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CRIMINAL LAW

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I INTRODUCTION

CRIME SITUATIONS are so very complex that any penal code, howsoever precise, cannot provide straight answers to the myriad situations that may arise in criminal law. And hence, the role of the courts in deciding and interpreting the law in a particular factual situation becomes very interesting. Though no doubt, precedents are to be followed, the amount of case law that is being generated as far as criminal law is concerned, sometimes becomes difficult to decide which cases can be relied upon. The survey of judicial pronouncement in criminal law, hence, becomes a fascinating experience. The present survey is a mapping of some important cases dealing with IPC crimes decided by the Supreme Court of India in the year 2014.

II OFFENCES AGAINST BODY

Culpable homicide

The provisions of the Indian Penal Code, 1860 relating to culpable homicide and murder are quite complex. The courts have been grappling with the issue whether a person becomes liable under section 325 IPC for causing grievous hurt or under section 304 IPC for culpable homicide not amounting to murder when the injury results in the death of the victim.

The court in *Sompal Singh* v. *State of U.P.*[1] found itself engaged in the applicability of the relevant section when death ensued after three days of the assault. The debate was whether the person was liable under section 325 IPC for causing grievous hurt or under section 304 for culpable homicide not amounting to murder when the injury resulted in the death of the victim. One must keep in mind that the culpable provisions in the IPC heavily lean towards a subjective liability, hence, it becomes very important to minutely sift through the facts of the case to impose liability. In the instant case, it was clear that there was an unlawful assembly of which the members were armed and attacked the deceased. No doubt,

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1 (2014) 7 SCC 316.

the particular injury caused by the appellant was not sufficient in the ordinary course of nature to cause death; but the intention could be read from the cumulative effect of the injuries as it would have caused death. Hence, the Supreme Court put its stamp of approval on section 304 part I IPC.

In contrast is the case *Vijay Singh* v. *State of M.P.*[2] wherein 11 people assaulted the deceased. Out of the 11, nine were acquitted and two were held guilty under section 302 and the same was confirmed by the high court. The apex court on perusal of evidence came to the conclusion that these two had given one blow each but the death was a result of multiple injuries (five to be precise) and altered the conviction to section 326 IPC.

Culpable homicide not amounting to murder and murder can be differentiated by the difference in the fault elements required for each. The fault element required for murder is of a high degree but culpable homicide not amounting to murder may be committed because either one of the exceptions to section 300 operates or there is a lower degree of fault than is required for murder.

In *Kusha Laxman Waghmare* v. *State of Maharashtra*,[3] the wife was beaten severely by the husband with a wooden bar which caused internal bleeding and her death. The court held that since the beating was with a wooden bar and there was no intention to cause death the conviction would be under 304 part II and not under section 302 IPC.

In *M.B. Suresh* v. *State of Karnataka*[4] gunshots were fired by the appellant and a person was injured and died on the way to the hospital. The gunshots were fired from a distance and the injury caused was not sufficient in the ordinary course of nature to cause death so the ingredients of section 300 were not satisfied. The medical evidence also proved that victim died as a result of shock so death did result from the *actus reus* of the accused. In result crimes like murder, causation is the issue and it is the liability of the defendant that has to be considered. The liability depends on proof that the defendant caused the result. If evidence proves he did not, he is not liable for the crime. The court, therefore, altered the conviction from section 302 to section 307 IPC.

In *Manjeet Singh* v. *State of H.P.*[5] where the accused fired from his carbine and the doctor's report stated that "death was due to haemorhagic shock as a result of laceration of lungs due to gunshot injury", the court held that "the evidence produced did not show any motive to cause death or intention to cause such bodily injuries as is likely to cause death" and that the incident occurred in the spur of moment, during the heat of exchange of words and hence held the accused guilty of culpable homicide not amounting to murder under section 304 IPC.[6] However

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2 (2014) 12 SCC 293.

3 (2014) 10 SCC 298. See B B Pande , "Limits on Objective Liability for Murder" 16 *JILI* 469-82 (1974).

4 (2014) 4 SCC 31.

5 (2014) 5 SCC 697.

6 The court did not specifically mention part I or part II.

it is submitted that firing of shots from a carbine is an act which is "so imminently dangerous that it would in all probability cause death" and the person who has used a carbine ought to have "known" the fact.

Consent

Exception 5 to section 300 gives a partial defense of consent and if proved, homicide would be charged as culpable homicide not amounting to murder. *Narendra* v. *State of Rajasthan*[7] is a saga of a young couple in love. They lived together for 10-15 days. Our society even in the 21st century is riddled with caste, *gotra* and other such banal considerations and for some Indians it is a sacrilege to fall in love within the same *gotra*. It is in this context and setting that the case needs to be analysed. The couple realized that the society will not accept their union and they decided to end their lives and the boy inflicted injuries with a sword on the girl and she died but before he could end his own life he was rescued. His case was a fit case for conviction under section 304 part I since there was an unequivocal intention to kill but could not be called a murder since there was an understanding and so consent between them. The trial court, however, convicted him under sections 302 and 309 IPC which was confirmed by the high court. These courts relied heavily on technicalities and asserted that there was no cogent proof which could unequivocally prove consent. It is submitted that in a country where honour killings are rampant due to same *gotra* relationship, the circumstances of the case does provide a sound basis for consent and the judiciary cannot just ignore the societal realities and very rightly the Supreme Court modified the conviction to section 304 part I and 309 IPC.

Sudden fight

To invoke exception 4, the culpable homicide must be committed without pre meditation in a sudden fight in the heat of passion upon sudden quarrel. In *State of M.P.* v. *Shivshankar*[8] there was an altercation and the accused went home and brought a licensed gun of his brother and shot the deceased on the stomach. The ingredients of exception 4 were not satisfied since the act was not done in heat of passion but was premeditated since there was an interval as he went home to fetch a gun and hence the apex court pronounced conviction under section 302 IPC.

K. Ravi Kumar v. *State of Karnataka*[9] relates to a gruesome murder of wife by burning. The appellant's father was sick and he wanted to go and see him accompanied by his wife. She refused to go saying that they will go the next day which led to heated exchange and the husband stabbed her with a knife and then poured kerosene and set her on fire. Exception 4 was pleaded. The ingredients of which are as follows: [10]

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7 (2014) 10 SCC 248.

8 (2014) 10 SCC 366. Also see *Nanak Ram* v. *State of Rajasthan* (2014) 12 SCC 297.

9 (2015) 2 SCC 638: 2014 SCC Online SC 950.

10 Emphasis added.

1. It is committed without premeditation in a sudden fight in the heat of passion about a sudden quarrel.

   and

2. Without the offender's having taken undue advantage or acted in *a cruel and unusual manner*.

By all standards, the act of the husband was cruel and unusual. But probably the patriarchal baggage did not allow the apex court to appreciate the gruesome act since wives in a patriarchal set up are to follow the husband's orders and if he commanded her to come she should obey. And when she didn't, he had the right to burn her to death! The court underplayed the "cruel and unusual" act of pouring kerosene and burning another human being by stating thus:[11] "True, it reached to its extreme inasmuch as the appellant in heated exchange of words lost his mental balance and poured kerosene on Padma setting her to burn." The court perhaps did not find it to be "cruel and unusual manner," and brought the case under exception 4 and altered the conviction from section 302 to section 304 part II IPC.

In *Murlidhar Shivram Patekar* v. *State of Maharashtra*[12] there was a homicide death. The appellants contended that the wife was raped by the deceased and in the morning when they were going for lodging a report a scuffle ensued. The deceased had a knife and the wife caught hold of the genitals of the deceased and the accused husband attacked him with the knife killing him. The medical evidence established that knife injuries were inflicted and were not accidental (as asserted by the appellants that he fell on the knife). The question was whether exception was applicable. In *Ravi's* case pouring of kerosene was not held to be cruel and unsual but in this case *Surinder Kumar*[13] was quoted to explain the ingredients of exception 4 and the requirement of "had not taken any undue advantage or acted in a cruel manner". It was explained that if "a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has *not acted cruelly*".[14] On these parameters the court brought the case under 304 part-II. But on this reasoning *Ravi's* case can be faulted. Furthermore, from the judgment it is not clear - whether the woman was raped? Was it really a sudden fight or were they aggressors? These points are not very clear from the discussion.[15] The judgment notes that "all the above witnesses saw the incident of scuffle is not disputed, however they entered the scene only after they heard the shout."

In *Bhagwan Tukaram Dange* v. *State of Maharashtra*[16] a son and a father were drunk and asked money from the lady of the house and on her refusal, the

11 *Supra* note 9 at 646.

12 (2015) 1 SCC 694.

13 *Surinder Kumar* v. *UT, Chandigarh* (1989) 2 SCC 217.

14 Emphasis added

15 There is a mention that as opposed to their claim that there was heavy rain so FIR could not be registered, the prosecution alleged that there was no rain.

16 (2014) 4 SCC 270.

man poured kerosene on his wife and the son lit the matchstick and she received 80% burns and died subsequently. The contention was that since the appellant was drunk, the case would fall under section 304 and exception 4 would be attracted as he did not intend to kill his wife. The court held him guilty under section 302 and reasoned that "Assuming that the accused was fully drunk, he was fully conscious of the fact that if kerosene is poured and a matchstick lit and put on the body, a person might die due to burns. A fully drunk person is also sometimes aware of the action. It cannot therefore be said that since the accused was fully drunk and under the influence of liquor, he had no intention to cause the death of his wife.[17]

Grave and sudden provocation

A boy went to meet his lover at her house at about 8 p.m. The love affair was frowned upon by the families and they were provoked by his untimely intrusion and beat him up with iron rods and lathi resulting in his death. The accused in *Saroj* v. *State of W.B*[18] were given the benefit of exception 1 and convicted for offence under section 304 part I.

In *B.D. Khunte* v. *Union of India*[19]a guard shot a *Subedar* and was held guilty of murder in a summary general court martial and convicted under section 69 of the Army Act, 1950 and section 302 of the Ranbir Penal Code, 1932. The appeals in armed force tribunal and in the high court were dismissed and the appellant challenged his conviction in the apex court.

The counsel for the appellant argued that it was a case of grave and sudden provocation. The factual matrix was that the appellant, a guard had been sodomized by the deceased, who was a *Subedar*, in the day time, a fact which he reported to his colleagues and seniors, though no formal complaint was lodged. A few of his friends did hatch a plan with the appellant that they would beat up the *Subedar*. At night the appellant was on duty with a loaded revolver since it was an operational area and he saw a human figure approaching him and "as per the prevailing drill and procedure, the appellant claims to have challenged the approaching person, but the person paid no heed to the warning and continued to approach till the appellant could recognize" that he was the *Subedar* who had sodomized him. This unabashed closing on to the appellant without verbally announcing his identity proved to be a provocation and the guard already seething in anger and shame pulled the trigger.

It is true that we have had a catena of cases including *K.M. Nanawati* v. *State of Maharashtra*[20] where it has been established beyond doubt that the defence of grave and sudden provocation will not be available where there has been a cooling off time. The same was contended in this case that "A provocation like the allegedly given by the deceased at 1 p.m would have sufficiently cooled down after long

17 *Id*. at 275

18 (2014) 4 SCC 802. There was some issue regarding order in this case and four weeks' time was given.

19 (2015) 1 SCC 286.

20 1962 SCR Supl. (1) 567.

hours especially when even recording to the appellant he had attended to other duties in the intervening period." This argument itself leads us to the basis for exception-1. One must situate the case in the peculiar, hierarchical structure of the army. The hierarchies are sacrosanct and intimidating and that's no secret. The second incident at night is an extension of the first incident as far as continuation of provocation is concerned. The second incident triggered a fresh round of grave and sudden provocation as there was an apprehension on the part of the accused that he would again be shamed and suffer sodomy. Thus, there was a cumulative grave and sudden provocation. The subsequent act of the deceased may not have been grave enough but it became grave in the light of his previous conduct. And that is precisely what happened in this case. So there was a real apprehension as a result of the cumulative provocation and before the superior could overpower him, he shot him. Para 13 of the judgment in its first few lines tried to capture the ignominy and shame that the accused may have felt but in a sudden slip the narrative loses track of the fact that the case is situated in the obstinate hierarchy of the army and the judgment rather insensitively declares that "The critical moment when the appellant could perhaps lose his cool and equilibrium to take retaliatory action against the deceased was thus allowed to pass uneventfully."

This comment becomes the defining narrative of the judgment and this skewed thinking did not let the court to engage with the proposition of a cumulative provocation which they did obliquely mention when they noted that "the contention that the day time incident being such that the appellant could get a grave provocation the moment he saw the deceased coming towards the place where he was on guard duty", but they said it has "not appealed to us". And the courts dismissed this cumulative provocation without properly engaging with it in the peculiar setting of the case. The court underplays the agony of a guard who is almost at the bottom of the hierarchy when it makes an observation thus:[21]

> The argument that the incident that took place around noon on that day was a grave provocation that continued to provoke the appellant right through the day till 9.30 evening when the appellant shot the deceased, does not, therefore, appeal to us, not only because the appellant had settled for a lesser act of retaliation like beating of the deceased in the evening by him and his colleagues when they assembled near the water heating point, but also because the appellant had performed his normal duties during the daytime and even in the evening except that he and some of his colleagues appear to have planned beating up the deceased.

The court seems unwilling and reluctant to treat the offence of sodomy with the seriousness that it deserves.

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21 *Supra* note 19 at 295.

III CRIME AGAINST WOMEN

Rape

The court in *State of Karnataka* v. *Shivanna*[22] observed that there must be amendments made in the Cr PC for fast tracking of rape cases and gave various directions so that the investigation in rape cases are done effectively and statements recorded properly. The order was directed to be sent to all police commissioners for onward transmission of it to all police stations for effective implementation.

In a brutal case of rape and murder of a minor girl, the Supreme Court affirmed death penalty as the judges were of the opinion that the offender was beyond reformation since the crime was committed by him in a brutal manner and that he was a history sheeter and had a number of cases pending against him.[23] The court observed thus:[24]

> The learned counsel would submit that the appellant had no criminal antecedents but we find that he was a history-sheeter and had a number of cases pending against him. That alone may not be sufficient. The appalling cruelty shown by him to the minor girl child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated. As the circumstances would graphically depict, he would remain a menace to society, for a defenceless child has become his prey. In our considered opinion, there are no mitigating circumstances.

In *State of Rajasthan* v. *Roshan Khan*,[25] a girl whose age remains contentious was gang raped. The high court acquitted the accused based on delay in the lodging of FIR and on the contention of the accused persons that it was consensual. No bodily injuries were found. The apex court giving weightage to section 114-A of the Evidence Act, 1872 and marshaling case law condoning delay in FIR, held the accused persons guilty of gang rape. The case stands out as no Victorian morality discourse is given in the judgment. The court refrained from patronizing the woman (which more often than not is the norm in such cases), and has dealt with the facts of the case and decided accordingly. The reviewer hopes that other judges would take a cue from this case and refrain from moralizing.

It is not necessary that the rape victim must have injuries on her body to prove rape, observed the court in *Krishan* v. *State of Haryana*.[26] In the instant case, the accused suffered some injuries due to the scuffle but it is submitted that a woman may get so intimidated that she may become numb but that does not mean that she was a consenting partner.

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22 (2014) 8 SCC 913.

23 *Vasanta Sampat Dupare* v. *State of Maharashtra* (2015) 1 SCC 253.

24 *Id*. at 285.

25 (2014) 2 SCC 476.

26 (2014) 13 SCC 574.

In *Parminder* v. *State of Delhi*,[27] a minor girl was raped but her hymen was not ruptured. The court held that it was nonetheless rape. As per the pre 2013 provision penile penetration was sufficient to constitute the offence of rape and so the contention that it was an attempt to rape was dismissed. The accused prayed for a reduction of sentence on a special reasoning that he was the sole bread earning member of the family consisting of two small daughters. The court, rejecting the contention, highlighted that he had raped a minor girl who then had to study privately and hence no respite could be given. Again, the judges stuck to the facts without adopting a patronizing attitude towards the victim which is laudable.

In the case of *Puran Chand* v. *State of H.P*[28] there was accusation of rape. After the alleged rape, the prosecutrix tried to commit suicide. There was delay in lodging the FIR as only when she was saved did she narrate the incident and the FIR was lodged. The medical report also did not categorically state that hymen was ruptured. The court made the following observation:[29]

> Section 114-A no doubt addresses on the consent part of the woman only when the offence of rape is proved but it also impliedly would be applicable in a matter of this nature where the victim girl had gone to the extent of committing suicide due to the trauma of rape and yet is sought to be disbelieved at the instance of the defence that she weaved out a concocted story even though she suffered the risk of death after consuming poison. If this were to be accepted, we fail to understand and lament as to what is the need of incorporating an amendment into the Evidence Act by incorporating Section 114-A which clearly has been added to add weight and credence to the statement of the victim woman who suffers the offence of rape and a claustrophobic interpretation of this amended provision cannot be made to infer that the version of the victim should be believed relating merely to consent in a case where the offence of rape is proved by other evidence on record.

The apex court was of the opinion that if the FIR for alleged crime was lodged due to enmity, why would the girl and her families create a story having a huge time gap between the date of incident and the date of lodgement of FIR? Hence conviction under sections 376 and 506 part I IPC stood imposed. In contrast is the factual situation in *Munna* v. *State of M.P*[30] where the statement of the prosecutrix of alleged rape and house trespass did not inspire confidence and the accused was given the benefit of doubt.

The court in *Gang Rape Ordered by Village Kangaroo Court in W.B., In Re* took *suo motu* cognizance of the gang rape of a girl ordered by a Kangaroo court

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27 (2014) 2 SCC 592.

28 (2014) 5 SCC 689.

29 *Id*. at 696.

30 (2014) 10 SCC 254.

in the name of honour.[31] It is indeed shameful that in the 21st century when on one hand there is talk of India poised as the next super power, the writs of Kangaroo courts run in the hinterlands. In the guise of custom and tradition women are being subjugated and killed in the name of honour. This case touched a new low when the members of the *khap panchayat*, who avowedly (according to their own assertions) are the custodian of traditions, ordered gang rape. There were many discrepancies found by the *amicus curiae* including relevant sections of IPC not being invoked which the counsel for the state said would be looked into. The judgment talks about payment of compensation to the victim and makes a very important point that compensation alone will not suffice but rehabilitation must be ensured. There is, however, no talk of counseling of the victim. If we analyze the rehabilitation report minutely, it is all compensation and, surprisingly, though she is an adult, "Patta" in respect of the land was issued in favour of the victim and even construction of house was completed which is in the name of the mother. The apex court took note of it and ordered otherwise. Except for the fact that the victim has been enrolled under the social security scheme for construction works, the other items in the report can be construed as compensation only and not really rehabilitation. In addition, the state government promised all possible administrative action for rehabilitation.

An analysis of the package which is touted as a rehabilitation package by the state government gives an uncanny feeling that in India a woman may have to subject herself to gang rape to get her entitlements which are her due as a citizen of this country! What is needed was counseling and perhaps a time away from that very land of ordeal and an inspection on a day-to-day basis (which was part of the rehabilitation package) will be perhaps counterproductive. The apex court, surprisingly, did not order a speedy disposal of the case so that the criminals are given punishment at the earliest.[32]

Dowry death

In *Donthula Ravindranath* v. *State of A.P.*[33] a woman died due to strangulation within seven years of marriage. There was a case of harassment which was established. The appellant was charged under section 302 IPC and he along with his parents was charged under section 304-B IPC. The parents were acquitted and the husband was held guilty under section 302 IPC and the same was affirmed by the high court. The Supreme Court in appeal was convinced that 304-B IPC applied in this case as all the ingredients required for the offence were present – within seven years of marriage, harassment and unnatural death. The onus was on the accused to discharge the burden of unnatural death which he could not and all

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31 (2014) 4 SCC 786.

32 The court received a report by the District Judge, Birbhum District that no police action has been taken. The court took a stern view and ordered the chief secretary to give a detailed report and the follow up action.

33 (2014) 3 SCC 196. See also *Raminder Singh* v. *State of Punjab* (2014) 12 SCC582.

ingredients of the offence stood proved. Hence the court altered the conviction from section 302 IPC to 304-B IPC. It is submitted that section 304-B was added to IPC to secure conviction in cases like the present one where the crime takes place in a familial setting and evidence of guilt is scant or not available and hence difficult to prove the guilt beyond a reasonable doubt which is essential for conviction under section 302 IPC.[34]

In *State of Punjab* v. *Gurmit Singh*,[35]the appeal was against the quashing of order summoning Gurmeet Singh to face trial under section 304-B. Gurmeet Singh had filed a revision petition before the high court when he was summoned for trial. His contention was that he cannot be said to be a relative of the deceased's husband since he was the brother of the aunt (*chachi)*. The high court upholding his contention had quashed the order since time and again it has been held by the courts that relative is one who is related by blood, marriage or adoption. And the court in the instant case again clarified the scope of the word 'relative' for purposes of section 304-B and 498-A IPC. The court made the following observation:[36]

> [T]he word "relative of the husband" in Section 304-B IPC would mean such persons, who are related by blood, marriage or adoption. When we apply this principle the respondent herein is not related to the husband of the deceased either by blood or marriage or adoption. … We hasten to add that a person, not a relative of the husband, may not be prosecuted for the offence under Section 304-B IPC but this does not mean that such a person cannot be prosecuted for any other offence viz. Section 306 IPC, in case the allegations constitute offence other than Section 304-B IPC.

In *Harish Kumar* v. *State of Haryana*,[37] there was conviction by the trial court as well as the high court under section 304-B as the woman died an unnatural death within seven years of marriage. The dowry demand also stood proved. However, what distinguished this case from others was that there was a dying declaration to the effect that the burn injury was accidental. Relying on the dying declaration the apex court allowed the appeal and set aside the conviction under 304-B and upheld the conviction under section 498-A alone.

On the contrary, in *Naresh Kumar*,[38] the wife's suicide note that "nobody be held responsible" did not absolve the husband from punishment as 'dowry harassment' stood proved and he stood convicted under 304-B IPC. The husband

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34 For a clear distinction refer *Vijay Pal Singh* v. *State of Uttarakhand*, 2014 SCC Online SC 1016.

35 (2014) 9 SCC 632.

36 *Id.* at 636-37.

37 (2015) 2 SCC 601.

38 *Naresh Kumar* v. *State of Haryana* (2015) 1 SCC 796.

contended that since the other members of his family were acquitted, on a parity of reasoning, he too deserved the same treatment. The court had this to say:[39]

> As regards the claim for parity of the case of the appellant with his mother and brother who have been acquitted, the High Court has rightly found his case to be distinguishable from the case of his mother and brother. The husband is not only primarily responsible for safety of his wife, he is expected to be conversant with her state of mind more than any other relative. If the wife commits suicide by setting herself on fire, preceded by dissatisfaction of the husband and his family with the dowry, the inference of harassment against the husband may be patent.

It is submitted that when dowry harassment stood proved there arose a presumptive responsibility of the husband for the death and as the court put it "Responsibility of the husband towards his wife is qualitatively different and higher as against his other relatives".[40]

Death by burning within seven years of marriage took place in *Manohar Lal* v. *State of Haryana*[41] but dowry harassment "soon before death" could not be proved and hence the appeal of the appellant against conviction under section 304-B by the trial court and affirmed by the high court was set aside. Though he was charge-sheeted under section 498-A and 304-B,IPC the trial court had convicted him only under 304-B and so the appellant was pronounced a free man.

But in *Ramesh Vithal Patil* v. *State of Karnataka*,[42] a young woman with her 10 month old child committed suicide. There were allegations of dowry demand which were mentioned vaguely in the FIR, but the trial court acquitted the accused under section 498-A, 304-B read with section 34. The high court on appeal by the state set aside the acquittal under section 304-B IPC and instead convicted him under section 306 and the other accused were acquitted. On appeal, the apex court held that the trial court judgment was replete with gross errors and "when a woman is harassed and ill-treated in her matrimonial house, it is not possible to get independent witnesses to depose about the harassment". And it was perfectly legal for the high court to convict under section 306 IPC.

Raminder Singh[43] relying on *Bachni Devi*[44] pronounced that demand for any property or valuable security, directly or indirectly which has a nexus with the marriage would constitute "demand for dowry". The woman was run down by the train and all ingredients of section 304-B stood proved. The apex court, however, put a important caveat in *Mangat Ram* v. *State of Haryana*[45] that the mere fact

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39 *Id*. at 801

40 *Ibid.*

41 (2014) 9 SCC 645.

42 (2014)11 SCC 516 see also *Satish Chandra* v. *State of M.P* (2014) 6 SCC 723.

43 *Raminder Singh* v. *State of Punjab* (2014) 12 SCC 582.

44 (2011) 4 SCC 427.

45 (2014) 12 SCC 595.

that a married woman committed suicide within a period of seven years of her marriage, the presumption under section 113-A of the Evidence Act would not automatically apply. Along with suicide, the other important ingredient is that "her husband or such relative of her husband had subjected her to cruelty" and only then the presumption will be attracted.

So the courts have to be cautious and not treat all unnatural deaths within seven years of marriage as dowry deaths or convict the husband under section 306 for abetment of suicide. Death is a phenomenon which may be natural, accidental or homicidal. A presumption arises in case of unnatural death within seven years of marriage, but it does not mean that all such deaths come under 304-B.[46] The evidence has to be properly scrutinized and when the trial court acquits, then the high court has to give specific reasons and suitable justification to convict the accused.[47]

Sexual harassment

In *X* v. *Secretary General, Supreme Court of India,*[48] a notice was issued to the respondents regarding the mechanism to enquire into the sexual harassment against judicial officers, sitting or retired judges, while holding office or not. The matter needs to be taken seriously as the dispensers of justice may be the perpetrators – after all, they have the same vices as others, they are as human as others and may conduct themselves inappropriately. And if this happens, where can the victim go for justice? The Supreme Court sought assistance from two senior advocates to formulate guidelines. The question arose when an intern complained against a judge and the court made this order without expressing an opinion on the case. The judiciary as Caesar's wife must be above suspicion.

Again when the custodians become perpetrators alarm bells must ring. Judiciary is known to be the custodian of human rights and dignity. Any aberration of rights has been frowned upon by the judiciary. And so when a writ petition[49] is filed against a sitting high court judge for sexual harassment of an additional district and session judge, it is a cause of concern. The court remarked that a charge of sexual harassment would depend on the manner in which it is perceived. The court observed:[50]

> Her sensitivity to the issue, one may confess, brought out to us, a wholly different understanding on the subject. It is, therefore, that we have remarked above, that the evaluation of a charge of sexual harassment would depend on the manner in which it is perceived. Each case will have to be decided on its own merits. Whether the

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46 See *Ramaiah* v. *State of Karnataka* (2014) 9 SCC 365. However, the case is a reflection on the society where a 14 year old child is married off!

47 *Id*. at 369.

48 *X* v. *Supreme Court of India* (2014) 3 SCC 158.

49 *Addl. District & Sessions Judge 'X'* v. *High Court of M.P.* (2015) 4 SCC 91.

50 *Id*. at 111.

> perception of the harassed individual was conveyed to the person accused, would be very material in a case falling in the realm of oversensitivity. In that, it would not be open to him thereafter, to defend himself by projecting that he had not sexually harassed the person concerned, because in his understanding the alleged action was unoffending.

The apex court seems to be recognizing the fact that men remain embedded in sexism while women's reactions get labeled as "oversensitive in many situations". The court then went into the nitty gritty of the in house procedure and observed that the chief justice of the respective high court ought not to be associated with the in house procedure, either chief justice of some other high court or the Chief Justice of India may assume the role.[51] This is an important measure which will inspire confidence in the victim.

IV INVESTIGATION

Investigation remains the weakest link in criminal cases. In *State of Gujarat* v. *Kishanbhai*,[52] the apex court had to point out the lapses on the part of the prosecution. Vital witnesses were either not produced or were not cross-examined. The medical report of the accused was not placed on record. No DNA profiling of the blood samples was done. The court lamented the fact that justice could not be done because of the failure of the investigation. The court was alive to the fact that the prowler would go scot free but were constrained and observed thus:[53]

> We have declared the respondent-accused innocent, by upholding the order of the High Court, giving him the benefit of doubt. He may be truly innocent, or he may have succeeded because of the lapses committed by the investigating/prosecuting teams. If he has escaped, despite being guilty, the investigating and the prosecution agencies must be deemed to have seriously messed it all up. And if the accused was wrongfully prosecuted, his suffering is unfathomable. Here also, the investigating and prosecuting agencies are blameworthy. It is therefore necessary, not to overlook even the hardship suffered by the accused, first during the trial of the case, and then at the appellate stages.

Of course "mere defects in the investigation could not be the basis for acquitting the accused, if sufficient evidence to prove the prosecution case was available on record".[54] The investigation goof up is endemic. In a murder case, *Prakash* v. *State of Karnataka*[55] the court lamented thus:[56]

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51 *Id*. at 135.

52 (2014) 5 SCC 108.

53 *Id*. at 136

54 *State of Karnataka* v. *Suvarnamma* (2015) 1 SCC 323.

55 (2014) 12 SCC 133.

56 *Id*. at 153.

> All that we need to say is that the investigation in the case was very cursory and it appears to us that the investigating officer had made up his mind that Prakash had murdered Gangamma and the investigation was directed at proving this conclusion rather the other way round with the investigation leading to a conclusion that Prakash had murdered Gangamma.

In a case of murder for dowry by poisoning, the court in *Joshinder Yadav* v. *State of Bihar*[57] had to issue directions to the effect that in case of suspected poisoning "viscera should be sent to FSL. And if the viscera report is not received, the court concerned must act for an explanation and must summon the officer concerned of the FSL to give an explanation as to why the viscera report is not forwarded to the investigation agency/court."

The shoddy work by the investigating agencies like not lifting the fingerprints *etc*. weakened the case against the accused in the case of a dacoity committed in a bus.[58] As far as the recovery on the basis of purported voluntary statements of the accused were concerned, the procedure under sections 165 and 166 Cr PC was not followed. The witnesses were not in a position to identify the accused. And hence the flaws in the investigation forced the apex court to set aside the conviction under 397 IPC and ordered release of the appellants.

There was a terrorist attack on Akshardham temple and the special POTA court and the high court sentenced various persons for the offence and pronounced punishment ranging from death penalty to life imprisonment, to rigorous imprisonment of 10 years. The apex court carefully sifting through the entire evidence found grave procedural irregularities and set aside the convictions.[59] The court, deprecating the role of the investigation agencies gave went to their anguish thus:[60]

> Before parting with the judgment, we intend to express our anguish about the incompetence with which the investigative agencies conducted the investigation of the case of such a grievous nature, involving the integrity and security of the nation. Instead of booking the real culprits responsible for taking so many precious lives, the police caught innocent people and got imposed the grievous charges against them which resulted in their conviction and subsequent sentencing,

V OBSCENTY

A bare bodied picture of Boris Becker, a well known tennis player and his fiancée, was published in a newspaper where Boris had covered the breasts with

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57 (2014) 4 SCC 42.

58 *Thimmareddy* v. *State of Karnataka* (2014) 13 SCC 408.

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

60 *Id.* at 831.

his hands. A complaint under section 292 IPC was filed against the appellants, the editor, and the publisher and the printer.[61] The complainant alleged that this nude photograph "would corrupt young minds both children and youth of this country and is against the moral and cultural values of our society." The court was of the opinion that the Hicklin test[62] that "postulated that a publication has to be judged for obscenity based on isolated passages of a work" was not the correct test and took note of the US and Canada courts disowning the Hicklin test. The court advocated the "community standard test" and held that the picture was meant to portray:[63]

> The message, the photograph wants to convey is that the colour of skin matters little and love champions over colour. The picture promotes love affair, leading to a marriage, between a white-skinned man and a black-skinned woman. We should, therefore, appreciate the photograph and the article in the light of the message it wants to convey, that is to eradicate the evil of racism and apartheid in the society and to promote love and marriage between white-skinned man and a black-skinned woman. When viewed in that angle, we are not prepared to say that the picture or the article which was reproduced by *Sports World* and the *Anandabazar Patrika* be said to be objectionable so as to initiate proceedings under Section 292 IPC or under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986.

The court was right in the final outcome of not penalizing the appellants for obscenity but their reasoning is flawed. The court in this case tried to contextualize the photograph within a familial heterosexual logic which is problematic. Secondly, and more importantly, the "community standard" is itself problematic in India since it is not clear as to what can be called the community standard – is it the dominant caste, the dominant sex, the elite class or the political class which sets the community standard. The woman perspective in a case of obscenity may be totally missing and it may be the male hegemonic view point which defines obscenity.

VI INCHOATE OFFENCES

Abetment

Rape is a gender specific crime in the Indian Penal Code and so only a man can be held liable for rape. But a woman may be held liable for abetment. In *Om Prakash* v. *State of Haryana,*[64] a woman was convicted under section 109 for aiding the commission of rape. The court held thus:[65]

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61 *Aveek Sarkar* v. *State of W.B.* (2014) 4 SCC 257.

62 *R.* v. *Hicklin* (1868) LR 3QB 360.

63 *Supra* note 61 at 269-70.

64 (2015) 2 SCC 84.

65 *Id*. at 89.

> [I]n the present case, there is positive evidence adduced by the prosecution that accused Chhoti has aided the commission of offence by asking the victim to go to her house to take "lassi" where accused Om Prakash and Kartar Singh bolted the room and subjected the victim to rape. From the record, it appears that for about an hour, the victim was not allowed to go out from the house where she was subjected to rape. It was the house of accused Chhoti and her husband where the incident is said to have taken place. As such, both the courts below have rightly concluded that it cannot be said that accused Chhoti has not abetted the crime in the manner suggested by the prosecution. We concur with the view taken by the courts below. Intentional aiding of the offence is covered by the third clause mentioned in Section 107 IPC.

It is a welcome judgment and stands in contrast to *Priya Patel*[66] case where the court did not express any opinion with regard to abetment and only adjudicated that a woman cannot be held liable for gang rape.

Where a young woman committed suicide within seven years of marriage and there was proof of cruelty and harassment, the husband was held guilty under section 306 for abetment of suicide.[67]

Conspiracy

It was held in *Adambhai Sulemanbhai Ajmeri* v. *State of Gujarat*[68] that: [69]

> To punish an accused under Section 120-B IPC, it is essential to establish that there was some common object to be achieved and that there was an agreement by the accused persons to achieve that object i.e. there was a "meeting of minds". In the present case, it cannot be said that the conspiracy was hatched by the accused persons in furtherance of some common object. The common object, according to the case of the prosecution was to take revenge for the Godhra Riots of 2002. But this object is vague, and is not very specific and the charge of criminal conspiracy against the accused persons cannot be proved on its basis. Further, even the confessional statements of the accused persons did not help the prosecution to establish the chain of events in pursuance of the alleged conspiracy. In fact, they are highly contradictory and improbable in nature.

Further, in *Chandra Prakash* v. *State of Rajasthan,*[70] while dealing with conspiracy for bomb blast the court reiterated that conspiracies are never

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66 *Priya Patel* v. *State of M.P.* (2006) 6 SCC 263.

67 *Ravindra Trimbak Patil* v. *State of Maharashtra* (2014) 13 SCC 405.

68 *Supra* note 59.

69 *Id*. at 822

70 (2014) 8 SCC 340.

hatched in open and, therefore, evaluation of proved circumstances play a vital role in establishing the criminal conspiracy.

VII COMPOUNDING OF OFFENCES

The court in *Yogendra Yadav* v. *State of Jharkhand*[71] held that the high court was right in compounding an offence under its inherent powers under section 482 of the Code "having regard to the fact that the parties have amicably settled their disputes and the victim has no objection, even though the offences are non-compoundable." However the court cautioned that these powers may not be invoked in cases of rape, murder *etc*., and involving moral turpitude as it may send a wrong signal to society. Is it that the apex court feels that the Code should do away with a list of offences that are compoundable under section 320 IPC and instead have a few selective offences which may be non-compoundable? The apex court categorically stated in *State of M.P.* v. *Deepak*[72] that offence under section 307 must not be quashed under section 482 of the Code on the basis of a compromise since it is an offence against the society. However, the courts cannot be swayed by the mere mention of section 307 but must analyse the case and gauge whether section 307 is attracted or not. In the instant case the injuries inflicted were quite serious in nature. In *Narinder Singh* v. *State of Punjab*[73] which was an earlier decision it was held thus:[74]

> While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation... Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime.

The entire reasoning and whole discussion on crime against society and severity of crime seems to be problematic. Both the judgments are given by the same judge and the distinction seems superfluous.

Compromise was also taken note of in *Manohar Singh* v. *State of M.P*[75] wherein the offence was under sections 498-A and section 4 of the Dowry

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71 (2014) 9 SCC 653. The contention was regarding compounding of offence under sections 326 and 307 read with 34 IPC. See *India Asian Ltd.* v. *State of Uttarakhand* (2014) 3 SCC 191 wherein court held that high court should not have quashed at the threshold the complaint and the summons issued by the criminal court in case of a commercial/economic offence.

72 (2014) 10 SCC 285.

73 (2014) 6 SCC 466.

74 *Id.* at 484.

75 (2014) 13 SCC 75.

Prohibition Act. Both the offences are non compoundable. However, the court was of the opinion that if there is a genuine compromise (in the instant case the genuineness perhaps was gauged by the fact that the husband agreed to pay Rs 2,50,000 to wife as compensation), criminal complaints between husband and wife arising out of matrimonial discord can be quashed as the offense is personal in nature and does not have repercussions in society. Dowry, it is submitted, has attached itself to the institution of marriage as a plague and in spite of deterrent laws, it is not waning. The societal effect of this is that a girl child continues to be seen as a burden as dowry has to be given to her. It is a vicious cycle and so dowry demand is not just a matter between the husband and wife but has wider societal ramifications which we cannot afford to ignore.

The court in *Vijayander Kumar* v. *State of Rajasthan*[76] held that "a given set of fact may make out a civil wrong also a criminal offence and only because a civil remedy may also be available to the informant/complainant that itself cannot be a ground to quash a criminal proceeding".[77]

In a case[78] where the accused had been charged under sections 120B/420 IPC and the civil liability of the respondents to pay the amount to the bank having been settled amicably, the apex court held that the high court was right in invoking the powers under section 482 Cr PC, though sections 120B/420 are not compoundable under section 320 IPC. Whereas in *Gopakumar B. Nair* v. *CBI*,[79] the high court refused to quash the proceeding as "there was no acknowledgement on the part of the Bank of the exoneration of the criminal liability of the appellant accused" unlike in the *Narendra Lal Jain* case.

VIII CHEATING

In *Bishan Das* v. *State of Punjab*[80] a *sarpanch* issued a false certificate to another person who pretended to be a landless person, for securing allotment. The trial court and the high court convicted him under sections 177 and 420 IPC. The Supreme Court in its order opined that section 420 was not applicable since there was "no wrongful gain for himself". The court also asserted that allotment of land was cancelled and that should be taken into consideration while imposing sentence under section 177. A careful perusal of sections 22, 23 and 420 of the IPC would reveal that wrongful gain to the person himself is not a requirement. There could have been a *quid pro quo* when the certificate was issued or other myriad possibilities. And if section 420 was not attracted there was no reason for the court to link the sentence under section 177 to the cancellation of the alloted land.

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76 (2014) 3SCC 389. See also *Mosiruddin Munshi* v. *Mohd. Siraj* (2014) 14 SCC 29.

77 *Id*. at 393-94.

78 *Central Bureau of Investigation, ACB, Mumbai* v. *Narendra Lal Jain* (2014) 5 SCC 364.

79 (2014) 5 SCC 800.

80 2014 SCC Online SC 656.

IX JOINT LIABILITY

The three accused armed with *palkati*, *pharsa* and *lathi* came looking for the deceased and on finding him asleep, one of them exhorted that he be killed. The accused who was armed with *palkati* gave a blow on the neck and he died instantaneously. On an alarm being raised, they fled the crime scene. The question of applicability of section 302 was settled but the contention was regarding invocation of section 34. The trial court convicted only the accused who was armed with *palkati* and who gave the blow. On appeal, the high court took the aid of section 34 and convicted all the three accused. The matter went in appeal to the apex court in *Naim* v. *State of Uttarakhand*.[81] The court, upholding the high court verdict, observed thus:[82]

> When three persons separately armed with weapons storm into the house of the victim in the dead of the night, merely because only one out of them uses the weapon and gives the fatal blow, would not absolve the others. The others may not be required to use their weapons but that by itself does not change the role of such other accused to that of a mere bystander. The circumstances can show that the others shared the same intention. In the instant case the common intention to bring about a definite result is evident from the circumstances on record.

State of Rajasthan v. *Manoj Kumar*[83] was a case where the right of private defense was exceeded by one of the three accused. And it was held that guilt of each of the accused, who had exceeded the right of private defense, has to be dealt separately and constructive liability under section 34 is not attracted.

In *Ram Kumar* v. *State of Madhya Pradesh*[84] it was held that:[85]

> Considering the aforesaid injuries and fractures sustained by the victim, which are as dangerous as to cause death of a person, in our opinion, it is not necessary for the doctor to give a specific report to the effect that the injuries were sufficient in ordinary course to cause death. In the facts and circumstances, it can be said that the appellants in pursuit of their common intention caused serious injuries on the victim which resulted in his death. Therefore, the stand taken by the appellants that they should not be dealt with under Sections 302/34 IPC cannot be accepted.

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81 (2015) 1 SCC 397.

82 *Id*. at 400.

83 (2014) 5 SCC 744.

84 (2014) 13 SCC 128.

85 *Id*. at 132.

The factual situation in *Anup Lal Yadav* v. *State of Bihar*[86] seems akin to a scene from some dacoity movie wherein the lead man brandishing a sword on horseback was followed by 300 to 400 people armed with all kinds of deadly rustic weapons such as bows, arrows, *ballams, bhalas, kulharis, dandas* and burning flames in their hands. The target of this unlawful assembly was Badhyas, a Muslim minority community and the incident resulted in killing of 14 persons, burning of 47 houses and loot and vandalism of other properties. Most of the accused absconded and the trial court sentenced the others including the present appellant under section 302/149 along with other offences. On appeal the high court allowed appeal of two accused persons and maintained conviction of others. These three accused challenged their conviction in the Supreme Court.

It was contended on behalf of the appellant that the mere presence of the accused with arms at the place of incident would not be sufficient to establish their involvement in the crime. The apex court upholding the conviction under section 149 IPC reiterated thus:[87]

> In view of the settled principles of law, once it is established that the unlawful assembly had a common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act, rather they can be convicted under Section 149 IPC. We, therefore, find no error in the order of conviction and sentence passed by the trial court and affirmed by the High Court calling our interference under Article 136 of the Constitution. The appeals fail and are hereby dismissed.

The court reiterated the same in *Om Prakash* v. *State of Haryana*[88] thus:

> Common object of an unlawful assembly can also be gathered from the nature of the assembly, the weapons used by its members and the behaviour of the assembly at or before the scene of occurrence. It cannot be stated as a general proposition of law that unless an overt act is proven against the person who is alleged to be a member of the unlawful assembly, it cannot be held that he is a member of the assembly. What is really required to be seen is that the member of the unlawful assembly should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141 IPC. The core of the offence is the word "object" which means the purpose or design and in order to make it common, it should be shared by all. Needless to say, the burden is on the prosecution. It is required to establish whether the accused persons were present and whether they shared the common

86 (2014) 10 SCC 275.

87 *Id*. at 284.

88 (2014) 5 SCC 753 at 761. See also *Nand Kumar* v. *State of Chhattisgarh* (2015) 1 SCC 776.

> object. It is also an accepted principle that number and nature of injuries is a relevant fact to deduce that the common object has developed at the time of incident.

X RASH AND NEGLIGENT ACT

In ancient times tort and crime were indistinguishable. With developments in different branches of law, tort and crime came to occupy separate fields. In tort law the victim is compensated by damages and in criminal law since the crime is deemed to be against the state punishment is awarded. Negligence falls within the realm of torts as well as criminal law where it is termed as criminal negligence. In the draft IPC, perhaps by oversight, no provision was inserted for death caused by a rash or negligent act. And when the provision was made, rashness and negligence were coupled together! It defies logic as rashness is a subjective test and the High Court of Allahabad in *Empress* v. *Idu Beg*[89] had held as far back as 1881 that "rashness is hazarding a dangerous or wanton act with the knowledge that it is so". Negligence, on the other hand, requires an objective test and the court in *Nidamarti Nagabhushnam*[90]had held thus:[91]

> Culpable negligence is acting without the consciousness that the illegal and mischievous consequence will follow, but in circumstances which show that the actor has not exercised the caution incumbent on him. And that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection.

And hence, it is imperative that the law is amended and the Code reflects this conceptual distinction between rashness and negligence, otherwise it would result in travesty of justice. It is in this background that one must examine *Sushil Ansal* v. *State*.[92] 59 people died in a cinema hall owned by the appellants due to fire in one of the transformers in the basement. The deaths were not by burning but due to noxious gases which permeated into the cinema hall. It is pertinent to note that the "immediate cause of death, the *causa causans* was not the fire in the transformer but the breaches committed by the occupiers of the cinema theatre which prevented or at least delayed rapid dispersal of the patrons: thereby fatally affecting them"[93]. The court found them guilty under section 304-A and sections 336 to 338 read with section 36 IPC. Thakur J upheld the sentence of one year as given by the high court whereas Gyan Sudha Mishra J opined thus: [94]

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89 (1881) 3 All 776.

90 (1872) 7 MHCR 119 .

91 *Id*. at 120.

92 (2014) 6 SCC 173.

93 *Id*. at 176.

94 *Id*. at 330.

> I am of the view that the appeals preferred by AVUT and CBI are fit to be allowed and no leniency deserves to be shown while awarding maximum sentence prescribed under Section 304-A IPC and other allied sections. Nonetheless one will also have to be pragmatic and cannot ignore that the enhancement of sentence of one year to two years to the accused cannot bring back those who suffered and lost their lives in the tragic and the horrific incident. Thus, while I am fully conscious and share the intensity of the agony and deep concern of AVUT which has diligently prosecuted the appeal up to the highest court, I am of the view that the ends of justice to some extent would be met by not merely awarding them sentence of imprisonment which I do by dismissing their appeals … but also by enhancing their sentence but substituting it with substantial amount of fine to be used for the public cause in the memory of the Uphaar Victims.

And since there was a difference in the sentencing, the matter was ordered to be placed before the Chief Justice of India for constitution of an appropriate bench. It is submitted that it is difficult to bring the case under section 304 part II as was the contention of AVUT (Association of Victims of Uphar Tragedy) but section 304-A perhaps needs a revisit. It is one of the contentious provisions of the Penal Code where rash and negligence have been bracketed together.

XI HATE SPEECH

The Supreme Court in *Pravasi Bhalai Sangathan* v. *Union of India*[95] showed extraordinary restraint when it was required to pass appropriate orders or guidelines to contain hate speeches. India is a multicultural/multilingual society where communities need to respect and show tolerance towards each other but more often than not the atmosphere is vitiated. However, the court after spelling out the relevant IPC sections like 124-A, 153-B, 295-A, 298, 505 (1) and 505(2) and sections in other Acts like Representation of peoples Act, IT Act *etc*., clarified thus:[96]

> Thus, it is evident that the legislature had already provided sufficient and effective remedy for prosecution of the authors who indulge in such activities. In spite of the above, the petitioner sought reliefs which tantamount to legislation. This Court has persistently held that our Constitution clearly provides for separation of powers and the court merely applies the law that it gets from the legislature. Consequently, the Anglo-Saxon legal tradition has insisted that the Judges should only reflect the law regardless of the anticipated consequences, considerations of fairness or public policy and the Judge is simply not authorised to legislate law. "If there is a law, Judges can certainly

95 (2014) 11 SCC 477.

96 *Id*. at 488.

> enforce it, but Judges cannot create a law and seek to enforce it." The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The very power to legislate has not been conferred on the courts.

XII SENTENCING

In *Hari Om* v. *State of Haryana*[97] the high court gave life imprisonment for an offence under section 304-B but the apex court reduced it to l0 years on the reasoning that only in rare cases should imprisonment for life be given. In this case, a member of the police force harassed a woman for dowry and forced her to commit suicide within one month of her marriage.

Madan Lokur J has been grappling with offences against body and the punishments meted out. In *Sangeet,*[98] the judge tried mapping the cases to understand the journey of death penalty in India. And in *Richpal Singh Meena* v. *Ghasi*[99] the judge has tried to deconstruct homicide in the IPC and it is heartening that he grapples with the case in hand by seriously taking the theoretical framework of IPC. However, when he delves into the sentencing under the IPC scheme for sections 302, 304 and 304 A, he misses a very important point that section 304 is divided into two parts, separated by a semi-colon and in the latter part the punishment "may extend to two years or with fine or with both." That in effect means that the accused may only be liable for fine, if the court wishes, and is then placed in the category of section 304-A which again uses the word "or" when it reads "which may extend to two years or with fine, or with both. An interesting facet of this judgement is the judge's caution on heavy reporting of judgments.

Speaking in the context of the Probation of Offenders Act, 1958 Madan Lokur J in *State* v. *Sanjiv Bhalla*[100]observed thus:[101]

> Every accused person need not be detained, arrested and imprisoned - liberty is precious and must not be curtailed unless there are good reasons to do so. Similarly, everybody convicted of a heinous offence need not be hanged however shrill the cry "off with his head" - and this cry is now being heard quite frequently. Life is more precious than liberty and must not be taken unless all other options are foreclosed. Just sentencing is as much an aspect of justice as a fair trial and every sentencing judge would do well to ask: Is the sentence being awarded fair and just?

The court felt that the philosophical basis is undergoing a shift from punishment being deterrent and retributive to punishment being a humanizing

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97 (2014) 10 SCC 577.

98 *Sangeet* v. *State of Haryana* (2013) 2 SCC 452.

99 (2014) 8 SCC 918.

100 2014 SCC Online 540.

101 *Id*., Madan Lokur J para 2.

mission. Madan Lokur J does take into consideration the necessity of giving justice to the victims of a crime and mentions plea bargaining "which again is intended to assist and enable the trial Judge to arrive at a mutually satisfactory disposition of a criminal case by engaging the victim of a crime". The reviewer is not sure if that was the intention of plea bargaining. Plea bargaining was introduced as a measure to address the concerns regarding delay in criminal justice administration.

In *Birju* v. *State of M.P.*[102] in the discussion for imposing the extreme penalty of capital punishment it was held that the fact that the accused had 24 cases pending against him, which, *inter alia*, included cases under section 302, cannot be taken as an aggravating circumstance. The court, relying on *Shankar Kisan Rao Khade* v. *State of Maharashtra*[103] held that the "Courts can then examine whether the accused is likely to indulge in commission of any crime or there is any probability of the accused being reformed or rehabilitated…" and ordered rigorous imprisonment of 20 years without remission. The problem arises, how are the courts dealing with the probability of reform? Unlike the earlier case, this man seems to be a repeat offender with a bad temper. So either along with rigorous imprisonment, the court was contemplating counselors to engage with him and reform him!

The point is not that the man should have been hanged - his crime perhaps rightly deserved a punishment of life imprisonment but this whole discourse on the probability of reformation is problematic. Keeping in line with the post *Shraddananda*[104] trend, the court in *Selvam* v. *State*[105] a case of rape and murder, commuted death penalty into "minimum 30 years in jail without remission", and qualified it by adding "though subject to exercise of constitutional power for clemency"!

Again, in *Rajkumar* v. *State of M.P,*[106]a rape and murder case, death sentence was commuted and life imprisonment was awarded. The court ordered "The appellant must serve a minimum of 35 years in jail without remission, before consideration of his case for premature release. However, it would be subject to clemency power of the executive.

Offences against women are to be dealt with sternly by the courts. In a case[107] under sections 323 and 354 IPC, regarding outraging the modesty of a women, the trial court sentenced the accused to undergo rigorous imprisonment for six months with a fine of Rs. 500/-. On appeal, the high court reduced the sentence to the period already undergone which was a measly 21 days. The reasoning of the high court was that he was a first time offender! In such cases, this is a very specious plea and the courts cannot engage with it. Crimes against women are on the rise and the apex court restored the sentence imposed by the trial court and deprecated

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102 (2014) 3 SCC 421.

103 (2013) 5 SCC 546.

104 *Shraddanda* (2) v. *State of Karnataka* (2008) 13 SCC 767.

105 (2014) 12 SCC 274.

106 (2014) 5 SCC 353.

107 *State of MP* v *Bablu* (2014) 9 SCC 281.

the high court for dealing with this case in a casual manner which would have the effect of emboldening the accused to repeat such crimes.

Case after case in 2014 have mentioned the fact that it is not the contention of the state that he cannot be reformed[108]and the court is using it as a mitigating circumstance by observing that "The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated."[109] The reviewer does not contend that life imprisonment is not an adequate punishment in such cases. But what is questionable is the assertion of the claim of reformation and how the courts come to this conclusion!

Again the court, while debating whether to give death penalty to a convict guilty of crime of pederasty and murder, though convinced of the diabolic act, asserted that the "State has not discharged its responsibility of proving the impossibility of rehabilitation. The state has till date (not to the reviewer's knowledge) undertaken any psychoanalysis of the accused persons to come to that conclusion. The state has always harped on the depravity of the act and has sought death penalty on that count. Whether a person can be reformed or not does not have easy answers and the present state machinery is not geared to even engage with this issue. The court surprisingly even invoked *Suresh Kumar Kaushal*[110] which dealt with consenting adults - this was a case of pederasty which would be diabolic and grotesque even if the *Kaushal* judgment was otherwise. The court in the instant case gave 30 years imprisonment without remission.

As far as death penalty is concerned the observation of the apex court in *Ashok Debbarma* v. *State of Tripura*[111] assumes significance in these times of 'war against terror'. In the instant case, 15 people were killed and many injured by a mob consisting of 30 to 35 persons who mercilessly fired at women, children and men with latest arms and ammunition and then went on a rampage setting on fire hutments of poor people. On the question of death penalty which was confirmed by the high court, the apex court made a very interesting observation that "the appellant could not have organized and executed the entire crime" and that the high court "recognized the accused as one of the perpetrator of crime, not the sole". The court in effect was arguing that this kind of a massacre had many actors, including those who absconded and all of them jointly acted in a cruel and dastardly manner. The court asserted that "the court below put the entire elements of crime on the accused and treated those elements as aggravating circumstances so as to award death sentence which is not sustainable".

It is hoped that the apex court will consistently follow this dictum and would refuse to give death penalty in terror cases where the masterminds are never caught and the mere pawns in these sordid sagas are sentenced to death.

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108 *Santosh Kumar Singh* v. *State of M.P* (2014) 12 SCC 650. See also *Amar Singh Yadav* v. *State of U.P.* (2014) 13 SCC 443 and *Lalit Kumar Yadav* v. *State of U.P.* (2014) 11 SCC 129.

109 *Id*. at 663.

110 (2014) 1 SCC 1.

111 (2014) 4 SCC 747.

The court coined the theory of "residual doubt" used before the jury in United States. It is submitted that in an adversarial system and the kind of investigation that we have in this country the "residual doubt" element is present in many cases. The reviewer hopes that if the apex court as an institution remains consistent in the assertions that have been put forward in this case, many would escape the gallows. The court in the instant case commuted death penalty to life imprisonment for 20 years without remission.

In *Mahesh Dhanaji Shinde* v. *State of Maharashtra*[112] the appellants put many naive people to death after convincing them that he possessed supernatural powers of money shower. Colin Gonsalves, while appealing against death penalty, brought forth the fact that the accused are pursuing their studies in jail and are on their way to reformation. And Madan Lokur J, on perusal of all the circumstances, commuted death penalty to life imprisonment with a clarification that the "custody of the appellants for the rest of their lives will be subject to remissions if any, which will be strictly subject to the provisions of sections 432 and 433-A Cr PC".[113] It may be pointed that the appellant-accused had put nine innocent and unsuspecting victims to death in a pre- planned manner and then robbed them of cash and yet the court in this case did not order a sentence without remission.

In *Vasanta Sampat Dupare* v. *State of Maharashtra*[114] a four year old girl was ravished and done to death the court confirming death sentenced observed thus:[115]

> As we perceive, this case deserves to fall in the category of the rarest of rare cases. It is inconceivable from the perspective of the society that a married man aged about two scores and seven makes a four-year minor innocent girl child the prey of his lust and deliberately causes her death. A helpless and defenceless child gets raped and murdered because of the acquaintance of the appellant with the people of the society. This is not only betrayal of an individual trust but destruction and devastation of social trust. It is perversity in its enormity. It irrefragably invites the extreme abhorrence and indignation of the collective. It is an anathema to the social balance. In our view, it meets the test of the rarest of the rare case and we unhesitatingly so hold.

The *mantra* as has been highlighted above has been reformation for punishment. However, the court not only obliquely endorsed the theory of retribution but also acknowledged divine retribution when in *Vinod Kumar* v. *State of Kerala*,[116] while acquitting the accused in a case of rape (it was consensual sex) in a moralizing tone remarked thus:[117]

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112 (2014) 4 SCC 292.

113 *Id.* at 316.

114 (2015)1 SCC 253.

115 *Id*. at 285.

116 (2014) 5 SCC 678.

117 *Id* . at 688. Emphasis added.

> The appellant is not an innocent man inasmuch as he had willy-nilly entered into a relationship with the prosecutrix, in violation of his matrimonial vows and his paternal duties and responsibilities. If he has suffered incarceration for an offence for which he is not culpable, he should realise that *retribution in another form has duly visited him*. It can only be hoped that his wife Chitralekha will find in herself the fortitude to forgive so that their family may be united again and may rediscover happiness, as avowedly the prosecutrix has found.

The court it is submitted must refrain from these kind of remarks.

Reaffirming death penalty in *Mofil Khan* v. *State of Jharkhand*[118] wherein the accused/appellants brutally murdered member of the brother's family, the court in its order held thus:[119]

> In the context of these turbulent social times, we cannot remain oblivious to the substantial suffering of the victims. It stands as a fact that criminal justice reform and civil rights movement in India has historically only paid considerable attention to the rights of the accused and neglected to address to the same extent the impact of crime on the victims. It is not only the victims of crime only that require soothing balm, but also the incidental victims like the family, the co-sufferers and to a relatively large extent the society too. The judiciary has a paramount duty to safeguard the rights of the victims as diligently as those of the perpetrators.

The court in *Mohd. Arif* v. *Supreme Court of India*[120] did acknowledge in para 29[121] that "different judicially trained minds can arrive at conclusions, which, on the same facts, can be diametrically opposed to each other". The judge in clear terms brought out the difference between an oral hearing and one by circulation and upheld oral hearing to be preferable in review petitions in death penalty cases. The following remarks are self explanatory

> The first factor mentioned above, in support of our conclusion, is more fundamental than the second one. Death penalty is irreversible in nature. Once a death sentence is executed, that results in taking away the life of the convict. If it is found thereafter that such a sentence was not warranted, that would be of no use as the life of that person cannot be brought back. This being so, we feel that if the fundamental right to life is involved, any procedure to be just, fair and reasonable should take into account the two factors mentioned above. That being so, we feel that a limited oral hearing even at the review stage is mandated by Art. 21 in all death sentence cases.

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118 (2014) SCC Online SC 844.

119 *Id*., para 59.

120 (2014) 9 SCC 737.

121 *Id.*, at 758.

However, after this great discourse, the court was reluctant to reopen *Arif*'s case since the review petition and the curative petition had been disposed off and they didn't want to reopen the trial. Then, why the discourse in this case?

In a case[122] of negligent driving where a man was killed, the high court reduced the punishment to the period already undergone and imposed a compensation of Rs. 2000/- to be paid to the mother/widow. The apex court's observations are self explanatory:[123]

> In our considered opinion, the High Court while passing the impugned order [*Surendra Singh* v. *State of M.P.*, Criminal Revision No. 3 of 2008, decided on 22-8-2012 (MP)] has completely failed to follow the principles enunciated by this Court in a catena of decisions. Undue sympathy by means of imposing inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and the society cannot endure long under serious threats. If the courts do not protect the injured, the injured would then resort to personal vengeance. Therefore, the duty of any court is to award proper sentence having regard to the nature of the offence and the manner in which it was committed.

The court restored the sentence of six months and two years, respectively, with a fine of Rs. 2500/-.

V.K.Verma v. *Central Bureau of Investigation*[124] involved a case regarding bribery of Rs. 265/- back in 1984 and the appeal before the Supreme Court was decided in 2014. The case deals with "special reasons" for reducing substantive sentence of imprisonment. But it again raises the question whether the apex court should be burdened with these kinds of cases. Are we not reducing the Supreme court to a mere general court of appeal? We need to regain the supremacy of the Supreme Court in the context of the important issues of law that it grapples with rather than a routine appellate court.

Duryodhan Rout v. *State of Orissa*[125] was a case of rape and murder of a minor. The trial court gave death penalty and imprisonment for specific offences. The high court altered capital punishment to life imprisonment and ordered that sentences under sections 376(2)(f)and 302/IPC to run consecutively. However, on appeal the Supreme Court modified the order and made it to run "concurrently". The reviewer has argued that post *Shraddananda*[126] the sentencing jurisprudence is in a mess and we need some legislative clarity on the issue, the sooner the better. Otherwise, it is leaving too much to chance and the disposition of the bench.

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122 *State of M.P.* v. *Surendra Singh* (2015) 1 SCC 222.

123 *Id*. at 224.

124 (2014) 3 SCC 485.

125 (2015) 2 SCC 783.

126 *Supra* note 104.

The court in *O.M. Cherian* v. *State of Kerala*[127] concerned itself with the issue whether the sentences for different offences must run consecutively or concurrently. The court by and large agreed that section 31 Cr PC gives lot of discretion to the judge and expressed an opinion thus:[128]

> When the prosecution is based on single transaction where it constitutes two or more offences, sentences are to run concurrently. Imposing separate sentences, when the acts constituting different offences form part of the single transaction is not justified. So far as the benefit available to the accused to have the sentences to run concurrently of several offences based on single transaction, in *V.K. Bansal* v. *State of Haryana* [(2013) 7 SCC 211 : (2013) 3 SCC (Civ) 498 : (2013) 3 SCC (Cri) 282] , in which one of us (T.S. Thakur, J.) was a member, this Court held as under: (SCC p. 217, para 16)
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> "*16*. … we may say that the legal position favours exercise of discretion to the benefit of the prisoner in cases where the prosecution is based on a single transaction no matter different complaints in relation thereto may have been filed as is the position in cases involving dishonour of cheques issued by the borrower towards repayment of a loan to the creditor."

It is submitted that there cannot be any "thumb rule" regarding the same and the courts, gauging the entire transaction, may decide one way or the other.[129] The term of life imprisonment is being debated[130] and the same was challenged by a convict who had undergone 20 years imprisonment. He filed a *habeas corpus* petition under article 32 in *Arjun Jadav* v. *State of West Bengal.*[131] The court constrained itself and refused to meddle in the executive power of remission and left it to term by dismissing the writ petition. Much of the confusion will be sorted out if the courts stay within their prescribed limits as in this case. The court in *State of Rajasthan* v. *Mohammad Muslim Tagala*[132]asserted "when the appropriate Government commutes the sentence it does so in the exercise of its sovereign powers. The court cannot direct the appropriate government to exercise its sovereign powers".

Commuting capital punishment into life imprisonment in *State of U.P* v. *Narendra,*[133] the high court held that "Longevity of incarceration may make them see reason. Passage of time may make them ponder over the crime they had committed. This might arouse in them a feeling of remorse and repentance". And

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127 (2015) 2 SCC 501.

128 *Id*. at 510.

129 *Id*. ed. note at 504.

130 See Jyoti Dogra Sood, "Criminal Law' *ASIL* 438-46 (2013)

131 (2014) SCC Online SC 522.

132 (2014) 10 SCC 658.

133 (2014) 10 SCC 261.

in *Sumer Singh* v. *Surajbhan Singh* [134] Dipak Misra J sought to remind the courts the very purpose of sentencing:[135]

> The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the court's accountability to remind itself about its role and the reverence for the rule of law. It must evince the rationalised judicial discretion and not an individual perception or a moral propensity. But, if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined. Law cannot tolerate it; society does not withstand it; and sanctity of conscience abhors it. The old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. True it is, it has its own room, but, in all circumstances, it cannot be allowed to occupy the whole accommodation. The victim, in this case, still cries for justice. We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society. Therefore, striking the balance we are disposed to think that the cause of justice would be best subserved if the respondent is sentenced to undergo rigorous imprisonment for two years apart from the fine that has been imposed by the learned trial Judge.

XIII MERCY PETITION

One of the most contentious issues this year has been the issue of mercy petitions. A bunch of writs were filed with a prayer that death penalty be commuted to life imprisonment due to executive delay and other supervening circumstances. All the writs were clubbed in *Shatrughan Chauhan* v. *Union of India*[136] and the court tried to grapple with this highly problematic issue. It may be mentioned at the outset that when the President or the Governor gives mercy it does not mean that they obfuscate the guilt of the accused (which, in various stages of appeal, has been adjudicated and all the supposed aggravating and mitigating circumstances have been taken care of),[137] what it does is gives mercy in spite of the guilt. And so

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134 (2014) 7SCC 323.

135 *Id.* at 338.

136 (2014) 3 SCC 1.

137 See *Mofil Khan* v. *State of Jharkhand* (2015) 1 SCC 67 para 21"Before proceeding to discuss the fact situation in the instant case, it would be expedient to briefly visit the

no criteria can be laid down, as all the aggravating and mitigating circumstances have been thoroughly deliberated (atleast that is the assumption) by the judiciary while deciding the case. Interestingly, the court while agreeing that no criteria can be set goes ahead to suggest some criteria in the form of circular for deciding mercy petitions and suggested thus:[138]

> 55. Though guidelines to define the contours of the power under Articles 72/161 cannot be laid down, however, the Union Government, considering the nature of the power, set out certain criteria in the form of circular as under for deciding the mercy petitions:
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> 55.1. Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification);
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> 55.2. Cases in which the appellate court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction;
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> 55.3**.** Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified;
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> 55.4. Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence;
>
> 55.5. Is there any difference of opinion in the Bench of the High Court Judges necessitating reference to a larger Bench;
>
> 55.6. Consideration of evidence in fixation of responsibility in gang murder case;
>
> 55.7. Long delays in investigation and trial, etc.

The court has tried to interfere with the criminal jurisprudence which it itself has evolved over the years. Aren't the judges supposed to take care of all these criteria while confirming death penalty at various stages – in appeals, in reviews and in curatives! Can they shift the onus to the President or Governor who are not trained in law? As far as the reviewer understands, in spite of it being called a

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judicial decisions of this Court on sentencing policy in cases wherein the entire family has been exterminated and where the accused persons plead for lesser sentence on grounds of age, lack of criminal antecedents and existence of dependents such as children or old aged parents or seeks commutation indicating probability of reformation and rehabilitation." Para 60: "This Court held that to award the lesser punishment would be to render the justice system of this country suspect due to which the common man would lose faith in courts. This Court approved the harshest punishment in such cases as here adopting the approach that the accused understands and the society appreciates the language of deterrence more than the reformative jargon".

138 *Supra* note 136 at 41-42.

constitutional duty, it nonetheless does remain an act of mercy or grace and for exercising that act one needs no reasons whatsoever. It is a constitutional duty since the President and the Governor do not exercise their power in their private capacity but as heads of states. And object of punishment and all its theoretical foundations are for the judiciary to adhere to and cannot be attributed to an act of grace. The files of the cases in which mercy is petitioned are required just to understand the case for which mercy is sought and any minute detail may appeal to these constitutional heads to grant mercy.

The mercy petition has become a very contentious issue since the courts have fettered this act of grace and humanity by calling it a constitutional scheme, subject to the aid and advice of the council of ministers and further, subject to judicial review.

When the death penalty is to be given by the courts and the arguments are there for punishment, the law officer of the state presses for death penalty in heinous offences and it is the defense counsel who tries to highlight the mitigating circumstances and on this the judges do a balancing act (howsoever flawed) and give the final pronouncement. The whole problem is because we were not able to distinguish between the powers on the one hand and the functions of the President on the other. He definitely has to function with the aid and advice of council of ministers. But, should his power be so constrained? The court reproduced paras from *Kehar Singh*[139] which held thus:[140]

> [T]hat the power to pardon rests on the advise tendered by the executive to the President, who subject to the provisions of Article 74(1) of the Constitution *must act in accordance with such advice*.

But the *Kehar Singh* court contradicts itself in the very next page and observes thus:[141]

> It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to *determine for himself* whether the case is one observing the grant of relief falling within that power.

The court should have held that the government gives its opinion and then leaves it to the discretion of the President/Governor. But in *Narayan Dutt* v. *State of Punjab*[142]the court laid down certain grounds on which this power could be challenged and it, *inter alia*, held thus:[143]

> (a) If the Governor has been found to have exercised the power himself without having been advised by the Government.

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139 *Kehar Singh* v. *Union of India* (1989) 1 SCC 204.

140 *Id*. at 211. Emphasis added.

141 *Id*. at 214. Emphasis added.

142 (2011) 4 SCC 353.

143 *Id*. at 361.

…

(e) The order of the Governor has been passed on some extraneous considerations.

The point is that he cannot go against the advice but what if the advice of the Government is based on extraneous considerations?

Secondly the judges are better trained to sift through evidence and circumstances and the procedural Code has enough and more safeguards to ensure this. The same state which was pressing for death penalty through its law officer is now supposed to direct the President- it then does not remain a matter of grace but a matter of political score. The courts have, under article 142, power to do complete justice and they can go to any length to do so and have evolved a mechanism of judicial review (and the constitutional bench in 2014 has pronounced that even oral arguments will be allowed in death penalty cases in review petitions) and beyond that the death row convict has a remedy in the form of a curative petition. Therefore, when every supervening circumstance can be taken care of on the judicial side,[144] why leave it to the executive? The court in *Shatrughan* observed that:[145]

> [T]the President/Governor is not bound to hear a petition for mercy before taking a decision on the petition. The manner of exercise of the power under the said Articles is primarily a matter of discretion and ordinarily the courts would not interfere with the decision on merits. However, the courts retain the limited power of judicial review to ensure that the constitutional authorities consider all the relevant materials before arriving at a conclusion.
>
> Certainly, delay is one of the permitted grounds for limited judicial review as stipulated in the stare decisis. Henceforth, we shall scrutinise the claim of the petitioners herein and find out the effect of supervening circumstances in the case on hand.

The court in this case also tried to grapple the distinction between terror cases and IPC crimes and quoted *Triveniben* [146]and held thus: [147]

> [W]e are of the view that unexplained delay is one of the grounds for commutation of sentence of death into life imprisonment and the said supervening circumstance is applicable to all types of cases including the offences under TADA. The only aspect the courts have to satisfy is that the delay must be unreasonable and unexplained or inordinate at the hands of the executive.

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144 See *Supra* note 120

145 *Supra* note 136 at 32,33.

146 *Triveniben* v. *State of Gujarat* (1989) 1 SCC 678.

147 *Supra* note 136 , para 78.

There were cases of insanity in this writ petition and it was stressed that India being a signatory to many conventions which prohibit death penalty to insane persons and it was recorded that as far as insanity is concerned, the jail manuals may be relevant and if on a medical checkup the death row convict appears insane the state may petition for commutation of death penalty to life imprisonment.

The court sat on judgment over the executive delay and conveniently forgot all about the judicial delays which have crumbled our justice delivery system. The courts ordered that "death convicts are entitled as a right to receive a copy of the rejection of the mercy petition by the President and the Governor" and mandated a "minimum period of 14 days….between the receipt of communication of the rejection of mercy petition and the scheduled date for execution" to "make peace with God" and do other earthly things. Why did the court leave so much scope for itself? If it was so concerned about the executive delay it could have well ordered that if the President or Governor fails to take decision within three months-six months (or any other time limit which they deemed fit) it would be deemed to be rejected because, after all, the guilt has been conclusively proved. Why do the courts always want to have the final say in everything, negating sometimes, the separation of powers, especially in this "act of mercy"? The court, after dominating the whole discourse and keeping the last word, had this to say:[148]

> In the aforesaid batch of cases, we are called upon to decide on an evolving jurisprudence, which India has to its credit for being at the forefront of the global legal arena. Mercy jurisprudence is a part of evolving standard of decency, which is the hallmark of the society.

In a court of law there is no place for mercy jurisprudence. It has to lie somewhere else!

XIV CONCLUSION

The cases on criminal law are quite fascinating and this year provided some interesting cases. The compounding of offences under section 307 and the sermon on sentencing in *Sanjiv Bhalla's*[149] case makes the reviewer wonder whether the notion that crime is against the society is slowly being compromised or done away with and are we heading back to the age where offences as barbaric as murder could be compensated by blood money. The year under survey also had to deal with a number of cases involving 304-B which is indeed a blot on the Indian society that girls continued to be harassed for dowry.

Ravi[150] judgment was indeed appalling where pouring kerosene and putting a wife on fire was not considered an act perpetrated in a "cruel and unusual manner", perhaps pandering to the social structure of male dominance over wife. And in

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148 *Id*. at 91

149 *Supra* note 100.

150 *Supra* note 9.

Kunte,[151] apprehension of sodomy by a guard, who is at the bottom of the pyramid, by his superior the *Subedar* was not enough of provocation. It shows that the women and people from the bottom of social structure *i.e* at the bottom of the hierarchical structure perhaps have the same fate in this country even when the issues are in the judicial domain. Hence a critical perspective including a feminist perspective to law is imperative to take care of all this inequalities.

As far as sentencing is concerned the Supreme Court continued with its arbitrariness in sentencing the convicts for 20 years, 30 years without any justification as to how do they reach this magical figure of 20,21,30,35 *etc*. It they are following 'just deserts' then how do they decide on the number of years? There is no discussion in the judgments. In *Mahesh Dhanaji Shinde* [152] the life imprisonment was not in terms of years but for life subject to remission.However, what was interesting was that in *Selvam*[153] the punishment was "minimum 30 years in jail without remission", and qualified by "though subject to exercise of constitutional power for clemency"! The same was repeated in *Rajkumar*,[154] where the court ordered: "The appellant must serve a minimum of 35 years in jail without remission, before consideration of his case for premature release. However, it would be subject to clemency power of the executive" was that qualification required since it was assumed in all earlies cases where remission was denied. The court was perhaps stressing that sections 432 and 433 where the government can suspend, remit or commute sentences will not be available. The constitutional pardons *etc*. by the President or Governor under articles 72/161will be available. The courts are wary of the government remission under CrPC but when it comes to the constitutional power the courts are not willing to take that away.[155] That leads to the inevitable conclusion that the constitutional clemency (though the Constitution does not use the word clemency) cannot and should not be dependent on government's advice. The advice or opinion may be considered but it cannot be binding. So discussions in *Shatrughan*[156] become problematic. Another issue is that how do we read judgments which talked only about remission without specific reference to the constitutional power. Does it mean only 433-434 Cr PC provisions or even the constitutional provisions under articles 72/161. The courts need to be consistent to avoid any confusion. The court in *Adambhai* deprecated the investigation agencies for framing innocent but what about the court which affirmed death penalty to these innocents? Last but not the least the borrowing of 'residual doubt' theory from a system which has [157] jury trials is indeed unfortunate.

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151 *Supra* note 19.

152 *Supra* note 112.

153 *Supra* note 105.

154 *Supra* note 106.

155 However, the judiciary has made inroads (through judicial review of the executive clemency) to commute sentence.

156 *Supra* note 136.

157. *Supra* note 111.