under part I was to run concurrently with section 201 IPC. In such cases the courts must be finding it difficult whether it should be concurrent or consecutive. Probably since 10 years was given so it was concurrent!

105 (2019) 14 SCC 151.

106 *Shankar* v. *State of Maharashtra* (2019) 5 SCC 166.

107 (2019) 16 SCC 235.

108 *Id*. at 241, para 19.

109 (2019) 3 SCC 517.

Death penalty

A man who had gone on a rampage killing people when his night duty was not shifted to day, tried to take the plea of insanity in which he was not successful in *Dnyaneshwar Suresh Borkar* v. *State of Maharashtra.*[110] The trial court and the high court awarded him death penalty as he was "a menace and threat to the harmonious and peaceful coexistence of the society".[111] The apex court in appeal while commuting the death penalty to life imprisonment stressed that though insanity could not be proved, one thing was clear that he was under mental stress and strain and otherwise had no criminal antecedents. The court also took into account his conduct in jail and was of the opinion that he could be reformed. The courts must always have the hope of reformation and do away with death penalty in all cases!

Capital punishment to an accused guilty of rape and murder of a seven and half year old girl child was the issue before the court in *Vijay Raikwar* v. *State of M.P.*[112] The court, acknowledging that the act was brutal, observed that it however, did not merit a death sentence. The young age of the appellant (19 years at the time of commission of crime) and his good conduct during incarceration worked in his favour and the death penalty was commuted to life imprisonment.

The court while dealing with a gruesome rape and murder of a nine year old child in *Raju Jagdish Paswan* v. *State of Maharashtrai*[113] engaged in sentencing objectives and, *inter alia,* stressed on "protection of society by incapacitating criminals, the rehabilitation of past offenders, or the deterrence of potential wrongdoers. The purposes of criminal sentencing have traditionally been said to be retribution, deterrence and rehabilitation."[114] It is indeed surprising that the court did not specifically mention reformation! But it engaged in a detailed discussion of case law on the issue and commuted the death penalty to life imprisonment for a period of 30 years without remission and directed all states to implement the 2016 manual which mandated a reformative and rehabilitation programme for the prisoners.

The issue before *Ravishankar* v. *State of M.P.*[115] was that of death penalty *vis-à-vis* life imprisonment. The trial court and the high court had pronounced death penalty in a gruesome rape and murder case and throwing off the body in the well. One of the reasons that the high court gave was "that there was bleeding due to sexual intercourse and that there was no possibility of reform owing to appellant's denial of crime".[116] But isn't that the fact in all cases! The apex court entered again into a detailed examination of death penalty jurisprudence and then came up with a "residual doubt" theory and since the case was based on circumstantial evidence, death penalty was commuted to life imprisonment for the rest of his life sans remission.

110 (2019) 15 SCC 546
111 *Id*., para 10.
112 (2019) 4 SCC 210.
113 (2019) 16 SCC 380.
114 *Id*. at 385, para 9.
115 (2019) 9 SCC689.
116 *Id*. at 702, para 39.

Rape and gruesome murder of a minor girl by her tutor attracted death penalty by the trial and the high court. Sanjay Hegde, a known abolitionist argued the case for the accused-appellant in *Parasuram* v. *State of M.P.*[117] and argued for commutation of death penalty into life imprisonment. However, shockingly, counsel, rather than making some principled arguments against death penalty argued in the face of post mortem report that confirmed rape that "the foreign object thrust into the vagina of the victim was not male genital but a stem of the mustard plant, since the offence took place in a mustard field". The court outrightly rejected this argument. It was of the view that since the accused was 22 years old at the time of the commission of the offence and there was no argument by the state that there is no possibility of reform or rehabilitation, life imprisonment for 30 years without remission was given.

Whereas in *Manoharan* v. *State,*[118] in a review petition directed against a three judge bench decision upholding death penalty to an accused guilty of raping and sodomising a boy and a girl and subsequently murdering them and throwing the bodies in the canal, the court on being faced with the plea of young age of 30 years observed that "one may view that such young age poses a continuous burden on the state and presents a longer risk to society, hence warranting serious intervention by the courts."[119] The other accused had been shot in an encounter in a scuffle during recovery evidence. The court upheld the death penalty as it felt that the crime was "grave to shock the conscience of the society and the court." The dissenting judge, however, stuck to her dissent on sentencing! On the question whether the convict could be reformed, the report called from the jail superintendent revealed that "the conduct of the petitioner is merely satisfactory and he has not undertaken any study or anything to show any signs of reformation."[120] It is submitted that this whole 'capable of reformation' narrative is hugely problematic. An abolitionist judge panders to a narrative that state did not show that he was incapable of reformation and a retentionist judge argues that 'he is not done anything to 'show signs of reformation.'[121] The jails are not a uniform category, each state and each jail have different potentials for reformation. Was that ever factored in ? is a moot question.

In *Khushwinder Singh* v. *State of Punjab*[122] the accused killed six people including two minors. The court held it to be rarest of rare category and awarded death penalty. In *Nand Kishore* v. *State of M.P.*[123] again a case of rape and murder by a 50 year old man, the court commuted death penalty to life imprisonment, *inter alia*, on the reasoning that there was no finding recorded by courts below to the effect that there is no possibility of reformation!

117 (2019) 8 SCC 382.
118 (2020) 5 SCC 782.
119 *Id*. at 805, para 65.
120 *Id*. at 805, para 61.
121 See also *Nand Kishore* v. *State of M.P.* (2019) 16 SCC 228.
122 (2019) 4 SCC 415.
123 (2019) 16 SCC 278.

In a case of acid attack the court did not find any 'special reasons' for death penalty as the accused-appellant, was "disappointed in his relation with the deceased who he believed deserted him".[124] The court set aside the death penalty and gave life imprisonment (Surprisingly unlike other cases of commutation to life imprisonment the caveat of no remission was thankfully not added).

In another case of rape and murder of a minor girl,[125] the court talked about reform in the abstract (no report of jail superintendent is mentioned) and held that "we are not convinced that the probability of reform of the appellant is low, and the absence of prior offending history and keeping in mind his overall conduct".[126] The court was of the view that the case though heinous, did not warrant death penalty. However, life imprisonment simpliciter would also not suffice and hence it commuted the death penalty to life imprisonment without remission for 25 years. It is submitted that even in *Akshay Kumar* and in most other cases (review petition was rejected) no prior offending history was recorded!

In contrast in *Ravi* v. *State of Maharashtra,*[127] where a toddler of two years was brutally raped and murdered, the court seemed inclined to award the death penalty and all previous cases were marshaled to that end. When it was brought to the notice of the court that in many cases death penalty was commuted to life imprisonment, it took pains to distinguish each case. Not only this, it also brought in the victimology argument and the recent changes in the POCSO Act which introduced death penalty. The court, speking through Rohington J, to buttress its stand opined that "the judicial precedents referred before the recent amendment came into force, therefore, ought to be viewed with a purposive approach so that the legislative and judicial approaches are well harmonized".[128] The court upholding death sentence observed as follows:[129]

> The appellant who had no control over his carnal desires surpassed all natural, social and legal limits just to satiate his sexual hunger. He ruthlessly finished a life which was yet to bloom. The appellant instead of showing fatherly love, affection and protection to the child against the evils of the society, rather made her the victim of lust. It is a case where trust has been betrayed and social values are impaired. The unnatural sex with a two-year-old toddler exhibits a dirty and perverted mind, showcasing a horrifying tale of brutality. The appellant meticulously executed his nefarious design by locking one door of his house from the outside and bolting the other one from the inside so as to deceive people into believing that nobody was inside. The appellant was thus in his full senses while he indulged in this senseless act. The appellant has not shown any remorse or repentance for the gory crime,

124 *Yogendra* v. *State of M.P*. (2019) 9 SCC 243 at 246, para 13.
125 *Sachin Kumar Singhrah* v. *State of M.P.* (2019) SC 371.
126 *Id*. at 380, para 24.
127 (2019) 9 SCC 622.
128 *Id*. at 652, para 61.
129 *Id*., para 62.

> rather he opted to remain silent in his Section 313 CrPC statement. His deliberate, well-designed silence with a standard defence of "false" accusation reveals his lack of kindness or compassion and leads to believe that he can never be reformed. That being so, this Court cannot write off the capital punishment so long as it is inscribed in the statute book.

Needless to say that this is true of all the rape cases of minors and by this reasoning all cases deserve capital punishment. Reddy J upheld the conviction but dissented on the award of death penalty and gave a detailed reasoning for the dissent and, *inter alia,* argued that the nature of the "crime alone is not sufficient to impose the sentence of death, unless state proves by leading cogent evidence that the convict is beyond reform and rehabilitation".[130]

In a case of rape and murder of a five year old child by a 53 year old man, the court was not inclined to give death penalty and reasoned thus: "There can be no doubt that rape and murder of a 5 years old shocks the conscience. It is barbaric. There is, however, no evidence to support that the murder was pre-meditated. The petitioner did not carry any weapon".[131] The court also brought in that effective pre-sentence hearing was not given and commuted the death penalty to life imprisonment till the very end of his life without remission.

The Rohington Nariman J bench again dealt with a gruesome case of kidnapping and sexual assault of a girl aged 10 and the brother aged seven and they were killed and bodies thrown in the canal. One of the accused was shot dead by the police in an encounter. The other accused had given a confessional statement which he later retracted and both the trial court and the high court confirmed death penalty for the gruesome crime. In appeal in *Manoharan* v. *State*[132] the court again alluded to the POCSO amendments and confirming death penalty held as follows:[133]

> No remorse has been shown by the appellant at all and given the nature of the crime as stated in para 84 of the High Court's judgment it is unlikely that the appellant, if set free, would not be capable of committing such a crime yet again. The fact that the appellant made a confessional statement would not, in the facts of this case, mean that he showed remorse for committing such a heinous crime. He did not stand by this confessional statement, but falsely retracted only those parts of the statement which implicated him of both the rape of the young girl and the murder of both her and her little brother. Consequently, we confirm the death sentence and dismiss the appeals.

Sanjiv Khanna J dissented on the sentence.

130 *Id*. at 659, para 76.

131 *Dattatraya* v. *State of Maharashtra*, 2019 SCC OnLine 1181, para 131.

132 (2019) 7 SCC 716.

133 *Id*. at 751, para 34.

As opposed to this case the rape of a minor girl of five years and subsequent killing by throttling, the death sentence was commuted to life imprisonment without remission for 25 years. It is a very short judgment and the fact that he was a repeat offender, having raped minor girls on two past occasions, should have raised concerns of "harmonious construct of POCSO amendments" but the court saw it as an occasion to commute death penalty as the court said that "the appellant has become the victim of his own past and there is only circumstantial evidence against him." [134] It is submitted that most of such cases are based on circumstantial evidence and the conviction must satisfy the rigor of circumstantial evidence that the chain must be complete and if there are two views possible, the one favouring the accused must be followed. The point here is that the retentionist courts find ways to uphold death penalty whereas the abolitionist court twists the same agreement to commute death penalty!

Death penalty involves discretion by the judges. And needless to say that the discretion has to be a judicious one. It was pointed out in *X* v. *State of Maharashtra*[135] that in India we do not have sentencing guidelines but we do have 'guidelines judgment'. But we have seen in case after case that the guideline judgments are used as per the choice of the bench. The court in the instant case reminded us that "achieving sentencing uniformity may not only require judicial efforts, but even the legislature may be required to step in".[136] The case, *inter alia,* dealt with the issue of execution of a mentally ill person. The court took pains to distinguish section 84 which relates to the fault element at the time of the commission of offence and post-conviction mental illness which is based on punishment and right to dignity. The court stressed that "different normative standards underpinning the above consequently mean different threshold standards as well".[137] The court recognizing mental health issues of the convict was also constrained by the observations in sentencing that he would be a menace to society and commuted death penalty to life imprisonment till the very end of his life without remission.

It is indeed unfortunate that the court while recognizing that "prisons inevitably become home for a greater number of mentally ill prisoners of various degrees"[138] could only invoke the aspirational aspect of the Mental Health Care Act, 2017 and directed the state government to examine if the convict is entitled for it!

In a review petition in *Mohd. Mannan* v. *State of Bihar,*[139] which again involved rape and murder of child victim, the court put forth the entire rehearsed case law on rarest of rare. Then the court found that effective legal representation was not afforded

134 *Dileep Banker* v. *State of M.P*. 2019 SCC Online SC 1911.

135 (2019) 7 SCC 1.

136 *Id*. at 25, para 52.

137 *Id*. at 29, para 65.

138 *Id*. at para 75.

139 (2019) 16 SCC 584. In *Akashay Kumar Singh* v. *State (NCT of Delhi)* (2020) 3 SCC 431 the convict raised issues of pollution in Delhi and Kalyug but also added another dimension that Law Officer of Tihar had written a book *Black Warrant* where he opined that co accused Ram Singh was murdered in jail. The court brushed it aided by saying that it was his personal opinion. The review petition was dismissed.

to the accused. It faulted the high court which affirmed death penalty by stating that adequate consideration was not given by it to the mitigating circumstances *viz.,* material regarding no prior criminal antecedent etc.. The accused was in solitary confinement and was also facing unsoundness of mind. The court commuted death sentence to "to life imprisonment, till his natural death, without reprieve or remission"![140]

In another review petition death penalty given to the accused was under review for murder of his wife and four children by strangulating them. The review court agreed that the case is based on circumstantial evidence and engaged in the concept of 'residual doubt' acknowledging that the concept has "not been given much attention in Indian Capital sentencing jurisprudence, the fact remains that this court has on several occasions held the quality of evidence on a higher standard for passing the irrevocable sentence of death than that which governs conviction."[141] The review court took into account the dictum of the court that the "petitioner was menace to society and could not be reformed, and that lesser punishment would expose society to peril at his hands." [142] The convict's conduct in the prison had been very aggressive and he constantly indulged in illegal activities, the court commuted his death penalty to life imprisonment for the remainder of his life sans any right to remission. It is submitted that does the 'residual doubt' has no bearing on life imprisonment tell the end of his life.

Appeal against acquittal

Long delays in trials end up in sentences way beyond the prescribed sentence and results in complete negation of the proportionality principle! Appeal against acquittal in respect of section 302 came up before the apex court in *State of M.P.* v. *Amar Lal.*[143] But since the accused had served more than 14 years of imprisonment the court decided not to interfere! It was a 1990 case and by the time the high court acquitted the accused he had already served a sentence of 14 years.

Solitary confinement

Inordinate delay is plaguing the courts,[144] where the dockets are full either due to increase in crime, lesser number of courts, litigating mindset and so on and so forth. It is, however, shocking when a mercy petition took 13 years and five months to be rejected. If the blatant delay was not enough to shock, it came to light that proper facts were not put before the President *viz.,* the fact that the man was acquitted of rape charge. The accused was guilty of rape and while on bail he killed five members of the family of the rape victim and was sentenced to death penalty. The factum of acquittal in rape was a factor which was very important to be in contemplation of the mercy giver. The result of all this was that the convict was in solitary confinement for 18 years out of the 25 years that he was in prison!

140 *Id*. at 609, para 85.

141 *Id*., para 19.4.

142 *Id.*, para 20 at 40.

143 (2020) 2 SCC 64.

144 For example, a kidnapping case of 1988 was finally decided in appeal in 2019 in *Munawwar* v. *State of U.P* (2019) 7 SCC 653.

The apex court in *Union of India* v. *Dharam Pal*[145] marshaled case after case to deride solitary confinement and tried hard to drive home the point that solitary confinement is extremely unfortunate and palpably illegal. It is only when all remedies are exhausted that the convict comes "under a finally executable death sentence" and must be put in solitary confinement. The apex court, however, after this lengthy and strenuous exercise went back to his original crime of killing five people and while upholding commutation of death penalty, held that he must suffer 35 years of actual imprisonment including the period already undergone! If this was to be the verdict, why did the court engage in castigating solitary confinement which was not for a year or two but for 18 long years? The least that could have been done was to order his release immediately. The court in this case failed miserably to uphold what it preached.

X MISCELLANEOUS

Victimology

Acid was thrown on a girl and she suffered 16% injuries. The high court altered the conviction under section 302/34 IPC to section 326 IPC and reduced the sentence of 10 years rigorous imprisonment and a fine of Rs.5000 each to five years rigorous imprisonment and increased the fine to Rs.25000 each. The apex court in *State of H.P.* v. *Vijay Kumar,*[146] keeping the victim at the centre stage remarked thus:[147]

> Indeed, it cannot be ruled out that in the present case the victim had suffered an uncivilised and heartless crime committed by the respondents and there is no room for leniency which can be conceived. A crime of this nature does not deserve any kind of clemency. This Court cannot be oblivious of the situation that the victim must have suffered an emotional distress which cannot be compensated either by sentencing the accused or by grant of any compensation.

The court directed the accused persons to pay an additional compensation of Rs.150,000 each and the state was also directed to pay the compensation as admissible under the victim compensation scheme.

Section 201 IPC

Due to lack of evidence regarding the involvement of offence under section 301 IPC, that the body was cremated hurriedly after killing the woman, benefit of doubt was given in *Om Prakash* v. *State of Haryana*.[148]

Judicial impropriety

The callous manner in which cases come to be decided was called out in the case of *Deep Narayan Chourasia* v. *State of Bihar*[149] where the order was given by the high court based entirely on wrong factual premise!

145 (2019) 15 SCC 388.
146 (2019) 5 SCC 373.
147 *Id*. at 377, para 13.
148 2019 SCC OnLine SC 508.
149 (2019) 13 SCC 153.

In the interest of justice

A widow filed a writ petition before the high court for directions to institute a judicial inquiry into the cause and persons responsible for the death of her husband. The widow's case was that her husband was picked up by the army when he was visiting his relatives and his whereabouts were unknown until after about four days when police informed her that he was killed in an encounter. The army contended that no civilian was picked up by them and the man was killed in an encounter. The court directed a district and sessions judge to hold an enquiry which resulted in the finding that the man was indeed picked up by the army and died in their custody and the story of encounter was a cover-up. The high court directed the case to be registered under section 302 IPC and directed the CBI to undertake investigation. The order also gave a compensation of Rs. 3 lakhs to be paid by the Union Government and commandant, Eight Madras Regiment. The Union of India and other respondents moved the apex court by way of appeal in *Union of India* v. *Junu Gayary*.[150] The apex court upheld the high court direction of CBI investigation. Taking serious note of the violation of article 21 of the Constitution and in exercise of its power under article 142 of the Constitution of India, enhanced the amount of compensation to rupees five lakhs, to be deposited by the appellants.

Rights of the accused

Keeping the right of the accused again at the forefront, the court in *Anokhilal* v. *State of M.P,*[151] a case which dealt with a gruesome rape and murder of a child, sent it back to the trial court for *de novo* trial. The trial court and the high court had awarded death penalty but the court, perhaps after the *Ankur Shinde* case, engaged in a detailed examination of the short coming in the trial and how the legal representation was technically given, which did not qualify as effective legal representation.

In *CBI* v. *Mohd. Parvez Abdul Kayuum*[152] where the high court had recorded acquittal in the murder case of one Pandya, the apex court engaged in a detailed examination of the evidence and the veracity of the confessional statements which were later retracted. The court held that the corroborative evidence on record indicated that the retractions were not true. The court placed lot of reliance on the SP's testimony – being a senior police officer, that all procedural safeguards were adhered to. The court held that conspiracy for murder to avenge post-Godhra incident stood proved. The court was very critical of the writ petition that was filed in the case on the behest of the accused persons for reinvestigations and cost of Rs.50,000 was imposed.

Prosecution for false evidence

India has a dubious distinction of having fake universities and time and again the authorities come out with lists but by then many students fall prey to it. In *Sarvepalli Radhakrishnan University* v. *Union of India*,[153] the facts revealed that repeated

150 2019 SCC OnLine SC 988.
151 (2019) SCC OnLine SC 1637.
152 (2019) 12 SCC 1.
153 (2019) 14 SCC 761.

assessments were done and the college was found wanting and the Central Government debarred the college from taking fresh admissions. The college filed a writ petition in the high court and the court allowed provisional admission subject to the outcome of re-inspection. The special leave petition was filed before the apex court which confirmed the order of re-inspection. The report found that during the inspection for the purpose of granting admission most of the patients were fictitious, false patient details were furnished, doctors affiliated to the college were fake, medical files were dubious and other such devious practices were followed to trick the committee into giving approvals. The court held the Dean of the college liable for prosecution under section 193 IPC. The Secretary General was directed to depute an officer to initiate prosecution. Penalty of rupees five crores was imposed for playing fraud on the court and further ordered that the students were entitled to get refund of atleast one lakh rupees as compensation.

Preventive detention

Detention is an important aspect of criminal law. A person is detained for further investigation and also as a punishment by curtailing the liberty. The Constitution of India which upholds personal liberty and freedom does also have provisions on preventive detention! However, the courts reiterated in *Khaja Bilal Ahmed* v. *State of Telangana*[154] that the detaining authority must be satisfied that the person to be detained is likely to indulge in illegal activities which will be prejudicial to the maintenance of public order. This satisfaction has to be based on relevant and not stale material or by merely cataloguing the criminal antecedents of the person. A causal nexus has to be established otherwise private detention would become an excuse for punishment!

XI CONCLUSION

The year stands out for the stellar contribution of the apex court by reversing its own judgment and saving six innocent men, including a juvenile, from the gallows in *Ankush Maruti Shinde*.[155] Not only did it undo its own wrong but also unlike the *Adambhai* case,[156] gave compensation of rupees five lacs each and ordered the erring officials to be taken to task. One shudders to think that had the *Mohd Arif*[157] judgment not been delivered, review would have well been disposed of by circulation in a perfunctory manner, without oral arguments! The poor and the downtrodden are more often than not at the receiving end of the criminal justice system. And it is not always that the courts come to their rescue. Ignoring the harsh reality of caste dynamics in the hinterlands of India the conviction for murder in *Khuman Singh*[158] was altered to culpable homicide not amounting to murder. Had the court factored in the caste dynamics the result may well have been different. Imprisonment years in part I and part II of section 304 IPC continues to be intriguing. 67 years were given under part I

154 2019 SCC OnLine 1657.

155 *Supra* note 8.

156 *Adambhai Sulemanbhai Ajmeri* v. *State of Gujarat* (2014) 7 SCC 716.

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

158 *Supra* note 40.

and even ten years under part II.[159] It would have been useful for the readers if the courts engaged in some academic discussion regarding part I and part II and how the magical numbers of three, six, seven, ten years *etc*., are reached. Exposing extreme subjectivity in the sentencing, the court took into account the fact that the gang rape convicts engaged in sports/garden activities in the jail, reduced the punishment to eight years in a pre 2013 rape law case.[160] While in other cases of a pre POCSO era the court gave death penalty as it felt that "harmonious construct of POCSO amendment" is necessary.[161] Death penalty was awarded in another rape and murder of a girl child by the trial court and the high court. In appeal, it came to light that effective legal representation was not made available to the accused and the apex court, perhaps fresh from the *Ankur Shinde* shocker, sent the case for a *de novo* trial.[162] In a review petition the court stressed that the petitioner was aggressive in the prison, could not be reformed and "was menace to society", commuted death penalty to life imprisonment! The reasoning is baffling to say the least. Moreover, the narrative around 'incapable or capable of reformation' is dubious in the absence of adequate facilities across prisons in India and the tools to gauge the same. The courts must dwell seriously on the issue - whether conduct during incarceration should be a defining factor - given the fact that it takes years for the case to reach the apex court. And then be consistent with its application. The 'residual doubt' is another contentious area which needs deeper probe. Every case has to be proved beyond a reasonable doubt to merit a conviction and if there is 'residual doubt' the moot question is should the courts acquit or just scale down the punishment from death penalty to life imprisonment without remission?[163]

159 See discussion under "culpable homicide not amounting to murder".

160 *Thongam Tarun Singh* v. *State of Manipur* (2019) 18 SCC 77.

161 *Ravi* v. *State of Maharashtra, supra* note 127; *Manoharan* v, *State*, *supra* note 118

162 *Anokhilal* v. *State of M.P., supra* note 151.

163 *Supra* note 115.