7

CRIMINAL LAW

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I INTRODUCTION

'CRIME' IS difficult to be defined and scholars have struggled for a long time to find an acceptable definition. Glanville Williams has given a working definition, without alluding to the subject matter of crime, and has said that "a crime is an act capable of being followed by criminal proceedings having a criminal outcome"[1] Criminal outcome involves stigmatization and possible sentence in the form of punishment. Punishment is considered a legitimate exercise of state power but this power will have to be reigned in lest it becomes an unruly horse. Hence, various procedural protections are guaranteed to the accused and one most important is the presumption of innocence. The proceedings in India are conducted through an adversarial system wherein ordinarily the burden of proof is on the prosecution to prove the charges leveled against the accused. The presumption of innocence gives a direction to officials involved in the criminal justice process how to deal with the accused. The presumption has no bearing on the actual outcome of the case. The substantive and the procedural law complement each other. While substantive criminal law (the Indian Penal Code, 1860) sets out the conduct rules which direct the public to refrain from specified misconduct, the procedural rules (Criminal Procedure Code, 1973) direct officials to investigate and then prosecute.[2] The investigation and prosecution is governed by rules of evidence and circumscribed by the part III of the Constitution. The courts as seats of justice are expected to sift through the evidence and come to a conclusion of guilt or innocence.

The hierarchy of courts is established in order to do complete justice by arriving at the truth. Since courts are manned by human beings (who may inadvertently err), appellate courts are established so that in appeal the evidence and application of laws are further scrutinized with a singular aim that the 'truth' emerges and the guilty get punished. It may be axiomatic to mention that the first interface that the public has with justice delivery mechanism is through the district courts. They are the foundation and pillars on which our justice delivery system is resting and thriving on. Each wing of judiciary – be it the district judiciary / the high court or the Supreme Court – is

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1 Glanville Williams, 'The Definition of a Crime' (1955) *CLP* 107 at 130.

2 See Donald A Dripps, "The Substance-Procedure Relationship in Criminal Law" in R.A. Duff and Stuart Green (eds.) *Philosophical Foundations of Criminal Law* (OUP, 2011).

supreme in its own sphere.' The fact that appeal lies to the higher court does not at all mean or envisage that the lower wing of justice dispensation is inferior. Since courts are expected to give just decisions, appeal mechanisms are integrated in the system to minimize errors. Hence it becomes a cause of concern when appellate courts, while deciding appeals, pass disparaging remarks on the district judiciary over whom they have superintendence power only on the administrative side not on the judicial. In a case the district judiciary had acquitted the accused of a murder charge. The state went in appeal and the high court, while reversing the order passed derogatory remarks on the trial court verdict which had the potential to seriously undermine its independence. The apex court while upholding the trial court verdict deprecated the practice of adverse remarks on the trial court verdict and cautioned the high court thus: [3]

> Every case has its journey towards the truth and it is the Court's role to undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity nor the nature of the offence affects its performance. We have a hierarchy of courts in dealing with cases. An appellate court shall not expect the trial court to act in a particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial court decides the case on its own merit despite the sensitivity.

This case needs to be in the course manual of the National Judicial Academy so that the appellate judiciary does not cross the 'Lakshman Rekha' while sitting in appeal.

It is with these prefatory remarks that the present survey deals with IPC related offences which were decided by the apex court in the year 2021.

II OFFENCES AGAINST HUMAN BODY

Culpable homicide

Murder is a result crime and issues of causation are very relevant. Additionally, Macaulay had always advocated for a subjective liability. Hence, for a murder conviction, both these issues become very relevant. In a homicide case the facts were that, after an altercation over money, the accused pushed the other person and stood over his abdomen causing injuries. The injured was not taken to the hospital till about the next day and he died there three days later due to septicemia. If one were to apply the 'but for' test of causation, the septicemia was a result of the injuries but here one also has to apply the 'substantial factor' test to gauge the causation issues. It is important to understand that "'substantial' involves a question of degree depending on the particular circumstances of the case and may involve a value addition evaluation."[4] In the instant case, *Khokan* v. *State of Chhatisgarh,*[5] after discussing in detail the circumstances of the case, the conviction was altered to culpable homicide not amounting to murder *i.e.,* from section 302 to section 304 IPC. However, without any

3 *Mohan* v. *State of Karnataka,* 2021 SCC OnLine SC1233 para 21.

4 Neil Morgan *et al*, *Criminal Law in Malaysia and Singapore* 80 (2012).

5 (2021) 3 SCC 365.

discussion on intention, the conviction was done under part I of section 304 and not under part II, unlike in *Kala Singh* v. *State of Punjab*[6] where it was held that since it was a case of sudden fight and the appellant-accused attacked the deceased with a knife – there being no pre-meditation or intention the conviction was altered to section 304 part II IPC.[7]

As far as culpable homicide is concerned merely because the injuries are on non vital parts of the body does not prove non-intention. The entire factum of the case – the setting, the assault will have to be examined. In *Vinod Kumar* v. *Amritpal,*[8] the victim was forcibly taken in a vehicle and the vehicle was stopped on reaching the unmetalled road. The victim was then taken out of the vehicle and forced on the ground and was assaulted. The case clearly fell within the contours of murder under thirdly of section 300 IPC, opined the court.

In *Mohd Rafiq* v. *State of M.P.*[9] the apex court engaged in an extensive discussion on murder and culpable homicide not amounting to murder and the use of the word 'likely' in section 304. It finally came to the conclusion that conviction under section 302 was not warranted. In the words of the court:[10]

> All the essential elements show that the appellant did not have any previous quarrel with the deceased; there was lack of *animus*. The act resulting in SI Tiwari's death was not premeditated. Though it cannot be said that there was a quarrel, caused by sudden provocation, if one considers that the deceased tried to board the truck, and was perhaps in plain clothes, the instinctive reaction of the appellant was to resist; he disproportionately reacted, which resulted in the deceased being thrown off the vehicle. Such act of throwing off the deceased and driving on without pausing, appears to have been in the heat of passion, or rage. Therefore, it is held that the appellant's conviction under Section 302 IPC was not appropriate.

However, in the very next paragraph the conviction is under section 304 part I as the court opined that "he had the intention of causing such bodily harm, to the deceased as was likely to result in his death, as it did".[11] It is submitted that if he just wanted to get him off the truck it would well be a case of knowledge and not intention! The initial arguments do not match up with the ultimate conviction.

In a case the prosecution was able to establish that the husband poured kerosene over his wife and set her on fire as per her dying declaration. Subsequently, he tried to extinguish the fire and sustained some injuries in the process. The court opined that the case fell squarely under fourthly of section 300 and merely because he might have

6 (2021) 10 SCC 744.
7 See also *Pardeshiram* v. *State of M.P.* (2021) 3 SCC 238.
8 2021 SCC OnLine SC 1150.
9 (2021) 10 SCC 706.
10 *Id*.,para 15.
11 *Id*., para 16.

tried to extinguish the fire did not bring the case out of fourthly of section 300 and convicted the husband on charge of murder under section 302.[12]

A husband was convicted under section 302 IPC for the unnatural death of the wife by the additional sessions judge and the same was upheld by the high court. The courts had relied on section 106 of the Evidence Act, 1872 and the last seen theory. However, as mentioned in *Subramaniams* v. *State of T.N.,*[13] "Ordinarily when the husband and wife remained within the four walls of a house and death by suicide takes place it will be for the husband to explain the circumstance in which she might have died. However, we cannot lose sight of the fact that although the same may be considered to be a strong circumstance but that alone in the absence of any evidence of violence on the deceased cannot be held to be conclusive!"[14] The apex court in appeal, taking note of this, held that section 106 Evidence Act and the last seen theory do not absolve the prosecution of discharging its primary duty of proving the prosecution case beyond reasonable doubt. The apex court in *Shivaji Chintappa Patil* v. *State of Maharashtra*[15] set aside the conviction and reiterated that in the case of circumstantial evidence motive needs to be proved and the prosecution failed to do so on all counts.

Kidnapping

In a case where a child was kidnapped and a ransom demand was made the high court affirmed the conviction under section 364-A which specifically talks about ransom. However, the court engaged in a detailed examination of the said section and came to the conclusion that kidnapping was there, ransom was demanded but another important ingredient was missing *i.e*., "and threatens to cause death or hurt to such person". The facts of *SK. Ahmed* v. *State of Telangana*[16] revealed that no such threat was made and the child was looked after well and hence the conviction under section 364-A (IPC) was set aside and the appellant was convicted under section 363 IPC and was sentenced to seven years imprisonment.

Dacoity

The state is wary of numbers and so stringent punishments are factored in for offences perpetrated by a larger group. In *Ganesan* v. *State*,[17] the court engaged in a discussion on robbery and dacoity and iterated that the only difference between robbery and dacoity is the involvement of five or more persons. The fear and alarm is more when more persons are involved in a crime, hence the punishment is more stringent. The plea of the accused that since deadly weapon was used by other members and not him, and hence he shall not be liable for enhanced punishment was countered by the court on the following grounds:

12 *Nagabhushan* v. *State of Karnataka* 2021 5 SCC 222 at 232.
13 (2009) 14 SCC 415.
14 *Id.,* para 26.
15 (2021) 5 SCC 626.
16 (2021) 9 SCC 59.
17 2021 SCC OnLine SC 1023 para 45.
18 2021 SCC OnLine SC 1279.

> So far as Section 391 IPC 'dacoity' and Section 396 IPC – 'dacoity with murder' is concerned an accused can be convicted on the basis of constructive liberty, however the only requirement would be the involvement of five or more persons conjointly committing or attempting to commit a robbery dacoity / dacoity with murder.

Section 397 of the IPC is an aggravated offence when a deadly weapon is used and as mandatory minimum sentence of seven years is prescribed. The contention in *Ram Ratan* v. *State of M.P.*[18] was that since the appellant had not used the firearm even if it is held that the incident had occurred as alleged. The court held that "it is clear that the use of weapon to constitute the offence under Section 397 IPC does not require that the offender should actually fire from the firearm or actually stab if it is a knife or dagger but the mere exhibition of the same. … create fear or apprehension in the mind of the victim is sufficient."[19] It is the offender alone who 'uses' the deadly weapon who would be guilty under section 397 and no constructive liability can be imputed under it.

Simple hurt

Even cases involving simple hurt entailing six months simple imprisonment are contested up to the apex court! It is true that personal liberty is sacrosanct and guaranteed under article 21 but it is submitted that some filtering mechanism will have to be evolved for matters to reach the constitutional court![20] The court's dockets are brimming with cases and some mechanism may have to be devised so that the apex court has time to deal with serious cases and timely justice becomes the hallmark of the system.

III OFFENCES AGAINST WOMEN

A love affair culminating in a secret marriage and the girl being minor the parents press for kidnapping charges! This has been the fact situation in many a case and the patriarchal families and the patriarchal state are in no mood to relent. Invariably, the sexual autonomy of the adolescent girl is sought to be negated by the stringent provisions of kidnapping. The words used in the kidnapping provision are, *inter alia*, 'enticing' and 'taking'. The love affair among adolescents is, thus, brought under the ambit of 'enticing', ignoring the fact that it was mutual love, being equal partners in the crime! Yet, the law charges the boy who may be 19-21 years of age – himself an adolescent (neo adult)[21] – with the severe charges of kidnapping! The facts of *Anversinh* v. *State of Gujarat* [22] is a case of a love affair followed by elopement and the father pressing for rape and kidnapping charges. The court was of the view that the contention that it was a consensual affair and the prosecution had joined the accused's company voluntarily cannot be acceded to, given the unambiguous language of the statute, as

19 *Id*., para 17.

20 *Lakshman Singh* v. *State of Bihar* (2021) 9 SCC 191. See also *Surendran* v *Sub Inspector of Police*, 2021 SCC OnLine SC 445.

21 *State* v. *Nikhil Kumar* FIR No. 915/2020 – 19 year old held in murder case released on bail after Delhi Court calls him a"neo-adult".

22 (2021) 3 SCC 12.

she was below 18 years of age.[23] It is submitted that this is an age where the state perceives women either as asexual or without any sexual agency! The law has failed its children and the courts are not doing any better. The law leaves no scope for the so called Romeo-Juliet cases and is out to treat consenting partners – the boy as an accused – and the girl as the victim. In 2015 in a love affair case in *State* v. *Suman Dass,*[24] the contention of the Delhi Commission for Women was that there shall be total prohibition upon teenagers and adolescents from having any kind of sexual relationship! To this the learned district judge had responded thus: "I am afraid, if that interpretation is allowed, it would mean that the human body of every individual under 18 years of age is the property of the State and no individual below 18 years of age can be allowed to have the pleasures associated with one's body"[25] It is humbly submitted that this fear has come true in the *Aversinh's* case. The girl having owned up the love affair - "The prosecutrix nevertheless admitted during cross-examination to being in love with the appellant, having had consensual sexual intercourse with him on a prior date and also having met him outside her home on previous occasions",[26] was then under the control of the patriarchal family and she changed her stance. In a very problematic way the high court distinguished this case from that of *S. Varadarajan*[27] saying that in that case it was voluntary abandonment:[28]

> [T]he High Court has acknowledged that there was a love affair, frequent meetings, and consensual relationship between the parties, which merited the appellant's acquittal under Section 376 IPC. But in the very same breath, the High Court has also held [*Anvarsinh* v. *State of Gujarat*, 2009 SCC OnLine Guj 6145] that the prosecutrix did not willingly leave her parents' custody and had not consented to be taken for marriage. These two findings were canvassed as being mutually contradictory.

The moot question is, did the court come down from its high pedestal to enquire from the girl whether she was enticed or she voluntarily abandoned the care of her guardian? The court in its magnanimity reduced the sentence to the period already undergone, but what about the stigma of criminality which got attached to the boy in a consensual love affair? The court and the Parliament need to seriously introspect.

Dowry death

In a case where the woman died by burns within one year of marriage, the conviction was upheld for dowry death. The accused husband called it an accidental

23 *Id*.,para 16.

24 SC No. 66/13; FIR No. 63/13 by Dharmesh J., dated Aug. 17, 2013, *available at*: https://indiankanoon.org/doc/118116845 (last visited on Jan. 10, 2023).

25 *Id*., para 23.

26 *Supra* note 22 at 17.

27 *S. Vardarajan* v. *State of Madras* (1965) 1SCR 243 wherein it was held that voluntary abandonment of home by a minor girl would not amount to kidnapping and that in the absence of some active involvement, the appellant could not be said to have 'taken' or 'enticed' the girl.

28 *Supra* note 22 at 19.

death but the doctor's report showing that the body was doused with kerosene gave away the accident hypotheses. The court iterated in *Satbir Singh* v. *State of Haryana*[29] that the phrase "soon before" as appearing in section 304B IPC is not "immediately before" but it is enough that the prosecution establishes the existence of "proximate and close link" between the dowry death and cruelty![30] The court also raised a concern regarding recording of statements under section 313 Cr PC in a casual manner by the trial courts thereby denying the very purpose of this important provision which enables the accused to offer an explanation for the incriminatory materials appearing against him. The same view was reiterated in another dowry death case in *Gurmeet Singh* v. *State of Punjab*.[31]

In a case where the woman went missing from the matrimonial home and there were dowry allegations also and the body was recovered from the banks of the river, a presumption was raised against the husband under section 113B of the Evidence Act. The court in *Parvati Devi* v. *State of Jharkhand*[32] held that the "circumstances put together, unerringly point to his guilt in extinguishing the life of a wife within few months of the marriage on her failing to satisfy the demands of dowry" and convicted the husband under sections 304B and 201 IPC.

Skin to skin contact

In a case of sexual assault the special court convicted and sentenced the accused Satish for offences under sections 342, 354 and 363 of IPC 1860 and section 8 of the Protection of Children from Sexual Offences Act, 2012. The accused preferred an appeal and the Nagpur Bench of the High Court of Bombay disposed off the appeal by acquitting him of section 8 of the POCSO, Act and convicting him for the offence under sections 342 and 354 IPC. The judge while acquitting him of POCSO charge factored in a very controversial issue and observed that "admittedly it is not the case of the prosecution that the appellant removed her top and pressed her breast. As such, there is no direct physical contact i.e. skin to skin with sexual intent without penetration"[33] This observation caused a national outrage and the Attorney General of India, the National Commission for Women and the State of Maharashtra filed appeals before the apex court and the court through Bela Trivedi J., dealt with the provisions of the POCSO Act threadbare. The court engaged with the objects and reasons for the enactment of the Act and also the Constitution and the Convention of the Right of the Child came to the conclusion that:[34]

> The interpretation of Section 7 at the instance of the High Court on the premise of the principle of "*ejusdem generis*" is also thoroughly misconceived. It may be noted that the principle of "*ejusdem generis*" should be applied only as an aid to the construction of the statute. It

29 (2021) 6 SCC 1.

30 *Id*., para 38.3.

31 (2021) 6 SCC 108.

32 2021 SCC OnLine SC 1285.

33 *Attorney General* v. *Satish* (2022) 5 SCC 545 at 564.

34 *Id*. at 577, para 45.

> should not be applied where it would defeat the very legislative intent. .... So far as Section 7 of the POCSO Act is concerned, the first part thereof exhausts a class of act of sexual assault using specific words, and the other part uses the general act beyond the class denoted by the specific words. In other words, whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, would be committing an offence of "sexual assault". Similarly, whoever does any other act with sexual intent which involves physical contact without penetration, would also be committing the offence of "sexual assault" under Section 7 of the POCSO Act. In view of the discussion made earlier, the prosecution was not required to prove a "skin-to-skin" contact for the purpose of proving the charge of sexual assault under Section 7 of the Act.

Ravindra Bhat J., gave a concurring judgment deftly engaging with the embedded patriarchal notions in IPC offences like outraging the modesty of a woman. The mandatory minimum was sought to be justified in the judgment given the severity of the crime and the status of a vulnerable child victim. The court held the accused liable for sexual assault under section 7 of the POCSO Act punishable under section 8 of the same and other provisions of the IPC and sentenced him to rigorous imprisonment for three years. However, the judges having taken the difficult path of questioning the patriarchy could have also dealt with the problematic aspects of the legislation wherein the consensual cases also fall in the crime category as the definition of child varies from 0-18! And the rigour of the POCSO Act does away with the presumption of innocence giving way to statutory presumption under section 29 of the POCSO Act. The Act mandates that the accused has to discharge this presumption beyond reasonable doubt. And this has to be accomplished factoring in a very important provision contained in section 33(6) of the Act which prohibits aggressive questioning or character assassination of a child. This is indeed necessary so that the victim child is guarded against further victimization. But when looked from the perspective of a framed accused this also becomes a serious issue as he has to put up a spirited defence. And, to top it all, the sentencing discretion has been done away with by incorporating mandatory minimum in the Act. The district judiciary and the special courts will not have the luxury to decide the case in the lines of *K. Prakash* v. *State of Karnataka*[35] wherein the accused were convicted of offences under sections 366 and 344 IPC and section 6 of the POCSO Act and sentenced to undergo imprisonment for a period of 10 years. In appeal the apex court magnanimously was of the view that: [36]

> Many factors which may not be relevant to determine the guilt, must be seen with a human approach, at the stage of sentencing. While imposing the sentence, all relevant factors are to be considered, keeping

35 2021 SCC online SC 234. See also *Vishwas Bhandari* v. *State of Punjab* (2021) 2 SCC 605 when both families agree to marry then the courts also facilitate acquittal and dropping of charges!

36 *Id*., para14.

> in mind the facts and circumstances of each case. ... The alleged incident is of the year 2014 and we are informed that the appellants have already served sentence of about three months and paid fine amount. They specifically pleaded that there is no one to take care of their minor son and old age parents.

Intersectionality

The judgment in *Patan Jamal Vali* v. *State of A.P*[37] is akin to reading a research paper on intersectionality of violence, gender, caste and disability. The judgment by Chandrached J is divided into topics and sub topics (a pattern that the judge has been following) to make it more reader friendly. The judgment unpacks gender, caste and disability and intersectionality very eloquently in a case of rape of a visually challenged girl belonging to the SC community. The court made a very apt observation:[38]

> Intersectionality merely urges us to have "an open-textured legal approach that would examine underlying structures of inequality". This requires us to analyse law in its social and economic context allowing us to formulate questions of equality as that of "power and powerlessness" instead of difference and sameness. The latter being a conceptual limitation of single axis analysis, it may allow certain intersectional claims to fall through the cracks since such claims are not unidirectional in nature.

Further, engaging with disability the court remarked:[39]

> This kind of a judicial attitude stems from and perpetuates the underlying bias and stereotypes against persons with disabilities. We are of the view that the testimony of a prosecutrix with a disability, or of a disabled witness for that matter, cannot be considered weak or inferior, only because such an individual interacts with the world in a different manner, vis-a-vis their able-bodied counterparts. As long as the testimony of such a witness otherwise meets the criteria for inspiring judicial confidence, it is entitled to full legal weight. It goes without saying that the court appreciating such testimony needs to be attentive to the fact that the witness' disability can have the consequence of the testimony being rendered in a different form, relative to that of an able-bodied witness. In the case at hand, for instance, PW2's blindness meant that she had no visual contact with the world. Her primary mode of identifying those around her, therefore, is by the sound of their voice. And so PW2's testimony is entitled to equal weight as that of a prosecutrix who would have been able to visually identify the appellant.

The court upholding life sentence on charge of rape under section 376 IPC explained that it is difficult and artificial to delineate the many different identities of

37 2021 SCC OnLine SC 343.

38 *Id.*, para 22.

39 *Id.*, para 51.

an individual which overlap to place them in a disadvantaged position of power and create the circumstances for heinous offences such as rape to occur. The court, while factoring in the caste factor, equally engaged with the provisions of the SC/ST Act and after a careful scrutiny allowed the appeal to drop charges under the SC/ST Act. A brilliant judgment by the apex court.[40]

IV JOINT CRIMINAL ENTERPRISE

Common intention

A prerequisite of constructive liability is that the act must have been done in furtherance of the common intention. The court in *Indrapal Singh* v. *State of U.P.*[41] reiterated that "in absence of a common intention even if several persons simultaneously attack the man each one of them would be individually liable for whatever injury he caused and none would be vicariously convicted for the act of any or the other".[42] The prosecution does not have to prove that there was an elaborate plan between the accused to kill the deceased or a plan was in existence for a long time. A common intention to commit the crime is proved if the accused by their words or action indicate their assent to join in the commission of crime.[43]

Ravinder Bhat J in *Netaji Achyut Shinde (Patil)* v. *State*[44] explained the concept of constructive liability very succinctly by saying that when the physical presence of the two accused was established and evidence was led by way of independent witnesses that they facilitated the crime that clearly shows that there was a "consensus of the mind of persons participating in the criminal action to bring about a particular act".[45]

Common object

In India caste dynamics run unabated in spite of progress in other fronts. And especially where marriages are concerned the communities remain totally embedded in issues of caste. In a case[46] a boy and a girl belonging to different caste wanted to marry. A *panchayat* was convened and the girl from the *Jat* community made her intention clear of marrying her lover who belonged to the *Jatav* community. This infuriated the *Jat* community and they ordered that the boy and another boy who accompanied the couple be hung upside down and their private parts be burned. This was not the end of the macabre show. These two boys along with the girl were ordered to be hanged to death and they were taken to a 'Banyan Tree', and the parents of the three youngsters were forced to pull the rope to strangulate them! 35 people were convicted by the trial court and in appeal the high court acquitted two persons. It also commuted the death penalty of eight persons to life imprisonment. The convicts appealed before the apex court against the conviction under section 302/149 IPC.

40 See also *Lelu* v. *State of Chhattisgarh* 2021 SCC OnLine SC 591.

41 (2022) 4 SCC 631.

42 *Id*., para 16 at 638.

43 *Gulab* v. *State of U.P.,* 2021 SCC OnLine SC 1311 para 31.

44 2021 SCC OnLine SC 247.

45 *Id*., para 34. See also *Mihir Gope* v. *State of Jharkhand* (2021) 2SCC 726 at 733.

46 *Hari* v. *State of U.P*. 2021 SCC OnLine SC 1131.

The apex court in appeal, while upholding the high court judgment (while acquitting two due to doubtful identities), summarized the scope of section 149 IPC in the following words:[47]

> Section 149 of the Penal Code, 1860 is declaratory of the vicarious liability of the members of an unlawful assembly for acts done in prosecution of the common object of that assembly or for such offences as the members of the unlawful assembly knew would be committed in prosecution of that object. If an unlawful assembly is formed with the common object of committing an offence, and if that offence is committed in prosecution of the object by any member of the unlawful assembly, all the members of the assembly will be vicariously liable for that offence even if one or more, but not all committed the offence. Again, if an offence is committed by a member of an unlawful assembly and that offence is one which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object, every member who had that knowledge will be guilty of the offence so committed. It is not necessary for the prosecution to prove each of the members' involvement especially regarding which or what act (*Masalti* supra). While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149**.**

V INCHOATE OFFENCES

Attempt

The line between preparation and attempt is very thin. However, a careful analysis does lay the distinction bare. In a case a minor girl was lured into a room and the accused rubbed his genitals against the child and the child started crying. It was a clear case of attempt to rape and the apex court rightly called the high court order calling the act as preparation to rape as 'perverse and untenable' and convicted the accused under section 376 read with section 511 IPC in *State of M.P* v. *Mahendra*.[48]

Abetment

One of the duties of the school and the teachers also is to discipline children and inculcate good habits in them and this may require some kind of reprimand. In this case a child was reprimanded by a teacher for repeatedly bunking classes and his parents were called. The child committed suicide that night and was found hanging at 4 a.m. The physical training instructor was charged and convicted by the high court for abetment of suicide. The apex court setting aside the judgment of the high court in *Geo Varghese* v. *State of Rajasthan*[49] observed thus:[50]

47 *Id.*, para 36.

48 2021 SCC OnLine SC 965.

49 2021 SCC OnLine SC 873

50 *Id*., para 40.

> Insofar as, the suicide note is concerned, despite our minute examination of the same, all we can say is that suicide note is rhetoric document, penned down by an immature mind. A reading of the same also suggests the hyper-sensitive temperament of the deceased which led him to take such an extraordinary step, as the alleged reprimand by the accused, who was his teacher, otherwise would not ordinarily induce a similarly circumstanced student to commit suicide.

Section 113A of the Indian Evidence Act, 1872 raises a presumption of suicide being abetted by husband or such relative if the essential ingredients or the offence are stand satisfied. In a case where the woman committed suicide within two years of marriage and the offence of cruelty stood proved the court presumed that it was a case of abetment. The presumption can be rebutted and since no material was brought on record to disprove this presumption the high court conviction under sections 498A and 306 IPC was upheld in *Gurmansinh* v. *State of Gujarat.*[51]

Mere harassment without any positive action on the part of the accused proximate to the time of the occurrence of the suicide would not amount to an offence under section 306 IPC.[52]

The court reiterated in *Bhagwanrao Mahadeo Patil* v. *Appa Ramchandra Savkar*[53] that section 306 IPC is broader in its application and one aspect of it is section 304B. If a conviction for causing a suicide is based on section 304B IPC, which is a dowry death provision, it will necessarily attract section 306 IPC. However, the converse is not true.[54]

VI SENTENCING

In a case of rash and negligent driving resulting in loss of life, the widow of the victim did not come forward despite being served notice. Compensation of Rs. three lakhs was deposited and since the widow of the victim did not appear despite notice being served, a lenient view was taken regarding sentencing [55]

The court in *Murali* v *State*[56] factored in the amicable settlement while sentencing and opined that since sections 324 and 307 IPC are not in the list of compoundable offences, nevertheless the courts can exercise discretion by factoring in the compromise and reducing the quantum of sentence. Similarly, in *Sy Azhar Sy Kalander* v *State of Maharashtra*[57] the court taking into consideration, *inter alia,* the compromise entered into between the two parties while upholding the conviction under section 307 IPC reduced the quantum of punishment to five years. However, in *Bhagwan Narayan Gaikwad* v *State of Maharashtra*[58] the court was non-plussed by a compromise in a

51 2021 SC OnLine SC 660.

52 *Shabbir Hussain* v. *State of M.P* 2021 SCC OnLine SC 743, para 5.

53 2021 SCC OnLine SC 3291

54 *Id.*, para 11 quoting *Bhupendra* v. *State of Madhya Pradesh* (2014) 2 SCC 106.

55 *Sagar Lolienkar* v. *State of Goa* (2022) 1 SCC 161,para 14.

56 (2021) 1 SCC 726.

57 2021 SCC OnLine SC 701.

58 2021 SCC OnLine SC748.

conviction under section 326 IPC. The fact that 28 years had elapsed and the families were now on cordial terms did not move the court to give any benefit of the alleged compromise! The victim was leading his life with a prosthetic arm and leg as a result of the assault which made him permanently disabled.

There has been a trend that in some of the cases the courts factor in the possibility of future crimes while deciding the quantum of sentence. In a case of rape the court in *Manoj Mishra* v. *State of U.P*[59] gave seven years imprisonment (as one it was a pre 2018 case so minimum mandatory sentence of 10 years was not attracted) The discretion was to give the sentence ranging from seven years to life imprisonment. The court observed "taking into consideration all facts including that no material is available on record to indicate that the appellant has any criminal antecedents and that he is also a father of five children ….., it appears that there is no reason to apprehend that the appellant would indulge in similar acts in future"? [60].

If consensual sex was the consideration, the court did not mention that. Since the girl was minor, it was a case of statutory rape. Therefore, the reasoning of the court begs a question that why then in certain cases stricter punishments are awarded keeping the deterrence theory in mind – that it will deter others? It would be very humane if the judges were to examine this aspect in each case whether the accused has a proclivity for further crimes.

In a case where the right of private defense was exceeded the court took note of the fact that the complainants' family members were the aggressors and they had tried to disturb the peaceful possession of the accused from the land. The court upheld the conviction under section 304 part II, reduced the quantum of sentence to two years rigorous imprisonment and Rs. 5000 /-fine.[61]

Review petition

A review petition was filed in *Mofil Khan* v. *State of Jharkhand* [62] wherein it got listed to be heard in the open court since death penalty was awarded to the petitioners by the trial court which was upheld by the high court. The court made it clear that the only jurisdiction in a review petition is to see if there has been a patent mistake or glaring omission due to judicial fallibility. The court did not find any such reason to interfere in the instant case. However, the court took note of the fact that there is a possibility of reformation and rehabilitation. The conduct of the petitioners during incarceration was satisfactory and this moved the court to commute death penalty to sentence of a period of 30 years.

Young offenders are to be given a different treatment so that the society is able to reclaim and rehabilitate them. Probation of Offenders Act, 1958 is one such enactment which is precisely to meet these ends. However, it remains one of the most underutilized legislation in the country. It was heartening to note that the apex court,

59 (2021) 10 SCC 763.

60 *Id*., para 20.

61 *Govindan* v. *State* (2022) 3 SCC 82.

62 2021 SCC OnLine SC 1136.

given the young age of the accused being 19 and 21 at the time of commission of crime, utilized the provisions of this progressive Act in *Lakhvir Singh* v. *State of Punjab*[63] and held that "this is a fit case that the benefit of probation can be extended to the appellants under the said Act in view of the provisions of section 4 of the said Act on completion of half the sentence"[64]. However, the reasoning of the court was problematic inasmuch as it based its decision of invoking the Probation of Offenders Act,1958 on a reasoning that the victim had forgiven them (that also possibly with passage of time). The beneficial provision cannot be left to the temperament of the victim – whether he/she is vindictive or retributive or forgiving but has to be based on the nature of the crime and the character of the offender.

Death penalty

Speedy trial is desirable but convicting a person and giving death penalty on the same day cannot be allowed in a country which is governed by the rule of law and imposes death penalty only in the rarest of rare cases. This entails that the courts necessarily look into not only the crime but also the criminal, his state of mind, social background, possibility of reformation, *etc*. The apex court in *Lochan Srinivas* v. *State of Chhattisgarh,*[65] keeping all these factors in mind, partly allowed the appeal commuting the death penalty to life imprisonment under section 302 IPC.[66]

In *Bhagchandra* v. *State of M.P,*[67] three members – one sibling and two nephews – were hacked to death by the appellant over a property dispute. The court on appeal, while upholding the conviction, entered into a discussion on reform potentiality of the accused and opined that since it was the first offence and the jail superintendant certificate showed that his conduct was satisfactory in the prison - the death penalty was commuted to life imprisonment for a period of 30 years. Given the past trends this meant life imprisonment with no remission for 30 years.

Reformation

In a 498A IPC case where the husband showed remorse and was willing to make arrangements for the second wife and his two children born out of this union, the court pontificated on the object of criminal jurisprudence that "object of any criminal jurisprudence is reformative in character and to take care of the victim". The surveyor is assuming that the victim wife was agreeable to such an arrangement! In fact, the husband should have been asked by the court to do this as part of his liability not as compensation and punishment for the offence. The court reduced the punishment to a period already undergone which was seven months![68]

63 (2021) 2 SCC 763.

64 *Id*. at 774

65 2021 SCC OnLine SC 1249.

66 See also *Irappa Siddappa Murgannavar* v. *State of Karnataka,* 2021 SCC online SC 1029 where death penalty was commutted to life imprisonment and no remission till 30 years.

67 2021 SCC OnLine SC 1209.

68 *Samuel S.K.* v. *State of Jharkhand*, 2021 SCC OnLine SC 645.

VII MISCELLANEOUS

Given the fact that conviction in *Ankush Maruti Shinde*[69] was based on a case which solely rested on the test identification parade (it was only in the review petition that the innocence of the six men on the death row was established) it becomes important to note the observation in *Ganesan* v. *State*[70] wherein the court iterated thus:

> It is well settled law that TIP is not a substantive piece of evidence and may only be relied upon when the substantial evidence is uncorroborated. Identification tests are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines.

The case of *Jaikam Khan* v. *State of U.P.*[71] showcases how even in cases where death penalty is awarded and the same is being confirmed by the high court the attitude of the trial courts is often found wanting. The case reminds one of the infamous *Shinde* case. But no lessons have been learnt. The Supreme Court was completely shocked by the apathy of the trial court and remarked "It is really surprising, as to how the Additional Sessions Judge could have dealt with the present case in such a casual manner when he was considering the question of life and death of four accused".[72] The high court, being the superior court, with more experience, maturity and wisdom was equally apathetic as is reflected in the apex court's observation:[73]

> We are amazed by the manner in which the High court has dealt with the present matter. It will be apposite to refer to the following observations of the High Court with regard to the recovery of clothes. "It has been urged that in order to prove the recovery of the clothes, no independent witness was produced. It is correct that the prosecution only produced the formal witness to prove the recovery, but on the other hand the disclosure of this fact about the room having been opened by the keys provided by Hina, the daughter of accused Momin was not rebutted by the defence which could have been done by producing Hina in order to deny any such recovery.

These judgments are a telling commentary on the quality of training that is imparted in judicial academies. The law on paper is as good as the human mind interpreting it. And so it is essential that periodic training programmes are conducted for the judges.

VIII CONCLUSION

Criminal law functions to guide the conduct of the members of the society. It also provides direction to the courts and the law enforcement agencies. That is the

69 (2019) 15 SCC 470.

70 2021 SCC OnLine SC 1023 para 22.

71 2021 SCC OnLine SC 1256.

72 *Id*., para 78.

73 *Id.,* para 80.

reason why the IPC not only puts forth proscribed conduct but also defines the contours of that conduct. It is the genius of Macaulay that the Penal Code is written with quite a degree of precision, although the courts shy away from engaging with the theoretical contours of a case leaving much to imagination. One such area is the culpable homicide not amounting to murder. The distinction between part I and part II and the punishments awarded are often problematic and surveys, year after year, flag this problem! Sexual offences, especially of adolescents in consensual relationships are dealt in a manner where the consensual woman partner is infantilized and her sexual agency is totally negated and the adolescent boy carried the burden of criminality. Judicial discretion, which is a hallmark of justice dispensation system, has been taken away by the state in some cases and this does not augur well for criminal justice system as myriad scenarios come before the court and discretion in sentencing can be a useful tool to deal with the situation. It is also important to sensitize the courts to use beneficial legislation like the Probation of offenders Act without fettering it with the victim's benevolence!