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CRIMINAL LAW

*Jyoti Dogra Sood**

I INTRODUCTION

THE CRIMINAL law was in disarray in India and it goes to Macaulay's credit that under Bentham's influence he gave to India and other colonies a penal code which was marked by clear, concise and comprehensive provisions which were qualified by explanations and illustrations to make the task of adjudication in criminal matters easy and definite. However, the substantive law howsoever precise and accurate it may be can only be worthwhile if the procedure is followed diligently and in that sense the substantive –procedure relationship cannot be ignored. It is axiomatic to mention that jurisprudence of criminal procedure is an indispensable supplement to any inquiry into substantive criminal law. As Paul Roberts argues "jurisprudence of criminal procedure should be regarded as an indispensable supplement to theoretical inquiries in criminal law, and indicate some promising avenues and useful source materials for further procedurally orientated theorizing."[1] And so the relationship between substantive law and procedural law plays an important role in thinking of criminal justice. The present survey on substantive criminal law remains mindful of this indispensable supplement while dealing with the cases that were decided by the apex court in the year 2022 related to offences under the Indian Penal Code,1860 (hereinafter IPC) and starts with procedural lapses which informed the decision in the infamous case of Gujarat riots.

II CRIMINAL JUSTICE

The year witnessed a long judgment in the case of *Zakia Ahsan Jafri* v. *State of Gujarat*.[2] A complaint was filed by *Zakia* whose husband was among 69 people – inhabitants of Gulbarga society – who were killed by a mob. In her complaint, she alleged that Chief Minister and Ministers of State, as well as high official committed offences *inter alia* under sections 302 read with section 120B IPC. The court in 2008 had appointed a special investigation team (SIT) to look into the complaint.

* Professor, Indian Law Institute.

1 Paul Roberts, "Groundwork for a Jurisprudence of Criminal Procedure" in R.A. Duff and Stuart Green(eds.), *Philosophical Foundations of Criminal Law* (2011,oup).

2 2022 SCC Online SC 773

The apex court judgment points out extensively[3] to the shoddy investigation done by SIT, for example it observed thus:[4]

> The SIT, for reasons best known to it, followed irregular procedure of taking initials of the persons whose statements were being recorded despite a bar under Section 162 of the Code. The SIT made no attempt to seize the mobile and obtain call records of the relevant party. Moreover, no public notice was issued by the SIT after the complaint dated 8.6.2006 was made over to it by this Court in terms of order dated 27.4.2009. If such public notice was to be issued, as was done after taking over investigation of nine cases pursuant to order dated 26.3.2008, many of the family members of the victims or the victims themselves would have come forward and handed over more material to the SIT concerning the allegation of larger conspiracy.

Interestingly after all this the court observed thus:[5]

> However, each of these issues were considered at great length by this Court between 2008 and 2011 whilst monitoring the investigation done by the SIT and culminating in final report. The findings of the SIT had also to pass through the strict scrutiny of the *Amicus Curiae* assisting this Court, who was authorised to even interact with the witnesses examined/questioned by the SIT. It would be, therefore, travesty of justice and doubting the wisdom of this Court which had supervised/monitored the investigation completed by the SIT on all aspects and being satisfied permitted the SIT to present the final report before the Magistrate. The entirety of the material was presented before this Court by the SIT from time to time. The final report in question presented before the Magistrate, therefore, forecloses the enquiry concerning the allegations in complaint dated 8.6.2006.

The court in its final analysis vetted the SIT report and provided counter arguments to the petitioners claims and did a investigative job complete with annexures (appended to the judgment) to exonerate the state machinery of having any inducement in the riots!

III OFFENCES AGAINST STATE

Offences against state take place of pride in the schema of the IPC given the fact that it was the colonial ruler which enacted the Code and for obvious reasons the offences against state figure in chapter VI much before say offences against human body. And so the provisions were also worded in a manner which gave enough scope for the colonizers to smother dissent though criminal law provisions.

3 *Id*. paras 93-106. Paras after paras in the judgment point finger at the inadequacy of investigation!

4 *Id*., para 93.

5 *Id*., para 129.

It is axiomatic to mention that the offence of sedition under section 124 A was not in the Code enacted in 1860 but was later added to suppress the revolutionary activities if freedom fighters. The Indian state, however, continued to have it in the penal code even after gaining Independence and lot of cases and discussions of its suitability in a democratic country have happened ever since.

In a very significant order in the year 2022 which would have wide ramifications, the apex court in *S.G.Vombatkere* v. *Union of India*[6] urged the central and state governments to restrain from registering any FIR, containing any investigation or taking any coercive measures by invoking section 124-A IPC while the aforesaid provision of law is under consideration.[7] It is indeed heartening to note the contents of the affidavit filed on behalf of the Union of India which in clear terms promises to usher a new era of post colonialism – the era of *Amrit Kal* where this relic of colonial rule the sedition law will be recovered ushering in an era of civil liberties, freedom and upholding the cherished human rights. No less than the head of the government the Prime Minister's vision was invoked in the affidavit. And so one can hope that the day is not far when this section which was used by British regime to smother the voice of the native population would be wiped from the Indian Penal Code.

There are other provisions in the statute which aim at subversive activities which intend to overawe by means of criminal force or show of criminal force, the central or state government and any conspiracy to this end is punishable under section 121-A. The apex court in *Mohd. Irfan* v. *State of Karnataka*[8] engaged with the term overawe and explained thus:[9]

> The word "overawe" clearly imports more than the creation of apprehension or alarm or even perhaps fear. It appears to me to connote the creation of a situation in which the members of the Central or the Provincial Government feel themselves compelled to choose between wielding to force or exposing themselves or members of the public to a very serious danger. It is not necessary that the danger should be a danger of assassination or of bodily injury to themselves. The danger might well be a danger to public property or to the safety of members of the general public.

IV OFFENCES AGAINST HUMAN BODY

Causation

Section 299 starts with causation when it reads thus: "Wherever *causes* death by doing an act with the contention of causing death, or with the intention of causing such body injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."[10]

6 (2022) 7 SCC 433.

7 *Id.*, para 8.2.

8 2022 SCC Online SC 856.

9 *Id.*,para57.

10 Emphasis added.

So the first inquiry is a causal inquiry in case of homicide. In *State of U.P.* v. *Jai Dutt*[11] the deceased was beaten up by four persons and he was admitted to a hospital where he died after six days due to the injuries. A conviction under section 302 read with section 34 IPC was handed by the trial court. The high court converted the conviction from section 302 to section 326 on the reasoning that "deceased died after six days from the incident and no fracture of head was found" .[12] In appeal the apex court examined the post mortem report and came to the conclusion that the cause of death was the injuries inflicted on the deceased including internal injuries due to assault by deadly weapons. It is submitted that what is required to be examined is the 'substantial test' of causation and when that is satisfied the whoever 'causes' is satisfied and then further inquiry needs to be done. It was rightly decided by the apex court that the high court has erred in its judgment and quashed the judgment of the high court and restored the conviction of trial court holding the accused guilty under section 302 IPC. It must also be mentioned that the incident of this impugned judgment happened 36 years ago. It is not clear from the judgment whether the accused was in jail or on bail during this long period.

In *State of Uttarakhand* v. *Sachendra Singh*[13] causation issue was settled that the accused caused the death. What was contentious was that whether the offence fell under murder provision or culpable homicide not amounting to murder. The factual matrix revealed that in a *mehndi* ceremony on the occasion of a wedding, a fight broke out between the accused and the deceased which was mediated by the intervention of the villagers participating in the wedding. However, after dinner the accused attacked the victim with a *danda/phakadiyat* (rough piece of wood) and ran after him in rage and even when the victims' wife tried to intervene, the accused managed to give multiple blows resulting in multiple injuries on the head resulting in death. The trial court convicted the accused under section 302 IPC, in appeal the high court gave him the partial defense of sudden fight under exception fourthly and convicted him for culpable homicide not amounting to murder and sentenced him for ten years imprisonment. The apex court in appeal faulted the high court conviction on two grounds. Firstly, the incident which resulted in causing death was aftermath of the fight. The sudden fight upon a quarrel had been doused by the intervention of the villagers. So the benefit of exception fourthly does not arise. Even otherwise the court observed that the high court failed to appreciate the multiple injuries that were caused. What the apex court was perhaps alluding to was that the accused must have not acted in a "cruel and unusal manner" to get the benefit of the exception. According to the court, the use of *pakhadiyat* with such force which resulted in 34 stitches and multiple other injuries cannot qualify him to get the benefit of exception. Hence keeping all this in perspective the apex court upheld the murder conviction of the trial court. . Similarly

11 (2022) 3 SCC 184.

12 *Id*.,para 5.

13 (2022) 4 SCC 227.

where a son caused the death of his father by giving repeated blows as a result of sudden fight resulting in eleven injuries the court acknowledged that sympathy for the son in such brutal attack would be misplaced. Since the son acted in a cruel manner exception fourthly was not allowed and conviction under section 302 IPC was upheld. The court, however, ruled that since the accused had undergone 12 years of sentence and on completion of the stipulated sentence remission policy may be invoked.[14] The surveyor is of the view that courts somewhat normalize male violence – this was seen *Ravi'*s case[15] and when woman is the perpetrator and is the daughter the courts are quite scathing in their observations.[16]

In contrast in *Singh* v. *State of Punjab*[17] the court held that "intention plays a vital part in criminal jurisprudence… Intention is pivotal to decide whether the accused has committed culpable homicide amounting to murder or culpable homicide not amounting to murder. Along with intention, knowledge and the degree of crime, *i.e*. how the deceased was killed, plays an important role in deciding."[18] The apex court convicted the accused for culpable homicide not amounting to murder on the reasoning that the accused struck a single blow with the leg of the cot. The court presumed that he may have wanted to punish his uncle for the reprimand he received the previous day. To clearly distinguish between murder and culpable homicide not amounting to murder is quite tricky as in both death ensues. However, the degree of intention and knowledge varies in both the crime situations and cases must be decided accordingly.[19]

In a case where a girl child died after a brutal rape attracting 376 IPC and POCSO provisions, one of the argument was that the case falls under section 304 IPC as the killing was not intentional. The court held as follows:[20]

> In the case on hand both the trial court and the High Court, had analysed evidence on record and found that the appellant had pressed the neck of the victim so hard unmindful of the fact that she was aged only 8 years and caused internal haemorrhage. The cause of death was asphyxia due to throttling. The nature of the injuries found on the neck of the deceased would reveal the pressure exerted by the appellant on the neck. … If the said act was subsequent to commission of rape in the diabolic and gruesome manner revealed from the grave injuries sustained on her private parts, causing death alone can be inferred from the circumstances. If the act of constricting the neck with such force resulting in the stated injuries preceded

14 *Cherturam* v. *State of Chhatisgarh* (2022) 9 SCC 571.

15 *Ravi* v. *State of Karnataka*(2015) 2SCC 638.See Jyoti Dogra Sood "Criminal Law" *L Annual Survey of Indian Law* 419-421(2014).

16 *Shabnam* v. *State of U.P*. (2015) 6SCC 632.

17 2022 SCC online SC 1443.

18 *Id*., para 15.

19 See *Ajmal* v. *State of Kerala* (2022) 9 SCC 766.

20 *Veerendra* v. *State of M.P.* (2022) 8 SCC 668 at 706, para 96.

> the offence of rape, then, the manner by which she was ravished should be taken only as an act done knowingly that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. Thus, viewing in any angle the homicidal death would fall either under Clause Firstly or Clause Fourthly of Section 300IPC.

Given the highly contentious reasoning in *Govindaswamy*[21] this judgment is a welcome addition to the jurisprudence on section 300 IPC.

Burden of Proof

A woman was found murdered in the house and her jewelry was missing. Accused persons were arrested and each one of them confessed to the crime in a detailed confession recorded on a DVD. Their confession also led to the recovery of the weapon used for dacoity and they were punished under section 396 IPC by the trial court. The trial court took into account *inter alia* the voluntary statements and the fact that the accused were involved in multiple other cases and imposed death sentence on them. The high court sentenced them under section 394 read with section 34 IPC and sentenced them to undergo life imprisonment. The apex court in appeal dealt with the issues in detail and made some very pertinent observations. The prosecution case heavily relied on the confession statements. The court made it clear that section 27 Evidence Act makes an exception for recovery evidence, otherwise confession in custody before a police officer is not admissible in court of law.[22] The court factored in that accused were apprehended 15 months after the offence and the weapon discovered as a result of confession still had blood stains and the chemical examination could not link it to the deceased. The apex court also cautioned that merely by putting up a chart giving description of offences etc. cannot be taken at the time of conviction. Furthermore, the ornaments recovered were of a generic nature and so was not of much help. Taking all this into consideration the apex court rightly pointed out that the circumstances put forth by the prosecution do not "lead to a consistent chain leading to a consistent chain leading to a hypothesis sought to be proved by the prosecution and the appellant were given benefit of doubt and acquitted.[23]

In a double murder case the witness had turned hostile and the accused was acquitted by the high court. On reappreciation of evidence it was found by the apex court that the high court had not engaged in a detailed discussion on the CFSL report which matched the blood stains on a *loi* worn by the accused as that of the accused and the deceased. The accused could not explain the injury on his finger and all the evidences pointed to his guilt. The apex court held the high court

21 *Govindaswamy* v. *State of Kerala* (2016) 16 SCC 295.

22 Quoted is the judgment of *Pulukuri Kotayya* v. *King Emperor*, AIR 1947 PC 67 in which the words "with which I stabbed 'A'" were inadmissible since they did not relate to the discovery of knife in the house of the informant.

23 *Venkatesh* v. *State of Karnataka,* 2022 SCC Online SC 765 para 40.

acquittal to be "perverse" and restored trial court conviction under S. 302 IPC in *Malti Sahu* v. *Rahul*.[24]

Hostile witnesses

In a case of election dispute two persons were done to death. There was both oral and documentary evidence against the accused persons. But as it happens in protracted trials the witnesses turned hostile. In a detailed judgment in *Rajesh Yadav* v. *State of U.P.*[25] the court held thus:[26]

> What is important for the court is the conclusion on the basis of existence of a fact by analysing the matters before it on the degree of probability. The entire enactment is meant to facilitate the court to come to an appropriate conclusion in proving a fact. There are two methods by which the court is expected to come to such a decision. The court can come to a conclusion on the existence of a fact by merely considering the matters before it, in forming an opinion that it does exist. This belief of the court is based upon the assessment of the matters before it. Alternatively, the court can consider the said existence as probable from the perspective of a prudent man who might act on the supposition that it exists. The question as to the choice of the options is best left to the court to decide. The said decision might impinge upon the quality of the matters before it.

The court convicting the accused also expressed its anguish on the tendency of trial court "adjourning the cross examination of the private witnesses… without any rhyme or reason. Long adjournments are being given after the completion of the chief-examination which only helps the defence to win over them at times, with passage of time".[27] The court directed that this judgment be circulated to all trial courts so that trial courts take up the examination of the private witnesses first, before that of the official witnesses.

It is axiomatic to mention that "too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny."[28] Given the dismal state of investigation and laxity on the part of the prosecution the burden of justice administration falls heavily on the judiciary.

Discovery evidence

In a case of murder of a woman and four daughters, the husband was the accused on the basis of discovery of weapon of offence and blood stained clothes and extra judicial confession as well as motive for the crime. The case was based

24 (2022) 10 SCC 226.
25 (2022) 12 SCC 280.
26 *Id.*at 211, para 17.
27 *Id.*, para 43.
28 *Shahaja* v. *State of Maharashtra* 2022 SCC Online SC 883.

on circumstantial evidence. The court iterated that mere discovery cannot be interpreted to be traced to a person who discovered the weapon. After a meticulous examination of the evidence the court in *Ramanand* v. *State of U.P.*[29] acquitted the accused and again underlined the importance of effective investigation and efficient legal aid in the following words:[30]

> Without any hesitation and with disappointment, we state that the case on hand is one of most perfunctory investigation. It appears that the accused herein was provided with a legal aid. He might not have been able to afford a good and experienced trial side lawyer to defend himself. We have noticed that the cross-examination of each and every witness is below average. Questions, which the defence counsel was not supposed to put to the prosecution witnesses were put without realising or understanding the legal implications of the answers to such questions, more particularly, when they were not necessary. The defence counsel remained oblivious of the position of law that suggestions made to the witnesses by the defence the answers to those are binding to the accused.

In a similar view the court in *Subramanya* v. *State of Karnataka*[31] acquitted the accused as circumstances leading to the making of extra judicial confession, and discovery of weapon etc. were not convincingly established.

V OFFENCES AGAINST WOMEN

Dowry death

The apex court in *Devender Singh* v. *State of Uttarakhand,*[32] flagged a very important issue that the trial court acquitted the accused as it was "appreciating the evidence from the prism of assessing the charge under section 302 IPC, when the evidence on record ought to have been analysed and appreciated keeping in mind the requirements of sections 304-B and 498-A IPC and the ingredients thereof."[33] One must be alive to the fact that proving murder under 302 IPC was proving to be impossibility in dowry related homicide in India. As such a provision was added as section 304-B for dowry related deaths which provided for statutory presumptions once the foundational facts stood proved.

It is indeed disturbing to note that in spite of judgments to the contrary the courts (in this case the high court) continue to interpret dowry demands in a pedantic manner. A girl died by burns when she was being pestered to get money for construction of house. The trial court convicted the accused husband under section 304-B IPC but the high court overturned the conviction and upheld conviction only under section 498-A IPC. The apex court chastising the verdict of the high court held that the "courts must be sensitive to the social melieu from

29 2022 SCC Online SC 1396.

30 *Id*., para118.

31 2022 SCC Online SC 1400.

32 (2022) 13 SCC 82.

33 *Id.* at 91, para 23.

which the parties hail."[34] And after a detailed discussion on foundational facts, conviction under sections 498-A and 304-B was restored by the apex court.

Wife's death

In case a victim dies an unnatural death and the post mortem clearly reveals homicidal deaths the husband with whom she was living will have to answer some questions which obviously would be within the knowledge of the husband. The chain of circumstances becomes complete when the accused husband is not able to discharge the burden under section 106 of the Evidence Act,1872.[35]

Rape

Compromise or compounding or quashing is not allowed in serious offences. This is because such crimes are not against the victim alone but are seen as offences against the State. A woman filed a FIR for rape case and subsequently a counter FIR was filed against the woman alleging extortion. The matter was amicably settled between the parties and petition was filed for quashing the proceeding under section 482 CrPC. The court in *Kapil Gupta* v. *State (NCT of Delhi)*,[36] quashed the proceeding with a caution that ordinarily the courts must shy away from quashing but given the facts that "she feels that going through trial in one case, where she is a complainant and in the other case, wherein she is the accused would rob the prime of her youth."[37] Though the case was at a nascent stage and charge sheets were filed in both cases, the charges were yet to be framed. It is submitted that this may be not a very healthy precedent!

Kidnapping

Kidnapping provisions are invoked by parents in love-romance cases. The court underlined the ingredients of kidnapping and underlined the fact that kidnapping necessarily involves 'enticing or taking away any minor under eighteen years if a female'. The girl was neither taken away or abducted but left her parental house on her own volition was the finding of the court in *Mafat Lal* v. *State of Rajasthan*[38] It is submitted that the court took this stand perhaps due to the fact that the couple was now married and had a son aged eight otherwise the approach of the court has not been so progressive as was seen in *Anversinh* v. *State of Gujarat*.[39]

Dying declaration

Economically dependent women in most Indian households continue to be harassed. A woman died of burns and two dying declarations were given. In the first one given to the investigating officer she said that her father-in-law and mother-in-law were demanding money and when she refused the father-in-law

34 *State of M.P.* v. *Jogendra* (2022) 5 SCC 401 para 14.
35 *Mohd. Anwar Hussain* v. *State of Assam*, 2022 SCC Online SC 1399.
36 2022 15 SCC 44
37 *Id*., para 14.
38 (2022) 6 SCC 589.
39 (2021) 3 SCC 12.

assaulted her and she committed suicide by pouring kerosene over herself. The second dying declaration was before the SDM wherein she deposed that on her refusal to give money the father-in-law poured kerosene over her and set her on fire. The medical evidence also revealed that burns were of such nature that someone else rather than the deceased must have poured kerosene! Strangely the high court disbelieved both the dying declarations even the one which was given to the SDM and acquitted the accused overturning the trial court verdict. It was held on appeal that "there runs a common thread in the statements of the deceased that she was attacked by the accused respondent herein"[40]and hence convicted the accused under section 302 read with 34 IPC.[41] (conclusion – even causation).

In another case of woman dying in the matrimonial home, the first dying declaration was before a judicial magistrate; wherein the woman deposed that she had fever and many medicines were lying and she had a medicine of a given colour thereby completely exonerating her in-laws and husband. Her parents arrived and on the third day and there was another dying declaration before another judicial magistrate, on a request from her parents, wherein she deposed that her husband had demanded six lacs and her husband and that her in-laws administered poison to her. The court considered the first dying declaration to be trustworthy and reliable after going through the facts and circumstances of the case.[42] What is important in case of a dying declaration is that it must be reliable since it cannot be put to a test of cross examination. The courts once satisfied that it is trustworthy then law does not insist on further corroborators. And so a dying declaration before a local person was held reliable given the facts and circumstances of the case in *Kamal Khudal* v. *State of Assam*,[43] wherein a man came out with burns injuries from a liquor factory and informed that the locals that the accused persons had poured hot *lalli* (raw material used for preparing local liquor) on him and he left. His dead body was later found. The appellants guilt was upheld by the apex court.[44]

Where there are more than one dying declaration and they are contradictory the court has to be circumspect and cautious as to which of the dying declaration is to be accepted. In *Uttam* v. *State of Maharashtra*[45] the court was mindful of the fact "that all four dying declarations, two in writing and the other two oral, were based on the statements given by the deceased at different times on the same day i.e. 27.3.1995, when she had suffered 93% injuries and there are serious doubts about her being mentally and physically fit to give her statement"[46] Hence conviction of the appellant was set aside as there was no stellar evidence to pin his guilt.

40 *State of U.P.* v. *Veerpal* (2022) 4 SCC 741, para 20.

41 See also *Rajaram* v. *State of M.P.*, 2022 SCC Online SC 1733.

42 *Makhan Singh* v. *State of Haryana*, 2022 SCC Online SC 1019.

43 2022 SCC Online SC 882.

44 See also *Munuwa* v. *State of U.P.* (2023) 1 SCC 714; *Sultan* v. *State of Karnataka,* 2022 SCC Online SC1000. Also see *Gorabai* v. *State of M.P.,* 2022 SCC Online SC 917.

45 (2022) 8 SCC 576.

A woman and the daughter were in the hospital after consuming poison. A dying declaration before a magistrate mentioned that the woman consumed poison due to stomach pain and also gave poison to the child. The child died but the woman survived and so the dying declaration subsequently got classified as statement under section 164 Cr.PC which she later denied. Since no corroboration of the disputed confession was brought forward her conviction by the trial court and high court was set aside in *Vijaya* v. *State.*[47]

VI INCHOATE OFFENCES

Abetment to Suicide

In a case under sections 498(a) and 306 IPC the court in *Mariono Anto Bruno* v. *State,*[48] iterated that "each suicide is a personal tragedy that prematurely takes the life of an individual and has a continuing ripple effect, dramatically affecting the lives of families, friends and communities. However, a court of law while adjudicating is not to be guided by emotions of sentiments but the dictum is required to be based on analysis of facts and evidence on record."[49] It is clear that section 306 IPC fault element requires a very active incitement, goading and encouragement to the other to commit suicide. Also a 306 IPC offence which is a serious offence cannot be compromised or compounded! Hence section 482 CrPC cannot be invoked to quash criminal proceedings on the basis of a compromise. It is a settled position of law that serious crimes which are not private in nature cannot be compromised as they are crimes against society and not merely against individual. This is the fiction of law which is at the heart of criminal law. The victim or the heirs are just complainants and then the matter is between the state and the accused.[50]

VII GENERAL DEFENCES

In *Mahadev* v. *Border Security Force*[51] the high court had convicted the accused who was serving in BSF for a cold blooded murder. The basis for conviction was that the post mortem report revealed that the two bullets which caused dealt were shot by a person in an elevated position as the direction of the bullets were from above the chest going downwards and backward. However, on appeal the court was in favour of the plea of right of private defense pleaded by the appellant that he was surrounded by armed intruders and he shot in self defense. What weighed in his favour was that smuggling activity was rampant in that area and the deceased was in the list of smugglers maintained by the BSF. The court held him guilty under section 304 by giving him the benefit of exception secondly of section 300. This remains a very contentions issue as the forces trained at target shooting end up killing people instead of incapacitating them!

46 *Id.*, para 38.
47 2022 SCC Online SC 1270.
48 2022 SCC Online SC 1387.
49 *Id.*, para 38.
50 *Daxaben* v.*State of Gujarat*, 2022 SCC Online SC 936 paras 38, 39.
51 (2022) 8 SCC 502.

VIII JOINT CRIMINAL ENTERPRISE

Constructive liability was sought to be explained by an analogy of a football match in *Jasdeep Singh* v. *State of Punjab*:[52]

It is a team effort akin to a game of football involving several positions manned by many such as a defender mid fielder, sticker and a keeper. A striker may hit the target, while a keeper may stop or attack. The consequence of the match, either a win or a loss, is borne by all the players, though they may have their distinct roles. A goal scored or saved may be the final act, but the result is what matters. As against the specific individuals who had impacted more, the result is shored between the players. The same logic is the foundation of section 34 IPC which creates should liability on those who shared the common intention to commit the crime.

The judgment focused on the expression "in furtherance of" in deciding constructive liability under section 34 IPC:[53]

> The underlying basic assumption or foundation in criminal law is the principle of personal culpability. A person is criminally responsible for act or transactions in which he is personally engaged or in some other way had participated. However, there are various modes and capacities in which a person can participate in a crime. He can instigate, be a facilitator or otherwise aid execution of a crime. Section 34IPC incorporates the principle of shared intent, that is, common design between the two perpetrators, which makes the second or other participants also an equal or joint perpetrator as the main or principal perpetrator [We have used the said terms for want of a better phrase. Section 34IPC does not postulate such distinction.]

Further once the common intention stands proved it is immaterial whether the accused sharing the common intention used any weapon or not or for that matter caused any injury to the victim.[54]

In *Ashok Kumar Chandel* v. *State of U.P.,*[55] the incident took place at two places. The persons setting in a Jonga were fired on by the accused party and when relatives of the injured party reached the spot and started driving towards the hospital with the injured and when they were about 50-75 metres from the shooting site, the accused party had already reached there and one of them exhorted that "no one from Shukla family should escape alive"[56] and again there was indiscriminate firing resulting in death and injuries. The trial court acquitted all accused while the high court reversed the acquittal. In appeal, the apex court

52 (2022) 2 SCC 545,para 22.

53 *Krishnamurthy* v. *State of Karnataka* (2022) 7 SCC 521at 529, para 12.

54 *State of M.P*. v. *Ramji Lal Sharma* (2022) 14 SCC 619, para 11. See also *Rishiraj* v. *State of Chhattisgarh* 2022 SCC Online SC 661.

55 2022 SCC Online SC 1525

56 *Id.*, para 64.

meticulously dealt with each aspect of motive, investigation, unlawful assembly etc. Regarding liability under unlawful assembly the court held thus:[57]

> The expression 'in prosecution of common object' as appearing in Section 149 has to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object which may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly."

IX SENTENCING

Proportionality in sentencing is one of the hallmarks of criminal justice system. Grave offences like murder carry the maximum penalty that is life imprisonment and in rarest of rare case (for reasons to be recorded) it may be death penalty. Hence when the high court upheld the conviction under section 302 IPC and gave a punishment as period already undergone, the same was quashed by the apex court in *State of M.P.* v. *Nandu*.[58] The court reiterated the provision of section 302 IPC which mandates a punishment of imprisonment for life. The court clarified that "any punishment less than the imprisonment for life for the offence punishable under section 302 IPC would be contrary to section 302 IPC."[59]

It is not the case that the courts are following a retributive approach but courts as upholders of justice aim for a just deserts approach. Keeping up with approach the apex court in *A.G.Perarivalan* v. *State of T.N.*[60] engaged with a matter where the apex court had commuted death imposed on the applicant to life imprisonment. The mercy petition in the case had been referred to the President by the Governor of Tamil Nadu. However, factoring in that the convict had undergone 32 years behind bars the apex court directed "the applicant is directed to be released on bail, subject to the satisfaction of the designated Special TADA Court, Chennai. In addition, the applicant shall report to the Jolarpet Police Station, the 1st week of every month. He shall not leave without seeking permission of the court."[61]

57 *Id.*, *paras* 164,165 quoting *Bhupendra Singh* v. *State of U.P.* (2009) 12 SCC 447 and *Saddik Alias Lalo Gulam Hussein Shaikh* v. *State of Gujarat* (2016) 10 SCC 663.

58 (2002) 9 SCC 184.

59 *Id.*, para 7.

60 2022 SCC Online SC 755.

61 *Id.*, para 10.

In another case the court examined the case under a policy rolled out by the U.P. Government titled as "standing Policy regarding premature release of prisoners sentenced to life imprisonment on the occasion of every republic Day (26th January)." The apex court in *Rashidul Jafar* v. *State of U.*P. held as follows:[62]

> All cases for premature release of convicts undergoing imprisonment for life in the present batch of cases shall be considered in terms of the policy dated 1 August 2018, as amended, subject to the observations which are contained herein. The restriction that a life convict is not eligible for premature release until attaining the age of sixty years, which was introduced by the policy of 28 July 2021, stands deleted by the amendment dated 27 May 2022. Hence, no case for premature release shall be rejected on that ground;

When the court's sensitivity regarding old age was invoked in 498 A IPC case that the appellant was 80 years of age and hence leniency should be shown and period undergone should be enough the court reminded the counsel that:[63]

> Being a lady, the appellant, who was the mother-in-law, ought to have been more sensitive vis-à-vis her daughter-in-law. When an offence has been committed by a woman by meting out cruelty to another woman i.e. the daughter-in-law, it becomes a more serious offence. If a lady i.e. the mother-in-law herein does not protect another lady, the other lady i.e. daughter-in-law would become vulnerable.

The court reduced the sentence to 3 months rigorous imprisonment with fine.

The judicial discretion in sentencing has to be a judicious one. In case of section 307 IPC the punishment prescribed is "imprisonment of either description for a term which may extend to ten years." So a judicious discretion would be exercised when punishment is imposed proportionately and factoring in the nature and gravity of the offence committed and other factors that need to be considered depending on the peculiarity of situation as no two cases in criminal law are alike.[64] The facr that long period had elapsed from the time of the incident is no reason to circumvent the above mentioned criteria of punishment.[65] More so, victim rights will have to be seriously taken into consideration. If the offender is let off with light punishment than is due, then the victim and in turn the society will lose faith in criminal justice administration.[66] Benjamin Cardozo's words are very relevant when he observed that "justice though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[67]

62 2022 SCC Online SC 1201, para 18(1).

63 *Meera* v. *State* (2022) 3 SCC 93.

64 *State of Rajasthan* v. *Banwari Lal* (2022) 1 SCC 166.

65 Also see *Sahebrao Arjun* v. *Raosaheb*, 2022 SCC Online SCS 1160.

66 *Jaswinder Singh* v. *Navjot Singh Sidhu* (2022) 7 SCC 628.

67 *Synder* v. *Commonwealth of Massachusetts*, 1934 SC Online US SC 21.

Post *Shraddananda*[68] the courts had started giving fixed terms for 25 years, 30 years etc. without remission in cases where life imprisonment was given and the surveyor had questioned that how do the judges reach this magical figure! In one case where the judges were confronted with extreme brutality exhibited in killing the option was either to give death penalty or a fixed term! The courts while giving a fixed term of 30 years give an explanation which reflects that the 30 years period was given after due deliberation. The court observed that "even at that age (after serving 30 years) the convicts would be in their 50s and we hope and pray that they would have learned their lesson and joined the society as responsible members at that stage."[69] Sanjay Kishan Kaul J in this one para of the judgment has given us an amalgam of punitive and reformatory aspects of penal justice.

Strangely in *State of Rajasthan* v. *Komal Lodha,* the apex court remitted a case to high court to consider alternate punishments under section 302 IPC. The high court had observed that the "accused is a young person and is not a previous convict and that there is possibility of reformation of the accused, the death penalty has been converted into life sentence."[70] The apex court faulted this on the ground that aggravating and or mitigating circumstances had to be pleaded! Given the post 1973 position where death penalty is to be imposed in rarest of rare category and special reasons would have to be given for imposing death penalty this order of the apex court defies logic.

In a case of brutal rape which resulted in death of a four year old girl the apex court shied away from imposing the punishment under section 376-A IPC which entails punishment for the remainder of the appellant's natural life. The court in *Mohd. Firoz* v. *State of M.P.* pontificated as follows:[71]

> One of the basic principles of restorative justice as developed by this Court over the years, also is to give an opportunity to the offender to repair the damage caused, and to become a socially useful individual, when he is released from the jail. The maximum punishment prescribed may not always be the determinative factor for repairing the crippled psyche of the offender. Hence, while balancing the scales of retributive justice and restorative justice, we deem it appropriate to impose upon the appellant-accused, the sentence of imprisonment for a period of twenty years instead of imprisonment for the remainder of his natural life for the offence under Section 376-AIPC. The conviction and sentence recorded by the courts below for the other offences under IPC and the POCSO Act are affirmed. It is needless to say that all the punishments imposed shall run concurrently.

68 *Swamy Shraddananda*(2) v. *State of Karnataka* (2008) 13 SCC 767.

69 *State of Haryana* v. *Anand Kindo*, 2022 SCC Online SC 1214, para 12.

70 2022 SCC Online SC 1832 para 4.

71 (2022) 7 SCC 443, para 61.

Taking a humanistic approach the court in a case involving convict in Rajiv Gandhi assassination emphasized that it is the executive power of the state which extends to cases under section 302 IPC. The State Cabinet had recommended remission and no decision was taken for one and half years. The court took into account the fact that the convict was aged only 19 at the time of the offence and had served 23 years imprisonment, and during his imprisonment completed his studies and obtained various academic degrees. His conduct during paroles granted to him was also satisfactory. And keeping all this in perspective the apex court exercising power under article 142 ordered that the appellant who was on bail, be set at liberty forthwith."[72] In a case where premature release was denied the order of the state government contained an observation that release may cause resentment to the victim party. It was held by the apex court that this would be the case in all premature releases. However, premature release is based on the theory of reformation, hence each case has to be decided on its own merits.[73]

The case reading of *Manoj Pratap Singh* v. *State of Rajasthan*[74] serves as a text book explanation of death penalty jurisprudence. The case involved a brutal rape and murder of a mentally challenged minor girl. The case was based on circumstantial evidence. The apex court in appeal minutely engaged with the evidence and the jurisprudence evolved over a period of time regarding death penalty including *Panchsheel* principles in case of circumstantial evidence.[75] The court after weighing the aggravating and mitigating circumstances: aggravating that the crime was heinous and brutal, the child involved was of limited intelligence and the mitigating factor was that the appellant was a young man having a girl child of 8 years and old parents to look after. But what worked against him was his criminal background of stealing and damaging property. If that could still be condoned the accused indulged in unruly behavior in the prison and was also accused of murder of a co-inmate with three other inmates (appeal pending in the case). The court was constrained to observe that "there is no possibility that he would not relapse again in this crime."[76] And death penalty was upheld.

What was heartening in case of *Manoj* was that pre- sentence hearing was done and sentence was awarded 3 days after the conviction. Pre-sentence hearing is a very important facet where is in most cases given a shortshrift. The apex court did try to frame guidelines for potential mitigating circumstances under a very able bench of U.U.Lalit, Ravindra Bhat and Sudhanshu Dhulia JJ and underlined the fact that there must be a real and meaningful opportunity, as opposed to a mere formality on the issue of sentence. The court exhorted the Chief Justice to constitute

72 *A.G.Perarivalar* v. *State of T.N.* (2023) 8 SCC 257 para 386.

73 *Sharafat Ali* v. *State of U.P*. (2022) 13 SCC 186.

74 (2022) 9 SCC 81.

75 *Sharad Birdichand Sarda* v. *State of Maharashtra* (1984) 4 SCC 116.

76 *Supra* note 67. Para 122.3. Also see, *Bhagwani* v. *State of M.P.* (2022) 13 SCC 365 where death penalty was commuted to life imprisonment for a period of 30 years without remission.

a larger bench for this issue.[77] In yet another case of rape and murder of a minor girl *inter alia* the death penalty was in question the court factoring in the probability of reformation given the satisfactory jail conduct commuted death penalty to life imprisonment for minimum period of 30 years.[78]

In case of penetrative sexual assault the age of the accused which was 75 at the time of sentencing (65 at the time of commission of offence) was invoked as a mitigating circumstance and leniency was prayed for in sentencing. The court in *Nawabuddin* v. *State of Uttarakhand*[79] invoked the Convention on Rights of Child and Statement of objects and Reasons of POCSO Act 2012 and held as follows:[80]

> Any act of sexual assault or sexual harassment to the children should be viewed very seriously and all such offences of sexual assault, sexual harassment on the children have to be dealt with in a stringent manner and no leniency should be shown to a person who has committed the offence under the Pocso Act. By awarding a suitable punishment commensurate with the act of sexual assault, sexual harassment, a message must be conveyed to the society at large that, if anybody commits any offence under the Pocso Act of sexual assault, sexual harassment or use of children for pornographic purposes they shall be punished suitably and no leniency shall be shown to them.

The accused was sentenced to 15 years rigorous imprisonment. However, age became a relevant factor in *Ratan Mondal* v. *State of W.B.*[81] where a cryptic order mentioned thus: "Taking note of the fact that the first petitioner is a septuagenarian and the second petitioner is in a sexagenarian and the further fact that they have already undergone one year incarceration ——— exemption from surrendering is allowed." It is important to note that conviction was under section 304 part I of IPC and were sentenced to seven years rigorous imprisonment by the trial court which was confirmed by high court.

Manoj v. *State of M.P.*[82] is a compendium of best practices in criminal investigation and criminal justice administration. It also serves as a guideline for sentencing. Taking up individual cases even when the convicts got into altercations with fellow inmates, the court factored in that after counseling the behavior had improved! The bench of Ravindra Bhat J commuted death penalty to life imprisonment for a minimum of 25 years. A brilliant judgment from the top court of the country and should become a trend setter if country really is serious about reformation.

77 *Framing guidelines regarding potential mitigating circumstances to be considered while imposing death sentences, In re* 2022 SCC Online SC 1245).

78 *Pappu* v. *State of U.P.* (2022) 10 SCC 321.

79 (2022) 5 SCC 419.

80 *Id.* at 430.

81 2022 SCC Online SC 1260.

82 (2023) 2 SCC 353.

A woman was convicted under the draconian NDPS Act and was sentenced to 15 years imprisonment and further three years in case of default of fine. In appeal, the apex court factored in the seriousness of offences involving drugs but also mentioned that this is a case involving a poor illiterate woman from a rural background "*completely unaware to the law and unaware what was happening surrounding her*."[83] It is astonishing that having made this stunning insight into the case the court reduces the punishment to 12 years and in default of fine further imprisonment for six months! The mandatory minimum for the offence is ten years. So what prompted them to reduce it to 12 is beyond comprehension.

X MISCELLANEOUS

The apex court deals with multitude of cases clogging the justice delivery system and in the survey year its jurisdiction was invoked to consider a very important yet underutilized legislation - Probation of Offenders Act 1958 in *Som Dutt* v. *State of H.P*.[84] This case is a telling commentary on the need for effective induction training and continuous training of judges in the National Judicial Academy. The judges must be sensitized towards a benevolent justice administration rather than a punitive one. This would also result in easing the pressure on the apex court.

Investigation

Shoddy investigation and lackadaisical attitude have been the bane of our criminal justice administration. Seizure memos not signed; station diary entry not being done properly; eye witnesses not being examined have been recorded in cases after cases leading to acquittals and the guilty party going scot free.[85] Examples galore in case after case each year. In a cheating case there was no effort to segregate the tickets seized by the inspection team from the conductors of different buses who were allegedly duping the government through sale of fake tickets. The tickets were produced before the court in unsealed cover and the witnesses who were produced were neither the witnesses of recovery nor they had personal knowledge of said recovery of tickets.[86] It is also strange that disclosures by the accused are supposedly made on the date of arrest, but recovery statements are given at different stages of investigation.[87] And the recoveries are not mentioned in the depositions of the recovery witnesses.[88] DNA evidence was sent after 20 days to forensic science laboratory and DNA expert was not even cross examined.[89] In a rape trial where the victim - a six year old girl -the *salwar* with semen stains was sent to the FSL but there was no report from FSL.[90] Shockingly

83 *Budhiyarin Bai* v. *State of Chhatisgarh*, 2022 SCC Online SC 992, para 18 emphasis added).

84 (2022) 6 SCC 722.

85 *Khema* v. *State of U.P.* (2023) 10 SCC 451.

86 *Jarnail Singh* v. *State of Punjab* (2022) 10 SCC 451.

87 *Manoj* v. *State of M.P.* (2023) 2 SCC 353.

88 *Id.*, para 22.

89 *Id.*, para 37. Also see *Rajbir Singh* v. *State of Punjab,* 2022 SCC Online SC 1090.

90 *Chotkau* v. *State of U.P.* (2023) 6 SCC 42.

the prosecution did not bother to subject the accused to examination by a medical practitioner in spite of clear direction to the effect in Cr.P.C.[91]

It is also disturbing that many a times the media starts playing an adjudicatory role. Linking of the accused to the crime is an exercise which has to be done by the court of law and not by TV channels by playing DVD recorded by the investigation agency. All this only hampers justice administration.[92]

Judicial discipline

Judicial discipline is a hallmark of justice dispensation. Pronouncing the operative part of the judgment acquitting the accused and subsequently passing a reasoned judgment after five months was taken very seriously by the apex court. And the case was remanded back to high court to decide afresh within a period of six months in *Indrajeet Yadav* v. *Santosh Singh.*[93]

Review petition

Death penalty is the highest punishment and the courts have to be circumspect else it results in travesty of justice. And hence in *Mohd. Arif* case[94] decided by a constitution bench it was held that death penalty review would be by open hearing and also ordered thus:[95]

> Henceforth in all cases where death sentence has been awarded by the High Court in appeals pending before the Supreme Court, a bench of three Hon'ble Judges will hear the same…. Further, we agree… that a review would be heard by the same bench.

However, Arif's dictum was to be applicable for subsequent review petitions and in 2016 the court in *Mohd. Arif* v. *Supreme Court of India*[96] revisited this position and held thus:[97]

> In the circumstances therefore and especially in view of the fact that the petitioner is perhaps the only person that will suffer the denial of the right to an open hearing, we are inclined to modify the judgment on review and direct that the petitioner shall also be entitled to seek reopening of the dismissal of review petitions.

In view of this judgment, an open hearing was done and the challenge was on admissibility of evidence in the absence of appropriate certificate under section 65-B of the Evidence Act 1872, ill treatment meted to the convict, recovery of ammunition that could not be associated with the disclosure statement and non consideration of reformation in sentencing . The apex court in *Mohd. Arif* v. *State*

91 S. 53 a (2) Cr.PC.

92 *Munikrishna* v. *State,* 2022 SCC Online SC 1449.

93 2022 SCC Online SC 461.

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

95 *Id*., para 39.

96 (2019) 9 SCC 404.

97 *Id*., para 9.

(NCT of Delhi)[98] dealt with these issues in open court and did not find any merit in the assertion. Nonetheless the case is important as it gave equal opportunity to the person who filed a review petition.

Offences committed outside India

Section 188 IPC mandates that previous sanction of the Central Government is required in cases when an offence is committed outside India by its citizen. However, if part of the offence is committed on the India soil then the Indian courts get trial jurisdiction without the requirement of sanction.[99]

Perjury

The agony of tribal people gets reflected in *Himanshu Kumar* v. *State of Chhatisgarh*.[100] The tribals are invariably caught up between the armed forces on one hand and the Naxalites on the other. The writ petition relates to massacre in three villages of Dantewada in Chhatisgarh imn the year 2009and the allegation was that the armed forces were invoved in this brutal massacre.The allegations were strogly countered by the State. The court came down heavily on the petitioner and cost of Rs. 5 lacs was imposed on him. Regarding perjury the court observed thus:[101]

> [T]the essential ingredient of an offence under Section 211 IPC is to institute or cause, to be instituted any criminal proceeding against a person with intent to cause him injury or with similar intent to falsely charge any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge. Instituting or causing to institute false criminal proceedings assume false charge but false charge may be preferred even when no criminal proceedings result. … The false charge must, therefore, be made initially to a person in authority or to someone who is in a position to get the offender punished by appropriate proceedings. In other words, it must be' embodied either in a complaint or in a report of a cognizable offence to the police officer or to an officer having authority over the person against whom the allegations are made. The statement in order to constitute the "charges" should be made with the intention and object of setting criminal law in motion.

It is submitted that the state was right that so many years have passed but given the fact that the matter concerned a marginalized population one shudders to think what if the state was indeed complicit in this!

XI CONCLUSION

The survey highlights the failure of investigative agencies and prosecutorial lapses which end up in acquittals as the fault element and the physical element

98 2023 6 SCC 654.

99 *Sartaj Khan* v. *State of Uttarkhand* (2022) 13 SCC 136.

100 2022 SCC Online SC 884.

101 *Id*., para 94.

have to be conclusively proved before a court of law. The court made some very important strides as far as sentencing is concerned. The courts moved ahead of mere lip service to the reformation mantra but walked an extra mile in *Manoj*[102] to establish that in some cases counseling may be needed to reform behaviour. This becomes important as prisons are not ideal places for displaying good behavior because of the dismal state of affairs and hence prison behavior should not be the criteria for gauging person's potential of reform. This judgment can serve as a training manual for judges in individualized sentencing and should be included in induction and in service training modules.

102 (2023) 2 SCC 353.