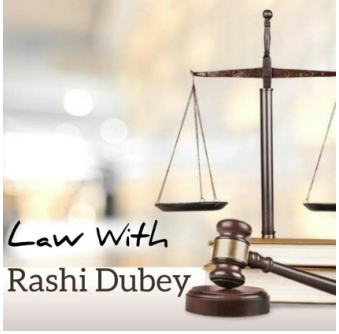
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Documents (100)

1. *Criminal Law in Ancient India*
   Client/Matter: -None-
2. *Criminal Law in Modern India*
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3. *1.1 Introduction to IPC*
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5. *2.1 THE CONCEPT OF CRIME*
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6. *2.2 THEORIES OF CRIME: NATURAL LAW VIS-À-VIS POSITIVE LAW*
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69. *9.1 Introduction*

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70. *9.2 Crimes against Women—Legal Provisions*

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97. *15.1 Introduction to Chapter XVIII of IPC*

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98. *15.2 Forgery*

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INDIAN PENAL CODE—AN OUTLINE

Criminal Law in Ancient India

The *Indian Penal Code, 1860*, the basic criminal law of the country, was created as a statute in 1860. It came into force on 1 January 1862, replacing the various rules and regulations on criminal law statute prevailing in British India.[1] However, the roots of criminal jurisprudence can be traced to Manu, the famous law giver who framed a comprehensive code containing not only the ordinances relating to law, but a complete digest of the then prevailing religion, philosophy and customs practiced by the people.[2]

Assault, battery, theft, robbery, false evidence, slander, libel, criminal breach of trust, adultery, gambling and homicide, recognised as crimes by Manu, are the principal offences against persons and property that occupy a prominent place in today's *Indian Penal Code, 1860*, (*IPC, 1860*). The king dispensed justice himself with the help of counsellors, or appointed judges and assessors for the administration of justice.

Although these precepts are excellent, the substantive criminal jurisprudence of Manu is not free from bias. According to him, the gravity of the offence varies with the caste and creed of the criminal and so does the sentence. The protection given to *brahmins* was paramount and they were placed above all.[3]

During this period, private and public wrongs were not clearly distinguished. Murders and other homicides were regarded as private wrongs. The right to claim compensation was the rule of the day. A distinction was, however, drawn between casual offenders and hardened criminals.[4] Further, he made provisions for exemption from criminal liability, where the act was done without any criminal intention, or by mistake of fact, or by consent, or was the result of accident, much on the lines provided in Chapter IV of the *IPC, 1860*. The right of private defence was fully developed.

Mohammedan Criminal Law

Manu's Code continued in India till the Mohammedan rule was established. The Muslim legal system had its origin in the *Koran*, which is said to have been revealed by God to the Prophet. In Muslim law, the concepts of sin, crime, religion, moral and social obligation are blended in the concept of duty, which varied according to the relative importance of the subject matter. The administration of criminal justice was entrusted in the hands of *kazis.* The punishment varied according to the nature of the crime. Broadly speaking, the punishment was four-fold, namely, *qisas* or retaliation, *diyah* or blood money, *hadud* or fixed punishment and *tazir* or *siyasah,* discretionary or exemplary punishment.[5] However, the notions of *Kazis* about crime were not fixed and differed according to the purse and power of the culprits. As a result, there was no uniformity in the administration of criminal justice during the Muslim rule in India, and it was in a chaotic state.

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1 *Essays on the Indian Penal Code*, Indian Law Institute, 1962, p 1.

2 Sengupta, *Evolution of Ancient Indian Law,* A Probsthain, 1953 p 3. 'In ancient Indian primitive societies the administration of justice was the concern of the common people in their various associations, such as *kula, sreni,* guilds etc. The King was not involved in the administration of justice. It was The *Dharma Sutras* that mentioned for the first time administration of justice as the function of the King.

3 See Manu, *Institutes of Hindu Law,* chapter VIII on “Judicature” and on “Law, Private and Criminal”, pp 44, 380.

4 See Manu, *Institutes of Hindu Law,* chapter VIII on “Judicature” and on “Law, Private and Criminal”, pp 129, 130: “First, let him punish by gentle admonition; afterwards, by harsh reproof; thirdly, by deprivation of property; after that, by corporal pain. However, when even by corporal punishment he cannot restrain such offenders, let him apply to them all the four modes with vigour.”

5 See *Essays on the Indian Penal Code,* Indian Law Institute, 1962, pp 1-32; see RC Nigam, *Principles of Criminal Law,* vol 1, 1965, pp 18-20.

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INDIAN PENAL CODE—AN OUTLINE

Criminal Law in Modern India

The Muslim system of administration of criminal justice was in practice when the British took over the reign of the country. In the beginning, they engrafted the Muslim system of administration, but were faced with much difficulty. As a result, the *moffussil* as well as the Presidency Courts gradually began to turn to the English law for guidance and help. However, in adopting the British system, each of the Presidency Courts followed an independent course of its own. The result was a chaotic mass of conflicting and contradictory decisions on similar points. The regulations passed by different Presidencies differed widely in their scope and contained different provisions. For instance, in the Bengal Presidency, serious forgeries were punishable with imprisonment for a term double the term fixed for perjury; whereas in the Bombay Presidency, perjury was punishable with imprisonment for a term double the term fixed for the most aggravated forgeries.[6] Likewise, in the Madras Presidency, the two offences were exactly on the same footing.[7] The result was utter disorder and confusion in the administration of criminal justice.[8]

Indian Penal Code

A law commission was constituted in 1834, with Lord Macaulay as its President and MacLeod, Anderson and Millet as the commissioners for preparing a comprehensive *Penal Code* for the sub-continent to bring about consistency and uniformity in criminal law. The commission submitted its report on 15 June 1835, and the Draft *Penal Code* was widely circulated in order to ascertain the views of judges, jurists, lawyers and others.

After a prolonged discussion and careful consideration, the Draft *Penal Code* was approved by the legislative council and received the assent of the Governor-General-in-Council on 6 October 1860, and the *Indian Penal Code* as stated earlier was brought into force on 1 January 1862.

The *Indian Penal Code, 1860* a comprehensive piece of legislation; originally, had 23 Chapters and 511 sections. However, in the course of time, three Chapters—V-A (Criminal Conspiracy), IX-A (Offences Relating to Elections) and XXA (Cruelty by Husband or Relatives of Husband) and a number of sections have been added numbering 550, and a few sections deleted. The *Indian Penal Code* embodies the general penal law of the country, and it is the sole authority on the general conditions of liability, the definitions of specific offences in the *IPC*, and the conditions of exemptions from criminal liability. Some crimes are cognizable and some are not.[9]

The *Indian Penal Code* is supplemented by local and special statutes to punish certain categories or behaviours or acts that are prejudicial to the interest of the citizens and the State.

The *Indian Penal Code*, although an admirable compilation of substantive criminal law, needs a thorough revision to make it progressive and pragmatic in order to adapt to the flux of changes. For instance, offences known as white-collar and socio-economic crimes, scams, bank frauds, *hawala* and criminalisation of politics, etc, hitherto unknown, have emerged and are multiplying at an alarming pace.[10] These crimes have become a dominant feature of a powerful section of society, which either aids and abets criminal activity or engages in it directly.[11]

The Santhanam Committee, while examining the various administrative, legal and social problems of corruption, broadly classified the socio-economic offences into eight categories,[12] and recommended in 1964, the addition of a new chapter to the penal laws of the country. The Law Commission, however, rejected the proposal on the ground that such offences should be dealt with by special and self-contained enactments that supplement the basic criminal law.[13]

Even the Bill for revision of the *Indian Penal Code* introduced in the Rajya Sabha *vide* the *Indian Penal Code* (Amendment) Bill 1972, was not passed.[14]

Classification of the Code

The provisions under The *Indian Penal Code, 1860* can broadly be classified into two categories, viz, general principles, and specific offences. General principles relate to the basic principles of criminal law, criminal liability and provisions relating to general exception from criminal liability and punishment.

These are:

I. *General Principles*

(1) Introduction (Chapter I, *IPC*, *sections 1*- 5);

(2) General Explanations (Chapter II, *IPC*, *sections 6-52A*);

(3) Of Punishments (Chapter III, *IPC*, *sections 53-75*);

(4) General Exceptions (Chapter IV, *IPC*, *sections 76-106*);

(5) Of Abetment (Chapter V, *IPC*, *sections 107-120*);

(6) A Criminal conspiracy (Chapter V-A, *IPC*, *sections 120A-120B*) and;

(7) Of Attempts to Commit Offences (Chapter XXIII, *IPC, section 511*).

II. *Specific Offences*

The specific offences under the *IPC, 1860* may broadly be classified into six categories as stated below. The entire scheme of specific offences has been explained in Table A.

(1) Offences affecting the State (Chapter VI, Chapter VII)

(2) Offences affecting common well being (Chapter VII, Chapter IX, Chapter IX A, Chapter X, Chapter XI, Chapter XII, Chapter XIII, Chapter XIV, Chapter XV and Chapter XIX)

(3) Offences affecting Human Body (Chapter XVI)

(4) Offences affecting Property (corporeal or incorporeal) (Chapter XVII and Chapter XVIII)

(5) Offences Relating to Marriage (Chapter XX and Chapter XX-A)

(6) Offences affecting Reputation (Chapter XXI and Chapter XXII)

The adjective law of procedure is contained in the *Code of Criminal Procedure 1973*[15] which consolidates the law relating to the establishment of criminal courts and the procedure to be followed in the investigation, inquiry and trial of the offences under the *IPC, 1860*.[16]

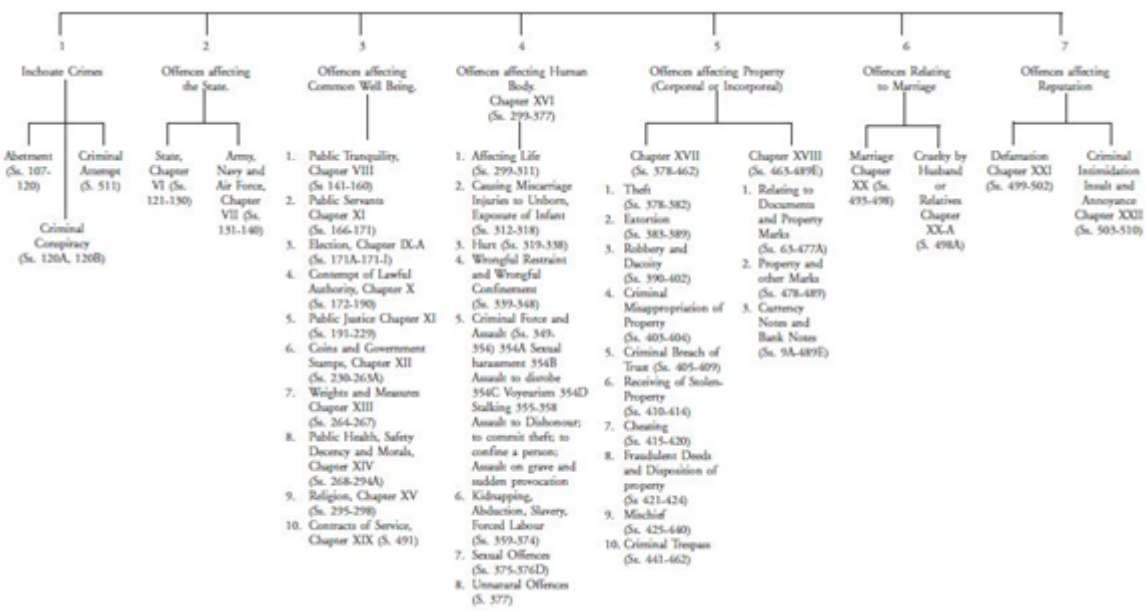
It is proposed to discuss different topics in the book in two parts as stated below:

(I) General principles (chapters 1 to 7); and

(II) Specific offences (chapters 8 to 25).

TABLE A

SPECIFIC OFFENCES UNDER THE *INDIAN PENAL CODE* AT A GLANCE



Quest of Truth and Justice in Law Courts: Broadly there are two systems of administration of criminal justice operating in different parts of the world, viz.,

1. Adversarial System, and

2. Inquisitorial System

3. Mob Lynching

1. Adversarial System: The adversarial system of common law inherited from British colonial rulers for dispensation of criminal justice is followed in India. The adversarial system as we know is one, which relies on the skill of the lawyers representing their client's positions before a neutral umpire, usually the judge, trying to ascertain the truth of the case. The judge as a neutral observer tries to find out and ascertain whether the prosecution has been able to prove its case beyond reasonable doubt; and the benefit of doubt if any is given to the accused. The judge in his anxiety to maintain his position of neutrality never takes any initiative to discover the truth. Since the adversarial system doesn't impose a positive duty on the judge to discover the truth, he plays a passive role.

2. Inquisitorial System: In the inquisitorial system operating in the continental countries of Europe, including Soviet Union, the responsibility of trial judge is to discover the truth. The judge is assisted by judicial police officer, who submits the investigation to the concerned prosecutor who after making a thorough scrutiny of the case can move the judge to take over the responsibility of supervising the investigation of such case. Since the investigation is undertaken under the guidance of the judge, the entire investigation process takes minimum time. The case is then forwarded to the trial judge for disposal of the case.

Once the judge undertakes the case, unlike the adversarial system followed in India, no adjournment is allowed and the case is finally concluded before another case is taken up for disposal. It is the judge who puts forth the questions to witnesses including the accused in order to ascertain the truth. There is no cross-examination as such; the standard of proof required is inner satisfaction and conviction of judge and not proof beyond reasonable doubt.

On the other hand, in the adversarial system where the investigation is the exclusive domain of the police, it takes years to complete the investigation and in most of the cases as a result of vested interests the cases are either dropped or become spineless with lot of loop holes resulting in witnesses going hostile and finally acquittal of the accused is ensured for want of proof beyond reasonable doubt.

It is high time that we devise a scheme similar to that of inquisitorial system for trial of criminal cases. This will help to a great extent, in ascertaining the truth in law courts and will go a long way in early disposal of cases to the relief

of millions of victims of the rotten system of criminal justice that has become cancerous, before the system collapses.

3. Mob Lynching (Mob Violence Leading to Death of Innocent Persons): A new trend of lynching cases of innocent people to death have surfaced on account of rumours of cow slaughter. A frenzy mob lynched a 45 year old man and critically injured his friend in Hapur in Uttar Pradesh on 18 June 2018. Surprisingly, Civil Aviation Minister under Modi Government appreciated such acts and garlanded eight men sentenced to life imprisonment for 2017 murder of Alimuddin Ansari in Jharkhand. Instead of apologizing for his irresponsible statement and behaviour, he said they will be acquitted, he is simply honouring the process of law. All this act of crime and irresponsible statement by Ministers in Government is disgusting and unpleasant. The chilling effect of mob lynching continues. A 31 years old Muslim man from Haryana, Mewat district became its victim. In Rajasthan's Alwar late on Friday, the 20 July 2018, Rakbar Khan, who was attacked allegedly by a group of 8 to 10 cow vigilantes, succumbed to his injures, in hospital a few hours later.[17] Three men have been killed since April 2017 in Alwar on the suspicion of being cow smugglers.

All these acts of mob violence putting people to death led a bench headed by Chief Justice Dipak Mishra, and Justice AH Khanwilkar and DV Chandrachud on 17 July 2018, coming down strongly on the new norm of recurring incidents of mob lynching cases recommended that Parliament passes a "separate offence". For the crime to instil the fear of law into offenders and preserve rule of law in a pluralistic society. The Supreme Court asked the Centre and States to discharge their constitutional duty of maintaining law and order to ensure peace and protect the secular ethos. Governments were duty bound to ensure rule of law prevailed in a democratic set-up and to treat those indulging in violence criminals needing stern punishment. Horrendous acts of mobocracy can not be permitted the inundate the law of the land. Earnest action and concrete steeps have to be token to protect citizens from the recurring pattern of violence which cannot be allowed to become "the new norms." The court issued guidelines to combat mob violence as stated below, to "instil a sense of fear for law among the people who involve themselves in such kind of activities".

The court said that following guidelines be strictly followed viz.

Monitoring at District Level

- States and Union Territories to designate officer of at least Superintendent of police-rank as nodal officer in each district, to be assisted by Deputy Superintendent of Police rank officer to prevent mob violence.
- Special task force to gather intelligence about people likely to commit such crimes or involved in spreading hate speech/fake news.
- Nodal officer to meet at least once a month with district information officer and police to identify tendencies of vigilantism, mob violence. Director General Police and Home Secretaries to review matters at least once a quarter with nodal officers and police.

Keep Ear to the Ground

- State's to identify areas where instances of lynching and mob violence have been reported of late.
- Such areas to be patrolled to discourage anti-social elements.

Cops to Pay for Negligence

Police, district administration's failure to comply with Supreme Court's directions will be deemed as deliberate negligence and/or misconduct for which appropriate action will be taken.

Compensation, Speedy Justice for Victims

- States and Union Territories to draw up compensation scheme for mob violence/lynching with provision for interim relief to victim (s)/next of kin within 30 days.
- Lynching cases to be tried by designated court/fast-track courts in each district holding trial on day-to-day basis; preferably concluded within six months.

Close Vigil Online

- Centre, States and Union Territories to broadcast radio, television and online messages: warning that lynching and mob violence will invite serious consequences.
- Centre, States and Union Territories to take steps to curb and stop spread of irresponsible messages, videos etc on social media that may incite mob violence.
- FIR a must against persons spreading such fake/irresponsible messages and videos.
- Supreme Court orders States and Union Territories to designate officer of SP rank as nodal officer in each district to prevent mob violence
- Centre, States and Union Territories to broadcast radio, TV and online messages warning that lynching and mob violence shall invite serious consequences.
- Police, district admin's failure to comply with Supreme Court's directions will be deemed deliberate negligence.
- States to draw up compensation scheme for lynching with provision for interim relief to victim (s)/next of kin within 30 days.
- Lynching cases to be tried by fast-track courts in each district and preferably concluded in six months.

The exigencies of the situation (created by incidents of mob lynching) require sound clarion call for earnest action to strengthen our inclusive and all-embracing social order which would, in turn, reaffirm the constitutional faith. Nothing more or nothing less."

While asking the Centre and States to frame a compensation policy for victims, the three-judge bench unanimously said trial in such cases, including pending one, should be tried by a designated court or a fast-track court day-to-day basis to conclude proceedings within six months of taking cognisance "To set a stern example in cases of mob violence and lynching, upon conviction of the accused persons, the trial court must ordinarily award maximum sentence under various offences under provisions of the *IPC*," CJI Misra said, while directing trial courts to provide protection to witnesses and conceal their identities.

The SC said authorities and police officers failing to comply with the guidelines outlined in Tuesday's judgment would be guilty of "an act of deliberate negligence and/or misconduct for which appropriate action must be taken against him/her and not limited to departmental action under the service rules. Departmental action shall be taken to its logical conclusion preferably within six months by the authority.

The court stated in no uncertain terms that vigilante groups could only report a crime but would be sternly punished if they took the law into their hands.

The court said Parliament should "create a separate offence for lynching and provide adequate punishment for the same" as a special law to deter mob crimes that often target innocents. It ordered the states to frame within a month a "lynching or mob violence victim compensation scheme" with provision for interim payment to victims within a month of an incident. Framing elaborate guidelines to prevent, remedy and punish mob lynching. The court, sought the Centre's response on allegations that its proposed social media hubs will curb circulation of inflammatory messages.

Writing the judgment on a bunch of petitions filed by Tehseen Poonawala. Tushar Gandhi and others, CJI Misra said. "It is axiomatic that it is the duty of the State to ensure that the machinery of law and order functions efficiently and effectively in maintaining peace so as to preserve our quintessential secular ethos."

It is high time that the strength of the Trial Court, High Courts and Supreme Court judges are increased considerably to cope with the enormous pressure to bring down the back log of cases and ensure proper court functioning.

A common sense approach whereby courts can close even non-compoundable offences, if both sides are agreeable in criminal cases as well as in civil cases perhaps should be given legal sanction in appropriate cases.

If all those concerned in judicial administration, namely, the Bar and the Bench, Government, and prosecuting agencies and litigants cooperate in the quick and fair disposal of cases time is not far off when Indian Judiciary will come up to the expectation of common man; and snail-paced justice delivery system of today would gather momentum.

TABLE B

INCIDENCE & RATE OF TOTAL COGNIZABLE CRIMES REGISTERED UNDER *INDIAN PENAL CODE* (*IPC*) AND SPECIAL AND LOCAL LAWS (SLL) (2001-2016)

Sl. No.	Year	Estimated Mid-Year Population (in Lakhs)*	*IPC*	Incidence SLL	Total	*IPC*	Rate SLL	Total	Percentage of *IPC* Crimes to Total Cognizable Crimes
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1	2001**	10270	1769308	3575230#	5344538	172.3	348.1	520.4	33.1
2	2002	10506	1780330	3746198	5526528	169.5	356.6	526.0	32.2
3	2003	10682	1716120	3778694	5494814	160.7	353.7	514.4	31.2
4	2004	10856	1832015	4196766	6028781	168.8	386.6	555.3	30.4
5	2005	11028	1822602	3203735	5026337	165.3	290.5	455.8	36.3
6	2006	11198	1878293	3224167	5102460	167.7	287.9	455.7	36.8
7	2007	11366	1989673	3743734	5733407	175.1	329.4	504.5	34.7
8	2008	11531	2093379	3844725@	5938104	181.5	333.4	515.0	35.3
9	2009	11694	2121345	4553872++	6675217	181.4	389.4	570.8	31.8
10	2010	11858	2224831	4525917	6750748	187.6	381.7	569.3	33.0
11	2011*	12102	2325575	3927154	6252729	192.2	324.5	516.7	37.2
12	2012	-	2387188	3654371	-	-	497.9		
13	2013	-	2647792	3992656	-	-	540.4		
14	2014		28,51,563	43,77,630	7229,193	229.2	351.9	233.6	
15	2015		29,49,440	43,76699	73,26,099	234.2	347.6	145.7	40.3
16	2016		29,75,711	48,31,515	7807226	367.5	379	379.3	

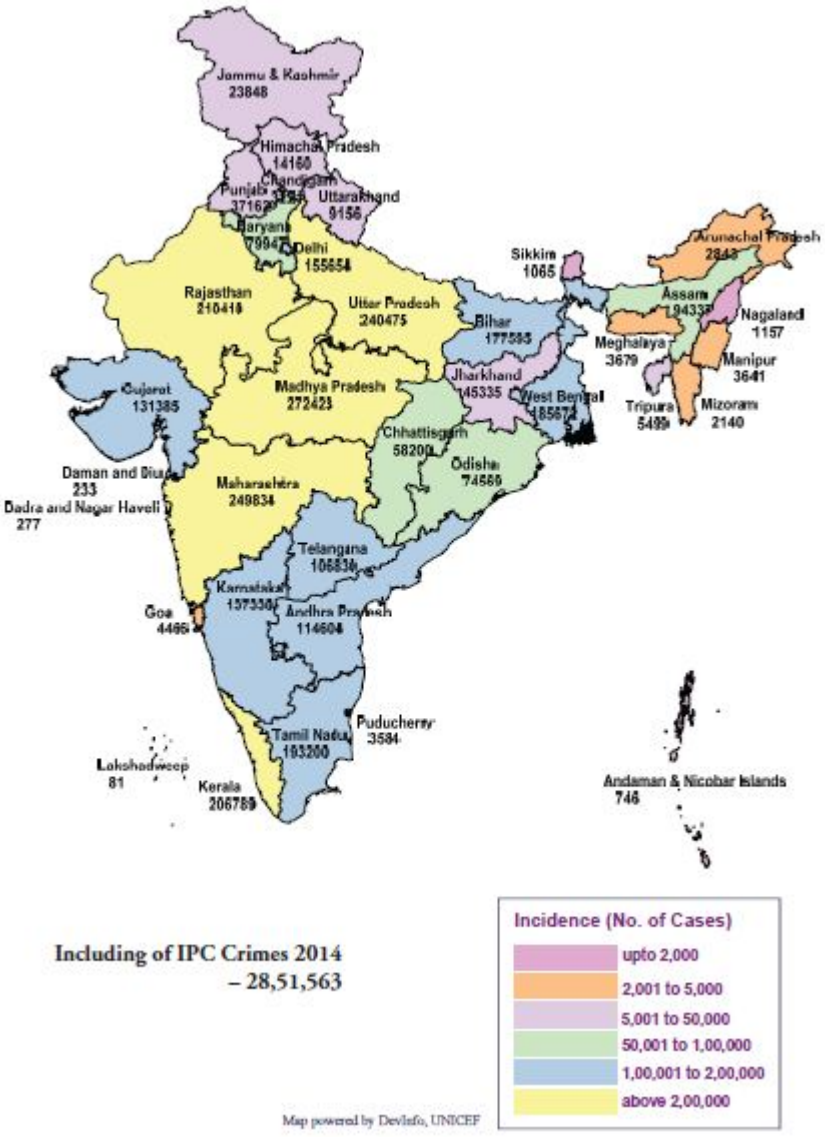
Variation is SLL Crimes Due to Exclusion of Large Number of Non-Cognizable Crimes under SLL by Kolkata City.

Criminal Law: Cases and Materials

*Indian Penal Code—An Outline*11

INCIDENCE OF *IPC* CRIMES DURING 2014

(All India 28,51,563)



CASES REGISTERED UNDER *IPC* CRIMES DURING 2015

(All India 29,49,400)

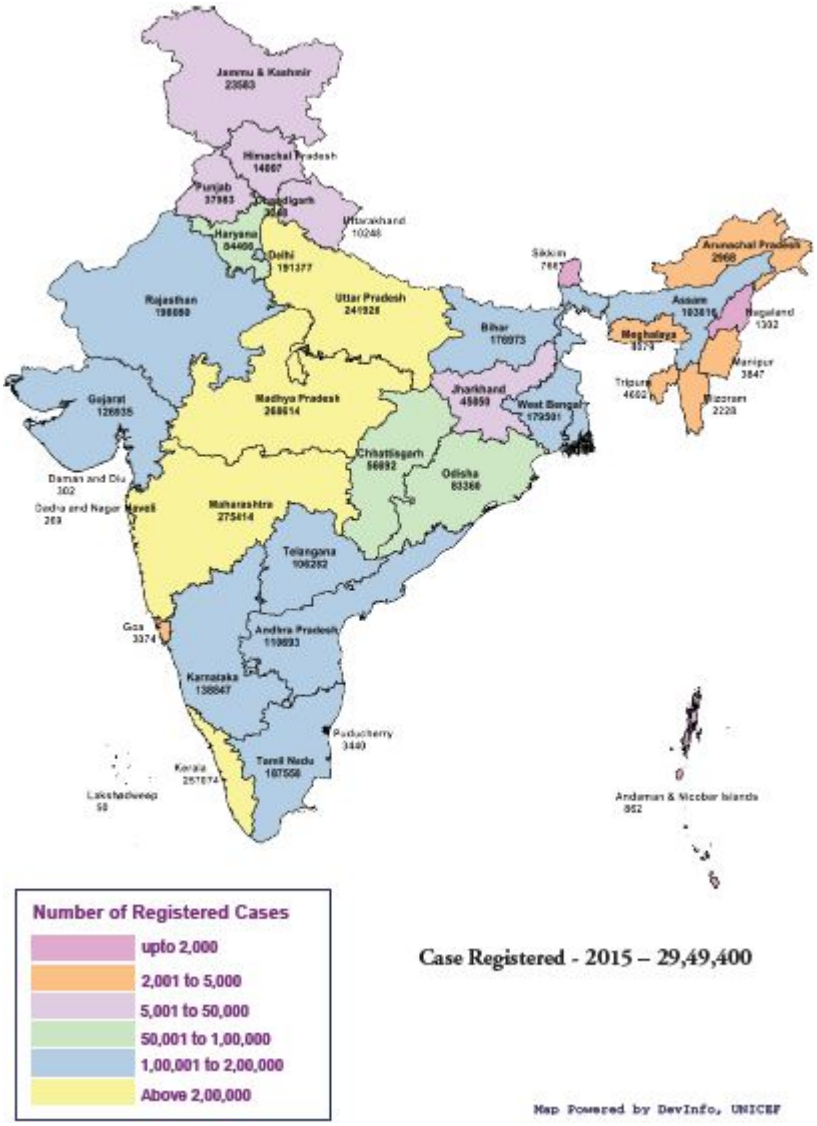
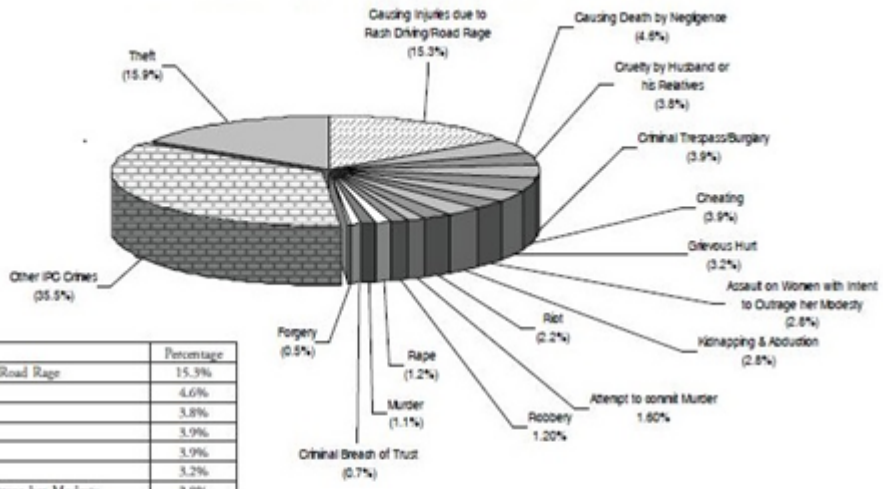


FIGURE 1.4

PERCENTAGE DISTRIBUTION OF *IPC* CRIMES DURING 2015

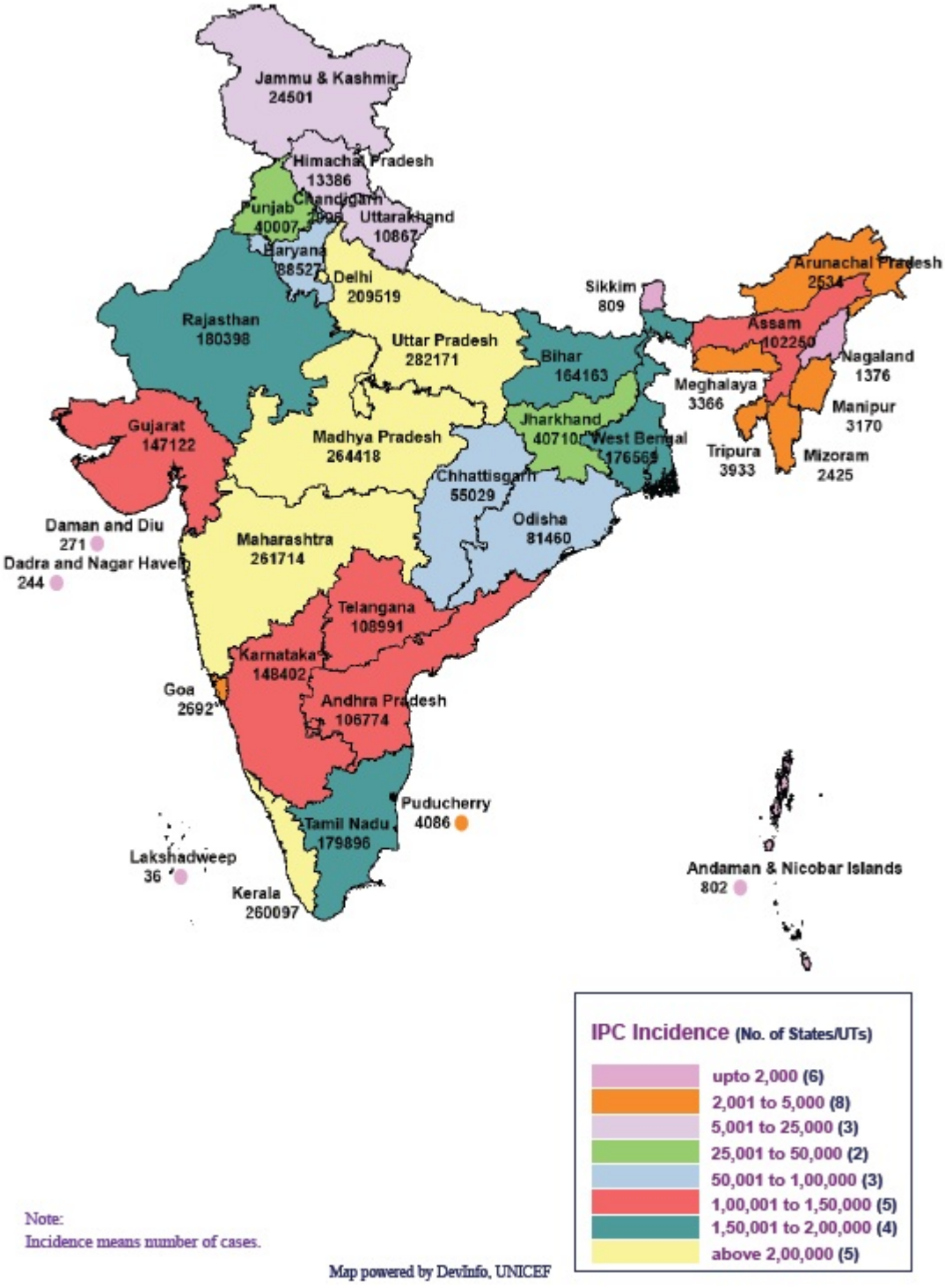


Types of Crimes	Percentage
Causing Injuries due to Rash Driving/Road Rage	15.3%
Causing Death by Negligence	4.6%
Cruelty by Husband or his Relatives	3.8%
Criminal Trespass/Burglary	3.9%
Cheating	3.9%
Grievous Hurt	3.2%
Assault on Women with Intent to Outrage her Modesty	2.8%
Kidnapping & Abduction	2.8%
Riot	2.2%
Attempt to commit Murder	1.6%
Robbery	1.2%
Rape	1.2%
Murder	1.1%
Criminal Breach of Trust	0.7%
Forgery	0.5%
Other IPC Crimes	35.5%
Theft	15.9%
Total	100%

Crime in India, 2015, p 23.

INCIDENCE OF *IPC* CRIMES DURING 2016

(All India 29,75,711)



RATE OF *IPC* – CRIMES DURING 2016

(All India 233.6)

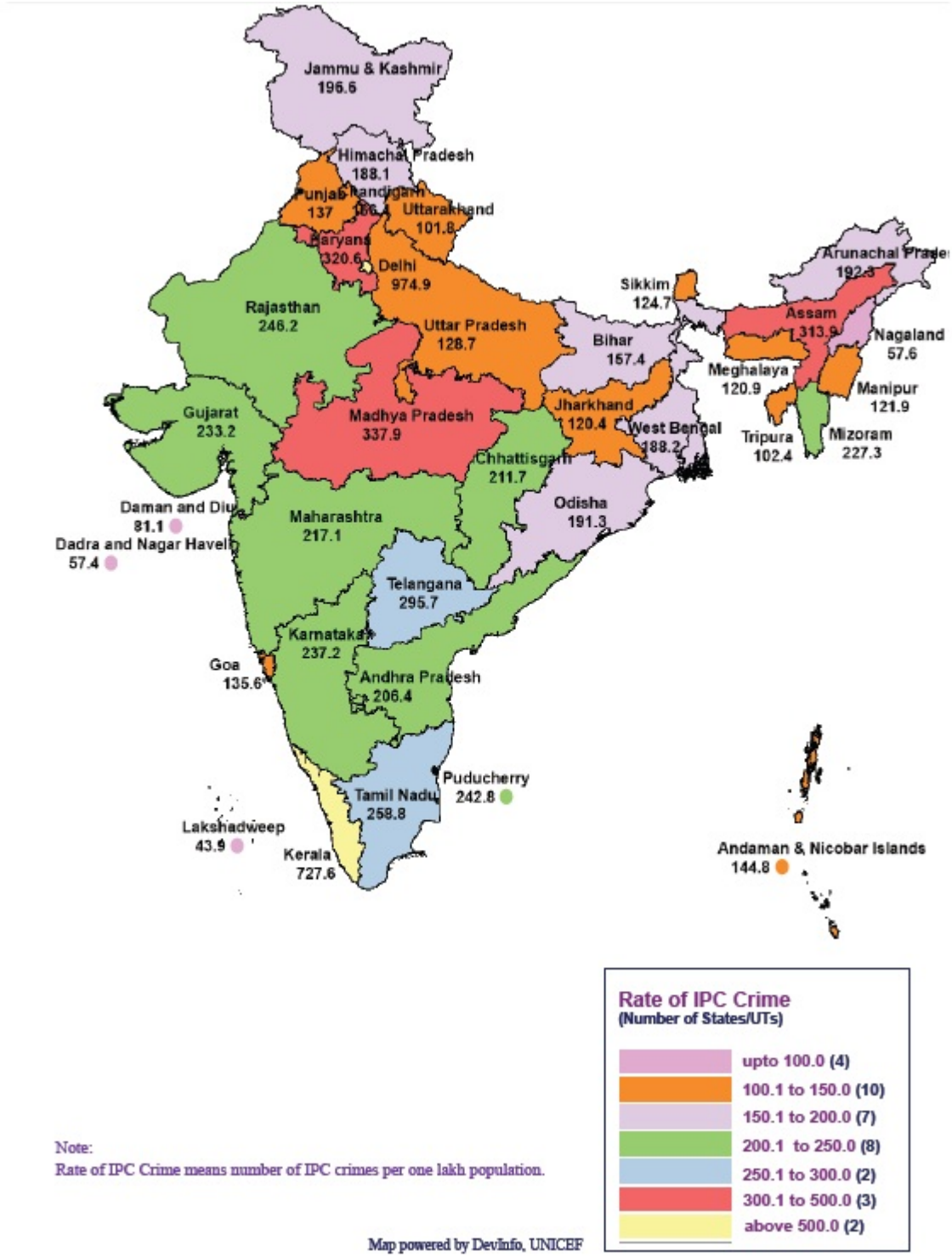


TABLE 1

INCIDENCE OF *IPC* CRIMES DURING – 2014

(All India Figure 28,51,563)*

S. No.	Name of States	Number of Crimes
1.	Andhra Pradesh	1,14,604

S. No.	Name of States	Number of Crimes
2.	Assam	94,327
3.	Bihar	1,77,595
4.	Gujarat	13,138
5.	Kerala	20,6788
6.	Madhya Pradesh	27,2428
7.	Tamil Nadu	93,200
8.	Maharashtra	24,9834
9.	Karnataka	13,7338
10.	Odisha	74,568
11.	Punjab	37,182
12.	Rajasthan	21,0418
13.	Telangana	10,8830
14.	Uttar Pradesh	24,0475
15.	West Bengal	18,5672
16.	Jammu & Kashmir	23,848
17.	Nagaland	1167
18.	Haryana	79,847
19.	Himachal Pradesh	14,160
20.	Manipur	3641
21.	Tripura	5499
22.	Meghalaya	1167
23.	Sikkim	1065
24.	Mizoram	2140
25.	Arunachal Pradesh	2843
26.	Goa	488
27.	Chhattisgarh	3716
28.	Uttarakhand	9156
29.	Jharkhand	45,335

TABLE 2

S. No.	Name of Union Territories	Number of Crimes
1.	Delhi	15,156
2.	The Andaman and Nicobar Islands	746

S. No.	Name of Union Territories	Number of Crimes
3.	Lakshadweep	81
4.	Dadra and Nagar Haveli	277
5.	Daman and Diu	293
6.	Puducherry	3584
7.	Chandigarh	3221

Statewise incidence of reported *IPC* crimes during 2015/2016 as depicted in the map enclosed is as follows:

States	Number of cases	2016	States	Number of cases	2015
Andhra Pradesh	1,10,693	106774	Assam	1,03,516	1,02,250
Bihar	176,973	164163	Gujrat	1,26,935	1,47,122
Kerala	25,714	260097	Madhya Pradesh	2,68,614	2,64,418
Tamil Nadu	1,87,558	179896	Maharashtra	2,75,414	2,61,714
Karnataka	1,38,847	148402	Odisha	83,360	81,460
Punjab	37,983	40007	Rajasthan	1,98,080	1,80,398
Utter Pradesh	2,41,920	282171	West Bengal	1,79,501	1,76,569
Jammu and Kashmir	23,583	24501	Nagaland	1,302	1,376
Haryana	84,466	88527	Himachal Pradesh	14,007	13,385
Manipur	3,847	3170	Tripura	4,692	3,933
Meghalaya	4,079	1376	Sikkim	766	809
Mizoram	2,228	2425	Arunachal Pradesh	29,68	2,534
Goa	3,074	2692	Chhattisgarh	56,692	55,029
Uttarakhand	10,248	10867	Jharkhand	45,050	40,710

Crimes reported in Union Territories for 2016, as given in the Crime Records Bureau are the following:

union Territory	Number of cases	2016	union Territory	Number of cases	2015
Delhi	191377	209519	Andaman and Nicobar Islands	862	802
Lakshadweep	50	36	Dadra and Nagar Haveli	269	244
Daman and Diu	302	271	Puducherry	3440	4086
Chandigarh	3248	2996			

SNAPSHOTS (STATES/UTS)

Crime Head	Crime Incidence			Crime Rate			Percentage Variation	
	2014	2015	2016	2014	2015	2016	2014-2015	2016-2016
IPC	28,51,563	29,49,400	29,75,711	229.2	234.2	233.6	3.4%	0.9%
SLL	17,20,100	17,61,276	18,55,804	138.3	139.9	145.7	2.4%	5.4%
Total	45,71,663	47,10,676	48,31,515	367.5	374.1	379.3	3.0%	2.8%

i. A total of 48,31,515 cognizable crimes comprising 29,75,711 *IPC* crimes and 18,55,804 Special & Local Laws (SLL) crimes were reported in 2016, showing an increase of 2.6% over 2015 (47,10,676 cases).

ii. During 2016, *IPC* crimes have increased by 0.9% and SLL crimes have increased by 5.4% over 2015.

iii. Percentage share of *IPC* was 61.6% while percentage share of SLL cases was 38.4% of total cognizable crimes during 2016.

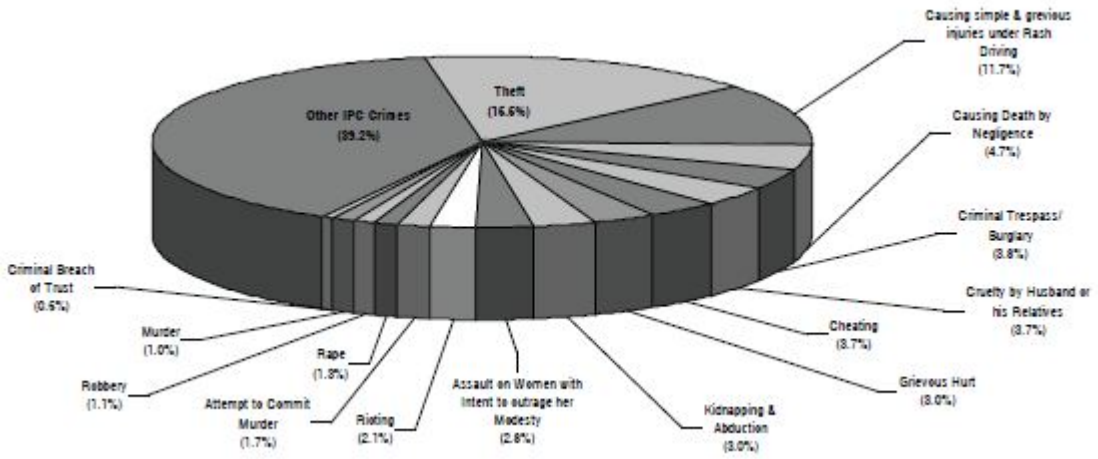
iv. Uttar Pradesh accounted for 9.5% of total *IPC* crime reported in the country followed by Madhya Pradesh (8.9%), Maharashtra (8.8%) and Kerala (8.7%).

v. Delhi UT reported the highest crime rate (974.9) under *IPC* crimes followed by Kerala (727.6) against national average of 233.6.

vi. Kerala has reported highest number of cases of SLL crimes (24.1%) followed by Gujarat and Tamil Nadu (15.5% each) of total SLL crimes reported in the country during 2016.

vii. Kerala reported highest SLL crime rate of 1,252.7 in the country during 216 followed by Gujarat (457.1) against national average of 145.7.

IPC Crimes in States/UTs (2016)



Other *IPC* Crimes	39.2%	Cruelty by Husband	3.7%	Assault on Woman	2.8%	Robbery	1.1%
Rash Negligent Act	11.7%	Cheating	3.7%	Rioting	2.1%	Murder	1.0%
Death by Negligence	4.7%	Grievous Hurt	3.0%	Attempt to murder	1.7%	Criminal Breach of Trust	0.6%
Trespass burgling	3.8%	Kidnapping & Abduction	3.0%	Rape	1.3%	Total Crime	100%

Cognizable Crimes

A cognizable offence or case is defined as the one which an officer in-charge of a police station may investigate without the order of a magistrate and effect arrest without warrant. The police have a direct responsibility to take immediate action on the receipt of a complaint or of credible information relating to such crimes, visit the scene of the crime, investigate the facts, apprehend the offender and arraign him before a court of law having jurisdiction over the matter. Cognizable crimes are broadly categorised as those falling either under the '*Indian Penal Code* (*IPC*)' or under the 'Special and Local Laws (SLL)'.

The *Code of Criminal Procedure, 1973* (*CrPC, 1973*) classified all the crimes into two categories:

(i) Cognizable – *section 2 (c) CrPC, 1973*

(ii) Non-cognizable – *section 2 (1) CrPC, 1973*

Non-Cognizable Crimes

Non-Cognizable crimes are defined as those which cannot be investigated by police without the order of a competent magistrate. Police do not initiate investigation in non-cognizable crimes except with magisterial permission. First Schedule of the The *Code of Criminal Procedure, 1973* gives the classification of the offences of the *Indian Penal Code, 1860*.

CRIMES UNDER *INDIAN PENAL CODE* (*IPC*) AND SPECIAL & LOCAL LAWS (SLL) – 2014-2016

S. No.	Years	Mid-Year Projected Population (in Lakhs)	Crime Incidence +			Crime Rate ++			Percentage of *IPC* Crimes to Total Cognizable Crimes
						IPC	**SLL**	**Total**	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1	2014	12440.4	2851563	1720100	4571663	229.2	138.3	367.5	62.4
2.	2015	12591.1	2949400	1761276	4710676	234.2	139.9	374.1	62.6
3.	2016	12739.9	2975711	1855804	4831515	233.6	145.7	379.3	61.6

The above data given in Table 1.1 of the Crime Record Bureau indicates the incidence of *IPC* and special and local laws in the country from 2014 to 2016 which indicates rate of crime has increased every year. The total *IPC* and SLL in 2014 was 4571663, 2015 went up to 4710 676 and further increased to 4831514 in 2016.

*Crime in India 2016 National Crime Record Bureau Minister of Home Affairs. Government of India.

Note: (i) Population Source: Registrar General of India estimated population of 2016 based on 2001 census

(ii) '+' Incidence: Number of FIRs Registered

(iii) '++' Crime Rae is calculated as Crime incidence per one lakh of population.

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6 Bombay Regulation XIV of 1827, sections XVI and XVII.

7 Madras Regulation VI of 1811, section 111.

8 Sir Hari Singh Gour and AB Srivastava, *Dr. Hari Singh Gour's Penal Law of India*, 11th Edn, 2000, pp 15-19.

9 The *Code of Criminal Procedure 1973, section 2* (c) states:

> "Cognizable offence" means an offence for which, and "cognizable case" means a case in which a police officer may, in accordance with the First schedule or under any other law for the time being in force, arrest without warrant.

10 KD Gaur, '*White Collar Crime and Its Impact on Society*', Journal of the Bar Council of India, vol 5 (4), 1976, p 1.

11 *Santhanam Committee Report on the Prevention of Corruption*, 1964, p 11, para 2.13.

12 *Santhanam Committee Report on the Prevention of Corruption,* 1964, pp 53-4, para 7.3. The categories are as follows: (1) Offences calculated to prevent or obstruct the economic development of the country and endanger its economic health; (2) Evasion and avoidance of taxes lawfully imposed; (3) Misuse of their position by public servants in making of contracts and disposal of public property, issue licences and permits and similar other matters; (4) Delivery by individuals and industrial and commercial undertakings of goods not in accordance with agreed specifications in fulfilment of contracts entered into with public authorities; (5) Profiteering, black marketing and hoarding; (6) Adulteration of food-stuffs and drugs; (7) Theft and misappropriation of public property and funds; and (8) Trafficking in licences, permits, etc.

13 Twenty-ninth Report of the Law Commission of India, 1966, pp 10-11.

14 Forty-second Report of the Law Commission of India on *Indian Penal Code*, 1971 (recommended for revision).

15 The first general *Code of Criminal Procedure* came into force in 1861, (Act 25 of 1861) which was replaced by Act 10 of 1872 and later by Act 5 of 1898, The *Code of Criminal Procedure, 1973*, which came into force on 1 April 1974, has replaced the earlier Act of 1898.

16 See *Code of Criminal Procedure, 1973, section 4*.

17 Published in the Times of India, 20 June 2018 pp 8, 10 and 8 July 2018, pp 1, 13.

***** Source: Registrar General of India.

****** Actual Population as per 2001 Census & 2001 (Provisional).

Excluding Jharkhand State.

@ Andhra Pradesh excluded *Motor Vehicles Act, 1988* (Non-Cognizable) Cases from the year 2008.

++ Variation in SLL crimes is due to less registration of *MV Act, 1988* (Cognizable) & Town Nuisance Act cases in Andhra Pradesh.

***** Source: Registrar General of India.

***** *IPC* Crime in India, 2014, Crime Record Bureau, pp iii.

1.1 Introduction to IPC

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

1 INTRODUCTION

1.1 Introduction to IPC

The first chapter of the *Indian Penal Code, 1860* (*IPC, 1860*), is an introductory chapter which consists of the preamble and five sections. The preamble, in brief, sets forth the object and purpose of enacting a general *penal code* for India. Section 1 states the name of the Code and the extent of its operation. Section 2 fixes criminal liability for offences committed within India, whereas sections 2, 3 and 4 extend the operation of *IPC, 1860* beyond India; section 5 is a saving clause.

WHEREAS it is expedient to provide a general *Indian Penal Code, 1860*, it is enacted as follows:

1. Title and extent of the operation of the Code.—This Act shall be called the *Indian Penal Code*, and shall extend to the whole of India except the State of Jammu and Kashmir.

2. Punishment of offences committed within India.—Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.

3. Punishment of offences committed beyond, but which by law may be tried within India.—Any person liable, by any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India.

4. Extension of code to extra-territorial offences.—The provisions of this Code apply also to any offence committed by—

(1) any citizen of India in any place without and beyond India;

(2) any person on any ship or aircraft registered in India wherever it may be.

(3) any person in any place without and beyond India committing offence targeting a computer resource located in India.[1]

Explanation.[2]—In this section—

(a) the word “offence” includes every act committed outside India which, if committed in India, would be punishable under this code;

(b) the expression “computer resource” shall have the meaning assigned to it in clause (k) of sub-section (1) of *section 2 of the Information Technology Act, 2000*.[3]

Illustration

A, who is a citizen of India, commits a murder in Uganda. He can be tried and convicted of murder in any place in India in which he may be found.

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1 Ins. by Act 10 of 2009, section 51 (a)(i).

2 Subs. by Act 10 of 2009, section 51 (a)(ii), for Explanation. Explanation, before substitution, stood as under "Explanation—In this section the word "offence" includes every act committed outside India which, if committed in India, would be punishable under this code."

3 The *Information Technology Act, 2000, section 2* (1)(k) states: "computer resource" means computer, computer system, computer network, data, computer database or software.

1.2 Commentary

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

1 INTRODUCTION

1.2 Commentary

Section 1 declares that the name of the Code shall be the "*Indian Penal Code*" and it will operate throughout the territory of India except the State of Jammu and Kashmir.[4]

It is a well-recognised principle of criminal jurisprudence that the exercise of criminal jurisdiction depends upon the place of the offence and not upon the nationality or domicile of the offender.[5] Thus, to invoke the provisions of *IPC*, it must be established that the offence for which the accused is charged was committed within the territory of India. The territory of India, for the purposes of application of its laws, would comprise not only its land, its internal waters, such as rivers, lakes and canals, but also that portion of sea lying along its coast, which is commonly called the maritime zone.

The Maritime Zones of India Act 1981, provides for a 24-mile contiguous zone, a 200-mile exclusive economic zone, and a continental shelf up to the continental margin or 200 nautical miles, whichever is greater. The *Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act 1981* provides for the regulation of fishing by foreign vessels in certain maritime zones of India and provides that no foreign vessel shall be used for fishing unless it has been granted a license and a permit by the Central Government under the prescribed provisions herein. Further, any violation of these provisions results in penalty and/or imprisonment. According to *Article 297 of the Constitution of India*, all lands, minerals and other things of value underlying the ocean within the territorial waters or the continental shelf and resources of the exclusive zone, vest in India.

Section 2 imposes criminal liability for offences committed within India. Section 2 makes "every person", irrespective of his nationality or allegiance, or his rank, status, caste, colour or creed, liable to punishment under the Code for an offence committed within India.

The words "every person" have a wider connotation in as much as the term includes not only citizens, but even non-citizens (foreigners) and a company or an association or body of persons whether incorporated or not.[6] A foreigner is as much liable for committing an offence as a resident is. A foreigner can neither take the plea of ignorance of law,[7] nor that he was unaware of the criminal nature of the act in question since it was not an offence in his country.[8] The criminal liability for an offence arises on the basis of the laws applicable in the country where the offence is committed, and not on the basis of laws applicable in the country of the person committing it.[9] Even the corporeal presence of the accused is not required for holding an accused liable for committing an offence, provided all the ingredients of the offence occur within the municipal territory of the country trying the offence.[10]

However, the heads of sovereign States and their representatives, such as ambassadors, high commissioners, diplomatic agents, United Nations representatives, are entitled to immunity against criminal prosecution by the virtue of Vienna Convention on Diplomatic Relations adopted on 18th April 1961.[11] The Indian Parliament in 1972 passed The *Diplomatic Relations (Vienna Convention) Act, 1972* to give effect to the Convention of 1961,[12] President of India and Governors of States, etc, are exempt from criminal prosecution by virtue of clause (2) to *Article 361 of the Constitution of India*.[13]

This is based on the principle that the exercise of criminal jurisdiction would be incompatible with the high status and constitutional position, which such persons possess. All countries have universally acknowledged the immunity

from criminal prosecution to such persons. This is based on the principle that the “king can do no wrong” and, hence; is not bound by any act of Parliament, unless he is named by special and particular word.[14]

Sections 3 and 4 extends extra-territorial operation to *Indian Penal Code, 1860*. Section 3 gives criminal jurisdiction to the courts to try an offence committed by a person beyond the territory of India, provided he is subject to the Indian law.[15] For instance, if a soldier in the Indian army commits a murder in Nepal while on service, he is liable to be prosecuted for murder in India, as if it were committed within India.[16]

Section 4, clause (1) extends the operation of *IPC, 1860* to the offences committed by a citizen of India in any place without and beyond India and clause (2) to offences committed by any person on any ship or aircraft registered in India.

Clause (3) has been added in *section 4 of the Indian Penal Code, 1860*[17] by Information Technology (Amendment) Act, 2008 with a view to make offences targeting a computer resource located in India from abroad punishable under *IPC, 1860*.

The rationale behind extension of criminal jurisdiction of the courts, even if the offence is committed outside India, is based on the contention that every sovereign State can regulate the conduct of its citizens, wherever they might be.[18] Where *A*, an Indian with a wife marries an American, in the United States, he can be prosecuted for bigamy under *section 494 of IPC, 1860* on his return to India.

If a person is not an Indian citizen at the time the offence was committed, he cannot be tried in India for an offence committed outside and beyond India. The fact that the accused acquired Indian citizenship after the commission of the offence cannot confer any jurisdiction on the Indian courts retrospectively, so as to authorise them to try the accused for an offence committed outside India at a time when he was not an Indian citizen.[19]

Section 4, clause (2) gives admiralty jurisdiction[20] to the Indian courts and the power to try offences committed on any ship or aircraft registered in India, wherever it might be. A ship is considered to be a floating island and belongs to the country whose flag the ship is flying. The same is applicable to aircrafts. As such, all vessels, ships or aircrafts are considered to be the territory of the country whose flag they fly. A person committing a crime on board, whether an Indian citizen or a foreigner, is amenable to the jurisdiction of Indian courts if the vessel is flying the Indian flag and is registered in India.

If a foreigner, after committing a crime outside India, steps into India, he may be sent back to the country where the offence was committed for trial on the proper requisition by that country. The requisition proceedings are termed as extradition proceedings, and are governed by the Indian *Extradition Act 1962*.

Right to speedy trial is a constitutional mandate but fixation of time limit is not feasible in trial and prosecution of a criminal cases as it amounts to judicial legislation—Supreme Court—2002

P Ramachandra Rao v State of Karnataka,

AIR 2002 SC 1856 : *(2002) 4 SCC 578* : 2002 (4) JT 92 : *2002 (3) Scale 497*

The Full Bench court consisting of seven judges in a unanimous verdict held that the constitutional philosophy propounded as right to speedy trial has though grown in age by almost two and a half decades, the goal sought to be achieved is yet a far-off peak. Myriad situations bearing testimony to denial of such fundamental right to the accused persons, on account of failure on the part of prosecuting agencies and the executive to act, and their turning an almost blind eye at securing expenditure and speedy trial so as to satisfy the mandate of *Article 21 of the Constitution* have persuaded the Supreme Court to devise solution by engrafting a bar of limitation beyond which the criminal proceedings or trial shall not proceed.

Though the bar of limitation, judicially engrafted, is meant to provide a solution, but a solution of this nature gives rise to greater problems like scuttling a trial without adjudication, stultifying access to justice and giving easy exit from the portals of justice. Such general remedial measures cannot be said to be apt solutions.

Therefore, it must be left to the judicious discretion of the court seized of an individual case to find out from the totality of circumstances of a given case if the quantum of time consumed up to a given point of time amounted to violation of *Article 21*, and if so, then to terminate the particular proceedings, and if not, then to proceed ahead. The

test is whether the proceedings or trial has remained pending for such a length of time that the inordinate delay can legitimately be called oppressive and unwarranted, as suggested in *AR Antulay*.[21]

The decisions in *Common Cause* cases[22] and *Raj Deo Sharma* cases[23] run counter to the dictum of the *Constitution* Bench in *AR Antulay* and therefore cannot said to be good law to the extent they are in breach of the doctrine of precedents. The well-settled principle of precedents which has crystallized into a rule of law is that a Bench of lesser strength is bound by the view expressed by a larger strength and cannot take a view in departure or in conflict there from.

Prescribing periods of limitation at the end of which the trial court would be obliged to terminate the proceedings and necessarily acquit or discharge the accused, and further, making such directions applicable to all the cases in the present and for the future amounts to legislation, which, cannot be done by judicial directives and within the arena of the judicial law-making power available to constitutional courts, howsoever liberally *Articles 32*, *21*, *141* and *142* of the *Constitution* may be interpreted.

The court further said that the mental agony, expense and strain which a person proceeded against in criminal law has to undergo and which, coupled with delay, may result in impairing the capability or ability of the accused to defend himself have persuaded the constitutional courts of the country in holding the right to speedy trial a manifestation of fair, just and reasonable procedure enshrined in *Article 21*. Speedy trial, again, would encompass within its sweep all its stages including investigation, inquiry, trial, appeal, revision and retrial— in short everything commencing with an accusation and expiring with the final verdict—the two being respectively the *terminus a quo* and *terminus ad quern*—of the journey which an accused must necessarily undertake once faced with an implication.

The *Constitution* Bench, in the *AR Antulay v RS Nayak,* *AIR 1992 SC 1701* : *(1992) 1 SCC 225* : 1991 (2) Scale 1273, formulated certain propositions, 11 in number, meant to serve as guidelines. Suffice it to state in the opinion of the *Constitution* Bench:

(i) Fair, just and reasonable procedure implicit in *Article 21 of the Constitution* creates a right in the accused to be tried speedily;

(ii) Right to speedy trial flowing from *Article 21* encompasses all the stages, namely, the stage of investigation, inquiry, trial appeal, revision and retrial;

(iii) Who is responsible for the delay and what factors have contributed towards delay are relevant factors, attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on—what is called the systemic delay must be kept in view;

(iv) Each and every delay does not necessarily prejudice the accused as some delays indeed work to his advantage.

Guidelines (viii), (ix), (x) are relevant for our purpose and hence are extracted and reproduced:

(viii) Ultimately, the court has to balance and weigh the several relevant factors—"balancing test" or "balancing process"—and determine in each case whether the right to speedy trial has been denied in a given case.

(ix) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed, the changes or the conviction, as the case may be, shall be quashed.

(x) It is neither advisable nor practicable to fix any time limit for trial of offences. Any such rule is bound to be a qualified one. It is primarily for the prosecution to justify and explain the delay.

Dismissing the petition the court said, the bar of limitation have been deleted by the Apex Court on following two grounds, viz:

(i) it amounts to judicial legislation, which is not permissible; and

(ii) it runs counter to the doctrine of binding precedent.

Appeals are allowed and remitted to the High Court to be heard and decided afresh.

Presence of the accused in India is not necessary for prosecution, if the offence is committed in India—conviction upheld—Supreme Court—1957

Mobarik Ali Ahmed v State of Bombay[24]

Per Jagannadhadas and Imam and Govind Menon, JJ:

Facts: The appellant was convicted for the offence of cheating under section 420, read with *section 34 of IPC, 1860*. The complainant, who was the director of an export-import company in Goa, contacted an agent Jaswalla to import rice. A contract was brought about by Jaswalla acting as the agent between the complainant and the appellant, a trader in Karachi, for purchasing 2,000 tons of rice at £51 per ton, to be shipped from Karachi to Goa, and the complainant paid the appellant through the agent, five and a half lakhs in three installments As admitted, the rice was not shipped and the money was not returned. The appellant argued that he was a Pakistani national, and during the period of the offence, never came to India, and to hold him liable would give extra territorial effect to *IPC, 1860*.

Per Jagannadhadas, J:

...The offence of cheating under section 420 as defined in section 415 has two essential ingredients, namely:

(1) deceit that is dishonest or fraudulent misrepresentation to a person, and

(2) the inducing of that person thereby to deliver property.

In the present case, the appellant though at Karachi was making representations to the complainant through letters, telegrams and telephone talks, sometimes directly to the complainant and sometimes through Jasawalla, that he had ready stock of rice, that he had reserved shipping space and that on receipt of money he would be in a position to ship the rice forthwith, which was never delivered even after receiving the entire amount.

On these facts, it is clear that all the ingredients necessary for cheating under section 420 read with section 415 have occurred at Bombay. In that sense the entire offence was committed at Bombay and not merely the consequences viz, delivery of money which was one of the ingredients of the offence.

This emphasises the principle that exercise of criminal jurisdiction depends on the exact place where the offence occurred, and not on the nationality of the alleged offender (except in a few specified cases such as Ambassadors, Princes, etc).

Sections 3 and 4 deal with offences committed beyond the territorial limits of India and *section 2 of IPC, 1860* obviously and by contrast refers to offences committed within India. It appears to be clear that it is section 2 that determines the liability and punishment of persons who have committed offences within India. The section asserts categorically that “every person” shall be liable to punishment under the Code for every act or omission contrary to the provisions of the Code and of which he shall be guilty within India.

A reference to section 3 of the Code clearly indicates that it is implicit therein that a foreigner who commits an offence within India is guilty and can be punished as such without any limitation as to his corporeal presence in India at the time.

Even on the assumption that the appellant has ceased to be an Indian citizen and was a Pakistani national at the time of the commission of the offence, he must be held guilty and punished under *Indian Penal Code, 1860* notwithstanding his not being corporeally present in India at the time.

Section 4 IPC, 1860 and section 188 CrPC, 1973: Extra-territorial Operation of the Code—The Code has no application for an offence committed by a foreigner outside India.—Supreme Court—2008

Fatima Bibi Ahmed Patel v State of Gujarat[25]

SB Sinha, J:

Appellant Fatima Bibi was a citizen of Mauritius and her son and daughter-in-laws were residing in Kuwait.

Appellant had been visiting India on visas and staying in India with her relatives in Gujarat. Son of the appellant Hanif Ahmad Patel was married to the complainant-respondent on 22 April 2004.

It appears that the relation between her son and daughter-in-law became strained and a complaint petition was filed before the Chief Judicial Magistrate, Navsari (Gujarat) by the complainant-respondent (daughter-in-law) alleging physical and mental torture by her husband (first accused) under *sections 498A* and *506* (2) *IPC, 1860* and against the appellant that she used to instigate her son accordingly.

As the couple was residing in Kuwait, indisputably the entire cause of action arose in Kuwait. However, the Chief Judicial Magistrate took cognizance of the aforesaid offence and directed issuance of summons, which was confirmed by the High Court. The appellant accordingly moved the Apex Court. Allowing the appeal the Apex Court held that:

> In view of the fact that the offence is said to have been committed in Kuwait, the provisions of the India *Penal Code* or *Criminal Procedure Code* cannot be said to have any application.

Jurisdiction: Offences committed within and outside India under sections 2, 4, 403, 405 and 423 IPC, 1860 for cheating, criminal breach of trust and for fraudulent execution of deed. Absence of the accused in India when offence was allegedly committed, their foreign nationality and residence outside India do not exempt them from being tried under sections 2, 4, 403, 405 and 423 IPC for cheating, criminal breach of trust and fraudulent execution of deed, vide sections 179, 181 and 182 of the Code of Criminal Procedure, 1973.

Lee Kun Hee v State of UP[26]

Per Jagdish Singh Khehar and Ashok Kumar Ganguly, JJ:

The seller, complainant JCE Consultancy, a proprietorship company having its office at 108, Rohini Complex, Shakarpur, Delhi, supplied coke calcination[27] packages to M/s Sky Impex Ltd., having its registered office in Tortola, British Virgin Islands under an agreement for the value of USD 1,37,000. The bill of exchange (a written order to pay certain sum named in the agreement to the person named) was received by the complainant, but it was not honoured in spite of repeated requests. Accordingly, the seller/complainant filed the petition against M/s Sky Impex Ltd for criminal prosecution under *sections 403*, *405* and *423 IPC* for criminal breach of trust and cheating. The accused denied its obligations alleging that since accused is a foreign company and its officers were foreign nationals residing outside India and were not present in India when the offence was allegedly committed. Dismissing the accused's contentions the Apex Court held the plea is not tenable. It cannot be said that the actions attributed by complainant to the accused, have no connection to territorial jurisdiction in India. In the instant case, the complainant had sent the goods from India. The bill of exchange was received in India. On its dishonor, the complainant had made communication with the accused from India. Thus, it cannot be said that actions attributed to accused had no connectivity to India. *Section 179 of Code of Criminal Procedure, 1973* vests jurisdiction for inquiry and trial in a court, within whose jurisdiction anything has been done with reference to an alleged crime, and also where the consequence of the criminal action ensues. *Section 181 (4) of Code of Criminal Procedure, 1973* leaves no room for any doubt that culpability is relatable even to the place at which consideration is required to be returned or accounted for. Finally, *section 182 of Code of Criminal Procedure, 1973* postulates that for offences of which cheating is a component, if the alleged act of deception, is shown to have been committed, through communication/letter/ message, the court within whose jurisdiction the said communication/letter/message was sent and received has jurisdiction to try such cases.

Rule against Double Jeopardy—Exceptions: ordering retrial in view of disclosure of new and compelling evidence of confession and guilty plea will not be unfair and unjust and prejudicial to the interest of justice and will not be hit by the rule of double jeopardy for delay in trial of the accused defendant—Court of Criminal Appeal—United Kingdom—2007

R v Dunlop,

(2007) I All ER 593 (CA) : [2006] EWCA 1354

While allowing the appeal and quashing acquittal and ordering retrial of the accused for murder of H in 1989, the court said that in cases where a person has been acquitted of the most serious of crime, say murder, in view of new material (evidence) pointing strongly or conclusively to the guilt of the accused, retrial would not jeopardize the

interest of justice. The delay, if any between acquittal and retrial would not be hit by the principal of double jeopardy.

The double jeopardy clause protects against being tired twice for the same offence. The clause does not, however, bar a second trial if the first ended in mistrial. - US Supreme Court—2012.

Blueford v Arkansas,

132 S.Ct. 2044 : 182 L. Ed. 2d 937 : (2012) US Lexis 3941

Chief Justice Roberts, of the US Supreme Court, delivered the opinion of the court.

One year-old Mathew McFadden, Jr, suffered a severe head injury on 28 November 2007, while at home with his mother's boyfriend, Ale Blueford. Despite treatment at a hospital, Mcfadden died a few days later.

The State of Arkansas charged Blueford with capital murder, but waived the death penalty. The State's theory at trial was that Blueford had injured Mcfadden intentionally, causing the boy's death "under circumstances manifesting extreme indifference to the value of human life".

The defence, in contrast, portrayed the death as the result of Blueford accidentally knocking Mcfadden onto the ground.

The trial court instructed the jury (12 in number) that the charge of capital murder included three lesser offences:

(i) First-degree murder,

(ii) Manslaughter, and

(iii) Negligent homicide. In addition to describing these offenses, the court addressed the order in which the jury was to consider them: if you have a reasonable doubt of the defendant's guilt on charge of murder in the first degree, you will then consider the charge of murder in first degree, you will then consider the charge of manslaughter… If you have reasonable doubt of the defendant's guilt on the charge of manslaughter, you will then consider the charge of negligent homicide.

After the jury reported that it was unanimous against guilt as to capital murder and first degree murder, but deadlocked on manslaughter, when a verdict-still could not be reached, a mistrial was granted.

On retrial, petitioner's motion to dismiss the capital and first degree murder charge due to Double Jeopardy was denied. The Supreme Court of Arkansas affirmed the same. *Certiorari* was granted.

The judgment of the Supreme Court of Arkansas that petitioner could be re-tried on all charges was affirmed by the United States Supreme Court by 6 to 3 decision.

Sangeetaben Mahendrabhai Patel v State of Gujarat,

AIR 2012 SC 2844 : (2012) 7 SCC 621 : 2012 (4) Scale 549 : 2012 (4) JT 338

Under the doctrine of double jeopardy, enshrined in *Article 22 of the Constitution* and *section 300 (1) of CrPC, 1973* a person cannot be convicted twice for the same offence. In the present case, the sole issue raised was regarding the scope and application of the doctrine of double jeopardy. As per the facts of the case, the appellant had been tried under the provisions of *section 138 of Negotiable Instruments Act, 1881* for issuing a cheque which had bounced and was convicted by a trial court and the case was *sub judice* before the High Court.

Again, he was involved under sections 406 and 420 read with *section 114 IPC, 1860* for criminal breach of trust and dishonestly inducing delivery of property. Counsel for the appellant argued that as the appellant has already been dealt with/tried under *section 138 of Negotiable Instruments Act, 1881* it amounts to double jeopardy and, therefore, the appeal deserves to be allowed.

Dismissing the appeal and by citing the earlier rulings, the Apex Court held that the doctrine of double jeopardy cannot be attracted in this case as the ingredients of the offences under sections 406 and 420 read with *section 114*

IPC, 1860 are entirely distinct from the case under section 138 of the Negotiable Instrument Act, and do not constitute the same offence although there may be some overlapping of facts in both the cases.

Section 10 IPC—"Man", "Women" – The word "man" denotes a male human being of any age; the word "women" denotes a female human being of any age. Third Gender:—Members of transgender community (i.e., TG Community) who are neither male nor female, at the time of birth, are recognised as the "Third Gender" for the purpose of safeguarding and enforcing appropriately their fundamental and other legal, social and economic rights guaranteed under the Constitution - Supreme Court - 2014.

National Legal Service Authority v UOI[28]

Per KS Radhakrishnan J:

National Legal Service Authority[29] and Mata Nasib Kaurji Women Welfare society filed writ petitions in the Supreme Court on behalf of Transgender Community (TG community),[30] and Hijras/Eunuchs to seek a legal declaration of their gender identity than the one assigned to them, male or female, at time of the birth and to claim legal status as a "third gender" with all legal and constitutional protection. They claim that non-recognition of their gender identity violates their Constitutional rights guaranteed under *Articles 14*, *15*, *16* and *21* of the *Constitution*; and that every person of that community has a legal right to decide their sex orientation and to a spouse and determine their identity. It is claimed that since TGs are neither treated as male or female, nor given the status of a "third gender", they are being deprived of many of the rights and privileges which other person enjoy as citizens of the country. Trans genders are deprived of social and cultural participation and hence restricted access to education, health care and public places like railway stations, bus stand, school, workplaces, malls, theatres, hospital etc. which deprives them of Constitutional guarantee of equality before law and equal protection of law. Further, it was also pointed out that the community also faces discrimination to contest election, right to vote, employment, to get licenses etc. and, in effect, treated as outcaste and untouchable, and that the State cannot discriminate them on the ground of gender, violating *Articles 14* to 16 and 21 of the *Constitution of India*.

It was further submitted on behalf of the transgender persons that they be declared as socially and educationally as backward class of citizens and must be accorded all benefits available to that class of persons, which are being extended to male and female genders; and that the right to choose one's gender identity is integral to the right to lead a life with dignity, which is undoubtedly guaranteed by *Article 21 of the Constitution of India*. It was therefore, submitted that, subject to such rules/regulations/protocols, transgender persons may be afforded the right of choice to determine whether to opt for male, female or transgender classification, so that their views also could be heard.

Allowing the petition, the Supreme Court held that the TGs are being treated as "third gender" for the purpose of safeguarding and enforcing appropriately their human rights guaranteed under the *Constitution of India* and that the court spelled out following directions in para 129 of the judgment to be implemented forthwith by the Central and State Governments. The guidelines are stated below:

(1) Hijras, Eunuchs, apart from binary gender (male or female), be treated as "third gender' for the purpose of safeguarding their rights under Part III of *Constitution* and the laws made by the Parliament and the State Legislature.

(2) Transgender persons' right to decide their self- identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

(3) We direct the Centre and State governments to take steps to treat them as socially and educationally backward classes of citizens and extended all kind of reservation in cases of admission in educational institutions and for public appointments.

(4) Centre and State governments are directed to operate separate HIV sero-surveillance Centre since Hijras/Transgender face several sexual health issues.

(5) Centre and State governments should seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria (degeneration), social pressure, depression, suicidal tendencies, social stigma, *etc.* and any insistence for SRS (Sex Re-Assignment Surgery) for declaring one's gender is immoral and illegal.

(6) Centre and State governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.

(7) Centre and State governments should also take steps for framing various social welfare schemes for their betterment.

(8) Centre and State governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and not to be treated as untouchables.

(9) Centre and State governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life in ancient times.

It is alleged that an expert committee has already been constituted by the Government to make an in-depth study of the problems faced by the transgender community and suggest measures that can be taken by the Government to ameliorate their problems and to submit its report with recommendations within three months of its *constitution*. The Apex Court directed that the recommendations should be examined based on legal declaration made in this judgment and implemented within six months, of its pronouncement of judgment.

It is a welcome judgment and will go a long way in safeguarding the transgenders' rights and whip out the social stigma attached to transgender community.

It is heartening to note that after a year of Supreme Court's historic judgment, creating and awarding Transgenders the status of 'third gender', the Rajya Sabha and Lok Sabha unanimously passed "The Rights of Transgender Persons Act" seeking to provide social security to transgenders. The Act provides for a National Transgender Welfare Commission at the Centre as a Statutory body with similar bodies at the State level apart from reservations in educational institutions and jobs.

Non-Compoundable offence under section 320 CrPC, 1973 cannot be allowed to be compounded, even if there is settlement between the parties. However, compromise can be taken into account for determination of quantum of sentence—Supreme Court—2012

Gulab Das v State of MP,[31]

AIR 2012 SC 888 : *(2011) 10 SCC 765* : *2012 Cr LJ 667* : *2011 (12) Scale 625*

Per TS Thakur, Dr BS Chauhan, JJ:

Allowing the appeal and setting aside the conviction, the Apex Court held that the offences of attempt to murder, rape and buying minor for the purposes of prostitution etc., punishable under *sections 307*, *375*, *373 IPC*, read with *section 34 IPC* which are non-compoundable under *section 320 of Code of Criminal Procedure, 1973* cannot be allowed to be compounded, even if there is any settlement between the parties to that effect. However, settlement arrived at between parties can be taken into consideration for determining the quantum of sentence.

Have a heart for poor offenders, says the Supreme Court[32]

The Supreme Court has frowned upon the sentencing system which forces poor petty offenders to remain in jail even af-ter serving their sentence because of their inability to pay the fine imposed on them along with the period of imprisonment.

"Have heart for poor petty offenders" was the message sent out by an Apex Court bench when it ruled on 7 October 2012 that trial courts should use their discretion and not impose hefty fines as defaulting in the payment of fine entailed additional prison term. The bench ruled that imprisonment for defaulting the payment of fine was not a sentence.

Advising the trial courts not to impose "harsh or excessive" fines, the bench said,

> It is the duty of the court to keep in view the nature of the offence, circumstances in which it was committed, the position of the offender and the other relevant considerations, such as pecuniary circumstances of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine.

Application of right to silence in trial—No adverse inference is to be drawn in case of an appellant charged with robbery, false imprisonment and attempted murder for adhering to right to silence on the advice of

solicitor vide section 34 of the (United kingdom) Criminal Justice and Public Order Act 1994— Conviction quashed

R v Beckles,

(2005) 1 All ER 705 (CA)

Appellant lured the victim to fourth floor of a flat where he was detained, robbed and finally pushed out of the window by the appellant and a co-defendant. While summing up of the case to the jury, the judge directed that an adverse inference might be drawn from the silence pursuant to section 34 of the Criminal Justice and Public Order Act 1994 from the failure of the appellant defendants to mention in their first interview (questioning) before police the facts upon which they have relied at trial, that led to their conviction. The appellant exercised their right to remain silence at the trial on the advice of their solicitor.

While allowing the appeal and setting aside the conviction, the court ruled that unfairness caused by the misdirection rendered the appellant's conviction unsafe since the misdirection has violated the defendant's convention right available *vide* the European Convention for the Protection of Human Rights and Fundamental Freedom 1950.

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4 See *Article 370 of The Constitution of India* and The *Constitution* (Application to Jammu & Kashmir) Order 1950. There is a separate *penal code* for the State of Jammu and Kashmir—the Ranbir *Penal Code*, which is similar to the *IPC, 1860*.

5 See *Mobarik Ali Ahmed v State of Bombay,* 1957 AIR SC 857 : *1958 (1) SCR 328* : 61 Bom LR 58.

6 See *Indian Penal Code, section 11*.

7 *State of Maharashtra v MH George, AIR 1965 SC 722* : *[1965] 1 SCR 123* : (1965) 1 Cri LJ 641.

8 *R v Esop,* 7 C & P 456 : *(1836) 173 ER 203*. The accused was indicted for committing an unnatural offence on board an Indian ship lying in St Catherine dock. The accused's plea that the act in question was not an offence in the country of his origin, Baghdad, was negated.

9 *Sirdar Gurdyal Singh v The Rajah of Faridkote (Punjab), [1894] AC 670* : [1894] UKPC 44.

10 *State of Maharashtra v Mayer Hans George, AIR 1965 SC 722* : *[1965] 1 SCR 123*.

11 See J M Jones, *An Introduction to International Law. By J.C. Starke, b.a., ll.b., b.c.l. (Oxon)*, [London]: Butterworth & Co., 6th Edn, 1967, pp 216-238. The Vienna Convention of Consular Relations, gives immunity to a diplomatic agent against criminal prosecution in England; Convention on the (Privileges and Immunities) of the United Nations 1946 which come into force on 17 September 1946, confers immunities on United Nations and its representatives as well as on other international organisation.

12 See Shyam Kishore Kapoor, *International law and human rights*, Allahabad : Central Law Agency, 2000, 13th Edn, 2000, p 415.

13 The *Constitution of India*, 1949, *Article 361* (2):

> No criminal proceedings whatsoever shall be instituted continued against the President or the Governor of a State, in any court during his term of office.

See *Statham v Statham and His Highness The Gaekwar of Baroda,* 1912, Probate 92 (UK, Probate, Divorce and Admiralty Provision, 1911). Held, the Gaekwar of Baroda, being head of a princely State enjoyed all the attributes of sovereignty, and so could not be prosecuted on a criminal charge for adultery.

14 Holdsworth, *A History of English Law*, vol X, 1701 - 1875, London : Methuen & Co, p 355; *Blackstone Commentaries*, vol I, pp 261-262; *Director of Rationing and Distribution v The Corporation of Calcutta, AIR 1960 SC 1355* : *[1961] 1 SCR 158*.

15 The operation of the section is restricted to the cases mentioned in *Extradition Act 1962* and *Code of Criminal Procedure 1973, section 187* (power to issue summons or warrant for offences committed beyond local jurisdiction) and *Code of Criminal Procedure 1973, section 188* (Offences committed outside India of *Code of Criminal Procedure 1973*).

16 See *Sarmukh Singh v Emperor,* (1879) ILR 2 All 218 (FB).

17 Added by Act 10 of 2009.

18 RC Nigam, *Principles of Criminal Law*, vol I, 1965 p 276; *Morton*, 9 Bombay 288.

1.2 Commentary

19 *Central Bank of India Ltd v Ram Narain,* AIR 1955 SC 36 : [1955] 1 SCR 697.

20 The jurisdiction to try offences committed on high seas is known as admiralty jurisdiction. High seas have been recognised as no-man's territory.

21 *AR Antulay v RS Nayak,* AIR 1992 SC 1701 : (1992) 1 SCC 225 : 1991 (2) Scale 1273 : 1991 (6) JT 431. The appellants in these appeals were accused of offences under *Prevention of Corruption Act 1988*. Long delays in the prosecutions having taken place, they sought 'acquittal from the trial court. The trial court granted such acquittal. The State preferred appeals against the orders of acquittal. The learned single judge by the orders under challenge, set aside the orders of acquittal and restored the cases to the trial court for fresh disposal. Accordingly, the accused came to the Supreme Court.

22 *Common Cause v UOI*, 1996 (4) SCC 33 : 1996 Cr LJ 2380 and *Common Cause v UOI*, AIR 1996 SC 3538 : 1996 (6) SCC 775.

23 *Raj Deo Sharma v State of Bihar*, 1998 (7) SCC 507 : 1998 Cr LJ 4596 and *Raj Deo Sharma (II) v State of Bihar*, 1999 (7) SCC 604 : 1999 Cr LJ 4541.

24 AIR 1957 SC 857 : 1957 Cr LJ 1346, per Jagannadhadas and Syed Imam and Govinda Menon, JJ.

25 *Fatima Bibi Ahmed Patel v State of Gujarat*, AIR 2008 SC 2392 : (2008) 6 SCC 789 : 2008 (8) SCR 391 : 2008 (7) Scale 519. Per SB Sinha and Lokeshwar Singh, JJ.

26 AIR 2012 SC 1007 : (2012) 3 SCC 132 : JT 2012 (2) SC 237.

27 *Calcination* means heating of a chemical to a high temperature to remove unwanted contents or to change its naturality to a dry or powdery condition.

28 AIR 2014 SC 1863 : (2014) 5 SCC 438 : 2014 (5) Scale 1 : JT 2014 (5) SC 182, judgment was delivered by Justices KS Radhkrishnan and AK Sikri of the Supreme Court.

29 Writ Petition (Civil) No. 604 of 2013.

30 TG Community comprises of Hijras (neither men and women transgender), eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shaktis etc. and they, as a group, have got a strong historical presence in our country in Hindu mythology and other religious text. A prominent role has been played by them in the royal courts of Islamic world. The concept of *tritiya prakriti* or *napunsaka* has also been an integral part of Vedic and *Puranic* literatures. The word '*napunsaka*' has been used to denote absence of procreative capability.

31 Referred *L Ramlal v State of J & K,* AIR 1999 SC 895 : (1999) 2 SCC 213. *Ishwar Singh v State of HP,* AIR 2009 SC 675 : (2008) 15 SCC 667.

32 The Times of India dated 8 October 2012, p 7 (Pune Edn).

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2.1 THE CONCEPT OF CRIME

Part I General Principles

2 CRIME AND CRIMINAL LAW

2.1 THE CONCEPT OF CRIME

Of all the branches of law, the branch that closely touches and concerns man in his day-to-day affairs is criminal law, yet the law is not in a satisfactory state.[1] Many attempts have been made to define crime, but they all fail to help us in identifying what kind of act or omission amounts to a crime. Perhaps, this is because of the changing notions about crime from time to time and place to place. The very definition and concept of crime varies not only according to the values of a particular group and society, its ideals, faith, religious attitudes, customs, traditions, and taboos, but also according to the form of government, political and economic structure of the society and a number of other factors. For instance, what is an offence against property in a capitalist culture may be a lawful way of living in a socialist society. What is permissible in a free and an affluent society may be a pernicious vice in a conservative set up.[2] Criminal law serves the purpose of protecting elementary socio-ethical values. Any act, which is a crime today, may not be a crime tomorrow, if the legislature so decides. For instance, polygamy,[3] dowry,[4] untouchability[5] are now crimes, which was not so a few years ago. Suicide was a crime in England until the Suicide Act 1961[6] and in India from 1994 to early 1996,[7] when it became lawful to kill oneself. Similarly, after prohibition, laws are promulgated in a particular area, and the sale and purchase of liquor becomes a crime. Parliament can scrap a crime from the statute book and make it lawful. Abortions, which were a crime until 1971,[8] adultery under *section 497, IPC, 1860* are now legal.[9]

To understand the meaning and concept of crime in its correct perspective, it would be appropriate to examine some of the definition propounded by jurists.

2.1.1 As a Public Wrong

In his classical work, *Commentaries on the Laws of England*, Blackstone defines crime in two ways. In the first place, he defines crime as:[10] “An act committed or omitted in violation of a public law forbidding or commanding it.”

The definition appears to be misleading since it limits the scope of crime to violations of a “public law”. As such, the definition would cover only political offences, viz offences against the State. Such offences are merely a segment of the great bulk of criminal law. If “public law” is taken as equivalent to “positive” or “municipal law” as noted by Kenny, the definition would become too wide and would cover all legal wrongs, while in fact every legal wrong is not a crime. Likewise, if “public law” is interpreted to include both constitutional and criminal law, as with the Germans, the definition ceases to define, because it is fallacious to define crime with the help of constitutional law.[11]

Perhaps Blackstone visualised the inadequacy of his first definition of crime, so he modified it and said:[12] “A crime is a violation of the public rights and duties due to the whole community, considered as a community.”

While editing *Blackstone’s Commentaries*, Stephen modified this definition slightly and reconstructed it in the following words:[13] “A crime is a violation of a right, considered in reference to the evil tendency of such violation as regards the community at large.”

However, the definition is not free from error. It narrows down the scope of crime to the violation of rights only, whereas criminal law fastens criminal liability even on those persons who omit to perform duty required by law. Wilful omission to provide food, clothing, shelter or medical aid to a child by a father[14] or to a wife by husband is a

crime.[15] A police officer, who silently watches another police officer torturing a person for the purpose of extorting confession is liable for abetting the said offence as he is under legal duty to prevent torture.[16] Likewise, there are other acts which do not violate anyone's right but are nevertheless crimes. For instance, tampering with a currency note, or engraving upon a metal plate the words of a bank note[17] or being in possession of counterfeit coins[18] or counterfeit government stamps[19] or any document knowing the same to be forged, are crimes.[20]

The definitions given by Blackstone and Stephen further stress that crimes are breaches of "those laws which injure the community". Similar was the idea in regard to the concept of crime with the Romans, who designated crimes as *delicta publica* (public wrongs) and criminal trials as *judica publica* (public justice). However, all the acts that are injurious to the community are not necessarily crimes. As pointed out by Kenny:[21]

> It is possible that, without committing any crime at all, a man may by a breach of trust, or by negligent mismanagement of a company's affairs, bring about a calamity incomparably more widespread and more severe than that produced by stealing a cotton packet handkerchief, though that petty theft is a (felonious) crime.

For instance, a person's conduct may amount to a crime, even though, instead of being injurious, it is, on the whole, an advantageous act.[22] Hence, the reconstructed definition of crime is nothing but a general description of crime, and fails to give an adequate and comprehensive definition.

2.1.2 As a Moral Wrong

The word "crime" owes its genesis to the Greek expression *"krimo"*, which is synonymous with the Sanskrit word *"krama"* meaning social order. Thus, the word "crime" is applied "to those acts that go against social order and are worthy of serious condemnation".[23] Garafalo, an eminent criminologist, defines crime in terms of immoral and anti-social acts. He says:[24]

> "Crime is an immoral and harmful act that is regarded as criminal by public opinion because it is an injury to so much of the moral sense as to community—a measure which is indispensable for the adaptation of the individual to society."

In the definition, the emphasis on moral wrong again breaks down in many respects. No doubt, immoral acts like murder, or causing hurt without any reasonable excuse, stealing or destroying another's property, kidnapping a child, raping a woman, etc, have been traditionally considered crimes. However, immoral acts like ingratitude, hard-heartedness, callous disregard for the sufferings of others, etc, have never been crimes for obvious reasons of their triviality, or the impracticability of using criminal law as the means to correct such behaviour. Instead, they are to be corrected by social, educational and religious institutions. As stated by the authors of the Code:[25]

> ...We cannot admit that a *Penal Code* is by any means to be considered as a body of ethics, that the legislature ought to punish acts merely because those acts are immoral, or that, because an act is not punished at all, it follows that the legislature considers that act as innocent. Many things which are not punishable are morally worse than many things which are punishable. The man who treats a generous benefactor with gross ingratitude and insolence deserves more severe reprehension than the man who aims a blow in passion, or breaks a window in a frolic; yet we have punishments for assault and mischief, and none for ingratitude. The rich man who refuses a mouthful of rice to save a fellow-creature from death may be a far worse man than the starving wretch who snatches and devours the rice; yet we punish the latter for theft, and we do not punish the former for hard-heartedness.

There are many acts that are prohibited not because of their immoral nature, but because of social expediency and a number of other factors. For instance, traffic offences, offences relating to black-marketeering or hoarding of essential commodities, customs, licensing and taxing statutes, etc, are based upon economic expediency necessitated by a growing industrialised and urbanised social economy. Likewise, there are some harmless "crimes" like vagrancy and loitering; some prophylactic "crimes" like consorting and possession of prohibited goods (even without intent to use them) for example, weapons, drugs, illegal imports, and goods (including money) unlawfully obtained.[26]

2.1.3 As a Conventional Wrong

A noted criminologist, Edwin Sutherland, defines crime in terms of criminal behaviour. He says:[27]

> Criminal behaviour is behaviour in violation of the criminal law. No matter what the degree of immorality, reprehensibility, or indecency of an act, it is not a crime unless it is prohibited by the criminal law. The criminal law, in turn, is defined conventionally as a body of specific rules regarding human conduct which have been promulgated by political authority, which apply uniformly to all members of the classes to which the rules refer, and which are enforced by punishment administered by the State. Characteristics, which distinguish this body of rules regarding human conduct from other rules, are therefore, politicality, specificity, uniformity and penal sanction.

Sutherland merely enumerates the characteristics of a crime instead of giving a definition of crime. He only says that crime is a violation of the criminal law.

2.1.4 As a Social Wrong

As the legal concept of crime does not satisfy the demands of developing social science, John Gillin gives a sociological definition of crime. He says:[28]

> Crime is an act that has been shown to be actually harmful to society, or that is believed to be socially harmful by a group of people that has the power to enforce its beliefs, and that places such act under the ban of positive penalties.

The sociological definition too, like other definitions, fails to explain a number of criminal behaviours. As stated earlier, when legislature enacts that a particular act shall become a crime or that an act that is criminal shall cease to be so, the act does not change in nature in any respect other than that of legal classification. In other words, the name of the behaviour would be changed, but the nature and the social reaction to the behaviour would remain the same, for the “social interest” damaged by the behaviour would remain essentially unchanged. For instance, though dowry is a crime, there is hardly any change in the attitude of the people. Perhaps it is more in practice today than before as is evident from the number of dowry deaths and cases of bride burning reported each year.[29]

2.1.5 As a Procedural Wrong

Some writers define crime in terms of nature of the proceedings. For instance, Austin says:[30] “A wrong which is pursued by the sovereign or his subordinates is a crime. A wrong which is pursued at the discretion of the injured party and his representatives is a civil injury”.

The definition does not hold well in respect of a number of offences in which the prosecution could be initiated only at the instance of the injured party as in torts. No court will take cognizance of the offence of adultery and of criminal elopement (*sections 497*, *498 IPC*), except upon a complaint made by the husband of the woman. Accordingly, Kenny modified Austin’s definition and stated:[31] “Crimes are wrongs whose sanction is punitive, and is in no way remissible by any private person, but is remissible by the Crown alone, if remissible at all”.

Kenny’s definition is also not free from lacunae and is open to criticism.[32] It is with respect to the word “remissible” that the difficulty arises. The definition lays stress on remission by the Crown,[33] which is not always true. There are a number of compoundable offences that are remissible by some gratification from the accused.[34] From the foregoing discussion, it is evident that to define crime is a task that has so far not been satisfactorily accomplished by any writer. In fact, as stated by Russell:

> Criminal offences are basically the creation of the criminal policy adopted from time to time by those sections of the community who are powerful or astute enough to safeguard their own security and comfort by causing the Sovereign power in the State to repress conduct, which they feel may endanger their position...’[35]

Similarly, Roscoe Pound says:[36]

> A final answer to the question ‘what is crime?’ Possible because law is a living, changing thing, which may at one time be based on Sovereign will and at another time on juristic science, which may at one time be uniform, and at another time give much room for judicial discretion, which may at one time be more specific in its prescription and at another time much more general.

2.1 THE CONCEPT OF CRIME

When a penal statute prescribes punishment for an act or omission, it becomes crime. But as regards the definition of the term "crime", there is no satisfactory definition acceptable to all or applicable in all situations.[37] Even the *Penal Code of India* is silent on this issue, though it has codified a bulk of criminal law of the country. *Section 40 of IPC, 1860* simply states:

…

Except in the chapters and sections mentioned in clauses two and three of this section, the word "offence" denotes a thing made punishable by this Code... or under any special or local law.

This provision is nothing but a statement of fact and cannot be regarded as a crime. However, one can understand what constitutes a crime, by the following three essential attributes:

(i) crime is an act of commission or an act of omission on the part of a human being, which is considered harmful by the State;

(ii) the transgression of such harmful acts is prevented by a threat or sanction of punishment administered by the State; and

(iii) the guilt of the accused is determined after the accusation against him has been investigated in legal proceedings of a special kind in accordance with the provisions of law.[38]

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1 Peter Brett, *An Inquiry into Criminal Guilt*, Sydney: Law Book Co of Australasia, 1963, p 1.

2 VR Krishna Iyer, *Perspectives in Criminology, Law and Social Changes*, Allied Publishers, 1980, pp 7, 8.

3 See *Hindu Marriage Act 1955*, *sections 5*, *17*. A man is liable for conviction for bigamy under *section 494 of the Indian Penal Code, 1860*. Muslim men are governed by their personal laws and are exempt from the purview of section 494. However, Muslim women are liable for bigamy.

4 *Dowry Prohibition Act 1961*, *sections 3* and *4* gives or takes or abets the giving, taking or demanding of dowry punishable.

5 See *Protection of Civil Rights Act 1955, section 3*.

6 John Smith, *Smith and Hogan Criminal Law,* 10th Edn, London: Lexis Nexis Butterworths, 2003, p 393.

7 *P Rathinam v UOI,* AIR 1994 SC 1844 : (1994) 3 SCC 394. *Section 309 of the IPC, 1860* attempt to commit suicide was held to be a cruel and irrational provision violating *Article 21 of the Constitution of India* by the Supreme Court. The court, in *Lokendra Singh v State of MP,* AIR 1996 SC 946 : 1996 SCC (2) 648 : JT 1996 (3) 339 : 1996 Scale (2) 881 and *Gian Kaur v State of Punjab,* AIR 1996 SC 946 : (1996) 2 SCC 648, however, again upheld the validity of section 309 and reversed its earlier decision of 1994. Thus, attempt to suicide is now punishable as before. Suicide is no more a crime in the US, (1986) Columbia Law Review, p 384.

8 *Sections 312* and *313* of the *IPC, 1860* provided punishment for inducing abortion, is legal vide *Medical Termination of Pregnancy Act 1971, section 3*.

9 Supreme Court on 3 August 2018 decriminalized adultery by a bench consisting of CJI Dipak Mishra, RF Nariman and D Y Chandrachud, JJ.

10 4 B1 Comm 5.

11 J W Cecil Turner, *Kenny's Outlines of Criminal law,* 19th Edn, Cambridge University Press, 1966, p 532.

12 4 B1 Comm 5.

13 *Kenny's Outlines of Criminal Law*, 19th Edn, JWC Turner, Appendix, p 532.

14 *R v Russet,* (1993) VLR 59.

15 The Code of Criminal Procedure 1973, section 125F makes maintenance of wives, children and parents mandatory and failure to do so is punishable under the law: *Om Prakash v State of Punjab,* AIR 1961 SC 1782 : [1962] 2 SCR 254.

16 Gour Hari Singh, *The Penal Law of India*, vol 1, 10th Edn, 1983, pp 247-48.

17 *Indian Penal Code, 1860*, *sections 489A-489E*.

18 *Indian Penal Code, 1860*, *sections 242*, *243*.

19 *Indian Penal Code, 1860, section 259*.

20 *Indian Penal Code, 1860, section 474*.

21 J W Cecil Turner, *Kenny's Outlines of Criminal law*, 19th Edn, Cambridge University Press, 1966, p 533.

22 *R v Ward,* (1836) 4 A and E 384. The accused was held guilty of the offence of common nuisance for constructing a sloping causeway in Cowes Harbour, which was meant for facilitating the landing of passengers and goods: See *Indian Penal Code, 1860*, *sections 268*, *283*.

23 SS Huda, *The Principles of the Law of Crimes in British India*, TLL, 1902, p 1. See KS Pillai, *Principles of Criminology*, Madras, 1924, p 6. He states:

The word "crime" is derived from (i) a Latin word, meaning 'to accuse' and (ii) a Sanskrit word, *Kri* (to do). Combining the modern meaning of both the roots, 'crime' is "a most validly accusable act".

24 R Garofalo, *Criminology,* Boston: Little, Brown and Company, 1914, p 59.

25 Draft *Penal Code*, note Q, p 174.

26 Trevor Nyman, *The Dilution of Crime*, (1981) 56 ALJ 506, p 508.

27 Edwin H Sutherland, *Principles of Criminology*, 6th Edn, 1965, p 4. This definition is consistent with *nulla poene sine lege*, i.e., without law there is no crime. See Jerome Hall, *General Principles of Criminal Law*, 2nd Edn, 1960, pp 27-69; W L Clark, Wm L Marshall and Melvin F Wingersky, *A treatise on the law of crimes* (Clark & Marshall), Chicago: Callaghan, 1958, pp 29-39.

28 John Lewis Gillin, *Criminology and Penology ... Third Edition,* D Appleton-Century Co: New York, London, 1945, p 9. In Soviet Russia, crime had been defined in terms of socially dangerous acts. A socially dangerous act (commission or omission) provided for by the criminal law, which infringes the Soviet social or State system, the socialist economic system, socialist property, the person or the political, labour, property and other rights of citizens, or any other socially dangerous act provided for by the criminal law, which infringes the socialist legal order, shall be deemed to be a crime. See MC Bassiouni and VM Savitski, *The Criminal Justice System of The USSR,* Springfield, III: Charles C Thomas Pub Ltd, 1979, p 137.

29 *Section 3 of Dowry Prohibition Act 1961* prescribes punishment for giving or taking of dowry up to minimum of six months' imprisonment and fine of Rs 10,000.

30 See *Lectures on Jurisprudence*, Lecture 27, student's edition, 1920, pp 249-53.

31 Kenny's *Outlines of Criminal Laws*, 19th Edn, JWC Turner, Appendix, p 539.

32 See Winfield, *Province of the Law of Torts* TLL, p 197; Allen, *Legal Duties*, 40 Yale Law Journal pp 221-52.

33 *Articles 72* and *161* of the *Constitution of India* empowers the President of India and the Governor of a State respectively to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence.

34 See the *Code of Criminal Procedure 1973, section 320* (1) and (2), for offences that may be compounded.

35 J W C Turner, *Russell on Crime,* 12th Edn, Sweet & Maxwell Ltd, 1964, Indian Reprint 2001, p 18.

36 Roscoe Pound, *Interpretation of Legal History*, chapter III, Harvard University Press, 1946.

37 *General Clauses Act 1897, section 3* (38) states:

> "Offences shall mean any act or omission made punishable by any law for the time being."
>
> In *Halsbury's Laws of England*, a crime has been defined as: "An unlawful act or default which is an offence against the public and renders the person guilty of the act or default liable to legal punishment", Vol 10, Simond's edition, 1955, p 271.

38 See *Kenny's Outlines of Criminal Laws*, 19th Edn, JWC Turner, Appendix, pp 4, 5; see also W L Clark, Wm L Marshall and Melvin F Wingersky, *A treatise on the law of crimes (Clark & Marshall),* Chicago: Callaghan, 1958, p 79.

2.2 THEORIES OF CRIME: NATURAL LAW VIS-À-VIS POSITIVE LAW

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

2 CRIME AND CRIMINAL LAW

2.2 THEORIES OF CRIME: NATURAL LAW VIS-À-VIS POSITIVE LAW[39]

As discussed earlier, crime is defined as the commission of acts prohibited by penal law, and criminals as persons who commit such acts. On these assumptions, a vast literature has developed about the volume of crime, motivation for crime, prevention of crime, suppression of crime, and methodology for apprehension, adjudication, and reformation of criminals.

Considering crime philosophically, the fundamental issue is whether to define crime naturally by the laws of God, or positively by the laws of man. In essence, is crime God-made or man-made?

2.2.1 Natural Law

In the course of development of Western civilisation, God's law evolved into natural law. Crime became a breach of nature's order, natural being the ideal state of affairs ordained by God.

Gods, with natural law became progressively attenuated, and nature came to receive primary emphasis. Crime as a sin receded to a theological concept, and crime as an affront to the natural order became the dominant view. Under this theory, the love and respect we owe to our neighbour makes his killing or mutilation or seduction a violation of natural law, hence a crime. Under the natural law theory, certain conduct is inherently and immutably criminal, whether or not any enactment of man has so declared. Conversely, acts that do not violate the natural order are not criminal, no matter what classification the legal order may give them.

Natural law relies heavily on feeling, on moral sense, and on individual instinct for the fitness of things. Under the natural law theory, an act that violates the basic moral code is a crime, and by implication, an act that does not violate the moral code is not a true crime.

The great difficulty here lies in determining the basic moral code. Natural law today leaves us with the amorphous guidance that the basic moral code is what we feel is right, and its violation is what we feel is wrong. To translate moral feeling into a specific code of conduct is, however, a task worthy of the greatest theologian and beyond the strength of most Judges and legislators, such a state of affairs, crime, and with it criminal law, becomes plagued with vagueness, uncertainty, mutability, and lack of definition.

Positively, the alternative concept of crime considers it a man-made creation. Under this view, crime is a violation of a man-made command of a sovereign, a violation identified as a public wrong. This view of crime as conduct, formally prescribed by sovereign authority, carries the name positive law. The killing or mutilation or seduction of a neighbour is a crime only if sovereign authority has so declared. The virtue of positive law lies in its precision and its predictability—qualities that enable positive law to escape the theoretic tyranny of natural law's vagueness, uncertainty, and reliance on subjective moral sense and feeling. Positive law possesses the added virtue of practicable application to communities of diverse races, religions, classes, and cultures, for it appears to dispense with the need for commonly held beliefs about right and wrong. Crime under positive law consists of those acts, and

only those acts, specifically prohibited by criminal law under threat of punishment. Both crime and punishment are explicitly defined and specified in advance.

The positive law theory is particularly troubled by the problem of the unjust law, exemplified by the Nuremberg laws of Hitler's Germany that withdrew certain basic rights and legal protections to Jews. If law is the command of the sovereign, does the sovereign who is corrupt and inhumane create genuine law? Need such a law be obeyed? If the unjust criminal law oppresses beyond endurance, resort may be had to right of revolution, that is, overturn of the entire legal order. In short, bad law may be repealed or overruled, but in the meantime, it remains law.

Between these two theories of crime, one based on natural law, the other on positive law, each with its strengths and weaknesses, the struggle has continued for over five hundred years, in ascendancy. Neither theory of crime has been used to the total exclusion of the other. England, the birthplace of "due process", continues to recognise common law crimes, that is, acts not prescribed by any enactment, but nevertheless considered crimes because of their flagrant immorality. In 1961[40] and 1972,[41] the House of Lords found distribution of a commercial directory listing and advertising the services of prostitutes contrary to good morals, and hence criminal—though both prostitution and homosexuality are legal in the United Kingdom.

On the other hand, in the United States and in India, though natural law theories strongly influenced the penal legislation, it does not recognise natural law or common law crimes as in England. However, natural law serves as the conscience of positive law. And courts, at times, import the concept of common on law and natural law principles in order to interpret the provisions of law and give relief to the victim of crime and the accused.[42]

Between natural law and positive law theories, the positivists appear to have the better and more practical side of the argument, and in criminal law they have generally carried the day. Natural law tends to assume the role of a brake on excesses of positive law, to function as a tribune of the people.

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39 Macklin Fleming, *Of Crimes and Rights : the penal code viewed as a bill of rights*, Norton & Co, New York, 1978, pp 26-32.

40 *Shaw v Director of Public Prosecutions,* [*[1961] 2 All ER 446*](#) (HL). Common Law crime of conspiracy to corrupt public morals and outraging public decency is punishable even in the absence of statute.

41 *Knuller v Director of Public Prosecutions,* [*[1972] 2 All ER 898*](#) (HL). Notwithstanding the legalisation of homosexual practices in private between consenting males above the age of 18 years, agreement to encourage such practices continue to be conspiracies to corrupt public morals, punishable in law.

42 See *Maneka Gandhi v UOI,* 1978 AIR SC 597 : [*(1978) 1 SCC 248*](#) : 1978 SCR (2) 621, p 694; Procedure to deprive a person of his or her personal liberty under *Article 21* must be fair, just and reasonable; *Hussainara Khatoon v Home Secretary*, *State of Bihar,* AIR 1979 SC 1360 : (1980) 1 SCC 81. No procedure which does not ensure speedy trial can be said to be reasonable, fair and just.

2.3 TRUE CRIME IDENTIFIED

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

2 CRIME AND CRIMINAL LAW

2.3 TRUE CRIME IDENTIFIED

True crime is inherently evil. It comprises those violations of the natural order, which, if unchecked, make it impossible for men to live together. Such violation may be identified as invasions of primary personal rights.

Invasion includes both act and intent (pulling the trigger with intent to kill), and hence true crime requires that the invasion be intended. By limiting true crime to intentional invasions and excluding from the province of true crime invasions that are accidental, mistaken, coerced, provoked, or irrational, its identity is preserved as conduct abhorrent to moral feeling. Thus, true crime can be explained as invasions of primary personal rights, and of operations of public agencies created to protect personal rights, invasions abhorrent to the moral sense and prescribed by positive law.

Regulatory offences, are invasions of secondary personal rights and most victimless crimes are criminal in only a conventional or secondary sense.

2.3.1 Criminal Law as Protection of Primary Personal Rights[43]

Criminal law exists to protect primary rights of persons against intentional invasion by others. For instance:

(1) Every person has the right to life.

(2) Every person has the right to inviolability of his life or her body.

(3) Every person has the right to freedom of movement.

(4) Every person has the right to security of person.

(5) Every person has the right to security of habitation.

(6) Every person has the right to security and enjoyment of property.

The principal task of State is to protect primary personal rights against external invasions, say, war by armed forces, and protection against internal invasion by means of criminal law. The ultimate end of criminal law, therefore, is protection of primary personal rights against intentional invasion by others—protection of the weak against the strong, the law-abiding against the lawless, the worker against the predator (exploiters), the peaceable against the violent; the poor against exploiters.

The devices used by criminal law to protect rights consist of rules of conduct, sanctions for violation of the rules, machinery to impose sanctions, and procedures to operate its machinery. The protection of other rights, including collective rights and civil rights, is secondary to individual welfare.

The need for government arises from man's need for protection of life, liberty and property. This protection is against each other, for, in Madison's words, "if men were angels, no government would be necessary".[44] In a stable society, this protection is taken for granted, but in times of civil disorder or anarchy its need surfaces in acute form. The first job of the government is to protect the basic rights of life, liberty of persons, and property. In its prime

function, the government acts as watchman, and in this capacity, it protects the primary rights of persons against invasion by others—the lawless, the disorderly, the violent, the fraudulent. An effective government takes priority over liberty in creation of civilised society, because liberty cannot exist without the protection of an effective government.[45] Accordingly, the *Constitution of India* has authorized the States to make laws for preventive detention under *Article 22* (3)(b) when a person can be arrested or detained in custody, even though he has not committed any crime in the following cases:

(i) for the security of the country as a whole or part thereof; or

(ii) the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community or (IV) for reasons connected with defence or the security of India. However, the State's power of curtailment of liberty is not absolute. It is subject to safeguards provided under clause (4) to clause (7) of *Article 22 of the Constitution of India*.[46]

The military action by the security forces in the State of Punjab, and Jammu and Kashmir are examples of the State's intervention to protect the life, liberty security and property of individuals against acts of violence by extremists and terrorists.

2.3.2 Criminal Law as Protection of Secondary Personal Rights

The secondary function of the State is the protection of civil and political rights enshrined in Pt III of the *Constitution of India* under the heading "Fundamental Rights". These rights are designated to protect and preserve a person's fundamental rights guaranteed under Pt III of the *Constitution of India*, against the State's arbitrary deprivation of such rights. The essential function of civil rights is to restrict improprieties of the government itself, specifically of government agents who overstep their authority. Many civil and political rights (human rights), such as right to life and liberty, freedom of speech and expression, freedom of press, freedom of assembly, and freedom of political activity, principally concern the integrity of the structure of government, and thus involve more polity than criminal law, and these include protection against such invasions of personal right as false arrest, false imprisonment, compulsory self-incrimination, unreasonable search and seizure, cruel and unusual, punishment, denial of the due process of law and custodial violence etc.

Legislative and judicial protection for these civil rights seek to provide an answer to inquiry, "Who watches the watchmen"? These civil rights are of utmost importance. The first function of the government is to protect life, liberty, safety and property of persons, individually and collectively, against invasion by lawless and violent persons. Only after the establishment of an effective government, secondary needs come into existence. Both the rights must be protected so that each may perform its function—the government to act as watchman, and systems of collective rights and civil rights to act as the watchman's watchman.

2.3.3 Origin of Criminal Law

Broadly speaking, there are four theories that demonstrate the origin of criminal law, viz "civil wrong", "social wrong", "moral wrong", and "group conflict theory".

(a) The *"civil wrong theory"* regards criminal law as originating in torts, or wrongs to individuals. According to this theory, all wrongs produced efforts at self-redress in the injured parties, and were therefore treated as injurious to particular individuals, and later, the wrongs came to be regarded as harmful to the society at large. Consequently, the group took over charge of the treatment in its own hand. Of course, some crimes did originate in torts, namely, deceit, nuisance, false imprisonment, defamation, etc, for which compensation *(furtum)* was secured from the wrongdoer. However, this theory is inadequate as a universal explanation of criminal law, as it assumes priority of the individual over the group, which is not true in all cases. There are wrongs like treason, sedition, etc, that have been regarded since early days as direct wrongs to the group.

(b) The *"social wrong theory"* postulates that criminal law originated as a national process of unified society. Thus, when wrongs occur, society makes regulations in order to prevent the repetition of such wrongs. This theory is again only partially true. It certainly covers serious offences like murder, robbery, dacoity, etc, and explains how laws are made, but fails to explain how criminal law has developed in the course of time.

(c) The *"moral wrong theory"* says that the criminal law originated in and is a crystallisation of morals, traditions and the like. Customs, after persisting for a long time, achieved an ethical foundation. Violations of such customs produced antagonistic (hostile) reactions of the groups that were expressed in the form of

criminal law with penal sanctions. This is true in respect of conventional crimes, such as offences against person, property, reputation and the like. However, it does not explain many social and economic crimes that deal with the regulations of offences relating to evasion of taxes, licensing, hoarding of essential commodities, food adulteration, black-marketing etc.

(d) The *"group conflict theory" holds* that criminal law developed in the conflict of rival groups in order to protect each other's interests. Thus, through criminal law, the powerful group forces the State to prohibit the conduct when they feel it may endanger their position. This theory may explain offences relating to property interests, but fails to explain other categories of offences, viz, offences against the State and public tranquillity etc.

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43 Macklin Fleming, *Of Crimes and Rights : the penal code viewed as bill of rights*, Norton & Co, New York, 1978, pp 84.

44 James Madison, *The Federalist*, § 51, New York, The Modern Library, 1937, p 337.

45 JS Mill, *Utilitarianism*, 1861, Everyman's Library, London, JM Dent, 1940, p 50; Sir James Stephen, *Liberty*, *Equality and Fraternity*, 2nd Edn, Smith, Elder, London, 1874, p 184.

46 See DD Basu, *Constitutional Law of India,* 5th Edn, p 81. "Preventive detention means the detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenue by legal proof, but may still be sufficient to justify his detention."

2.4 PRINCIPLES OF CRIMINAL LIABILITY

Part I General Principles

2 CRIME AND CRIMINAL LAW

2.4 PRINCIPLES OF CRIMINAL LIABILITY

Criminal guilt would attach to a man for violations of criminal law. However, the rule is not absolute and is subject to limitations indicated in the Latin maxim, *actus non facit reum, nisi mens sit rea*.[47] It signifies that there can be no crime without a guilty mind.[48] To make a person criminally accountable, it must be proved that an act, which is forbidden by law, has been caused by his conduct, and that the conduct was accompanied by a legally blameworthy attitude of mind. Thus, there are two components of every crime, a physical element and a mental element, usually called *actus reus* and *mens rea* respectively.

2.4.1 Actus Reus

The word *actus* connotes a "deed", a physical result of human conduct. The word *reus* means "forbidden by law". The word *actus reus*, may, therefore, be defined as "such result of human conduct as the law seeks to prevent."[49] The *actus reus* is made up of three constituent parts, namely:

(i) human action which is usually termed as "conduct";

(ii) the result of such act in the specified circumstances, which is designated as "injury"; and

(iii) such act as is "prohibited by law".

2.4.2 Conduct

An act is defined as "an event subject to the control of the will".[50] In other words, an act means something voluntarily done by a human being,[51] for example, giving a blow, walking, speaking, or any external manifestation of one's mind. Broadly speaking, human action includes acts of commission as well as acts of omission.[52] For the purpose of fixing criminal liability, an act may be analysed as consisting of three parts:

(a) its origin in some mental or bodily activity or passivity of the doer, that is, a willed movement or omission;

(b) its circumstances; and

(c) its consequences.[53]

If *A* shoots *B* to death with a rifle, the material elements of the act are: first, its origin or the primary stage, namely, a series of muscular contractions by which the rifle is raised and the trigger pulled; secondly, the circumstances, the fact that the rifle is loaded and is in working order, and that the person killed is within range; thirdly, the consequences, the fall of the trigger, explosion of the powder, the discharge of the bullet, striking of the body of the victim resulting in his death. All these factors are implied in the statement "*A* killed *B"* and they constitute "an act"[54] for which he will be criminally liable.

However, if *A*, while in a fit of epilepsy strikes and hurts *B*, *A* is not liable for causing injury to *B*, because at that time he had no control over his actions. The movement of his arms and legs were not the result of his voluntary actions. Similarly, if *A*, suffering from somnambulism, (a disorder in which sleep-walking is the major symptom)

steps on *B*, who was sleeping on the floor and hurts him, *A* is not liable for causing hurt to *B*. *A's* actions were not conscious or willed actions, and so it would not amount to "an act" at law for the purpose of holding A criminally liable for causing injury to *B*.

2.4.3 Result of Conduct

To constitute a crime, there must always be a result brought about by human conduct; a physical event, which the law prohibits. Actus reus, therefore, is the result of a human conduct and is an event. However, an event is distinguishable from the conduct that produces the result. For example, in the case of a murder, it is the victim's death brought about by the conduct of the accused which is the actus reus. In other words, a crime is constituted by the event, and not by the activity which causes the event. For example, the activity that led to the event, namely, shooting, stabbing, strangling or poisoning etc might have caused the victim's death. It is immaterial to the crime of murder. Once the desired act is accomplished, the actus reus of the crime is complete and how the contemplated event took place is not of much significance except for the purpose of fixing criminal responsibility. If the desired result is not achieved, the person is not responsible for the intended *criminal act*, which could not materialise.

If *A* fires at *B* in order to kill him, but the bullet causes only slight injury in *B's* leg, *A* is not liable for murder, unless the actus reus of the crime of murder is complete. Of course, A will be liable for the offence of attempt to murder and for causing simple or grievous hurt, as the case may be.

2.4.4 Acts Prohibited by Law

An act, howsoever reprehensible it may be, is not a crime unless prohibited by law. Only those acts that the law has chosen to forbid are crimes. No crime is committed when a soldier, in a battlefield, shoots an enemy. The act being authorised by law, the killing is not the actus reus of crime, for there is a lawful justification for it. Similarly, no crime is committed when a person exercising his lawful right of private defence causes harm to another. Likewise, if an onlooker who happens to be a good swimmer does not rescue a child about to be drowned in a pond he is not liable for any offence because there was no legal duty on his part to rescue a person. An act of omission, to be punishable, must be an illegal omission[55] or a breach of legal duty. For instance, a jailor who starves the prisoners in his charge to death is guilty of murder. The jailor's act amounts to an illegal omission to discharge his legal obligation to provide meals to the prisoners.[56]

2.4.5 Mens Rea

Mens rea is a technical term, generally taken to mean some blameworthy mental condition, whether constituted by intention or knowledge or otherwise, the absence of which on any particular occasion, negatives the contention of a crime.[57] There must be a mind at fault to constitute a crime. No act is per se criminal; the act becomes criminal when the actor does it with a guilty mind. Causing injury to an assailant in self-defence is not a crime, but the moment injury is caused with the intent to take revenge, the act becomes criminal. Likewise, shooting in air is no crime, but shooting with the intent to kill a man is a crime.

The courts in earlier days in order to fix the accused's criminal liability were to determine whether the accused behaved in a manner which fell below the ethical norms approved in the society or not.[58] If the conduct happened to be below the ethical standard, the accused was responsible for his act at law. Later, two tests were evolved to determine mens rea. The first was whether the act in question was a voluntary act of the accused and second, whether the accused had the foresight of the consequences of his conduct.[59]

For instance, if A, a blacksmith, is seized by a gang of robbers and is forced to break open the doors of a house for the robbers to enter and commit robbery, he is not liable for committing robbery and breaking open the doors. A had to concede to the demands of the robbers under a threat of instant death, and so the act of breaking the doors was not a voluntary act for which he may be held liable. Likewise, if A, while shooting at a tiger, hurts B, who was behind a bush concealed from his view, he is not liable for injuring B, because the act being purely an act of accident, he could not foresee his bullet hitting B.

However, there is no single state of mind that must be present as a pre-requisite for all crimes. Mens rea takes on different colours in different surroundings. What is an evil intent for one kind of offence may not be so for another kind. For instance, in the case of murder, it is the intent to cause death; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible sexual intercourse with a woman without her consent; in the case of receiving stolen goods, knowledge that the goods were stolen; and in the case of homicide, by rash or negligent act, recklessness or negligence.[60] To appreciate the meaning of mens rea, it is necessary to have a clear

conception of words like intention, motive, knowledge, recklessness and negligence, etc, which are often used to indicate the different possible mental attitudes constituting the actus reus of a particular crime.

2.4.5.1 *Intention*

Intention means a purpose or desire to bring about a contemplated result or foresight that certain consequences will follow from the conduct of the person. For instance, if a man throws a boy from a high tower or cuts off his head, it is obvious that he desired the victim's death. Similarly, if a man abandons his two-month-old child in a forest, and the child ultimately dies, it is apparent that he knew the consequences. In all such cases, the man is said to have intended the desired act.

Intention must be distinguished from motive. Motive is the reason or ground of an action, whereas intention is the volition or active desire to do an act. In other words, intention is an operation of the will directing an overt act; while motive is the feeling that prompts the operation of the will, the ulterior object of the person willing.

For instance, if A kills B, the intention is the state of mind which directs the act which causes death, the motive is the object which the person had in view, namely, the satisfaction of some such desire as revenge, vengeance, hatred and the like.

Motive is not a basis for criminal liability. Criminal law takes into account only a man's intention and not his motive. A good motive will not render lawful what is in fact a crime. If a man steals food in order to feed his starving child, the act amounts to theft, in spite of the fact that the motive behind the act was to save the child's life. Likewise, a bad motive will not make unlawful, that which is lawful. An executioner may enjoy putting a convict to death because of spite against him, but this would not render his lawful act a crime. Thus, motive is not a sine qua non (necessary condition) for holding the accused liable. However, the evidence of motive is relevant, since it throws light on the question of intention and gives a clue to a crime, and though the prosecution is not bound to prove motive for a crime, the absence of motive may be a factor in consideration of the guilt of the accused. As stated by the Supreme Court of India in *Basdev v State of Pepsu*,[61] motive is something which prompts a man to form an intention.

Intention is also distinguishable from knowledge. An intention to commit an offence may be inferred from knowledge, though, at times, intention and knowledge merge into each other. If *A* sets a house, in an inhabited locality, on fire at night for facilitating a theft, and thereby causes death of some persons, *A* is liable for murder of the inhabitants. Intention to cause death will be inferred from the awareness of the risk involved in the act of setting fire.

Nonetheless, there is a distinction between intention and knowledge.[62] Knowledge is the awareness of the consequences of an act. A man may be aware of the consequences of his act, though he may not intend to bring them about.

For instance, *A*, attacked by a wild animal, calls out to *B* to fire in order to save him, though with imminent hazard to himself. If *B* fires in response to *A's* request, and causes the death of *A*, he is not liable for *A's* death. Here, *B's* act was not the intentional killing of *A*, though *B* knew the act was likely to cause *A's* death.[63] So also, if a patient gives his consent to take the risk of an operation, which in large proportion of cases has proved fatal, the surgeon who performed the operation would not be punished for murder, if the patient dies during the course of the operation. The death was not intentional though it was known that the operation might result in the death of the patient.

Knowledge is again distinguishable from "reason to believe".[64] A person is supposed to know a thing where there is a direct appeal to his senses, whereas "reason to believe" means sufficient cause to believe a thing, but not otherwise. If *A* comes to *B* at night under suspicious circumstances and offers to sell a valuable watch for rupees twenty only, *B* may not know that the watch is stolen, but he has sufficient reason to believe that the watch may be stolen, as is evident from the low price demanded.[65]

2.4.5.2 *Recklessness*

Recklessness is the state of mind of a person who foresees the possible consequences of his conduct, but acts without any intention or desire to bring them about. A man is said to be reckless with respect to the consequences of his act, if he foresees the probability that it will occur, but does not desire it nor foresee it as certain. It may be that the doer is quite indifferent to the consequences, or that he does not care what happens. In all such cases, the doer is said to be reckless towards the consequences of the act in question. In other words, recklessness is "an

attitude of mental indifference to obvious risk".[66] Driving at a furious speed through a narrow and crowded street is a reckless act. The person foresees that someone in the crowd may get injured by his act, but is "mentally indifferent" to such obvious risk. Likewise, if A throws a stone over a crowd, without caring whether it would injure someone, and the stone falls on the head of one of the persons in the crowd, A is responsible for causing injury recklessly.

2.4.5.3 *Negligence*

Negligence is used to denote want of care and precaution, which a reasonable man would have taken under the particular circumstances of the case.[67] Negligence is the omission to do something which a reasonable man, guided upon by those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. It is the state of mind of a man, who pursues a course of conduct without adverting at all to its consequences. If, during a quarrel with his wife, A in sheer anger, picks up a paper weight from the table and throws it out of the window, fracturing the skull of a passer-by, A is liable for causing injury to him. Here A had, at the time of throwing the paper weight, neither foreseen injury to anyone, nor contemplated it, yet A is culpable, because he failed to conform to the conduct of a reasonable man.

Negligence, in crimes, unlike in the case of torts, is not the basis of liability in general. It is only in a few cases that *IPC, 1860* fixes criminal liability on the ground of negligence. For instance, a man is liable for negligence, if it affects the life, or personal safety of others, such as in the case of rash and negligent driving,[68] rash navigation of a vessel,[69] negligent conveying of persons by water for hire in an unsafe or overloaded vessel, etc.[70]

Negligence must be distinguished from neglect.[71] Neglect, unlike negligence does not indicate a specific attitude of mind, but states a matter of fact, which may be the result of either an intentional or a negligent act. A man, who knows that the brake of his scooter is defective, neglects to set it right, and knocks down a child on the road. The harm to the child is caused not by his negligence, but by his wilful neglect or recklessness in not repairing the brake.

2.4.6 Mens Rea under the Indian Penal Code, 1860

The doctrine of mens rea has no application to the offences in general under the *Penal Code of India* unlike its counterpart, the common law.[72] The framers of *IPC, 1860* have not mentioned mens rea as such anywhere in the Code.

However, the doctrine has been incorporated in two ways: first, the provisions as to the state of mind required for a particular offence have been added in the sections itself by using such words as "intentionally, knowingly, voluntarily, negligently, recklessly, fraudulently, dishonestly, etc," depending on the gravity of the offence concerned. That is to say, every offence under *IPC, 1860* virtually imports the idea of mens rea.

Secondly, the concept of mens rea has been incorporated into the provisions relating to "General Exceptions" in Chapter IV of *IPC, 1860*. Where the legislature has omitted to lay down a particular state of mind as an essential ingredient of an offence under the *Indian Penal Code, 1860*, the presumption is that such an omission is deliberate and in such a case, the doctrine of mens rea will not apply.[73] For instance, in offences like waging war against the Government of India, sedition, kidnapping, abduction, counterfeiting coins and the like,[74] no element of mens rea is required for fixing criminal responsibility. Nevertheless, the courts have applied the doctrine of mens rea in deciding cases even where the section does not speak of any state of mind, relying on English precedents.[75]

The Supreme Court of India, on more than one occasion, has reiterated that unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, a person should not be found guilty of an offence, if he does not have a guilty mind. In *State of Gujarat v DP Pandey,* AIR 1971 SC 866, p 868 : (1970) 3 SCC 183 : 1971 SCR (2) 557, the Supreme Court has stated the rule of interpretation of penal statutes in the following words:

> The broad, principles accepted by courts in this country as well as in England are: Where an offence is created by a statute, however comprehensive and unqualified the language of the statute, it is usually understood as silently requiring that the element of mens rea should be imported into the definition of the crimes, unless a contrary intention is expressed or implied. In other words, the plain words of the statute are read subject to a presumption, which may be rebutted, that the general rule of law that no Crime can be committed unless there is mens rea, has not been ousted by the particular enactment.

47 The act itself does not make a man guilty, unless his intentions were so. The earliest trace of the maxim is to be found in St Augustine's Sermon No 118.02, where it is stated as *ream linguam non facit*, *nisi mens sit rea* cited in Pollock and Maitland, II, 476n; see Jerome Hall, *General Principles of Criminal Law*, 2nd Edn, 1960, pp 77-83. For a historical analysis of the origin of the doctrine of mens rea, see *Fowler v Padget,* (1789) 7 TR 509; "The intent and the act must concur to constitute a crime," Per Lord Keyon CJ in *Younghusband v Luffing,* [1949] 2 KB 354.

48 *Russell on Crime*, vol I, 12th Edn, 1964, pp 22-60. In the past, criminal liability was absolute. A man was responsible for doing an act prohibited by law irrespective of the mental attitude. However, in cases of self-defence (*defendendo*) and accident (*per infortunium*), the King used to pardon the accused.

49 J W Cecil Turner, *Kenny's Outlines of Criminal law,* 19th Edn, Cambridge University Press, 1966, p 17.

50 Monrad and Kadish, *Criminal Law and Its Processes*, 1962, p 212.

51 SS Huda, *Principles of Law of Crimes in British India*, Calcutta: Butterworth, 1903, pp 14-16. Examples may be found in old legal institutions of punishment inflicted on animals as well. See also J W C Turner, *Russell on Crime*, vol I, 12th Edn, 1964, pp 22-60.

52 See *Indian Penal Code 1860, section 32*.

53 See Monrad and Kadish, *Criminal Law and its Processes*, p 213.

54 See *Indian Penal Code, 1860, section 33*. The word "act" denotes as well a series of acts as a single act; the word "omission" denotes as well a series of omissions as a single omission.

55 *Indian Penal Code, 1860, section 43*. Some examples of illegal omissions under the *Indian Penal Code 1860*, are: omission to produce a document before a public servant by a person legally bound to do so (section 175); omission to assist a public servant when called upon to do so (section 176); omission to apprehend or to keep in confinement any person charged with an offence by a public servant legally bound to do so (sections 221, 222).

56 See *Om Prakash v State of Punjab,* AIR 1961 SC 1782 : [1962] 2 SCR 254. In England, a parent who fails to provide or to take steps to procure to provide adequate food, clothing, medical aid or lodging for children or young persons is criminally liable under section 1 of the Children and Young Persons Act 1933. *Section 125 of the Code of Criminal Procedure 1973*, provides for maintenance of wives, children and parents.

57 Stephen James, *History of Criminal Law of England*, vol II, 1883, pp 94-95; Smith and Hogan, *Criminal Law*, 5th Edn, 1983, pp 47-48; *Essays on the Indian Penal Code*, Indian Law Institute, 1962, pp 56-62. *"Annual Survey of the Indian Law"*, 1963, Indian Law Institute, p 499; KM Perkins, *"A Rationale of Mens Rea"*, Harvard Law Review, no 52, 1938-39, p 905; *"Mental Element"*, Harvard Law Review, no 74, 1960-61, p 779, Harvard Law Review, no 75, 1960-61, pp 17-21.

58 See *Russell on Crime*, vol I, 12th Edn, pp 17-22.

59 Jerome Hali, *General Principles of Criminal Law*, 2nd Edn, 1960, pp 70-77; Deylin, *"Statutory Offence"*, (1938) 4 JSPTL 213. Mens rea consists of two elements—first, the intent to do an act and secondly, the knowledge of the circumstance that makes that act a criminal offence.

60 Sayre, *"Mens Rea"*, Harvard Law Review, no 45, 1932, p 974; *SKKV Kara v State of Kerala,* 1970 AIR Ker 98 : 1970 Cr LJ 688, p 692.

61 AIR 1956 SC 488 : [1956] 1 SCR 363; Ratanlal and Dhirajlal, *Law of Crimes*, 23rd Edn, pp 213-217.

62 See RC Nigam, *Law of Crimes in India*, vol 1, 1965, pp 77-79. Knowledge may be of two kinds, actual knowledge and constructive knowledge. Actual knowledge is inferred from the conduct of the person, whereas constructive knowledge is presumed where a person either deliberately refrains from making inquiries, the result of which he might not care, or unintentionally fails to make inquiries which a reasonable and prudent man would make. Knowledge is an essential ingredient of offences in various sections of *Indian Penal Code, 1860*.

63 See *Draft Penal Code*, Appendix Note B, p 108.

64 *Section 26 of Indian Penal Code, 1860* states: "A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing, but not otherwise."

65 *Indian Penal Code, 1860, section 411*, defines stolen properly.

66 *Hudston v Viney,* [1921] 1 Ch 98.

67 *Blyth v Birmingham Waterworks Company,* (1856) 11 Ex Ch 781, p 784, per Anderson B.

68 *Indian Penal Code, 1860*, *sections 304A*, *337*, *338*, *279*.

69 *Indian Penal Code, 1860*, *sections 282-287*, *289*.

70 *Indian Penal Code, 1860*.

71 Negligence is also distinguishable from a rash act. A rash act is primarily a hasty act, and is thus opposed to deliberate act. See Ratanlal, *The Law of Crimes*, 23rd Edn, 1991, pp 898-900.

72 *Black's Law Dictionary*, West Publishing House, 1968, pp 345-46. Common Law is that body of law and juristic theory, which is administered in England. As distinguished from statutory law created by the enactment of statutes, Common Law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognising, affirming and enforcing such usages and customs.

73 MC Setalvad, *The Common Law in India*, p 139; Mayne, *Criminal Law in India*, 4th Edn, p 9; Gour Hari Singh, *The Penal Law of India*, vol 1, 11th Edn, pp 123, 297; Ratanlal and Dhirajlal, *Law of Crimes*, 23rd Edn, 1991, pp 214-17; *"Diluting the Doctrine of Strict Liability"*, 1970 Ann Sur IL, pp 477-80.

74 See the *Indian Penal Code, 1860*, *sections 121*, *124A*, *259*, *363*, *232*. The Supreme Court in *Ranjit D Udeshi v State of Maharashtra,* AIR 1965 SC 881 : [1965] 1 SCR 65, has ruled out the concept of mens rea in cases of obscenity under *IPC*, *sections 292*, *293*.

75 See *Ravula Hariprasad Rao v State of Madras,* AIR 1951 SC 204 : [1951] 2 SCR 322; *Srinivas Mall v Emperor,* 1947 AIR PC 135 : (1947) 49 Bom LR 688; In Re *Pantam Venkayya,* 1930 AIR Mad 246; *Kochu Muhammad Kunju Ismail v Mohammad Kodeja Umma,* 1959 AIR Ker. 151; *Nathulal v State of MP,* AIR 1966 SC 43 : 1966 Cr LJ 71. See also *Reg v Tolson,* [1889] 23 QBD 168; *Pearks' Dairies Ltd v Tottenham Food Control Committee,* (1919) 88 LJKB 623, 626; *Brend v Wood,* (1946) 62 TLR 462; *Harding v Price,* [1948] All ER 283; *Lim Chin Aik v Reg,* [1963] AC 160.

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2.5 STRICT LIABILITY

Part I General Principles

2 CRIME AND CRIMINAL LAW

2.5 STRICT LIABILITY

The general rule that mens rea applies to all criminal offences is subject to certain exceptions. In other words, in some exceptional situations, the law breaks through the rule on mens rea, and holds a person responsible for his *criminal act*, altogether independent of any wrongful state of mind or culpable negligence.[76] Such offences are termed as offences of strict liability or absolute liability.

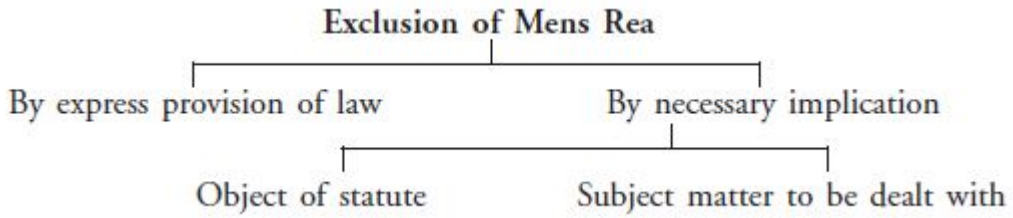
Crimes, not requiring legal fault on the part of the accused, may be classified into three categories. The first category includes those acts that are not criminal in any real sense, but are of a quasi-criminal nature and are prohibited in public interest under a penalty. This category includes cases of public welfare offences, for instance, social and economic offences, offences relating to food and drugs, weights and measures, licensing, road traffic, revenue offences etc. The second category includes cases of public nuisance, libel and contempt of court, etc. The third category includes cases in which, although the proceeding is criminal, it is really a mode of enforcing a civil right, for example, cases of violations of municipal laws and regulations etc.[77]

The doctrine of strict liability is a departure from the common law principle of *actus non facit reum, nisi mens sit rea* and is therefore, vehemently criticised. The jurists have gone to the extent of saying that strict liability offences are not criminal offences. Professor Jerome Hall has preferred to call strict liability offences as offences relating to "economic law" or "administrative regulations", instead of penal offences.[78]

2.5.1 Exclusion of Mens Rea

The exclusion of mens rea from statutory offences is justified on the ground that such laws are enacted by the legislature to preserve and protect social and economic interest of the community, which require strict adherence to such laws. Moreover, punishment provided in such cases is generally a nominal fine. In fact, the object of such regulations is not to punish the vicious, but to put pressure on the persons to discharge their duties properly in the interest of public health and safety of the community, and to preserve morals.[79] For instance, an industry engaged in hazardous or inherently dangerous activities, is absolutely liable for any harm caused, irrespective of reasonable care taken and without any negligence on the part of the industry.[80]

The exclusion of mens rea in the statutory offences can be illustrated with the help of following chart:



2.5.2 Moral, Ethical, Religious, Civil and Criminal Wrongs

Since the very beginning of human civilisation, man has recognised certain acts committed by an individual, for

instance, lying, gambling, cheating, stealing, killing, kidnapping, as reprehensible, because they tend to reduce human happiness. Such acts are called wrongs and are looked upon with disapprobation. The evil tendencies of these anti-social acts widely differ in degree and scope. For instance, lying, refusal to give a mouthful of rice to save a fellow creature, omission to rescue a man from drowning, etc are not considered sufficiently serious for an action in law. Such acts are simply considered as immoral or ethical wrongs and the concern of social and religious laws. On the other hand, wrongs like nuisance, deceit, libel, robbery, dacoity, murder, rape, kidnapping, etc are considered sufficiently serious for legal action.

The State may respond to any such act in two ways, either at the instance of the injured individual or group or by itself taking a direct action. In other words, where the magnitude of injury is supposed to be more concentrated on the individual the wrongdoer is asked to compensate the injured in terms of money as in case of deceit, libel, nuisance, negligence, etc. This type of wrong is called “civil wrong” or “tort”, for which civil remedy is open to the injured. Where the gravity of the injury is comparatively more directed to the public at large, public condemnation or provision for compensation, as in the case of moral and civil wrongs, is ineffective. Wrongs like dacoity, murder, kidnapping, sedition, treason and the like disturb the very fabric of law and order and jeopardise the State’s existence or create a widespread panic. Therefore, the State stresses punishment of the wrongdoer. This category of wrong is called “public wrong” or “crime” for which criminal proceedings are instituted by the State, and the culprit is punished by a court of law if found guilty.

2.5.3 Tort and Crime Distinguished

Since both tort and crime have a common origin. | They resemble each other basically in two respects, namely, both tort and crime are violation of right *in rem*, i.e., right is vested in some determinate person and available against the world at large; and secondly, in case of both the wrongs, the rights and duties are fixed by law irrespective of the consent of the parties, unlike contract. However, there are some points of distinction between the two wrongs, namely:

(1) (1) A tort is a private wrong. It is an infringement of the belongings of the individual; whereas crime is a public wrong which affects the society at large.

(2) (2) In tort, the wrong-doer has to compensate the injured party; in crime he is punished by the State. The convicted person is sent to jail and asked to pay fine not only for the sake of redress but also to set an example[81] for like minded persons not to indulge in criminal activities.

(3) (3) In tort, the action is brought by the injured party himself and the wrong-doer is asked to compensate him. In crime, the proceedings are initiated by and in the name of the State and the guilty person is punished. Of course, in some cases complaint is to be made by the aggrieved party, such as in case of offences relating to adultery, defamation, etc, in order to bring the State machinery into motion.[82]

(4) (4) In case of crime, the State initiates action to prevent offences from being committed and if committed, a prosecution is launched and the culprit is punished, since maintenance of law and order is the duty of the State. This is not so in the case of torts, where the injured person is let free to bring action against the wrongdoer either in a civil court or in a consumer forum to seek compensation and damages.

2.5.4 Felonious Tort (a crime which is also a tort): Merger of Crime with Tort

There are certain wrongs that may fall under the category of tort as well as crime, such as deceit, trespass, malicious prosecution, defamation, nuisance etc.[83] An assault is a tort when looked at from the point of view of an individual as it is a violation of the right of every person to his personal safety being preserved. At the same time when such an act is looked upon as a menace to the safety of the society it is then punished by the State as a crime.[84] In all such cases, two different kinds of actions are open against the wrongdoer. The wrongdoer may be punished criminally and also compelled in a civil action to pay damages to the party aggrieved. Such kinds of wrongs are called “felonious tort”.

Merger of criminal liability in civil liability or vice-versa is against public policy and, hence; invalid—Supreme Court—1992

Union Carbide Corporation v UOI,

AIR 1992 SC 248 : (1991) 4 SCC 584 : 1991 SCR Supl (1) 251

A massive amount of lethal gas escaped from the MIC storage tank at Bhopal Plant of the Union Carbide (I) Ltd

(UCIL) as a result of which 4000 human lives were lost and tens of thousands of citizens of Bhopal were physically affected. Action was brought up by the Union of India as *parens patriae* (Head-protector of common man's interest) before the district court, Bhopal pursuant to the statutory enablement in that behalf under Bhopal Gas Leak Disaster (Processing of Claims) Act 1985, claiming 33 billion dollars as compensation against the company. When an interlocutory matter pertaining to the interim compensation came up for hearing, there was a court assisted settlement between the Union of India and the Union Carbide Corporation (UCC owning 50.99 percent of shareholdings in UCIL). Under this settlement, a sum of US $ 470 million was agreed to be paid by the UCC to the Union of India in full and final settlement of all the claims of all the victims of the gas leak disaster against the UCC. The Union of India also agreed to withdraw certain prosecutions that had been initiated against the officials of the UCC and UCIL in this connection.[85] The review petitions under *Article 137* and writ petitions under *Article 32 of the Constitution of India* raised certain fundamental issues as to the constitutionality, legal validity, propriety and fairness and conscionability of the settlement of the claims of the victim. Allowing the review petitions in part and dismissing the writ petitions the Supreme Court held:

Per Ranganath Misra, J:

(1) The contention that the Apex Court had no jurisdiction to withdraw to itself the original suits pending in the district court at Bhopal and dispose of the same in terms of the settlement and the further contention that, similarly, the court had no jurisdiction to withdraw the criminal proceedings are rejected.

(2) The contention that the court had no jurisdiction to quash the criminal proceedings in exercise of power under *Article 142* (1) is rejected. But, in the particular facts and circumstances, it is held that the quashing of the criminal proceedings was not justified.

(3) Grant of blanket criminal immunity is a legislative function. There is no power or jurisdiction in court to confer immunity for criminal prosecution and punishment. Grant of immunity to a particular person or persons may amount to a preferential treatment violative of the equality clause (*Article 14*).

(4) However, the court's direction that future criminal proceedings shall not be instituted or proceeded with, must be understood as a concomitant and a logical consequence of the decision to withdraw the pending prosecution. In that context, the stipulation that no future prosecutions shall be entertained may not amount to conferment of any immunity but only to a reiteration of the consequence of such termination of pending prosecution. Thus understood, any appeal to the principle as to the power to confer criminal immunity becomes inapposite (irrelevant) in this case.

A contract whose object is opposed to public policy is invalid. The essence of the doctrine of stifling (stopping) of prosecution is that no private person should be allowed to take the administration of criminal justice out of the hands of the judges and place it in his own hands. The consequences of the doctrine of stifling of prosecution follow where a person sets the machinery of the criminal law into action on the allegation that the opponent has committed a non-compoundable offence and by the use of this coercive criminal process, he compels the opponent to enter into an agreement, that agreement would be treated as invalid for the reason that its consideration is opposed to public policy.

The distinction between the "motive" for entering into agreement and the "consideration" for the agreement must be kept clearly distinguished. Where dropping of the criminal proceedings is a motive for entering into an agreement and not its consideration—the doctrine of stifling of prosecution is not attracted, where there is also a pre-existing civil liability, the dropping of criminal proceedings need not necessarily be a consideration for the agreement to satisfy that liability.

In this case, the main thrust of the petitioners' argument of unlawfulness of consideration is that the dropping of criminal charges and undertaking to abstain from bringing criminal charges in future were part of the consideration for the offer of 470 million US dollars by the UCC and as the offences involved in the charges were of public nature and non-compoundable, the consideration for the agreement was stifling of prosecution and, therefore, unlawful, However, it is inconceivable that the Union of India, under the threat of a prosecution, coerces the UCC to pay 470 million US dollars or any part thereof as consideration for stifling of the prosecution. Thus, the doctrine of stifling of prosecution is not attracted in the present case.

A mistaken belief even though based on reasonable grounds regarding the age of the girl is no defence to a charge of kidnapping—conviction upheld—15 to 1—House of Lords—1875

Queen v Prince,

2.5 STRICT LIABILITY

[1875] LR 2 CCR 154 (HL)

Per Blackburn, J:

Henry Prince was tried and convicted upon the charge of having unlawfully taken Annie Phillips, an unmarried girl under the age of sixteen, out of the possession and against the will of her father contrary to section 55 of The Offences Against the Person Act 1861...which states:

[W] hoever shall unlawfully take any unmarried girl under the age of sixteen out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanour.

It was proved that the accused believed on reasonable grounds that the girl was above sixteen and the jury found upon reasonable evidence that before the accused took her away she told him that she was eighteen, and that the accused bona fide believed that statement, and that such belief was reasonable.

The lower court convicted the accused and the House of Lords by a majority of fifteen to one, upheld the conviction.

... Section 55 [of The Offences against the Person Act 1861] under which the present case arises, recognises a legal right to the possession of the child depending on the real age of the child, and not on what appears. And the object of the legislature, being, as it appears by the Preamble was to protect this legal right to the possession, would be baffled, if it were an excuse that the person guilty of the taking, thought the child to be above sixteen. The words “unlawfully takes”... mean without the authority of the master or mistress, or guardian.

... the question is, whether we are bound to construe the statute as though they were, on account of the rule that the mens rea is necessary to make an act a crime. I am of the opinion that we are not, nor as though the word “knowing” was there, and for the following reasons:

> The act forbidden is wrong in itself, if without lawful cause. The statute supposes that there is a girl—it does not say a woman, but a girl—something between a child and a woman; it supposes she is in the possession of her father or mother, or other person having lawful care or charge of her; and it supposes there is a taking, and that taking is against the will of the person in whose possession she is. It is, then, a taking of a girl, in the possession of some one, against his will. I say that done without lawful cause is wrong, and that the legislature meant it should be at the risk of the taker whether or not she was under sixteen. [On the contrary] taking a woman of fifty from her brother’s or even father’s house is not wrong. She is at an age when she has a right to choose for herself; she is not a girl, nor of such tender age that she can be said to be in the possession of or under the care or charge of anyone.

...The legislature has enacted that if anyone does this wrongful act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of *mens rea*. If the taker believed he had the father’s consent, though wrongly, he would have no mens rea; so if he did not know she was in anyone’s possession, nor in the care of or charge of anyone. In those cases he would not know he was doing the act forbidden by the statute—an act which, if he knew that she was in possession and in care or charge of anyone, would amount to a crime, irrespective of her being under sixteen or not. He would not know he was doing an act wrong in itself, whatever was his intention, if done without lawful cause.

Conviction is affirmed by a majority of 15 to 1.

Reasonable belief in good faith in the death of the spouse negatives mens rea and is a good defence to a charge of bigamy—House of Lords—Conviction quashed by 9 to 5

The Queen v Tolson,[86]

[1889] 23 QBD 168 (HL)

Per Lord Coleridge CJ, Denman, Pollock B, Field, Huddleston B, Manisty, Hawkins, Stephen, Cave, Day, Al Smith, Wills, Grantham and Charles, JJ:

In 1888, prisoner Martha Ann Tolson was convicted of bigamy at the Court of Assizes (law court) at Carlisle. The marriage of the prisoner to Tolson took place on 11 September 1880; that Tolson deserted her on 13 December

1881; and that she and her father made inquiries about him and learned from his elder brother and from general reports that he had been lost in a vessel bound for America, which went down with all hands on board. On 10 January 1887, the prisoner, supposing herself to be a widow, went through the ceremony of marriage with another man. The circumstances were all known to the second husband, and the ceremony was in no way concealed. In December 1887, Tolson returned from America.

The jury convicted the prisoner, stating, however, that they thought that she in good faith and on reasonable grounds believed her husband to be dead at the time of the second marriage, and the judge sentenced her to one day's imprisonment.

The indictment was framed under section 57 of The Offences Against the Person Act 1861, which states:

Whoever, being married, shall marry any other person during the life of the former husband or wife shall be guilty of felony, punishable with penal servitude for not more than seven years, or imprisonment with or without hard labour for not more than two years; with a proviso that:

...Nothing in this Act shall extend to any person marrying a second time whose husband or wife shall have been continuously absent from such person for the space of seven years last past, and shall not have been known by such person to be living within that time.

There is no doubt that under the circumstances the prisoner falls within the scope of the statute. She, being married, married another person during the life of her former husband, and, when she did so, he had not been continually absent from her for the last seven years.

It is, however, undoubtedly a principle of English criminal law, that ordinarily speaking a crime is not committed if the mind of the person doing the act in question be innocent "It is a principle of natural justice and of our law," says Lord Kenyon CJ in *Fowler v Padget*[87] "that *actus nan facit reum, nisi mens sit rea*: the intent and act must both concur to constitute the crime".

The case of *Reg v Prince*, (1875) LR 2 CCR 154 therefore, is a direct and cogent authority for saying that the intention of the legislature cannot be decided upon simple prohibitory words, without reference to other considerations. The considerations relied upon in that case are wanting in the present case.

Conviction is quashed, by a majority of 5 to 4.

Mens rea in statutory offences - Ignorance of fact an excuse - Divisional Court - 1895

Sherras v De Rutzen,

(1895) 1 QB 918

The appellant, a licensed inn-keeper, was convicted by a magistrate under section 16 (2) of Licensing Act 1872, for supplying liquor to a constable on duty. The appellant's daughter in his presence supplied liquor to the constable without making any inquiry as to whether there was an indication that he was on duty. Prior to entering the public house, which was nearly opposite to a police station, the constable had removed his armlet band, which was an indication that he was off duty. The appellant's plea was upheld by the quarter sessions on the ground that the knowledge, that the police constable, when served with liquor, was on duty, was not an essential ingredient of impugned section. The case was referred to the Divisional Court, which quashed the conviction.

Per Wright, J:

There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject- matter with which it deal, and both must be considered.

…there must in general be guilty knowledge on the part of defendant, or of someone whom he has put in the place to act for him, generally, or in the particular matter, in order to constitute an offence. It is plain that if guilty knowledge is not necessary, no care on the part of the publican could save him from a conviction under section 16 (2), sub-section (2), since it would be as easy for the constable to deny that he was on duty when asked, or to produce a forged permission from his superior officer, his armlet before entering the public house.

The conviction is quashed.

Positive Duty: Failure to protect a child or vulnerable adult from causing or allowing the death from domestic violence is punishable under section 5 of the Domestic violence, Crime and Victims Act 2004 (United Kingdom).

R v Khan,

[2009] EWCA Cr 2 : *(2009) 4 All ER 544*

In 2007, *K* was convicted of the murder of his 19 year old wife, *S*. In 2008 *K*'s mother (who was also *S*'s aunt), two of his sister (*S*'s cousins) and the husband of one of the sister were convicted of allowing, the death of *S*, a vulnerable adult, contrary to section 5 (1) of the Domestic Violence, Crime and Victims Act 2004. That sub-section provided that a person (*D*) was guilty of an offence if (a) a child or vulnerable adult (*V*) died as a result of the unlawful act of a person who was a member of the same household as (*V)*, and had frequent contact with him, (b) *D* was such a person at the time of that act, (c) at that time there was a significant risk of serious physical harm being caused to *V* by the unlawful act of such a person, and (d) either *D* was the person whose act caused *V* 's death or—(i) *D* was, or ought to have been, aware of the risk mentioned in paragraph (c), (ii) *D* failed to take such steps as he could reasonably have been expected to take to protect *V* from the risk, and (iii) the act occurred in circumstances of the kind that *D* foresaw or ought to have foreseen.

The Crime and Victims Act 2004 had created a new offence based on a positive duty on members of the same household to protect children or vulnerable adults from serious physical harm. The extent of that protective duty and the circumstances in which criminal liability for its non-performance could arise were defined by section 5 of the Act. The "significant risk" against which the victim was to be protected was serious physical harm, which was synonymous with grievous bodily harm for the purpose of the 1861 Act. An "act" within section 5 of the Act extended to a course of violent conduct and would include omissions of act which caused grievous bodily harm; it was therefore possible to envisage cases of death resulting from gross negligent manslaughter in which a defendant might be convicted of causing or allowing the death. Children under the age of 16 expressly fall within the protective provisions of the 2004 Act. Adults, or near adults who were over the age of 16, were vulnerable if their ability to protect themselves from 'violence, abuse or neglect' was significantly impaired. The objective of the 2004 Act was to protect those whose, ability to protect themselves was impaired; it was possible that an adult who was utterly dependent on others, even if physically young and apparently fit, could fall within the protective ambit of the 2004 Act.

Neglect of child is not an absolute offence—conviction quashed—House of Lords—(1980) 3 to 2

R v JM Sheppard, R v JC Sheppard,

(1980) 3 WLR 961 (HL)

The test for mens rea in wilful neglect to maintain a child is subjective and not objective. A 16-month old child died of hypothermia (abnormally low body temperature) and malnutrition. For some days previously, the child had been vomiting and was unable to ingest food. Medical attention might have saved the child, judge directed the jury that the test for wilful neglect was objective and both the parents were convicted.

The House of Lords has allowed a consolidated appeal by Sheppard and his wife, Jennifer Christine against their convictions of wilfully neglecting the child. The father was sentenced to six months' imprisonment and the mother to nine months.

The House of Lords, while allowing the appeal by a majority of three to two, held:

(i) The offence under section 1 (1) of The Children and Young Persons Act 1933 of wilfully neglecting a child in a manner likely to cause him unnecessary suffering or injury to health, was not an absolute offence.

(ii) If the jury were satisfied that the child did in fact need medical aid at the relevant time, the mens rea necessary to establish the charge against a parent or custodian was either:

(a) that such person was aware at the relevant time that the child's health might be at risk if it did not receive medical aid, or

(b) that the parent's unawareness of that fact was due to his not caring whether his child's health was at risk or not.

In so deciding, the House overruled decisions followed since 1899*, R v Senior,*[88] based on the meaning of a statutory provision in a series of Acts, in which it had been held that on charge of cruelty to children it was sufficient for the prosecution to establish that a child had in fact been neglected and that the state of mind of the parent or other custodian was irrelevant.

Section 23 IPC – Wrongful Gain is wrong itself (mala in se) Wrongful gain obtained by unfair means cannot be legitimized on the ground that knowledge gained by the appellants in MBBS course may not be wasted.

Nidhi Kaim v State of MP, – ""VYAPAM SCAM" case[89]

AIR 2016 SC 2865 : *(2016) 7 SCC 615* : 2016 (5) Scale 246 : 2017 SCC Online SC 123

Justice JS Kehar, CJI:

Invoking of jurisdiction under *Article 142* to sustain the benefit of education acquired by unfair means cannot be justified. Orders were passed by the Madhya Pradesh Professional Examination Board (hereinafter referred to as, 'Vyapam'), cancelling the results of the appellants, of their professional MBBS course, on the ground that the appellants had gained admission to the course, by resorting to unfair means, during the Pre-Medical Test. These orders were passed, with reference to candidates, who had been admitted to the above course, during the years 2008 to 2012. A challenge to the orders of cancellation, was raised by the appellants, by invoking the jurisdiction of the High Court of Madhya Pradesh under *Article 226 of the Constitution*. All writ petitions raising the above challenge were dismissed. Resultantly, the appellants approached Apex Court.

Rejecting the contention of appellants to consider case sympathetically and allow then to persue the MBBS course, the court said, investigation revealed, a well thought out, unethical plan, involving administrative support, during six consecutive academic sessions … from 2008 to 2013. Vyapam was certain, about the system having been manipulated, at the hands of at least 634 candidates (during the years 2008 to 2012 itself)[90].

The High Court in all the matters, consistently upheld, the cancellation orders passed by Vyapam. This court also reiterated, the validity of the orders passed by the High Court, and thereby, upheld the Vyapam orders. In the above view of the matter, the factual and the legal position, with reference to the admission of the appellants, to the MBBS course being vitiated, has attained finality. The fact that the appellants, had gained admission to the MBBS course, by established fraud, does not (as it indeed, cannot) require any further consideration.

In view of the sequence of facts narrated above, it is not possible for us to accept, that the deception and deceit, adopted by the appellants, was a simple affair, which can be overlooked. In fact, admission of the appellants to the MBBS course, was the outcome of a well orchestrated strategy of deceit and deception. And therefore, it is not possible to accept, that the involvement of the appellants was not serious. In fact, it was indeed the most grave and extreme.

In the above view of the matter, it is not possible for us, to overlook the consequences of the declared legal position, with reference to the consequence of fraud, on the ground that the involvement of the appellants in the acts of fraud, was not serious.

Each one of the appellants, was aware of the fact, that their admission to the MBBS course, would be determined on the basis of their performance in the Pre-Medical Test. Rather than appearing in the qualifying test on their own, they chose to seek assistance of meritorious students, to garner higher marks. We may not be completely wrong in our understanding, if we conclude, that the appellants were quite sure, that they would not be able to gain admission to the MBBS course, on their own merit. That is why, they had to strategize their admission to the MBBS course. We therefore, reject the contention advanced on behalf of the appellants, that the appellants were meritorious students, and as such, their admission to the MBBS course, deserved to be preserved and surely the appellants are not entitled to any equitable consideration.

In that view of the matter, it would not be proper to extend to the appellants, relief under *Article 142 of the Constitution*. We felt persuaded for taking the view that we have, for a very important reason – national character. There is a saying – when wealth is lost, nothing is lost; when health is lost, something is lost; but when character is lost, everything is lost.

Rejecting to invoke *Article 142 of Constitution*, the court said applying the test of a court's conscience, to a situation where on principle, a court is not in a position to decide, whether it should, or it should not, exercise its discretion in favour of a party to a *lis*. A situation, wherein the court's conscience commends to it (in a matter, as the one in hand), to exercise its discretion under *Article 142*, to preserve the benefit of the appellants' admission to the MBBS course; and at the same time, equally commends to it, not to so exercise its jurisdiction (*i.e.,* not to preserve to the appellants, the benefit of their admission to the MBBS course), in favour of the appellant. How should this court deal with such a situation?

We are of the considered view, that where two options are open to a court, and both are equally beckoning, it would be most prudent to choose the one, which is founded on truth and honesty, and the one which is founded on fair play and legitimacy. Siding with the option founded on the deceit or fraud, or on favour as opposed to merit, or by avoiding the postulated due process, would be imprudent. Judicial conscience must only support the righteous cause. If, despite its being righteous, a decision is seen as causing manifest injustice, the exercise of the power under *Article 142 of the Constitution*, would be prudent. In such situations, an onerous duty is cast on the court, to step in, to render complete justice. This is the manner that we commend, judicial exercise of discretion, under *Article 142 of the Constitution*. By adopting the above course, a court would feel satisfied, in having exercised its discretion, on the touchstone of justice – the concept which triggers the invocation of *Article 142 of the Constitution*. In the facts and circumstances of the present case, there seems to be absolutely no cause for us to, legitimize the admissions of the appellants to the MBBS course, since the same clearly fall in the imprudent (unwise) category.

Prayer of appellants to legalize admission in MBBS course obtained by manipulation turned down by Apex Court.

Appeal Dismissed.

Breach of Duty Leading to Involuntary Manslaughter: Defendant supplying victims with overdose of heroin is under legal obligation to seek medical assistance for victim's safety once appreciating that the overdose having potentially fatal impact might result in victim's death

R v Evans[91]

The defendant, *G*, her half-sister, *C*, and their mother, *A*, all had a history of heroin addiction. *G* brought three packages of heroin from a well known heroin dealer, *T*, and handed some or all of it to *C*. *C* injected herself while *G* and *A* were in the same house, and subsequently developed and complained of symptoms consisting with an overdose. *G* and A decided not to seek medical assistance and put *C* to bed in the recovery position, hoping that she would recover spontaneously in due course, *C* appeared to be recovering her normal colour and settle into a state of virtual unconsciousness, believed by recreational users of heroin to be normal. *G* and *A* decided to sleep in the same room as *C*, and when they went to bed *C*'s colour had returned normal. She looked much better. She was apparently fast asleep. In interview *G* accepted that *C*, expected *G* and *A* to look after her needs during the night. The following morning, *A* woke *G* and told her that *C* was dead.

The cause of death was poisoning by heroin. *A* and *G* were convicted of manslaughter by gross negligence.

The defendant challenged the decision on the grounds that having no familial duty to take care she is under no statutory obligation for taking care of the victim. Dismissing the appeal the Court of Appeal held that notwithstanding that their relationship lacked the features of familial duty or responsibility which marked *A* 's relationship with *C*, *G* was under a duty to take reasonable steps for *C* 's safety once she appreciated that the heroin she had procured for, *C* was having a potentially total impact on *C*'s health.

A and *G* were convicted of manslaughter by gross negligence. The judge rejected a submission on behalf of *G* that since the prosecution had failed to adduce evidence capable of establishing that *G* owed *C* a duty of care *G* is not liable for *C*'s death.

The issues in appeal before the Court of Appeal were

(i) whether, not withstanding that their relationship lacked the features of familial duty or responsibility which marked *A*'s relationship with *C*: *G* was under a duty to take reasonable steps for *C*'s safety once she appreciated that the heroin she had procured for *C* was having a potentially fatal impact on health. Dismissing the appeal the Court of Appeal held (1) The duty necessary to found gross negligence manslaughter was not confined to cases of a familial or professional relationship between the defendant and the deceased. When a person had created or contributed to the creation of a state of affairs which he

knew, or ought reasonably to have known, had become life-threatening, a consequent duty on him to act by taking reasonable steps to save the other's life would normally arise.[92]

(ii) In principle, the existence or otherwise of a duty of care or a duty to act was question of law. In that sense, the jury would be deciding whether the duty situation had been established or not.

(iii) In the instant case, on the facts found by the jury that *G* had been concerned in the provision of heroin, and the undisputed fact that *G* had remained at the premises, that she had appreciated that *C*'s condition was very serious and indicative of an overdose, and that *G* and *A* believed that they were responsible for the care of *C* after she had taken heroin. *G* under the circumstances had been under a plain and obvious duty to take reasonable steps to assist or provides medical assistance for *C*.[93]

Breach of duty of care leading to manslaughter by gross negligence and recklessness by an Anesthetist is an offence punishable in law.

R v Adomako (John Asare),

[1995] 1 AC 171 : *[1994] 3 WLR 288* : *[1994] 3 All ER 79* : [1994] UKHL 6

In cases involving involuntary manslaughter by breach of a duty of care the relevant questions are

Whether there existed a duty of care, (i) whether there had been a breach of that duty, (ii) whether the breach had caused the death and, if so, (iii) whether the breach should be characterized as gross negligence and a crime.

It is for a jury to decide whether the accused's acts were so bad that in all the circumstances they amounted to a crime. It is not necessary for a judge to refer to the test of recklessness.

D was acting as an anesthetist during an operation when a tube from the ventilator came free, causing the death of patient. D was convicted of manslaughter and his appeal dismissed by the court of Appeal.

While dismissing D's appeal the house of lords held that the question whether D's acts or omissions were so bad as to be criminal having regard to the risk of death involved was one for the jury and it was not appropriated to interfere with their decisions.

Appeal dismissed.

Compliance of statutory duty on the happening of some event is dependent on the knowledge of the occurrence of the event—Divisional Court conviction quashed—1948

Harding v Price,

(1948) All ER 283 (KBD)

The appellant was convicted by the magistrate under section 22 of The Road Traffic Act 1930[94] for having failed to report a road accident at a police station or to a police constable within 24 hours of its occurrence.

The appellant was driving a mechanical horse with a trailer attached to it, which collided with a stationary car. Owing to the noise made by the vehicle, which the appellant was driving, he could not know that an accident had occurred.

The division court quashed the appellant's conviction.

Non-compliance of statutory duties by Municipal Authorities to provide adequate provision for proper disposal of sewage, drainage facilities and safe drinking water is an offence punishable under law.

It is found that a number of municipal bodies have failed to discharge their statutory and constitutional obligation[95] relating to disposal of sewage facilities and availability of clean drinking water and the plea of lack of resources. It is heartening to note that the judiciary has come to the rescue of common man and directed the municipal authorities to discharge their functions adequately and rejected the plea of crunch of facilities and resources. Some of the cases are being discussed.

In *Municipal Corporation, Ratlam v Shri Vardhichand,* AIR 1980 SC 1622 : 1981 SCR (1) 97 the Supreme Court observed that the municipal authority must fulfil its statutory duty even where it is penniless. Similarly, in *Siromani*

Mittasala Chairman v President, Brindavanam Colony, (2002) (2) All LT 356 : 2002 (1) Andh LD 136 the High Court of Andhra Pradesh said:

> …no Municipality and no person can deprive the citizen of such basic human right by reason of its activity or inaction. It would be common knowledge that pollution of drinking water with sewage and sullage is dangerous to health and more dangerous to the health of children as well. No municipality has a right to allow sewage water into drinking surface water resources and no such municipal can be heard that they have no funds.

In *Narayana Setty v State of Karnataka,* ILR 2003 KAR 3206 the Karnataka High Court directed the diversion of 'the entire open drainage water through drainage panels either through underground or open drainage, to be cleanly maintained at a particular place, which is not a tank or public place so as to regulate the flow of open drainage water of sewage from residential localities, particularly hutment (a groups of huts) areas of Banglore city, to the tanks within and adjoining Banglore City.

Incase of non-compliance of statutory and its constitutional obligations the courts have held the concerned officers of the department personally responsible. The courts had zero tolerance in such matters and punished delinquent officers by imposing jail term and fine. For instance, in *KD Sharma v BM Dhaul, Chief Engineer (Retd.), Delhi Jal Board*,[96] on account of failure of officers of the Delhi Jal Board to comply with an order of the court directing them to rectify all broken sewer lines and to ensure that no sewage flows into storm water drain, Delhi High Court held the concerned officers in contempt of court and sent the officers to two month jail term and imposed fine. While awarding the sentence the court said that:

> … if a department which is meant for looking after the sewer lines is not able to stop the flow of sewage and sullage into a storm water drain and through a strom water drain into river Yamuna, the questions can be raised about the utility of such a department.[97]

Sale of lottery ticket to a person under the age of sixteen is an offence of strict liability. A reasonable belief that the age of the boy was at least 16 is no defence: Appeal Allowed—case refereed for trial—Queens Bench Division—1999

Harrow London Borough Council v Shah[98]

Per Michell, J:

The respondents were proprietors of Woods Newsagents at Uxbridge Road, Harrow. They had employed Hobday. On 25 April 1998, during the course of his employment, Hobday sold a national lottery ticket to a young boy who was thirteen and half years old. At the time of the sale, Hobday reasonably, but mistakenly, believed that the boy was at least 16 years old. The respondents were not aware of the transaction.

Harrow Justices on 30 September 1998 dismissed the prosecution case against the respondents, on the ground that Hobday on reasonable grounds believed that the child was over 16.

Allowing the appeal against the acquittal, Justices of the Queen's Bench held that the sale of a lottery ticket to a person who has not attained the age of 16 years, contrary to section 13 of National Lottery Act 1993[99] and regulation 3 of the National Lottery Regulations 1994, is an offence of strict liability. Thus, all that the prosecution is required to prove is that the sale of a national lottery ticket to a particular person and that, at the time of the sale, that person was under 16; the prosecution does not have to prove that the defendant or his agent was aware of the buyer's age, or was reckless as to his age.

The court said that this legislation deals with an issue of social concern. More particularly, there is obvious public concern that young people should not have lawful access to a gambling facility which would otherwise be readily available to them. The strict liability attaches to this offence will encourage greater vigilance in preventing the commission of the prohibited act.

No doubt, the ticket was sold, not by either Mr Shah or Mrs Shah, but by their employee Mr Hobday. His offence was, at once, their offence, given the principle of vicarious liability.[100]

Appeal of London Borough Council allowed conviction restored.

Absolute Liability: Gravity of the evil and danger in passing drugs through unauthorised channels excludes the requirement of mens rea—House of Lords—1962

Warner v Metropolitan Police Commr,

(1968) 2 All ER 356 : (1969) 2 AC 256 : (1968) 52 Cr App R 373 : *(1968) 2 WLR 1303*

The appellant, who used to sell perfume as a side job went to a cafe and collected two boxes without looking inside the smaller box, assuming that it also contained perfume. While he was driving his mini-van, he was stopped by a police officer and on search in the smaller of the two boxes were found 20,000 tablets containing amphetamine sulphate, a prohibited drug, specified in the schedule to Drugs (Prevention of Misuse) Act 1964. The larger box contained perfume.

The appellant was charged with having in his possession drugs contrary to section 1[101] of the Act of 1964. The jury was directed that absence of knowledge on the part of the appellant of what the smaller box contained went only to mitigation. The appellant was found guilty.

Per Lord Pearce, J (House of Lords):

Illicit drug traffic is a very serious evil. The Parliament intended by the Act of 1964 to prevent it as far as possible by penalising the unauthorised possession of certain drugs. If knowledge or guilty mind must be proved this is difficult for the prosecution to prove and it is much easier for the drug peddler (sellers) to escape by some story which is just plausible enough to raise some doubt. The express words of Drugs (Prevention of Misuse) Act 1964, “have in his possession” admittedly connote knowledge of some sort. It is conceded by the Crown that these words do not include goods slipped into a man’s pocket without his knowledge.

The gravity of the evil which the Act of 1964 is seeking to prevent and the dangers which are presented by the passing of drugs through informal or unauthorised channels, even where some of the unauthorised persons have no improper motives or are merely careless or indifferent, indicate the importance of closing them altogether. The Act forbids them. It expressly exempts certain persons who would obviously have no mens rea. The further exemption from the Act of all those who cannot be shown to have a guilty intention would seriously impair its effectiveness and the express exemption show that this was not intended.

The conviction is affirmed.

Possession of a controlled drug, Cannabis Resin, contrary to section 5 (3) of the Misuse of the Drugs Act 1971 ipso facto makes one liable unless proved otherwise—Court of Appeal—1988

R v McNamara[102]

A cardboard box containing 20 kg of Cannabis Resin was found on the back of McNamara’s motorcycle. His explanation was that he was delivering the box for a man he refused to name and thought it contained pornographic material or pirated videos. He was charged and convicted under section 5 (3)[103] of Misuse of Drugs Act 1971, with having a controlled drug in his possession with intent to supply it to another.

Dismissing the appeal their Lordships held that section 28 (2) of Misuse of Drugs Act 1971[104] casts upon the defendant the burden of disproving all facts adduced by the prosecution in support of the charges.

Per Lord Lane, CJ:

Once the prosecution has proved that the defendant has control of a box which he knows contains a thing which was the drug alleged, which he has not seen ...the defendant has the burden thereafter to show or suggest that he had no right or opportunity to open the box or reason to doubt the legitimacy of the contents and that he believed the contents were different in kind, and not merely quality, than what they actually were. In other words, the burden, is cast upon him to bring himself within those provisions. Thus, in our judgment, the direction of the judge in the present case was correct.

Appeal dismissed.

Absolute liability in case of drug offences to ensure public safety—House of Lords—1986

Pharmaceutical Society of Great Britain v Stockwain,

(1986) 2 All ER 635 (HL) : [1986] Cr LR 813 : *[1986] 1 WLR 903* : [1986] UKHL 13

The defendant-appellant supplied drugs on prescription purporting to be signed by a doctor. The prescription was forged. Accordingly, the accused were charged and convicted with an offence contrary to section 58 (2)(a) of Medicines Act 1968.[105]

There was no finding that the defendants acted dishonestly, improperly or even negligently. The House of Lords held that the Divisional Court had rightly directed the magistrate to convict. The court cited the following summary of principles stated by Lord Scarman, giving the advice of Privy Council in *Gammon (Hong Kong) Ltd v A-G of Hong Kong, (1984) 2 All ER 503* : [1984] Cr LR 479 : *[1985] AC 1*:

(1) There is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence.

(2) The presumption is particularly strong where the offence is 'truly criminal' in character.

(3) The presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute.

(4) The only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern; public safety is such an issue.

(5) Even where the statute is concerned with such an issue, the presumption of mens rea stands unless it can be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

The Divisional Court said that the statute applied to an issue of social concern and public safety; and strict liability would be effective to promote its objects. The House discerned the intention of Parliament to create an offence of strict liability in the facts that:

(i) express requirements of mens rea are to be found in other sections of the Act but not in section 58 (2)(a), and

(ii) exercising a power under the Act, the minister had provided for an exemption where the seller, having exercised all due diligence, believes on reasonable grounds that the product is not a "prescription only" medicine.

The defendant knew that the medicine was "prescription only", but believed on reasonable grounds that the prescription was valid. The minister had not provided an exemption for that.

Appeal was dismissed.

Offences relating to river pollution—strict liability conviction upheld—House of Lords—1972

Alphacell v Woodward,

[1972] 2 All ER 475 (HL) : *[1972] AC 824* : [1972] UKHL 4

Alphacell Ltd, the appellants, prepared manila fibres for paper on premises adjoining a river. The water in which the fibres were washed was polluted and, in order to prevent it from flowing into the river, the appellants, installed pumps in the cleansing tank. On one occasion these pumps, designed to work automatically, did not do so owing to the fact that the hose was blocked by brambles. The appellants were charged with "causing polluted matter to enter the river contrary to section 2 of Rivers (Prevention of Pollution) Act 1951".[106] The magistrate convicted them although there was no finding that they knew of the defect in the pumps or that they were negligent. The appellants unsuccessfully appealed to a Divisional Court and to the House of Lords.

Per Lord Salmon:

The appellants contend that even if they caused the pollution still they should succeed since they did not cause it intentionally or knowingly or negligently. Section 2 (1)(a) of Rivers (Prevention of Pollution) Act 1951, is undoubtedly

a penal section. It follows that if it is capable of two or more meanings then the meaning most favourable to the subject should be adopted. Accordingly, so the argument runs, the words “intentionally” or “knowingly” or “negligently” should be read into the section immediately before the word “causes”.

...The offences created by the 1951 Act seem to me to be prototypes of offences which “are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty”. I can see no valid reason for reading the word, “intentionally”, “knowingly” or “negligently” into section 2 (1)(a) and a number of cogent reasons for not doing so...

If this appeal succeeded and it were held to be the law that no conviction could be obtained under the 1951 Act unless the prosecution could discharge the often impossible onus of proving that the pollution was caused intentionally or negligently, a great deal of pollution would go unpunished and undeterred to the relief of many riparian factory owners. As a result,

> *many rivers, which are now filthy, would become filthier still and many rivers, which are now clean, would lose their cleanliness.*

The legislature no doubt recognised that as a matter of public policy this would be most unfortunate. Hence section 2 (l)(a) which encourages riparian factory owners not only to take reasonable steps to prevent pollution but to do everything possible to ensure that they do not cause it.

Appeal dismissed.

Absolute liability: absence of knowledge of contents is no defence to a charge of importation of prohibited material of persons under 16—Court of Appeal—2006

Forbes v Secretary of State for the Home Department[107]

On his return to the United Kingdom from abroad in August 2004, Giles Forbes was found to be in possession of two videotapes containing indecent photographs (pornographic materials) of persons under the age of sixteen. The Customs Consolidation Act 1876, prohibited the importation of indecent or obscene articles. The appellant accordingly was convicted under section 170 (2)(b)[108] of the Customs and Excise Management Act 1979 of the offence of fraudulent evasion:

> Of any prohibition or restriction...with respect [to any goods] under or by virtue of any enactment.

The offence did not require that the appellant knew or believed he was importing indecent images of children; it was sufficient that he knew that prohibited goods were involved and that a prohibition on their importation was being avoided.[109]

On 26 July 2005, Stanley Burnton J rejected the appellant’s contention that the provisions which required him to comply with the notification requirements of the Sexual Offences Act 2003 were incompatible with the right to respect for his private and family life contained in *Article 8*[110] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).[111]

Dismissing the appeal the Court of Appeal held that it was entirely appropriate for notification requirement to be imposed on those who had deliberately decided to import prohibited goods into the United Kingdom, careless or heedless of the risk that the goods so imported contained or included child pornography. The individual who chose to break the law against the importation of prohibited goods was responsible for the importation of the goods he had actually imported. The automatic notification requirements contributed to the protection of children as well as the detection of offenders and prevention of crime.

In an earlier case of *R v Forbes*[112] wherein the appellant was convicted for being in possession of two video tapes which contained indecent photographs of children under 16 years of age, the House of Lords held that it was not a pre-requisite to the appellant’s conviction that he knew or believed that he was importing indecent images of children.

It was sufficient for the prosecutor to prove that a defendant knew that the operation on which he was engaged

involved prohibited goods and was designed to evade a prohibition on their importation, and it was not necessary also to prove that the defendant knew the nature of the goods in question.

Appeal dismissed conviction upheld.

Reasonable belief in good faith of a valid divorce is good defence to a charge of bigamy under section 494 of the IPC, 1860—Kerala HC—1959

Kochu MK Ismail v Mohammad Umma[113]

B, a Muslim woman, married *C*, also a Muslim. They belonged to the Shia sect of Muslims and lived together cordially for about five years, when *B*, left *C* for her father's house for good. According to *B*, she was driven out forcibly by the complainant who divorced her by pronouncing the word *talaq* three times. *B* sent a letter to *C* intimating divorce or *"fasakh"* had been effected but it was returned to her. Consequently, *B* married a second time and a child was born under this union. *C* filed a complaint that *B's* second marriage was bigamous under *section 494 of the IPC, 1860*.

The questions that arose for consideration were:

(1) Are the divorce proceedings (*fasakh*) taken by the first accused valid?

(2) Assuming the second marriage is bigamous, have the accused been properly acquitted for want of mens rea?

Per Varadarajan Iyengar, J:

In the celebrated decision of *R v Tolson*, the requirement of mens rea was read into the bigamy section, though it was not expressly mentioned. The intent to commit bigamy was held to be negatived by the accused's mistaken belief in the death of her husband. It would seem anyhow that in the absence of words in the statute dispensing with proof of mens rea, it should be held that the crime could be committed only intentionally or recklessly.

So if a person charged with bigamy believed that he was legally free to marry again, it cannot be said that the crime was committed either intentionally or recklessly and the question whether the belief was unreasonable is irrelevant.

In *Janki Amma v Padmanabhan Nair,* (1954) Ker LT 977 Sankaran J, held:

> In prosecution under *section 494 IPC* the accused's ... criminal intention or guilty knowledge must be made out against the accused before the act complained of can be held to constitute a penal offence. It is clear from the expression 'having a husband or wife living' that it is not enough that the individual contemplated is alive at the relevant period but also that his or her earlier marriage also is subsisting in law. Only when both these conditions are satisfied can it be said that such husband or wife was alive at the relevant period. The plea of the accused that he entered into the second marriage in all good faith and after the honest impression that his earlier marriage with the complainant had been put an end to by the order of dissolution passed by a court of competent jurisdiction has to be accepted as a valid defence.

The first accused took learned opinion that she could effectively divorce the complainant and went through the formalities, thereof. She then gave notice to the complainant, waited for some time and then married the third accused. There could therefore have been no criminal knowledge that her first marriage with the complainant was subsisting when she entered into the second marriage.

Appeal dismissed.

Section 171F, IPC, 1860— personation at election—defence of bona fide belief is valid—Madras HC—1930

Venkayya (Pantam) v Emperor,

AIR 1930 Mad 246

The accused was convicted under section 171F, of the *Indian Penal Code, 1860*, for personation at an election.[114] The name of the accused had been wrongly included in the register of two divisions. As a result, he voted twice. He

admitted that he was ignorant of the laws and had acted by mistake and that he had not been corruptly influenced. The Magistrate held motive for doing so, whether corrupt or otherwise, was immaterial.

Rejecting the prosecutor's contention that there is no such thing as *mens rea* in India... the offence is committed as soon as the acts set out in the section in the Code which defines the offence have been committed,... the court said the intention of an offender in the commission of this crime is in no way different in India to what it is in England, and we see no reason for saying that whereas in England the corrupt intention of the voter is to be considered, here it is immaterial.

The conviction is set aside.

Foreign Exchange Regulation Act 1947—strict liability: object, purpose and effectiveness of the legislation would be frustrated if mens rea were to be interpreted—Supreme Court—accused liable (1965) 2 to 1

State of Maharashtra v Mayer Hans George,

AIR 1965 SC 722 : *[1965] 1 SCR 123*

Facts: This appeal raises the question of the scope of the ban imposed by the Central Government and the Central Board of Revenue under *section 8 (1) of the Foreign Exchange Regulation Act* 1947, against persons transporting prohibited articles through India.

On 24 November 1962, the Reserve Bank of India, in suppression of its earlier notification, which had permitted free movement of gold in transit,[115] imposed restrictions on the transit of gold to a place outside the territory of India, one of them being that such gold be declared in the "manifest terms" for transit in the same bottom cargo or trans-shipment cargo.[116]

The respondent, a foreign national left Zurich for Manila on 27 November 1962 which touched Santa Cruz Airport, Bombay at 6.08 am on the next day. The customs authorities on the basis of previous information on a search of the person of the respondent who was sitting in the plane found that he was carrying gold slabs weighing approximately 34 kilos (in the jacket he was wearing) without making a declaration to the effect as per notification under *section 23 (1A) of the Foreign Exchange Regulation Act* 1947.

The Magistrate found the accused guilty and sentenced him to one year imprisonment.

On appeal, the High Court of Bombay setting aside the conviction held that the *mens rea* being a necessary ingredient of the offence, the respondent who brought gold into India for transits to Manila, did not know that during the crucial period such a condition had been imposed and therefore, he did not commit any offence.

The State moved the Apex Court against the order of the High Court.

Rejecting the respondent's contention that *mens rea* must be held to be an essential ingredient of the offence under section 23 (I-A) of the Act;[117] and that since the respondent was not aware of the notification by the Reserve Bank of India dated 8 November, he could not be held guilty of the offence, the Supreme Court by a majority of 2 to 1 upheld the conviction awarded by the trial court. It was noted that the Act is designed to safeguarding and conserving foreign exchange, which is essential to the economic life of a developing country. The provisions have therefore to be stringent and so framed as to prevent unauthorised and unregulated transactions which might upset the scheme underlying the controls, and in a larger context, the penal provisions are aimed at eliminating smuggling which is a concomitant of controls over the free movement of goods or currencies.

Per Ayyangar, J (for himself and Mudholkar, J):

This question as to when the presumption as to the necessity for *mens rea* is overborne has received elaborate consideration at the hands of this court when the question of the construction of section 52-A of the Sea *Customs Act* came up for consideration in the *Steam Navigation*[118] case. Speaking for the court, Gajendragadkar CJ said: The intention of the legislature in providing for the prohibition prescribed, in section 52A, is, inter alia, to put an end to illegal smuggling which has the effect of disturbing very rudely the national economy of the country. It is well known for example, that smuggling of gold has become a serious problem in this country and operations of smuggling are conducted by operators who work on an international basis.

This passage, in our opinion, is very apt in the present context. The very object and purpose of the Act and its

effectiveness as an instrument for the prevention of smuggling would be entirely frustrated if a condition were to be read into section 8 (1) or section 23 (1-A) of the Act qualifying the plain words of the enactment, that the accused should be proved to have knowledge that he was contravening the law before he could be held to have contravened the provision.

By reason of that Explanation to section 8 (1), it would be seen that even if the gold continued to remain in a ship or aircraft which is within India without its being taken out and was not removed from the ship or aircraft it shall nevertheless be deemed to be a bringing for the purpose of this section. We are referring to this Explanation because if the act of the respondent was an offence under section 8 (1), he gets no advantage by his having remained on the aircraft without disembarking at Bombay, for if the carrying on his person of the gold was 'the bringing' of the gold into India the fact that he did not remove himself from the aircraft but stayed on in it would make no difference and he would nevertheless be guilty of the offence by reason of the Explanation to section 8 (1).

Minority Judgment: Justice Subba Rao dissented from the majority and held the respondent not guilty. He raised two questions that deserve to be analysed, viz:

(i) Whether intention of the legislature is to punish persons' who break the said law without a guilty mind;

(ii) Whether a person who does not know, for instance, that gold cannot be brought into India, can do anything to promote the observance of the law.

Per majority, the respondent was found guilty.

Offences relating to the Sea Customs Act 1878—strict liability—Supreme Court—1954

Indo-China Steam Navigation v Addl Collector of Customs, Calcutta,

AIR 1964 SC 1140 : *(1964) 6 SCR 594*

The vessel "Eastern Saga" belonging to the Indo-China Steam Navigation Co Ltd, which carried on business of carriage of goods and passengers by sea, arrived at Calcutta on 29 October 1957. On a search, it was found that a hole was covered with a piece of wood and over painted and when the hole was opened a large quantity of gold in bars was discovered.

The customs authorities made an order confiscating the vessel in addition to imposing other penalties *vide* section 52-A of the Sea *Customs Act* 1878. Under that section, "no vessel constructed, adopted, altered or fitted for the purpose of concealing goods shall enter, or be within, the limits of any port in India, or within the Indian customs waters".

The Supreme Court, after making a thorough analysis of the scheme and object of the Sea *Customs Act* 1878, held that mens rea was not a necessary ingredient of the offence as pleaded by the appellant. The incorporation of mens rea would make the statute a dead letter.[119]

Mens rea in taxing statutes—doctrine not applicable in crimes of absolute liability and economic offences—Punjab and Haryana High Court—1982

Commr of Income Tax, Patiala v Patram Das,

AIR 1982 P&H 1 : (1982) ILR (1) P&H 162

Per SS Sandhawalia, CJ:

...penalty proceedings for a tax delinquency are, in essence civil in nature, being a coercive and remedial process to ensure speedy collection of taxes. However, even assuming they partake of a penal nature, even then the doctrine of mens rea would not be automatically attracted irrespective of the specific language of the provision and the larger scheme of the statute. The only requirement of the statute thereunder is the presence or absence of reasonable cause for the tax delinquency and no other. Therefore, inducting the requirement of a deliberate defiance of law, or contumacious conduct, or dishonest intention, or acting in conscious disregard of the statutory obligations, is unwarranted under section 271 (1)(a) of the Act which reads as follows: (1) If the Income Tax Officer... in the course of any proceedings under this Act, is satisfied that any person—

(a) has without any reasonable cause failed to furnish the return of a total income which he was required to furnish under sub-section (1) of section 139 or by notice given under sub-section (2) of section 139 or section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required..., or... he may direct that such person shall pay penalty.

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76 See *State of Maharashtra v Mayer Hans George,* AIR 1965 SC 722 : [1965] 1 SCR 123; *Warner v Metropolitan Police Commr,* [1968] 2 All ER 356; *Indo-China Steam Navigation v Jasjit Singh* (*Collector of Customs*), AIR 1964 SC 1140 : [1964] 6 SCR 594.

77 *Sherras v De Rutzen,* [1895] 1 QB 918, G Williams, *Salmond on Jurisprudence*, 11th Edn, 1957, pp 408-409; Smith and Hogan, *Criminal Law*, 5th Edn, 1983, pp 86-92; *Halsbury's Laws of England*, 3rd Edn, pp 273-74; JLJ Edwards, *Mens Rea in Statutory Offences*, London: Macmillan, 1955, pp 84-110.

78 See Jerome Hall, *General Principles of Criminal Law*, 2nd Edn, 1960, p 326; *Mannheim,* (1936) 18 JCL 90.

79 Roscoe Pound, *Spirit of Common Law*, p 52; Eric H Banerji, *Strict Responsibility*: *Essays on the Indian Penal Code*, Indian Law Institute, 1962, pp 64-71; Sayre, *Public Welfare Offences* (1933) 33 Columbia LR, pp 55, 62, 78, 79.

80 *MC Mehta v UOI,* AIR 1987 SC 1086 : 1986 Supp (1) SCC 562 : 1987 4 SCC 463; J LI J Edwards, *Mens Rea in Statutory Offences*, London: Macmillan, 1955, p 247.

81 See *Winfield and Jolowicz on Torts*, 12th Edn, 1984, p 3—Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages.

82 J W Cecil Turner, *Kenny's Outlines of Criminal law,* 19th Edn, Cambridge University Press, 1966, p 536, fn 5. The conditional evil which persons will incur if they break a law, and which thus renders the law binding (sancit), is called [by jurists] its sanction. Hence they say, 'Punishment is the sanction of Crimes.'

83 See *Indian Penal Code, 1860*, *sections 493-98*, Offences relating to marriage; sections 499-500, Defamation; sections 503-10, Criminal Intimidation, Insult and Annoyance. The aggrieved party has to initiate criminal action in a court of law against the accused in such cases.

84 *Indian Penal Code 1860, section 351*.

85 AIR 1990 SC 273 : 1989 (2) SCC 540 : (1989) 1 SCC 674 : 1988 (2) Scale 1312.

86 See KD Gaur, *Criminal Law Cases and Materials*, 5th Edn (2008) pp 58 to 62 for *B* (*a minor*) *v Director of Public Prosecutions,* (2000) 1 All ER 833 (HL), *R v K,* (2002) 1 All ER 987 (HL). Reasonable belief that the child was above 14 and the girl was above 16 is a good defence for indecency and assault.

87 (1798) 7 TR 509, p 514.

88 (1899) 1 QB 283.

89 Jagdish Singh Khehar, CJ and Kurian Joseph and Arun Mishra, JJ. Delivered the judgment, decided on 13 February 2017.

90 *Article 142* confers power on the Supreme Court for enforcement of decrees and Orders as to discoveries etc. as in necessary for doing complete justice in any course or matter pending before it which shall be enforceable throughout India. Court can grant cancetole, relief to eradicate injustice.

91 (2010) 1 All ER 13 : [2009] EWCA Cr 650 : [2009] Cr LR 661 : [2009] WLR 1999, Lord Judge CJ, Moore Bick LJ Calvert Smith, Chaistopher Clarke and HoLroyde JJ.

92 *R v Admako,* [1994] 3 All ER 79, *R v Miller,* [1983] All ER 978, *R v Wacker,* [2003] 4 All ER 295 and *R v Willoughby,* [2005] 1 WLR 1880.

93 *Airdale NHS Trust v Bland,* [1993] 1 All ER 821 : [1993] AC 789 : [1993] 2 WLR 316 HL; *Mitchell v Glasgow City Council,* [2009] UKHL 11 [2009] 3 All ER 205 : [2009] 1 AC 874 : [2009] 2 WLR 481; *R v Dalby,* [1982] 1 All ER 916 : [1982] 1 WLR 425, CA; *R v Khan,* [1998] Crime LR 830, CA; *R v Kennedy,* [2007] UKHL : 38 [2007] 4 All ER 1083 : [2008] 1 AC 269 : [2007] 3 WLR 612; *R v Sinclair*, Johnson, Smith (21 August 1998, unreported) CA; *R v Wacker,* [2002] EWCA Crime : 1944, [2003] 4 All ER 295 : [2003] QB 1207 : [2003] 2 WLR 374.

94 Section 22 reads as follows:

(1) If in any case owing to the presence of a motor vehicle on a road, an accident occurs whereby damage or injury is caused to any person, vehicle or animal, the driver of the motor vehicle shall stop and, if required so to do by any person having reasonable grounds for so requiring, give his name and address, and also the name and address of the owner and the identification marks of the vehicle.

(2) If in the case of any such accident as aforesaid the driver of the motor vehicle for any reason does not give his name and address to any such person as aforesaid, he shall report the accident at a police station or to a police constable as soon as reasonably practicable, and in any case within twenty-four hours of the occurrence thereof.

…

(4) If any person fails to comply with this section, he shall be guilty of an offence.

95 Part III of the *Constitution* guarantees fundamental rights to the citizens and persons. Although the right to sanitation is not explicitly included in this list. The Supreme Court as well as High Court have read this right into the right to life guaranteed under *Article 21 of the Constitution*. See *Municipal Corporation Ratlam v Vardichand,* AIR 1980 SC 1622, *State of Rajasthan v Koolwal*, AIR 1988 Raj 2, the recognition of the right to sanitation casts a positive obligation upon the state to take steps to ensure a better and prosperous life and dignity to the individual and to eliminate water and air pollution. See *Loveleen Bhullor*, ensuring state municipal waste water disposal in urban India: is there a legal basis? Journal of Environmental Law p 235-260.

96 High Court of Delhi, decided on 25 November 2008.

97 155 *(2008) DLT 263*.

98 (1993) 3 All ER 302 (QBD), Kennedy LJ and Mitchel J.

99 Section 13, so far as material, provides:

(1) (a) The promoter of the lottery shall be guilty of an offence, except if the contravention occurred without the consent or connivance of the promoter and the promoter exercised all due diligence to prevent such a contravention, (b) any director, manager, secretary or other similar officer of the promoter, or any person purporting to act in such a capacity, shall be guilty of an offence if he has consented to or connived at the contravention or if the contravention was attributable to any neglect on his part, and (c) any other person who was a party to the contravention shall be guilty of an offence.

(2) A person guilty of an offence under this section shall be liable—(a) on summary conviction, to a fine not exceeding the statutory maximum; (b) on conviction on indictment, to imprisonment not exceeding two years.

100 *Moussell Bors London v North West Railway Co, (1917) 2 KB 836*; *BC v Hill, (1992) 156 JP 602*.

101 Drugs (Prevention of Misuse) Act 1964, section 1 reads: ...

it shall not be lawful for a person to have in his possession a substance specified in the Schedule to this Act unless it is in his possession by virtue of the issue of a prescription:

(a) by a duly qualified medical practitioner or a registered dental practitioner for its administration by way of treatment to him or to a person under his care; or

(b) by a registered veterinary surgeon or a registered veterinary practitioner for its administration by way of treatment to an animal under his care; or

(c) he is registered as a manufacturer of, or a dealer;...

102 (1988) 87 Cr App R 246 (Criminal Division) per Lord Lane CJ, Drake and Henry JJ.

103 Misuse of Drugs Act 1971, section 5 (3) reads:

Subject to section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 4 (1) of this Act.

104 Section 28 (2) reads:

In any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

105 Medicines Act 1968, section 58 (2)(a) reads:

no person shall sell by retail, or supply in circumstances corresponding to retail sale, a medicinal product of a description, or falling within a class, specified in an order under this section except in accordance with a prescription given by an appropriate practitioner...

106 Rivers (Prevention of Pollution) Act 1951, section 2 (1) reads:

A person commits an offence if he causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter.

107 *(2006) 4 All ER 799* : *(2006) 4 All ER 799* : [2005] EWHC 1597 (QB) Court of Appeal, Sir Igor Judge, P Scott Baker and Hallett LJJ.

108 Section 170 (2)(b) of 1979 act, so far as material is set out, below:

> ...If any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion...(b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment... he shall be guilty of an offence under this section.

109 The result of the claimant's conviction and sentence of six months' imprisonment was that he automatically became subject to the notification requirements contained in the Sexual Offences Act 2003 as the claimant's offence fell within para 14 of Sch 3 to the 2003 Act [Para 14, so far as material provides: An Offence under section 170 of the customs and Excise Management Act 1979... in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876...if the prohibited goods included indecent photographs of person under 16...].

110 *Article 8* of the European Convention for protection of Human Rights 1950 provides that:

1. 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

111 [2005] EWHC 1597 (QB) : [2005] All ER (D) 371 (Jul).

112 (2001) UKHL 40 : *(2001) 4 All ER 97* : *(2002) 2 AC 512*. The appellant was convicted at Isleworth Crown Court of fraudulent evasion of the prohibition on the importation of goods in England contrary to 170 (2)(b) of the Customs and Excise Management Act 1979 on 23 March 1999.

113 AIR 1959 Ker 151 : (1958) 2 KLJ 1129. In case of Muslims, a man can have four marriages, whereas a woman can have only one marriage. Hence if a woman enters into a second marriage she will be liable for bigamy under *section 494 IPC*.

114 *Indian Penal Code 1860, section 171D* reads:

> Whoever at an election applies for a voting paper or votes in the name of any other person; whether living or dead, or in a fictious name, or who having voted once at such election applies at the same election for a voting paper in his own name ...commits the offence of personation at an election.

115 The notification of 25 August 1948 reads:

> …[T] he Reserve Bank of India is... pleased to give general permission to the bringing or sending of any such gold or silver by sea or air into any port in India provided that the gold or silver (a) is on through transit to place which is outside... (i) the territory of India... and (b) is not removed from the carrying ship or aircraft, except for the purpose of transhipment.

116 The notification of 27 November 1962 reads as follows:

> ...The Reserve Bank of India gives general permission to the bringing or sending of any of the following articles, namely, (a) any gold coin, gold bullion, gold sheets or gold ingot, whether refined or not, into any port or place in India when such article is on through transit to a place which is outside the territory of India. Provided that such article is not removed from the ship or conveyance in which it is being carried except for the purpose of transhipment; Provided further that it is declared in the "manifest" for transit in the same bottom cargo or transhipment cargo.
>
> The above two notifications of 1948 and 1962 were issued under *section 8 (1) of the Foreign Exchange Regulation Act* 1947, which says:
>
> > The Central Government may, by notification in the Official Gazette, order that … no person shall, except with the general or special permission of the Reserve Bank of India... bring or send into India any gold...
> >
> > *Explanation*.—The bringing or sending into any port or place in India of any such article as aforesaid intended to be taken out of India without being removed from the ship or conveyance in which it is being carried shall nevertheless be deemed to be bringing, or as the case may be, sending into India of that article.

117 *Section 23 (1A) of the Foreign Exchange Regulation Act* 1947 reads:

> Whoever contravenes—(a) any of the provisions of this Act or of any rule, direction or order made thereunder... be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

118 *Indo-China Steam Navigation v Jasjit Singh,* *AIR 1964 SC 1140* : *[1964] 6 SCR 594*.

119 See *MC Mehta v UOI,* *AIR 1987 SC 1086* : *(1987) 1 SCC 395*.

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3.1 Introduction

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

3 GENERAL EXCEPTIONS

3.1 Introduction

In law a person is presumed to know the nature and consequences of his act, and therefore; is responsible for it. However, there are some exceptions to this. A man may be excused from punishment, either on the ground of the absence of the requisite mens rea for the commission of a crime[1] or on some other ground recognised by law.[2] Such provisions have been dealt with in Chapter IV of the *Indian Penal Code, 1860* from sections 76-106.[3]

The framers of *Penal Code of India* chose to put all general exceptions in a single chapter instead of repeating them in connection with each offence.[4] The provisions are applicable not only to offences under *IPC, 1860* but also to offences under special or local laws. *Section 6 of the Indian Penal Code, 1860* makes it clear in the following words: Throughout this Code every definition of an offence, every penal provision and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the Chapter entitled "General Exceptions", though these exceptions are not repeated in such definition, penal provision or illustration.

Illustration

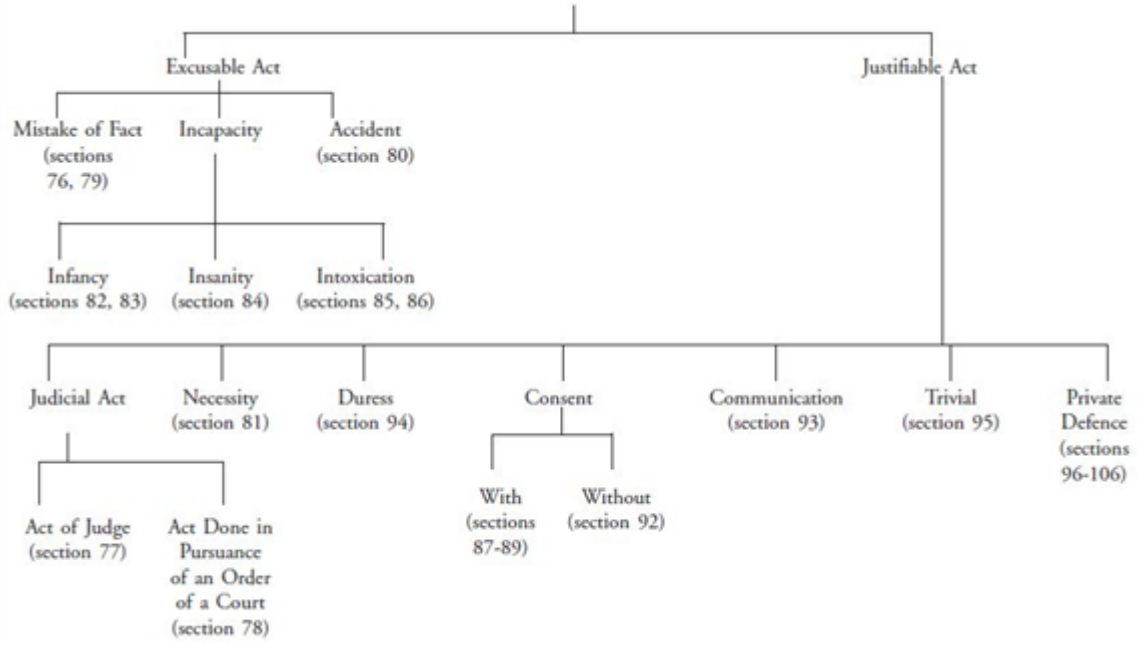
(a) The sections, in this code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences, but the definitions are to be understood subject to the general exceptions which provides that nothing shall be an offence which is done by a child under seven years of age.

(b) *A*, a police officer, without warrant, apprehends *Z*, who has committed murder. Here *A* is not guilty of the offence of wrongful confinement for he was bound by law to apprehend *Z*, and therefore, the case falls within the general exception which provides that "nothing is an offence which is done by a person who is bound by law to do it".

Broadly speaking, the provisions relating to "General Exceptions" deal with two classes of exceptions, namely, excusable and justifiable exceptions. In the first category, those cases of exceptions, may be grouped where there is a lack of mens rea on the part of the person committing the offence, either by reason of mistake as to the existence of fact, or by reason of the act being done accidentally, or by reason of infancy, insanity and so on.[5] In the second category, those cases may be placed where the circumstances, under which the act is committed, furnish legal justification either by reason of the act being done by a judge, when acting judicially or in pursuance of the orders of a court, or to prevent harm to a person or property, with or without consent of the person for whose benefit the act is done, or when communication is made in good faith; or when a person is compelled by threat to do an offence; or the act is of a trivial nature; or the act is done in the exercise of the right of private defence.[6] The entire scheme of exemptions is illustrated with the help of Table 1.

TABLE 1

GENERAL EXCEPTIONS: *INDIAN PENAL CODE 1860*, CHAPTER IV, SECTIONS 76 TO 106 EXEMPTIONS FROM CRIMINAL LIABILITY



1 SS Huda, *Principles on the Law of Crimes in British India*, TLT, 1902, Reprint 1982, chapter 7.

2 The President of India, governors of the States, heads of foreign governments, ambassadors and diplomatic agents, etc, are immune from criminal liability. However, the immunity lasts only up to the time such persons remain in office. The exemption is justified on the principle that the exercise of criminal jurisdiction would be incompatible with the high status of such persons. See *Constitution of India 1950, Article 361*; Regulations passed at the International Congress of Vienna; *Hall's International Law,* 3rd Edn, pp 174-75; Kenny's *Outlines of Criminal Law,* 19th Edn, JWC Turner, Chapter III, pp 57-98.

3 In some cases, the *Indian Penal Code, 1860*, has made provisions for special defences applicable to particular crimes. *Indian Penal Code, 1860, section 300*, exceptions 1-5; sections 334, 335, 358, 359, 361, 494, 499.

4 *Draft Penal Code,* Note B, p 106 says: "Chapter IV of the *IPC* has been framed in order to obviate necessity of repeating in every penal clause a considerable number of limitations... [I] t would obviously be inconvenient to repeat these exceptions several times in every section."

5 See *Indian Penal Code, 1860*, *sections 76*, *79*, *80*, *82-86*, *92-94*.

6 *Indian Penal Code, 1860*, *sections 77*, *78*, *81*, *87-91*, *95-106*.

3.2 Burden of Proof

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Part I General Principles

3 GENERAL EXCEPTIONS

3.2 Burden of Proof

Burden of proof means the obligation to prove the truth or falsehood of a fact[7] or proposition. Proof, however, does not mean proof in the rigid, mathematical sense, because that is not possible.[8]

The burden of proof is used in two distinct senses, namely, the burden of establishing a case and the duty to adduce evidence.[9] The burden of proof in the former sense is fixed by law and always rests upon the person, whether plaintiff or defendant, who substantially asserts the affirmative of the case.[10] On the other hand, the burden of adducing evidence is unstable and may shift from one side to the other during the course of the trial and lies on the person who would fail if no evidence is given on either side.

In a criminal case, burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.[11] Generally, the burden of proof rests upon the person who substantially asserts the affirmative and not upon the person who denies it.[12] The rule has its origin in the Roman maxim *ei qui affirmat non ei qui negat incumbit probatio*,[13] namely, he who seeks the aid of a court should be the first to prove that he has a case and that in the nature of things it is more difficult to prove negative than the affirmative.

The burden of proof may, however, be shifted by action of the parties and by statutory enactment. The standard or the degree of proof also varies according to the nature of the proceedings.[14] For instance, in case of civil proceedings a mere preponderance of probability is sufficient, whereas in criminal proceedings proof beyond reasonable doubt is required for conviction. There must be a high degree of probability than what is implied in the discharge of the burden of an issue in a civil case.[15]

The rule as to burden of proof in criminal cases is that the onus of proving that the accused not only committed the guilty act, but also did so with a guilty mind, necessary to constitute the crime charged, rests upon the prosecution throughout a criminal charge and never shifts to the defence.[16] In other words, it is left to the prosecution to prove the existence of all facts necessary to constitute the offence charged beyond reasonable doubt, and if there is any reasonable doubt regarding the guilt of a person charged with a crime, the benefit of it is given to the accused. For instance, in a case, *Bibuishan v State of Maharashtra, (2007) 12 SCC 390* : 2007 (11) SC 545 : *2007 (11) Scale 276* in 2007, the Supreme Court, while allowing the appeal reversing the order of the High Court convicting the accused for rape under *section 376* read with *section 511* of The *Indian Penal Code, 1860* held that the benefit of doubt should be applied in favour of the accused where the charges against him are not proved beyond reasonable doubt.[17]

However, the burden of proving the exemptions from criminal liability is on the person who wants to bring his case within any one of such exceptions. Thus, it is the accused who is required to show that his case falls within one of the general exceptions provided in Chapter IV, or within any special exceptions), or proviso contained in any other part of *IPC, 1860* or any law defining the offence.[18] However, the burden is no higher than that which rests upon a party to civil proceedings.[19]

7 *Bhoormal Premchand v Collector of Customs, Madras,* AIR 1967 Mad. 39, p 43 : (1965) ILR (2) Mad 10.

8 Ratanlal and Dhirajlal, *The Law of Crimes,* 24th Edn, 1997, p 236.

9 The word 'evidence' is derived from the Latin word *"evidens evidere"* which means, to show clearly, to make clear to the sight; see *Halsbury's Laws of England,* vol 13, 3rd Edn, para 605.

10 SC Sarkar, *Law of Evidence,* 9th Edn, 1953, p 767; *Indian Evidence Act 1872*, *sections 101-114*, lays down the rules as to "burden of proof".

11 *Indian Evidence Act 1872, section 103*.

12 *Phipson on Evidence,* 11th Edn, 1970, p 90.

13 *Phipson on Evidence*, 11th Edn, 1970, p 90.

14 Rupert Cross, *Evidence,* 3rd Edn, 1967, p 87.

15 See *Miller v Minister of Pensions, [1947] 2 All ER 372*, p 373; *Abhi Misser v Lachmi Narain,* (1900) 27 ILR Cal 566; Stephen, *A Digest of the Law of Evidence*, 12th Edn, *Article 104*.

16 See *Woolmington v Director of Public Prosecution, [1935] AC 462* : [1935] UKHL 1 : (1936) 25 Cr App R 72. Woolmington was charged with the murder of his wife. He did not deny that he had shot her, but he stated that the gun had gone off accidentally while he was endeavouring to induce her to live with him by threatening to shoot himself. The House of Lords quashed the conviction and held that the prisoner is entitled to the benefit of doubt. If the jury is either satisfied with the accused's explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted. See *Mancini v Director of Public Prosecutions, [1942] AC 1* : *[1941] 3 All ER 272*; *R v Edwards, [1974] 2 All ER 1085*.

17 Cr App No 1262 of 2007 decided on 19 September 2007. The Supreme Court, after examining the evidence of the doctor and upon satisfaction that there was no bodily injury to the prosecutrix and relying on the deposition of the doctor that the prosecutrix was habituated to sexual intercourse, took the view that the High Court and the trial court had not correctly appreciated the evidence.

18 See *Indian Evidence Act 1872*, *sections 103*, *105*. Re *Narsingh Naik,* 1972 Cr LJ 1150, p 1156.

19 *Oyami Ayatu v State of MP, AIR 1974 SC 216*, p 217 : (1947) 3 SCC 299; *Ratanlal v State of MP, AIR 1971 SC 778* : *(1970) 3 SCC 533*; *State of MP v Ahmadulla, AIR 1961 SC 998* : *[1961] 3 SCR 583*.

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3.3 Mistake of Fact

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Part I General Principles

3 GENERAL EXCEPTIONS

3.3 Mistake of Fact

76. Act done by a person bound, or by mistake of fact believing himself bound, by law.—Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law, to do it.

Illustration

(a) *A*, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. *A* has committed no offence.

(b) *A*, an officer of a Court of Justice, being ordered by that Court to arrest *Y*, and, after the due inquiry, believing *Z* to be *Y*, arrests *Z*. *A* has committed no offence.

79. Act done by a person justified, or by mistake of fact believing himself justified, by law.—Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

Illustration

A sees *Z* commit what appears to *A* to be a murder. *A*, in the exercise, to the best of his judgment exerted in good faith of the power which the law gives to all persons of apprehending murderers in the act, seizes *Z*, in order to bring *Z* before the proper authorities. *A* has committed no offence, though it may turn out that *Z* was acting in self-defence.

The common law principles of *ignorantia facti excusat* and *ignorantia juris not excusat* (ignorance of fact is an excuse and ignorance of law is no excuse) have been embodied in *sections 76* and *79* of *IPC, 1860*.

Section 76 deals with those class of cases where a person by reason of a mistake (or ignorance)[20] of fact, in good faith,[21] considers himself bound by law to do an act, whereas, section 79 deals with that class of cases where by reason of a mistake of fact a person considers himself justified by law to do an act in a particular way. The difference between the two provisions is involved in the words bound by law and justified by law which have been made clear by the two illustrations appended to the sections.

The act of the police officer, in the illustration to section 76, in arresting *Z* in place of *Y* for whose arrest, in fact, no warrant was issued, does not make him guilty of wrongful confinement (*IPC, 1860 section 342*). It was only, after making reasonable inquires and on well-founded grounds, when the police officer was convinced that *Z* was *Y*, that he arrested *Z*. The police officer believed in good faith that he was bound by law to arrest *Y,* because of the direction of a court of law, that is warrant, to arrest him. Had the facts been as supposed, the arrest would have been legal. Since the police officer honestly believed by reason of a mistake of fact *Z*, to be *Y,* he will be protected under *section 76 of IPC, 1860*.

Similarly, in the illustration to section 79, the act of *A*, in arresting *Z* in order to bring him before the proper

authorities, when *Z* was acting in self defence, is not culpable. *A*, presumed in good faith that *Z* was committing murder and so he thought on reasonable grounds that he was justified by law to apprehend him. *A* will be protected under *section 79 of IPC*

The justification for exemption from criminal liability on the ground of a mistake of fact is based on the principle that a man who is mistaken about the existence of a fact cannot form the necessary intention required to constitute a crime and is, therefore, not responsible in law for his deeds. Thus, a bona fide belief in the existence of facts, if they do exist, would make an act innocent. However, mistake (or ignorance) of law—*ignorantia juris neminem excusat*[22] is no defence to a charge of crime, howsoever genuine it might have been. In other words, all persons resident in a country, whether subjects or foreigners, are bound by the law of the land. The rule is founded on the fiction that "every man knows the law" or "at any rate ought to know the law" under which he lives or to which he is subject for the time being.[23]

No doubt, it is not possible even for a professional lawyer to know the entire bulk of law, nevertheless, the rule has been recognised as a basic principle of law on the ground of judicial expediency and public policy. If ignorance of law is to be a defence, it would be open to an accused, charged of a crime, to allege that he was not aware of the law, and it would be quite impossible for the prosecution to prove that the accused was cognisant of the law. The result would be the acquittal of the accused persons in all the cases rendering the administration of justice next to impossible.[24]

Carrying out the orders of a superior in good faith believing to be bound by law—a defence–IPC, section 76—acquittal confirmed—Supreme Court—1981

State of WB v Shew Mangal Singh,

AIR 1981 SC 1917 : *(1981) 4 SCC 2* : 1982 SCR (1) 360

Per Chandrachud, CJ:

The respondents, who are all police officers, were tried and convicted by the learned Judge, City Sessions Court, Calcutta, under *section 302* read with *section 34* of *IPC*, on the charge that at about 10 pm on 11 November 1970, they along with... the then Deputy Commissioner of Police... the then Assistant Commissioner of Police and some others, caused the death of Ranjit Chakraborty and Samir Chakraborty by causing them gunshot injuries.

In an appeal, the High Court acquitted them, against which the State of West Bengal has filed this appeal. According to the High Court, the police, while on patrol duty, were compelled to open fire after respondent 1, Shew Singh, received injuries as a result of the mob violence. Since the orders given by the Deputy Commissioner to open fire were justified, the respondents were bound to obey the lawful orders of their superior officer.

...important question was raised in the High Court as to whether the command of a superior officer to a subordinate officer, was justified and therefore lawful if, while acting in the execution of that command the subordinate officer causes injury or death.

Held, if that order was justified and lawful, no further question can arise as to whether the respondents, who acted in obedience to that order, believed or did not believe that order to be lawful. Such an inquiry becomes necessary only when the order of the superior officer, which is pleaded as a defence, is found not to be in conformity with the commands of the law.

Since the situation prevailing at the scene of the offence was such as to justify the order given by the Deputy Commissioner of Police to open fire, the respondents can seek the protection of that order and plead in defence that they acted in obedience to that order and therefore they cannot be held guilty. That is the purport of the illustration to section 76.

The petition is dismissed.

Act done in good faith believing it to be justified by law a defence—IPC, section 79—conviction quashed—MP High Court—1952

Chirangi v State,

AIR 1952 Nag 282 : 1952 Cr LJ 1212 (MP)

Facts: Chirangi Lohar, a widower, lived together with his unmarried daughter, only son Ghudsai and nephew Khotla. Chirangi took an axe and went with Ghudsai, his son, to a nearby hillock, in order to gather *siadi* leaves. When Khotla returned to his house in the evening, Ghudsai was not there and he found Chirangi asleep with the bloodstained axe beside him. Chirangi woke up at midnight, and when Khotla questioned him concerning his son's whereabouts, he replied: "I had become insane. I have killed my son in Budra Meta. It occurred to me that a tiger had come to me. I then dealt blows with the axe." Ghudsai's corpse was found on a hillock and Chirangi said that he had killed his son by mistake for a tiger, that two of his sons had died from insanity and that he himself was insane.

The trial judge convicted and sentenced him to transportation for life under *section 302 of IPC, 1860* for Ghudsai's murder.

The evidence of Dr Dube, a psychiatrist, who has examined him showed clearly enough that Chirangi's fall combined with his existing physical ailments could have produced a state of mind in which he in good faith thought that the object of his attack was a tiger and was not his son. The appellant's conduct after the occurrence was in consonance with that estimate, and it was manifest that he had no intention of doing wrong or of committing any offence.

Per Hemlon and Sen, JJ:

In *Waryam Singh v Emperor*, AIR 1926 Lah 554, a Division Bench, acting under section 79, held that an accused who killed a man with several blows from a stick was not liable under section 302, section 304 or section 304A

> "...[b] ecause he believed in good faith at the time of the attack that the object of his assault was not a living human being but a ghost or some object other than a living human being."

The Division Bench made it clear that the ground for their opinion was that mens rea or an intention to do wrong or to commit an offence did not exist in the case and that the object of culpable homicide could only be a living human being.

This view was followed in *Waryam Singh v Emperor*, AIR 1943 Pat. 64, a case in which a woman, in the middle of the night, saw a form, apparently human, dancing in a state of complete nudity with a broomstick tied on one side and a torn mat around the waist. The woman, taking the form to be that of an evil spirit or a thing which consumes human beings, removed her own clothes and with repeated blows by a hatchet felled the thing to the ground. Examination showed, however, that she had killed a human being who was the wife of her husband's brother. The conviction and sentence of the accused woman under section 304 were set aside, on the ground that she was fully protected by the provisions of section 79 "... [I] n as much as she thought that she was, by a mistake of fact, justified in killing the deceased whom she did not consider to be a human being, but a thing which devoured human beings."

…It is abundantly clear that if Chirangi had for a single moment thought that the object of his attack was his son, he would have desisted forthwith. There was no reason of any kind why he should have attacked him and, as shown, they were mutually devoted... all that happened was that the appellant in a moment of delusion had considered that his target was a tiger and he accordingly assailed it with his axe. He thought that by reason of a mistake of fact he was justified in destroying the deceased, whom he did not regard to be a human being but who, as he thought, was a dangerous animal. He was in the circumstances protected by section 79.

The conviction is set aside.

A father who forcibly releases his child from police custody if not in imminent danger, is liable—Court of Appeal—1970

R v Fennell,

[1970] 3 All ER 215 : *[1971] 1 QB 428*

Fennell's son was involved in a fight and was arrested by the prosecutor, a police officer. Fennel pressed the officer

to release his son and he struck the officer who was on the point of taking his son to the police station. Fennell was convicted. Fennell unsuccessfully appealed to the Court of Appeal.

Per Widgery, LJ:

Where a person honestly and reasonably believes that he or his child is in imminent danger of injury, it would be unjust if he were deprived of the right to use reasonable force by way of defence merely because he had made some genuine mistake of fact.

On the other hand, if the child is in police custody and not in imminent danger of injury, there is no urgency of the kind which requires an immediate decision, and a father who forcibly releases the child does so at his peril. If in fact the arrest proves to be lawful, the father's use of force cannot be justified.

Homicide is excusable if the fatal blow is necessary for protection of life, even though based on mistaken belief—Accused not guilty—Court of Appeal—1984

R v Rose,

(1884) 15 Cox CC 540

Facts: The accused was charged for committing murder of his father. The relations between father and mother were strained, and his father frequently used to quarrel with his mother one night there was a quarrel between the accused's father and mother and the mother called out "murder", and the father forced the mother to the top of stairs and threatened to knife her. The accused shot and killed his father. There was no evidence that the father had a knife. He was held not guilty.

Justice Lopes summed up the law in the following words:

> If the prisoner... acted without vindictive feeling towards his father when he fired the shot, that at the time he fired the shot he honestly believed, and had reasonable grounds for the belief, that his mother's life was in imminent peril, and that the fatal shot which he fired was absolutely necessary for the preservation of her life, then he ought to be excused, and the law will excuse him, from the consequences of homicide.

Mistake of law: no excuse to a crime—Supreme Court—(1965)—2 to 1

State of Maharashtra v Mayer Hans George[25]

Ignorance of law is no excuse. The notification of the Reserve Bank of India is law. It is deemed to have been brought to the notice of the individual concerned as soon as it is published in the Official Gazette. A reference was made to the case of *Lim Chin Aik*,[26] decided by the Privy Council in this regard.

Per Ayyangar J, for himself and Mudholkar, J (Majority):

The judgment of the Judicial Committee in so far as it was in favour of the appellant, was based on two lines of reasoning.

The first was that, in order to constitute a contravention of section 6 (2) of the Ordinance, mens rea was essential. The second was that even if the order of the minister under section 9 were regarded as an exercise of legislative power, the maxim "ignorance of law is no excuse" could not apply because there was not, in Singapore, any provision for the publication in any form, of an order of the kind made in the case or any other provision to enable a man, by appropriate enquiry, to find out what the law was....

The notification must be deemed to have been published and brought to the notice of the concerned individual on the 25 November 1962. The argument, that the notification dated 8 November 1962 was not effective, because it was not properly published in the sense of having brought to the actual notice of the respondent rejected.

20 There is a fine distinction between ignorance and mistake. The former implies a total want of knowledge in reference to the subject matter, whereas the latter admits knowledge, but implies a wrong conclusion. However, the distinction has not been recognised in general and taken to mean one and the same. See Parking M Rolling, *Criminal Law,* Foundation Press Inc, 1957, p 806; Jerome Hall, *General Principles of Criminal Law,* 2nd Edn, 1960, pp 360-414.

21 *Indian Penal Code, 1860, section 52* reads:

> Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.

22 See *Salmond on Jurisprudence,* 11th Edn, pp 435-36.

23 See SS Huda, *Principles of Law of Crimes in British India,* TLL, 1902, pp 219-39; RC Nigam, *Principles of Law of Crimes,* vol I, pp 297, 313; RL Narasimham, *"Ignorantia Juris Non Excusat"*, Journal of Indian Law Institute, 1971, no 13, pp 70-73.

24 See Law Commission of India, 42nd Report, 1971, pp 83-85.

25 *State of Maharashtra v Mayer Hans George, AIR 1965 SC 722* : *[1965] 1 SCR 123*; see chapter 2, for facts of the case and judgment of majority and minority.

26 *Lim Chin Aik v Queen, [1963] 1 All ER 223*.

3.4 Judicial Act

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Part I General Principles

3 GENERAL EXCEPTIONS

3.4 Judicial Act

77. Act of Judge when acting judicially.—Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

78. Act done pursuant to the judgment or order of Court.—Nothing which is done in pursuance of, or which is warranted by the judgment or order of, a Court of Justice; if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

Sections 77 and 78 grant immunity from criminal prosecution to judges[27] and to those who carry out their orders.[28] Section 77 extends protection to a judge with respect to acts done by him in discharge of his duty, even if he exceeds the jurisdiction granted to him by law and prosecutes a man for committing the alleged offence, provided it was done in good faith. Thus, if a magistrate assumes on an erroneous reading of the law that he had the jurisdiction to decide a particular case, he is not criminally liable for exceeding his jurisdiction, though it turns out to be that he had no authority to conduct the case. The privilege does not extend to acts when a judge knowingly exceeds his authority or does something contrary to law.[29] For instance, if a judge assaults or abuses a man, he is as much liable as an ordinary man would be for his acts.

Section 78 grants protection to officers acting under the authority or order of a court of law even if the court had no jurisdiction or the order happened to be erroneous. For instance, if a magistrate who is authorised under section 5 of Gambling Act 1867, to issue a search warrant on credible information only, issues a warrant to arrest a person without any such information, the police officer, who arrests the man in pursuance of such an order is not liable for committing an offence. As the arrest was made under the direction of a court, the police officer is protected from conviction in spite of the fact that the warrant was defective in law and, consequently, illegal.

Justification for exempting a judge from criminal liability has been well summarised by Markby J in *Chunder Narain Singh v Birjo Bullub Gooyee*[30] explained the law in the following words:

> The duties which a magistrate or judge usually performs are of such a nature as to render it absolutely necessary for their due performance that he should have that protection. He has generally either to punish an offence or to vindicate the rights of a private individual; and if he were hampered by fear of the consequences which might arise from a mistaken conclusion, he could not have that independence of mind which is essential to the discharge of such functions as these. This protection is not confined to persons holding and exercising a regular judicial office, but it extends to any person whose duty it is to adjudicate upon the rights or punish the misconduct of any given person, whatever form their proceedings may take, or however informal they may be.

27 *Indian Penal Code, 1860, section 19*, defines the word “judge”.

28 Judges and those who carry out their orders are also exempted from civil liability *vide* section 1 of Judicial Officer’s Protection Act 1850.

29 See *Indian Penal Code 1860*, *sections 219* and *220*.

30 (1874) 14 Beng LR 254, p 257 : 21 WR 391. See Ratanlal and Dhirajlal, *Law of Crimes,* 24th Edn, 1997, pp 242-43; Gour Hari Singh, *The Penal Law of India,* vol I, 11th Edn, 2000, pp 554-568.

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3.5 Accident

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Part I General Principles

3 GENERAL EXCEPTIONS

3.5 Accident

Section 80 of the Indian Penal Code, 1860, refutes criminal liability with respect to accidental acts.

80. Accident in doing a lawful act.—Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

Illustration

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of *A*, his act is excusable and not an offence.

A man is not criminally responsible for unintended and unknown consequences of his lawful acts performed in a lawful manner by lawful means with proper care and caution. That is to say, an act is not criminal, if it is done without any criminal intention or knowledge, merely by reason of any harm which it might cause accidentally to any person.

Sections 302/80 IPC, 1860 – Murder or accident — Accused persons travelling in truck allegedly causing death of deceased travelling in jeep and injuring other persons by hitting right side of truck to jeep. Mechanical test report revealing no head on collusion between two vehicles and death of deceased due to accident. Tyre marks in photographs of incident indicating application of brakes to avoid accident. Accused persons not armed with deadly weapons. Incident held to be accident and not murder. Conviction, unsustainable. (Paras 10, 11) — Supreme Court – 2017

State of Punjab v Pargat Singh[31]

Ashok Bhushan and Deepak Gupta, JJ:

These appeals have been filed by the State of Punjab challenging the impugned judgment of the High Court for the States of Punjab and Haryana at Chandigarh acquitting the appellants. The order passed by the Additional Sessions Judge convicting and sentencing the appellants under sections 302/34, 307/34 and 120-B was set aside by the High Court.

Aggrieved by the order of acquittal granted by the High Court, the State has come up in these appeals.

Dismissing the appeal Apex Court said, the story that a conspiracy was hatched on to commit the crime, was correctly disbelieved by the High Court with the observation that had they been aware of the conspiracy, they could have sent intimation to the police or to Panchayat or any other respectable person of the village. The High Court had referred to the mechanical test.

We fully endorse the view taken by the High Court in acquitting all the accused. Admittedly, both the vehicle colluded on the right side and from the tyre mark as apparent from the photographs, it is clear that brakes were applied to avoid the accident. False implication due to previous enmity was a plausible view and the High Court did not commit any error in acquitting the accused, accepting the defence version that it was a case of accident in which one person had died and others were injured. It is well-settled that in a case of acquittal, if two views are possible, the Court shall not interfere in a judgment acquitting the accused. (Para 11)

Appeals dismissed.

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31 *AIR 2017 SC 3066* : 2017 AIR (SCW) 3066. Ashok Bhushan and Deepak Gupta, JJ delivered the judgment.

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3.6 Necessity

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Part I General Principles

3 GENERAL EXCEPTIONS

3.6 Necessity

Section 81 of the IPC has incorporated the doctrine of necessity as a defence to a criminal charge.

81. Act likely to cause harm, but done without criminal intent, and to prevent other harm.—Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Explanation.—It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

Illustration

(a) *A*, the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat *B*, with twenty or thirty passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat *C* with only two passengers on board, which he may possibly clear. Here, if *A* alters his course without any intention to run down the boat *C* and in good faith for the purpose of avoiding the danger to the passengers in the boat *B*, he is not guilty of an offence, though he may run down the boat *C* by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down the boat *C.*

(b) *A*, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life and property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse *A's* act. *A* is not guilty of the offence.

By necessity, is meant a situation where conduct promotes some value higher than the value of the literal compliance with the law. As stated by Pollard:

> In every law there are some things, which when they happen, a man may break the words of the law, and yet not break the law itself and such things are exempted out of the penalty of the law, and the law privileges them although they are done against the letter of it; breaking the words of the law is not breaking the law, so long as the intent of the law is not broken. It is a common proverb, "*quod necessitas non habet legem*"—necessity knows no law.[32]

It is on the principle of expediency that the law has recognised necessity as an excuse in criminal cases. In other words, what necessity forces it justifies, namely *quod necessitas, cogit defendit*.[33] Section 81 stresses three conditions to claim exemptions from criminal responsibility, namely:

(i) the act must have been committed in order to avoid other harm;

(ii) the harm to be avoided must be such as to Justify the risk of doing an act likely to cause harm; and

(iii) the act must have been committed in good faith without any criminal intention to cause harm.[34]

Deliberate killing of an unoffending and unresisting man amounts to willful murder and cannot be justified by necessity—House of Lords—1884

Queen v Dudley and Stephens,

[1884] 14 QBD 273 DC

Facts: In 1884, the respondents, with one Brooks, and the deceased, a boy, between 17 and 18 years of age, the crew of a registered English vessel, were cast away in a storm on the high seas. They had no supply of water or food. On the 18th day prisoners spoke of their having families, and suggested it would be better to kill the boy so that their lives should be saved. Stephens agreed to the act, but Brooks dissented from it. Dudley, with the assent of Stephens, went to the boy, who was extremely weakened by famine put a knife into his throat and killed him. The three men fed upon the body and blood of the boy for four days; after which the boat was picked up by a passing vessel, and the prisoners were rescued, still alive.

If the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. The boy, being in a much weaker condition, was likely to have died before them. At the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. Under these circumstances, there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy or one of themselves they would die of starvation. There was no appreciable chance of saving life except by killing some one for the others to eat. Assuming any necessity to kill anybody there was no greater necessity for killing the boy than any of the other three men.

Per Lord Coleridge, CJ on behalf of Gove, Denman and Pollock, JJ:

How far the conservation of a man's own life is in all cases and under all circumstances an absolute, unqualified, and paramount duty. It is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by "necessity". To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it.

It is not correct, to say that there is any absolute or unqualified necessity to preserve one's life. By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "no".

It is not suggested that in this particular case the deeds were "devilish", but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime... It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure... But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was wilful murder, that the facts as stated in the verdict are no legal justification of the homicide; and... the prisoners are guilty of murder.

However, their sentence was later commuted to six months imprisonment.

Necessity does not justify indiscriminate throwing of passengers overboard to save sinking boat—Circuit Court, Pennsylvania—United States—1842

United States v Holmes,

(1842) 26 Fed Case 360 (Circuit Court, Pennsylvania)

This case arises out of the sinking of the American vessel, *"William Brown"* off Newfoundland, after hitting an

iceberg. The crew and some of the passengers managed to get away into what was called the “long boat” and the “jolly boat”. The accused Holmes was one of the occupants of the “long boat”. The ‘long boat’ leaked from the time it was launched. By the next morning the nine seamen and the passengers were exhausted and shivering in cold. About 10 pm on the same night Holmes and the crew threw 14 men and two women over board. None of the crew was thrown over.

The long boat was picked up by the “Crescent” next day. Holmes was charged for manslaughter. The prosecution pleaded that if the seamen believed that some passengers were to be thrown overboard, they should have given full notice to all on board. Common settlement would, then, have fixed the principle of sacrifice, and, the mode of selection involving all; a sacrifice of any would have been resorted to only in dire extremity.

The defence rebutted the suggestion and said that lots are the law of the ocean. Lots in cases of famine, where means of subsistence are wanting for all the crew, is what the history or maritime disaster records. To cast lots when all are going down, but to decide who shall be spared, to cast lots when the question is, whether any can be saved, is a plan easy to suggest, rather difficult to put in practice.

In conclusion, the defence counsel argued that Holmes’ action was in accordance with “the law of necessity, and the law of nature”.

Justice Baldwin, in charging the jury, mentioned:

> When the ship is in danger of sinking, but all sustenance is exhausted, and the sacrifice of one person is necessary to appease the hunger of others, the selection is by lot. This mode is resorted to as the fairest mode, and, in some sort, as an appeal to God, for selection of the victim.

The judge further felt that if lots are drawn and the victim resists “force may be employed to coerce submission”.

The jury found Holmes guilty and sentenced him to six months’ imprisonment and to pay a USD 20 fine for manslaughter. However, his sentence was remitted.

Necessity does not justify medical use of cannabis on extraneous considerations contrary to Misuse of Drugs Act 1971—conviction upheld—Court of Appeal—2006

R v Quayle (Attorney General’s Reference No 2 of 2004)[35]

Lord Justice Mance:

The defendants three in number who were convicted by the trial court for committing offences contrary to Misuse of Drugs Act, 1971 contended in appeal *inter alia,* that their cultivation or preparation, use and possession of cannabis had been excusable in law, since they genuinely and reasonably believed that those activities had been necessary to avoid them suffering serious injury or pain.

The defendants in the fourth appeal, the proprietor of a clinic whose customers suffered from debilitating diseases (heat debilitates-makes people weak) and his courier, who had imported cannabis which was an offence under Customs and Excise Management Act 1979 contended that a defence of necessity is admissible since they had acted in the interests of others towards whom they had reasonably regarded themselves as responsible and who they had genuinely and reasonably feared would suffer serious pain and or injury if they did not receive the cannabis imported.

Dismissing the appeal the Court of Criminal Appeal held that the common law defence of necessity by extraneous circumstances was not available where its role would be to legitimize conduct which was contrary to the clear legislative policy and scheme adopted in relation to controlled drugs.

The necessitous medical use of cannabis on an individual basis was in conflict with the clear purpose and effect of the legislative scheme in relation to controlled drugs which made the most careful provision regarding categorization, production importation, possession, supply, prescription and use of such drugs for medical or other purposes. Cultivation, prescription, supply, possession and use of cannabis would have to come into existence, which would not only be subject to no medical safeguards or constraints, but the scope and legitimacy of which would be extremely difficult to ascertain or control.

Appeal dismissed.

Necessity does not justify the homeless "squatting" in unoccupied buildings— Court of Appeal—1971

London Borough of Southwark v Williams,

[1971] 2 All ER 175 (CA) : *[1971] 2 WLR 467*

Fact: The defendants, two homeless families, were unable to obtain housing. With the help of squatters' association, they made an orderly entry into a house owned by the borough council. The council obtained an order for possession. The defendants relied, *inter alia,* on the defence of necessity.

Per Lord Denning MR:

There is authority for saying that in case of great and imminent danger, in order to preserve life, the law will permit of an encroachment on private property. That is shown by *Mouse's* case, (1608) 12 Co Rep 63, where the ferryman... took 47 passengers into his barge (boat) to carry them to London. A great tempest arose and all were in danger. Mr Mouse was one of the passengers. He threw a casket (box) belonging to the plaintiff overboard so as to lighten the ship. Other passengers threw other things. It was proved that, if they had not done so, the passengers would have been drowned. The court held that in any case of necessity, for the safety of lives of the passengers, it was lawful for Mouse to have cast the casket out of the barge. It was like pulling down a house at the time of fire to stop it spreading; which has always been held justified *pro bono publico.*

The doctrine so enunciated must, however, be carefully circumscribed. Else, necessity would open the door to many an excuse. It was for this reason that it was not admitted in *R v Dudley and Stephens, (1884) 14 QBD 273* DC. They were held guilty of murder. Similarly, when a man who is starving enters a house and takes food in order to keep himself alive, the law does not admit the defence of necessity. It holds him guilty of larceny.

The reason is because, if hunger were once allowed to be an excuse for stealing, it would open a way through which all kinds of disorder and lawlessness would pass. So here, if homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door, which no man could shut. ...The plea would be an excuse for all sorts of wrongdoing. So the courts must, for the sake of law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless; and trust that their distress will be relieved by the charitable and the good.

Per Edmund Davies, LJ:

It appears that all the cases where a plea on necessity has succeeded are cases which deal with an urgent situation of imminent peril, eg, the forcible feeding of an obdurate suffragette (stubborn woman seeking right to vote through organised protest), as in *Leigh v Gladstone,* (1909) 26 TLR where Lord Alverstone CJ, spoke of preserving the health and lives of the prisoners who were in the custody of the Crown; or performing an abortion to avert a grave threat to life, or at least, to the health of a pregnant young girl who had been ravished in circumstances of great brutality, as in *R v Bourne, [1939] 1 KB 687* : [1936] 3 All ER 615 or where a person may escape from a burning gaol (jail) notwithstanding a statute making prison-breach a felony, "for he is not to be hanged because he would not to stay to be burnt".[36] Such cases illustrate the very narrow limits with which the plea of necessity may be invoked.

Appeal dismissed.

Necessity does not justify escape from prison on apprehension of danger to life—conviction upheld—Supreme Court of Victoria, Australia—1981

R v Loughman,

[1981] VR 443 (Australia)

Facts: The applicant was tried and convicted on a charge of escaping from prison, under section 132 (1)[37] of the Act along with three other prisoners. The applicant relied on the defence of necessity. His case was that he had been insulted and threatened, and that on the day of his escape he had been told that he would be killed that night. He

had heard rumours of the escape, and joined in it without prior arrangement in order to avoid the threatened attack, but would not have done so had he not thought that he would be killed.

The trial judge ruled that there was no evidence of necessity and convicted the accused. The Supreme Court of Victoria, in Australia dismissing the appeal, held that:

(i) the law recognises a defence of necessity

(ii) the defence of necessity involves the following elements:

(a) The *criminal act* must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect.

(b) The accused must honestly believe, on reasonable grounds, that he was placed in a situation of imminent peril.

(c) The acts done to avoid the peril must not be out of proportion to the peril to be avoided.

(d) The harm to be justified must have been committed under the pressure either of physical forces or exerted by some human agency so that an urgent situation of imminent peril has been created.

(e) The accused must have acted with the intention of avoiding greater harm or so as to have made possible the preservation of at least an equal value.

(f) There was open to the accused no alternative, other than that adopted by him, to avoid the greater harm or to conserve the value.

(g) The doctrine so enunciated must, however, be carefully circumscribed. Else necessity would open the door to many an excuse. The accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril. The test is would a reasonable man in the position of the accused have considered that he had any alternative to doing what he did to avoid the peril?

(h) Self-defence, if not capable of being brought within the general description of a defence of necessity, is at least analogous to it, but in comparing the kind of necessity which requires self-defence with the necessity which requires escape from prison there is of course, an essential difference in that in the former the accused will always or almost always attack the person threatening him whereas in a case where a prisoner pleads necessity as a justification for escaping, the *criminal act* which he commits is not directed to the person making the threat.

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32 *Reniger v Fogosia,* (1550); *Morre v Hussey,* (1609) Hob 93, p 96: “All laws admit certain cases of just excuse, when they are offended in letter, and where the offender is under necessity either of compulsion or inconvenience”.

33 *Latin for Lawyers,* 3rd Edn, 1960, No 911, p 219.

34 See RC Nigam, *Law of Crimes in India,* vol I, 1965, pp 328-40; Ratanlal and Dhirajlal, *The Law of Crimes,* 23rd Edn, 1991, pp 212-222; Gour Hari Singh, *The Penal Law of India,* vol 1, 9th Edn, 1972, pp 542-54; Stephen, *Digest of Criminal Law,* 8th Edn, Article II, p 70: “An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was only done in order to avoid consequences which could not otherwise be avoided, and which, if they had followed would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and. that the evil inflicted by it was not disproportionate to the evil avoided.”

35 *[2006] 1 All ER 988* (CA). Court of Appeal, Criminal Division, Mance LJ, Newman and Rulford JJ.

36 See Glanville Williams, *Criminal Law,* 2nd Edn, pp 725-26.

37 Section 132 (1) of Community Welfare Service Act 1970 (Vic) provides that:

(1) Every prisoner who escapes or attempts to escape—(a) from prison or police gaol, or (b) from the custody of a member of the police force or a prison officer in whose legal custody he is or is deemed to be, shall be guilty of an indictable offence.

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3.7 Duress

Part I General Principles

3 GENERAL EXCEPTIONS

3.7 Duress

94. Act to which a person is compelled by threats.—Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence; provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1.—A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2.—A person seized by a gang of dacoits, and forced, by threat of instant death, to do a thing which is an offence by law; for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception. Section 94 exempts a man from criminal liability in respect of acts committed by him under compulsion or duress. This is founded on the well-known maxim *actus me invito (factus) non est mens actus,* ie, “an act which is done by me against my will is not my act and hence I am not responsible for it”.[38]

A compulsion can be pleaded as a defence when the threat of injury goes to the extent of causing death. In other words, it is not every threat of injury that will excuse a man from punishment. The threat in order to attract the benefit of section 94 must be of instant death to the person compelled to commit the offence, and that the person so threatened should not have placed himself in that situation of his own accord.[39] A man on the point of starvation cannot plead his hunger as an excuse for theft. In order to plead duress as a defence, the accused must show that he did not of his own accord, expose himself to the constraint; that the fear which prompted his action was the fear of instant death; and that the accused had no option but to die or to accomplish the act directed by the person so threatening. However, the defence is subject to two exceptions, namely, murder and waging war against the Government of India,[40] where compulsion cannot be pleaded as a defence to a *criminal act*. The exemptions are based on the ground that no one has a right to take another’s life in order to save his own,[41] and that the State has a right to ensure its own preservation by providing deterrent penalties.

Duress as a partial defence to murder suggested in exceptional cases as exception to section 300, of South African Penal Code—South African Supreme Court—1972

S v Goliath,

(1972) 3 SA 1 (South Africa)

Per Rumpff, J:

It is generally accepted that for the ordinary person in general his life is more valuable than that of another. Only they who possess the quality of heroism will intentionally offer their lives for another. Should the criminal law then state that compulsion could never be a defence to a charge of murder, it would demand that a person who killed another under duress, whatever the circumstances, would have to comply with a higher standard than that demanded of the average person... such an exception to the general rule which applies in criminal law cannot be justified.

For a decade, English law introduced some flexibility in this regard with the House of Lords decision in *Northern Ireland v Lynch, [1975] AC 653*, that duress is a defence to a secondary party to murder, *albeit* not the actual killer *Abbott v The Queen*[42]. However, fearing the increase of terrorism with its potential for forcing innocent persons to commit crimes, the House of Lords in *R v Howe,*[43] has resiled from this position and denied the defence of duress both to the actual killer and those assisting him.

If a reform of section 94 were being contemplated, the central issue would be whether duress should be a defence to all crimes. Perhaps it might be politically more acceptable to effect reforms to section 94 if murder remained exempted. There is, however, a strong argument that while duress ought not to be a complete defence to murder, persons who kill in such circumstances are clearly less blameworthy than those who kill in “cold blood” and, accordingly, a new exception to section 300 ought to be introduced whereby those who kill under duress are convicted of culpable homicide not amounting to murder.

Duress is not a defence to a person charged with murder as a principal in first degree—conviction upheld—Privy Council—1976

Abbott v R,

[1976] 3 All ER 140 (PC)

Facts: The appellant was a member of a commune that occupied a house in Trinidad. On the direction of the head of the commune, the appellant, with others, took an active part in the brutal killing of a young woman. The appellant was convicted of murder. He appealed on the ground that the trial judge had failed to direct the jury to consider the question whether the appellant was entitled to be acquitted on the ground that he had acted under duress. The appellant pleaded that he had to take part in killing because threats of death against him from the head of the commune. It was, held that the defence of duress is not available.

Per Lord Salmon, J:

Counsel for the appellant has argued that the law presupposes a degree of heroism of which the ordinary man is incapable and which therefore should not be expected of him and that modern conditions and concepts of humanity have rendered obsolete the rule that the actual killer cannot rely on duress as a defence. Their Lordships do not agree. In the trials of those responsible for wartime atrocities such as mass killings of men, women or children, inhuman experiments on human beings, often resulting in death, and like crimes, it was invariably argued for the defence that these atrocities should be excused on the grounds that they resulted from superior orders and duress; if the accused had refused to do these dreadful things, they would have been shot and therefore they should be acquitted and allowed to go free. This argument has always been universally rejected.

...in any civilized society, acts such as the appellant’s, whatever threats may have been made to him, could not be regarded as excusable or within the law... Common sense surely reveals the added dangers to which in this modern world the public would be exposed, if the change in the law proposed on behalf of the appellant were effected. It might well, as Lord Simon of Glaisdale said in *Lynch* (1975), prove to be a charter for terrorist, gang leaders and kidnappers.

The appeal is rejected.

Duress is defence to a charge of perjury—Court of Appeal—conviction quashed—1971

R v Hudson and Taylor,

[1971] 2 All ER 244 : *[1971] 2 QB 202*

The two accused, Hudson and Taylor were charged and convicted with perjury for giving false evidence at a criminal trial. They pleaded that a man named Farrell was present at the trial at which the false evidence was given who threatened to cut them up unless evidence was given as directed.

The Court of Appeal accepted the accused's defence and set aside the conviction. The court ruled out the trial court's contention that duress was no defence to a charge of crime, because the accused were not subject to immediate threat of physical violence when the false evidence was given in the court. It was held that the accused had no alternative under the circumstance but to give false evidence and this was sufficient justification for the act in question.

Duress is not a defence to a charge of aggravated burglary in case of voluntary association with another engaged in criminal activity—House of Lords—2005

R v Hassn[44]

Per Lord Bingham:

The defendant was charged with aggravated burglary. His defence was duress. He claimed that he had been coerced into committing burglary by another, who had threatened that if he did not do it, he and his family would be harmed, and that he had no chance to escape and go to the police.

On the issue of duress the judge put the following four questions (tests) to the jury to determine the applicability of the defence of duress.

Question 1: Was the defendant driven or forced to act as he did by threats which, rightly or wrongly, he genuinely believed that if he did not burgle [the] house, his family would be seriously harmed or killed?

If you are sure that he was not forced by threats to act as he did, the defence fails and he is guilty. But if you are not sure go on to:

Question 2: Would a reasonable person of the defendant's age and background have been driven or forced to act as the defendant did?

If you are sure that a reasonable person would not have been forced to act as the defendant did, then the defence fails and he is guilty. If you are not sure, then go on to:

Question 3: Could the defendant have avoided acting as he did without harm coming to his family?

If you are sure he could the defence fails and he is guilty. If you are not sure go on to:

Question 4: Did the defendant voluntarily put himself in the position in which he knew he was likely to be subject to threats?

If you are sure he did, the defence fails and he is guilty. And if you are not sure, he is not guilty.

On the basis of the facts and reply of the jury the defendant was convicted by the trial court and his appeal against conviction was allowed by the Court of Appeal, which held, *inter alia* that question 4 in the judge's direction on duress was misdirection. The crown appealed to the House of Lords.

Allowing the appeal the House of Lords held that the defence of duress was excluded when as a result of the accused's voluntary association with another engaged in criminal activity, he had foreseen or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence.

Baroness Hale of Richmond (one judge) further held the defence of duress was excluded when as a result of the accused's voluntary association with others he foresaw or should have foreseen to the risk of being subjected to compulsion to commit criminal offences. The concept of voluntary association with others was that of a person who exposed himself to the risk of unlawful violence without reasonable excuse.

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38 SS Huda, *Principles of Law of Crimes in British India*, TLL, 1902, p 340.

39 *Indian Penal Code, 1860, section 94*, expln 1 to section 94.

40 *Indian Penal Code, 1860*, *sections 121* and *302*.

41 See *Queen v Dudley and Stephens, [1884] 14 QBD 273*. Gour Hari Singh, *The Penal Law of India,* vol I, 9th Edn, 1972, pp 701-07.

42 *[1977] AC 755* Privy Council.

43 *[1987] AC 417* : *[1987] 1 All ER 771* : [1987] Cri LR 480.

44 [2005] UKHL 22 : *[2005] 2 WLR 709* : (2005) 4 ACCER 685. See *R v Graham, [1982] 1 All ER 801*, Lord Bingham of Cornhill, Lord Steyn, Lord Rodger of Earlsferry and Lord Brown—Lord Baroness Hale of Eaten-under-Heywood delivered the judgment.

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3.8 Infancy

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

3 GENERAL EXCEPTIONS

3.8 Infancy

82. Act of a child under seven years of age.—Nothing is an offence which is done by a child under seven years of age.

83. Act of a child above seven and under twelve of immature understanding.—Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

Sections 82 and *83* of the *Indian Penal Code, 1860* give protection to a child under a particular age from criminal prosecution and punishment. This is based on the principle that an infant is incapable of distinguishing between right and wrong and so no criminal responsibility could be fastened in regard to his deeds.[45] Section 82 grants absolute immunity to a child below seven years of age on the ground that such a child is *doli incapax,* that is, incapable of doing a *criminal act*,[46] because a child under such age group cannot form the necessary intention to commit a crime. Section 83 provides qualified immunity to a child above seven years of age and below 12 years of age. In other words, if it is shown that the child has not attained the requisite degree of understanding to judge the nature and consequences of his conduct, he is exempted from criminal liability. In the absence of such proof, a child above seven years of age is as much liable for his *criminal act* as an adult is. The maturity of understanding can be inferred from the nature and quality of the act, subsequent conduct of the doer and other allied factors. For instance, if a child aged nine years picks up a necklace valued at Rs 40 only, lying on the table in his friend's house and immediately sells it for Rs 20 only and misappropriates the amount, the act of the child shows that he was sufficiently mature to understand the nature and consequence of his deed. Hence, the child will not get protection under the section. His act would amount to theft.

However, no absolute rule as regards the age of discretion is found. It differs from country to country, in Malaysia and England, the age of complete immunity is 10 years, and a child between the age of 10 and 14 years enjoys qualified immunity respectively. In the United States, the age of absolute incapacity varies from State to State between 8 to 12 years. In Canada, a child under 7 is completely exempted, and between 7 to 14 years, liability is dependent on the maturity of the child; in Australia, Queensland, Western Australia and Tasmania, the minimum age for immunity is seven years, while in New South Wales, Victoria, and South Australia, it has been raised to 10 years. In Germany, Austria, Norway and Czechoslovakia, the minimum age is 14 years; while in Denmark and Sweden, it is 15 years; in Argentina, a minor under 16 years and in France below 13 years of age is not punishable. In Thailand, Sri Lanka (Ceylon), Iran, Syria and Lebanon, the minimum age of liability is 7 years; while in Philippines, 9 years; in Turkey and Iraq 11, and in Japan, 14 years.[47] The criminal liability of juveniles in different countries differ as mentioned below in table 2.[48]

TABLE 2

Country	Age of absolute immunity from criminal liability	Age for differential treatment as juvenile delinquents
1. Russia	Below 16 years	(a) 14-16 years serious offences only.
		(b) 16-18 years for other cases.

3.8 Infancy

Country	Age of absolute immunity from criminal liability	Age for differential treatment as juvenile delinquents
2. Poland	Below 16 years	(a) Juvenile below 18 years.
		(b) Young offenders below 21 years.
3. Germany	Below 16 years	(a) Juvenile 14-18 years.
		(b) Young offenders below 21 years.
4. Japan	Below 14 years	(a) Juvenile under 20 years.
5. England	10 years up to 14 years	(a) Under 17 years and 18-21 years for some offences classified as young offenders.
6. Canada	Under 7 years 7-14 years	(a) Under 16 years.
		(b) 16-18 years varying from province to province.
7. USA	7 years to 12 years (different for different states)	16-18 years varying from State to State but mostly 18 years.
8. China	16 years	(a) Child 9-13 years.
		(b) Juvenile 14-20 years.
9. Korea	14 years	(a) 14-18 years.
		(b) Under 20 years.
10. India, Myanmar, Sri Lanka, (Pakistan and RO Bangladesh similar to India)	7 years (conditional immunity from 7 to 12 years)	18 years for both male and female.
11. Malaysia	10 years	(a) Child 14 years.
		(b) Juvenile 10-18.
12. Indonesia	10 years	10-18 years.
13. Philippines	9 years	
9-15 years	9-18 years.	

3.8.1 Crimes against Children[49]

Crimes against children include physical and emotional abuse, neglect and exploitation, through child pornography or sex trafficking of minors. *Indian Penal Code, 1860* and various other protective and preventive special and local laws specifically mention the offences wherein children are victims. The age of child varies as per the definition given in the concerned Acts but age of child has been defined to be below 18 years as per *Juvenile Justice (Care and Protection of Children) Act 2000* Amended. Therefore, an offence committed on a victim under the age of 18 years is considered as crime against children. The list of offences under *IPC, 1860* and the Special and Local Acts is as follows:

(1) **Crime against Children under The *Indian Penal Code, 1860*:**

(i) Murder (*Section 302 IPC*)

(ii) Attempt to commit murder (*Section 307 IPC*)*

(iii) Infanticide (*Section 315 IPC*)

(iv) Rape (*Section 375-376 IPC*)

(v) Unnatural Offence (*Section 377 IPC*)*

(vi) Assault on Women (Girl Child) with Intent to Outrage her Modesty (*Section 354 IPC*)*

- 1. Sexual Harassment (*Section 354A IPC*)*
- 2. Assault or Use of Criminal Force to Women (Girl Child) with Intent to Disrobes (*Section 354B IPC*)*
- 3. Voyeurism (*Section 354C IPC*)*
- 4. Stalking (*Section 354D IPC*)*

(vii) Insult to the Modesty of Women (Girl Child) (*Section 509 IPC*)*

(viii) Kidnapping & Abduction (Sections 363, 364, 364A, 365, 366, 367, 368 & 369 *IPC*).

(ix) Foeticide (*Sections 315* and *316 IPC*).

(x) Abetment of Suicide of Child (*Section 305 IPC*).

(xi) Exposure and Abandonment (*Section 317 IPC*).

(xii) Procuration of Minor Girls (*Section 366-A IPC*).

(xiii) Importation of Girls from Foreign Country (*Section 366-B IPC*) (under 18 years of age).

(xiv) Buying of Minors for Prostitution (*Section 373 IPC*).

(xv) Selling of Minors for Prostitution (*Section 372 IPC*).

Incidence of Crime against Children: 94,172

A total of 92,715 cases of crimes against children were registered in the country during 2015 as compared to 88,108 cases during 2014, showing an increase of 5.3%. Maharashtra accounted for 14.8% of total crimes committed against children registered in the country. The next in order was Madhya Pradesh (13.7%), Uttar Pradesh (12.1%) and Delhi (10.1%). In 2016, crimes against children has gone upto 1,04,705 cases.

Crime Rate: 21.1

The crime rate ie, number of cases reported under crimes against children per 1,00,000 population of children (below 18 years of age) was observed as 21.1 at all India level during 2015. The crime rate was highest in Delhi (169.4) followed by Andaman & Nicobar Islands (75.0), Chandigarh (67.8), Mizoram (50.1) and Goa (46.5) in comparison to the national average of 21.1.

Crime Head-wise Analysis

The State-wise and crime head-wise incidents of crimes are presented in **Table-5**

Murder (excluding Infanticide): Incidence: 1,758 Rate: 0.4

A total of 1,758 cases of “murder” of children (excluding infanticides) were registered in the country against 1,817 cases in 2014 showing a decrease of 3.2% during 2015 over 2014. Uttar Pradesh has reported the highest number of such cases (474 cases) accounting for 27.0% of the total cases registered in the country. Sikkim, Lakshadweep and Puducherry did not report any case of intentional homicide of children during the year 2015. Total numbers of victims were 1,937 in 1,758 cases. D & N Haveli (1.6) followed by Arunachal Pradesh (1.3) have reported high crime rate compared to crime rate of 0.4 at all India level during 2015.

Infanticide (*Section 315 IPC*): Incidence: 91 Rate: Negligible

A total of 91 cases of “Infanticide” were registered in the country during the 2015. The incidents declined by 24.8% in the year 2015 over 2014 (from 121 cases in 2014 to 91 cases in 2015). Maximum of infanticides were reported in Madhya Pradesh (25 cases) followed by Rajasthan (18 cases) and Uttar Pradesh (9 cases). Crime rate in Haryana, Himachal Pradesh, Madhya Pradesh, Rajasthan and Delhi was 0.1 each during 2015.

Rape (*Section 376 IPC*): Incidence: 10,854 Rate: 2.4

3.8 Infancy

A total of 10,854 cases of child rapes under *section 376 of IPC* were registered in the country during 2015 in comparison to 13,766 cases in 2014 with a decrease of 21.1% during 2015 over 2014. Maximum number of child rape cases were reported in Maharashtra (2,231 cases) followed by Madhya Pradesh (1,568) and Odisha (1,052 cases). Crime rate was 2.4 under rape cases.

(2) Crime against Children under Special and Local Laws (SLL)

(i) *Prohibition of Child Marriage Act 2006*

(ii) *Transplantation of Human Organs Act 1994** (for persons below 18 years of age)

(iii) Child Labour (Prohibition & Regulation) Act 1986*

(iv) *Immoral Traffic (Prevention) Act 1956**

(v) Juvenile Justice (Care & Protection of Children) Act 2000*

(vi) *Protection of Children from Sexual Offences Act 2012**

Sexual Harassment (*Section 354A, IPC*): Incidence: 3,350 Rate: 0.8

A total of 3,350 cases of "Sexual Harassment" of children were registered during the year 2015. Maharashtra (1,043 cases), Uttar Pradesh (729 cases) and Madhya Pradesh (471 cases) have reported high number of such cases in the country. Crime rate was 0.8 at all India level under this head with highest in Mizoram (5.7) and Delhi (4.8).

Assault or Use of Criminal Force to Women (Girl Child) with Intent to Disrobe (*Section 354B IPC*): Incidence: 540 Rate: 0.1

A total of 540 cases under "Assault or uses of criminal force to women (girl child) with intent to disrobe" were registered during the year 2015. Uttar Pradesh (104 cases), UT of Delhi (82 cases) and Maharashtra (77 cases) have reported high number of such cases in the country. Crime rate was 0.1 at all India level under this head wherein the highest such crime rate was in Delhi (1.5) and followed by Tripura (1.0).

Voyeurism (*Section 354C IPC*): Incidence: 51 Rate: Negligible

A total of 51 cases of "Voyeurism" were registered during the year 2015. Maharashtra (12 cases), Delhi UT & Telangana (6 cases each) have reported high number of cases in the country. Total numbers of victims were 56 in 51 cases.

Stalking (*Section 354D IPC*): Incidence: 1,020 Rate: 0.2

A total of 1,020 cases of "Stalking" of children were registered during the year 2015. Maharashtra (422 cases), Delhi Union Territory (169 cases) and Telangana (135 cases) have reported high number of such cases in the country. Crime rate was 0.2 at all India level under this head with highest in Delhi Union Territory (3.0) and followed by Andaman & Nicobar Island (1.5).

Insult to the Modesty of Women (Girl Child) *Section 509 IPC*): Incidence: 348 Rate: 0.1

A total of 348 cases of "Insult to the modesty of women" (girl child) were registered during the year 2015. Maharashtra (91 cases) and Telangana (59 cases) have reported high number of such cases in the country. Crime rate was 0.1 at all India level under this head with highest in Delhi (0.9) followed by Andhra Pradesh (0.3).

Kidnapping & Abduction of Children: Incidence: 41,893 Rate: 9.4

A total of 41,893 cases of "kidnapping & abduction" of children were registered during the year 2015 as compared to 37,854 cases in the previous year showing an increase of 10.7%. Maharashtra (6,960 cases) followed by Delhi (6,881 cases) have reported high number of such cases in the country. Crime rate was 9.4 at all India level under this head with highest in Union Territory of Delhi (122.9) and followed by Chandigarh (41.0).

A total of 23,462 cases of "kidnapping & abduction" of children were registered under *section 363 IPC*, with 24,304 victims. Maximum numbers of such victims were from Union Territory of Delhi (7,257 victims).

A total of 12,516 cases of "kidnapping & abduction of women (girls children) to compel her for marriage" were

registered with crime rate of 2.8 at all India level. Maximum such victims were reported from Uttar Pradesh (4,462 victims).

A total of 192 cases of “kidnapping & abduction in order to Murder” were registered under *section 364 IPC*, with 192 victims. Maximum such victims were from Uttar Pradesh (129 victims). A total of 142 cases of kidnapping or abduction for ransom etc. were registered under *section 364A IPC*, with 147 victims. Maximum such victims were from Uttar Pradesh (29 victims).

TABLE-3

INCIDENTS OF CRIMES AGAINST CHILDREN AND % CHANGE IN 2015 OVER 2014

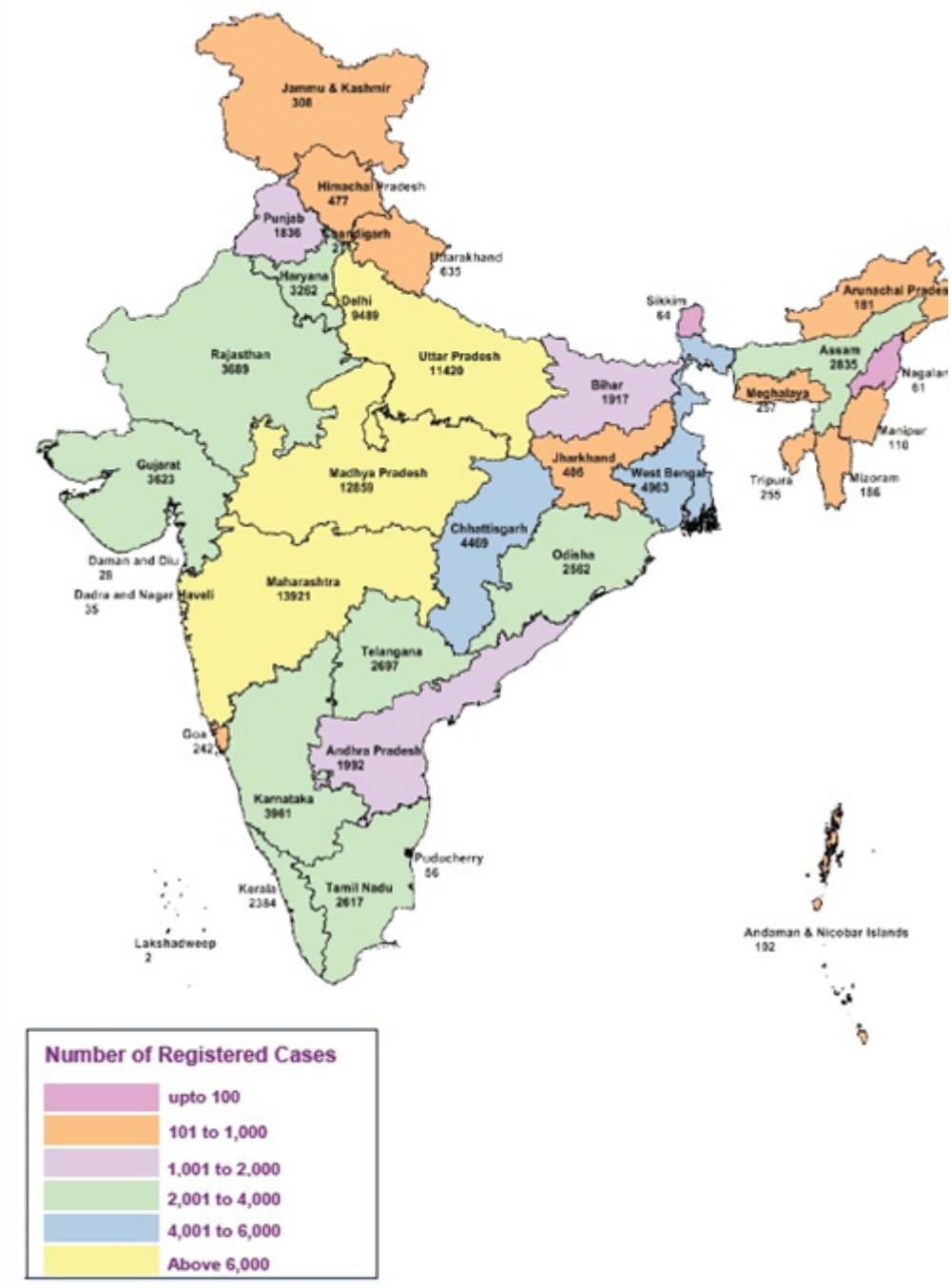
sl. No.	Crime Head	Year			% Variation in 2015 over 2014
		2013	2014	2015	
(1)	(2)	(3)	(4)	(5)	(6)
1.	Murder	1657	1817	1758	-3.2
2.	Attempt to Commit Murder*	-	840	276	-67.1
3.	Infanticide	82	121	91	-24.8
4.	Rape	12363	13766	10854	-21.2
5.	Assault on Women (Girls Children) with Intent to Outrage their Modesty*	-	11335	8390	-26.0
6.	Insult to the Modesty of Women (Girls Children)*	-	444	348	-0.3
7.	Kidnapping & Abduction	28167	37854	41893	10.7
8.	Foeticide	221	107	97	-9.3
9.	Abetment of Suicide	215	56	51	-8.9
10.	Exposure & Abandonment	930	983	885	-10.0
11.	Procuration of minor girls	1224	2020	3087	52.8
12.	Importation of girls from foreign country (below 18 years)*	-	2	2	0.0
13.	Buying of girls for prostitution	6	14#	11#	-21.4
14.	Selling of girls for prostitution	100	82#	111#	35.4
15.	*Prohibition of Child Marriage Act*	222	280	293	4.6

3.8 Infancy

sl. No.	Crime Head	Year			% Variation in 2015 over 2014
		2013	2014	2015	
(1)	(2)	(3)	(4)	(5)	(6)
16.	Transplantation of Human Organs Act*	-	1	0	-100.0
17.	*Child Labour (Prohibition and Regulation) Act**	-	147	251	70.7
18.	Immoral Trafficking (P) Act*	-	86	58	-32.6
19.	Juveniles Justice (C&P) of Children Act*	-	1315	1457	10.8
20.	*Protection of Children from Sexual Offences Act 2012**	-	8904	14913	67.5
21.	Un-natural Offences*	-	765	814	6.4
22.	Human Trafficking (*S 370 & 370A IPC*)*	-	-	221&	-
23.	Other Crimes	13037	8484	8311	-2.0
24.	**Total**	**58224**	**89423**	**94172**	**5.3**

CASES REGISTERED UNDER CRIME AGAINST CHILDREN DURING 2015 (ALL INDIA 94, 172)

3.8 Infancy



Crime in India-2015, p 94.

TABLE-4

CASES REGISTERED AGAINST CHILDREN DURING 2015

All India 94,172

State-wise

3.8 Infancy

Sl. No.	Name of State	Incidence of Crime	Sl. No.	Name of State	Incidence of Crime
1	Andhra Pradesh	1992	2	Assam	2835
3	Bihar	1917	4	Jharkhand	406
5	Goa	242	6	Gujarat	3623
7	Haryana	3262	8	Kerala	2384
9	Madhya Pradesh	12859	10	Chhattisgarh	4469
11	Tamil Nadu	2617	12	Maharashtra	13921
13	Karnataka	3961	14	Mizoram	186
15	Odisha	2562	16.	Rajasthan	3689
17	Uttar Pradesh	11420	18	Punjab	1836
19	Uttarakhand	635	20	West Bengal	4963
21	Jammu and Kashmir	308	22	Nagaland	61
23	Himachal Pradesh	477	24	Manipur	110
25	Meghalaya	257	26	Tripura	255
27	Sikkim	64	28	Arunachal Pradesh	181
			29	Telangana	2697

Union territories

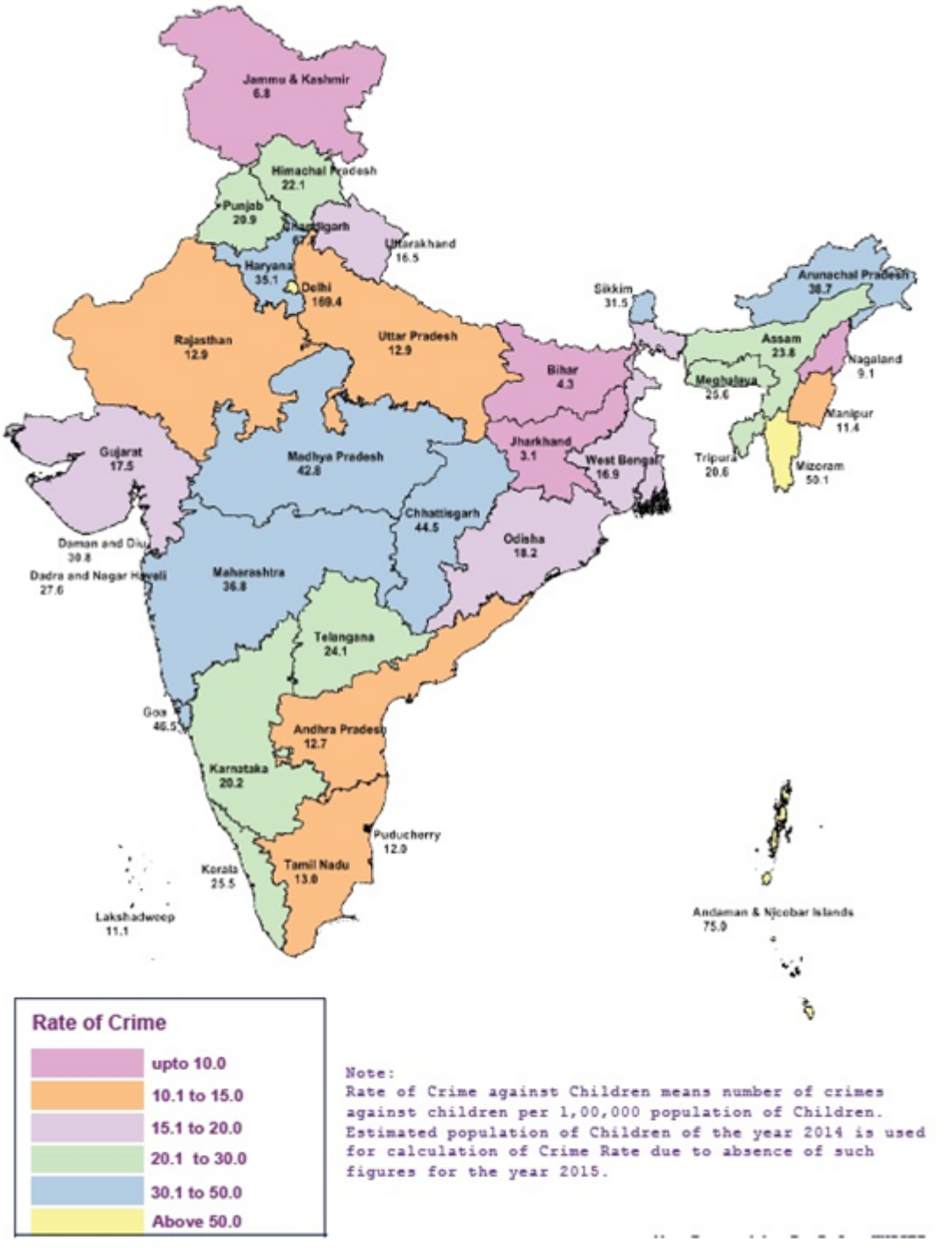
Sl. No.	Name of territory	Incidence of crime	Sl. No.	Name of territory	Incidence of crime
1	Delhi	9489	2	Lakshadweep	2
3	Chandigarh	271	4	Dadar and Nagar Haveli	35
5	Daman and Diu	28	6	Puducherry	56
7	Andaman and Nicobar	102			

RATE OF CRIME AGAINST CHILDREN DURING 2015

(ALL INDIA 21.1)

FIGURE 5

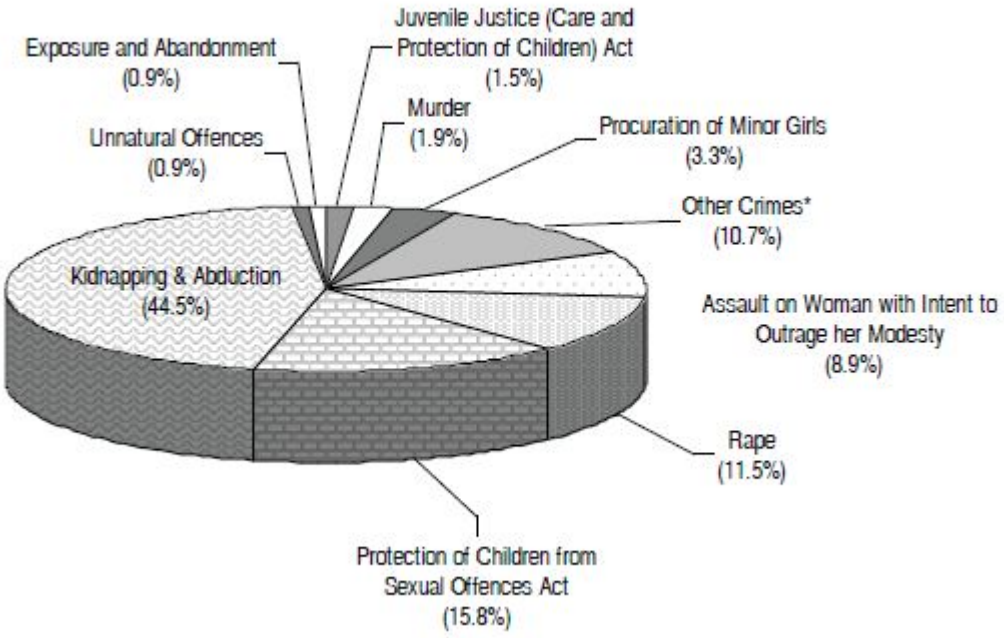
3.8 Infancy



Crime in India-2015, p. 95.

CRIME HEAD-WISE PERCENTAGE DISTRIBUTION OF CRIME AGAINST CHILDREN DURING 2015

3.8 Infancy

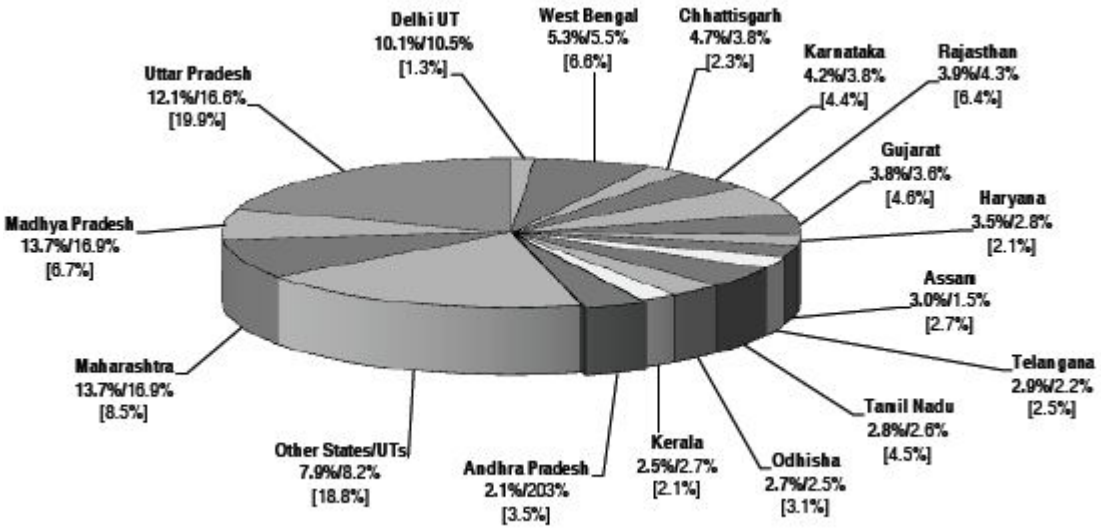


*

1	Unnatural Offences	0.9%
2	Exposure and Abandonment	0.9%
3	Juvenile Justice *CPC* Act	1.5%
4	Murder	1.9%
5	Procuration of Minor Girls	3.3%
6	Other Crimes	10.7%
7	Assault on Woman with Intent to Outrage her Modesty	8.9%
8	Rape	11.5%
9	*Protection of Children from sexual Offences Act*	15.8%
10	Kidnapping and Abduction	44.5%
	Total	100%

STATE/UT-WISE DISTRIBUTION OF CRIME AGAINST CHILDREN DURING 2015/2014

3.8 Infancy



States/Union Territories	Percentage
Maharashtra	8.5%
Madhya Pradesh	6.7%
Uttar Pradesh	19.9%
Delhi-Union Territory	1.3%
West Bengal	6.6%
Chattisgarh	2.3%
Karnataka	4.4%
Rajasthan	6.4%
Gujarat	4.6%
Haryana	2.1%
Assam	2.7%
Telangana	2.5%
Tamil Nadu	4.5%
Odhisa	3.1%
Kerala	2.1%
Andhra Pradesh	3.5%
Other States/Union Territories	18.8%
Total	**100%**

Other States and Union Territories include Bihar, Punjab, Uttarakhand, Himachal Pradesh, Jharkhand, Goa, Jammu & Kashmir, Meghalaya, Tripura, Chandigarh, Arunachal Pradesh, Mizoram, Manipur, Nagaland, Sikkim, A & N Islands, Puducherry, Dadar & Nagar Haveli, Daman & Diu and Lakshadweep.

3.8.2 Juvenile Justice (Care and Protection of Children) Act 2000

To protect and safeguard the interest of children against exploitation and child abuse, the General Assembly of the United Nations adopted the Convention on the Rights of the Child on 20 November 1989, wherein a set of standards to be adhered to by all State parties in securing the best interest of the child has been prescribed. The Convention laid emphasis on social re-integration of child victims, to the maximum possible extent without resorting to judicial proceedings. The Government of India, having ratified the Convention on 11 December 1992, redrafted the existing law relating to juveniles[50] in 2000, in consonance with the standards prescribed in the Conventions of the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of the Juvenile Justice 1985 (the Beijing Rules), the United Nations Rules for the Protection of the Juveniles Deprived of their Liberty (1990) and other relevant international instruments. Juvenile Justice Act 1986 was accordingly repealed and Juvenile Justice (Care and Protection of Children) 2000 was enacted by the Parliament and came into force on 30 December 2000.[51]

The 2000 Act is a comprehensive piece of legislation consisting of 70 sections divided into five chapters. Chapter I, consisting of three sections is the preliminary Chapter. Section 2 defines the various terms used in the Act. Chapter 2 (sections 4 to 28) is titled as “Juvenile in Conflict with Law” instead of “Delinquent Juveniles” as provided in Chapter 4 of Juvenile Justice Act 1986. Chapter 3 (sections 29-39) provide for *constitution* of Child Welfare Committee (section 29). The Act provides for the establishment of children’s home (section 34) and shelter homes (section 37) to look after the interest of the child in the need of care and protection. To monitor proper functioning of these institutions, section 36 provides for social auditing by Central and State Governments. Chapter 4 (sections 40 to 45), is devoted to rehabilitation and social integration of children by implementation of various schemes, such as adoption, foster care, sponsorship and sending the child to aftercare organisations (section 40). Chapter 5 (sections 46-70) deals with miscellaneous provisions.

Some of the salient features of the Act are noteworthy and will go a long way in tackling the problems of delinquent and neglected children in proper atmosphere with the ultimate goal of rehabilitation and social integration.

(1) *Juvenile:* Section 2 (k) has widened the scope of the term juvenile to include “juvenile” or “child”, and the artificial distinction of age between male (16) and female (18) child as provided under the earlier Act 53 of 1986 has been abolished. Now it is fixed at 18 years for both boys and girls equally. It is a welcome step.

(2) *Juvenile in conflict with law:* Section 2 (1) has preferred to use the words “juvenile in conflict with law” in place of “delinquent juvenile” for a juvenile who is alleged to have committed an offence as provided in section 2 (e) of Juvenile Justice Act 1986.

(3) *Child in need of care:* Section 2 (d) gives a detailed account of the conditions when a child will be treated as “child in need of care and protection”.[52]

(4) No juvenile (i.e. a child below 18) shall be sentenced to death or imprisonment for life for any offence under any law (section 16).

(5) A classification of children according to the age group, viz, (i) 7-12, (ii) 12-16, and (iii) 16-18 have been made to give proper attention considering the physical, mental status, nature and gravity of the offence committed by the child for induction in observation homes have been made (section 8).

(6) A provision for separate trial of juveniles in “conflict with law” has been provided (section 18), and provisions of Chapter VIII of *Code of Criminal Procedure 1973* relating to the “Security for keeping the Peace and Good behaviour” will not be applicable in case of juveniles (section 17).

(7) No appeal shall lie from any order of acquittal made by the Juvenile Justice Board[53] for trial of a juvenile alleged to have committed an offence [section 52 (2)(a)]; and no second appeal shall lie from any order of the Court of Sessions passed in appeal [section 52 (3)].

(8) To handle the problems of juvenile crimes expeditiously, a provision for the establishment of special juvenile police units has been made in every police station, which will be manned by trained officers to deal the problems of juveniles in a friendly manner [section 63 (1)].

3.8.3 Trial of Juvenile at Sixteen under Penal Code of India

In view of young criminals, a juvenile accused of committing heinous crimes of murder and rape, went unpunished because of lenient provisions under the Indian law. The government has finally bow down to the public pressure, for reforming tough laws against young criminals and has amended *Juvenile Justice (Care and Protection of Children) Act 2000*, vide *Juvenile Justice (Care and Protection of Children) Act 2015*. According to the amended Act, the

Juvenile Justice Board will determine whether a juvenile between 16-18 years, who is accused of different crimes, falls under the differentiated provisions of which the categories are: “petty”, “serious” and “heinous”.

The amendment happened in the wake of the “Nirbhaya gang rape” in Delhi in December 2012. One of the accused in the crime, who was the most brutal of all in the gang that ravaged a physiotherapy student shook the nation because of his sheer monstrosity; is a juvenile. To soften the rigor of law, a provision has been made in the Amended Act that finally the Juvenile Justice Board will decide as to whether a juvenile between the ages of 16-18 years is fit enough to be tried as juvenile or as an adult. The board will consist of social psychologists and social experts who will decide the matter as to the desirability of trial as a juvenile or adult of a child between 16-18 years. This is a welcome step and the need of the hour in view of the prevailing circumstances in the society.[54]

3.8.4 Child Crimes vis-à-vis Violence in Media

In recent years’ due to media and television serials depicting violent crimes and prevailing unhealthy conditions in a family or neighbourhood with ever growing number of slums, family discord, disintegration, etc, have led to the feeling of insecurity amongst children.

A study of the violence on Indian television and its impact on children, commissioned by the UNESCO, revealed clearly the act of “bombarding young minds with all kinds of violent images cutting across channels, programs and viewing times”.[55]

These visuals have long lasting impact on children as a result, they try to imitate and practice in actual life without understanding the nature and consequences of such acts. For instance, a six-year old boy of Lucknow leapt off the balcony of his second floor flat trying to imitate a bungee-jumper of a soft drink commercial and in the process, he died.[56]

3.8.5 Protection of Children from Sexual Offences Act, 2012

In 2012, an Act to protect children (below 18 years) from offences of sexual assault, sexual harassment and pornography and provide for establishment of special courts for trial of such offences and for matter connected therewith was enacted. It is a small Act consisting of 48 sections. The Act is divided into IX Chapters. Chapter I is preliminary consisting of two sections – Title and Definitions, Chapter II consists 12 sections bifurcated into four sub-sections. Sub-section A deals with Penetrative Sexual Assault and Punishment. Sections 3 to 4; sub-section B defines Aggravated Penetrative Sexual Assault and Punishment in sections 5 and 6; sub-section C deals with Sexual Assault and Punishment in sections 7 and 8; sub-section D consisting of two sections 9 and 10 that deals with Aggravated Sexual Assault and Punishment; sub-section E in sections 11 and 12 provide punishment for sexual harassment. Chapter III consisting of 3 sections 13, 14 and 15 deals with cases when child is used for pornographic purposes. Chapter IV deals with Abetment and to commit an offences under sections 16, 17 and 18. Chapter V in 5 sections 19 to 23 provide procedure for reporting of cases and Chapter VI deals with procedure to recording of the statement of child. Chapter VII in section 28 to 32 provide for establishment of Special Courts and Chapter VIII in sections 33 to 38 provide procedure and powers of Special Court. Last Chapter IX deals with miscellaneous provisions in 7 sections 39 to 42A and 43, 44.

A self-contained comprehensive legislation be enacted inter alia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well-being of the child at every stage of the judicial process incorporating child friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.”

Alakh Alok Srivastava v UOI[57]

The Judgment of the court was delivered by Dipak Misra, CJ:—

The instant writ petition initially raised two issues, first, the treatment of an eight month old female child who had become a victim of a crime committed under *Protection of Children from Sexual Offences Act 2012* (“the *POCSO Act*”) and the second, speedy trial and monitoring of the trials under the *POCSO Act* in a child friendly court regard being had to the letter and spirit of the provisions contained in the said Act.

The first prayer was dealt vide orders dated 31 January 2018, 1 February 2018 and 12 March 2018 as per direction of the court by the doctors of All India Institute of Medical Sciences, New Delhi.

Regarding second prayer the court issued the following directions:—

(i) The High Courts shall ensure that the cases registered under the *POCSO Act* are tried and disposed of by the Special Courts and the presiding officers of the said courts are sensitized in the matters of child protection and psychological response.

(ii) The Special Courts, as conceived, be established, if not already done, and be assigned the responsibility to deal with the cases under the *POCSO Act*.

(iii) The instructions should be issued to the Special Courts to fast track the cases by not granting unnecessary adjournments and following the procedure laid down in the *POCSO Act* and thus, complete the trial in a time-bound manner or within a specific time frame under the Act.

(iv) The Chief Justices of the High Courts are requested to constitute a Committee of three Judges to regulate and monitor the progress of the trials under the *POCSO Act*. The High Courts were three Judges are not available the Chief Justices of the said Courts shall constitute one Judge Committee.

(v) The Director General of Police or the officer of equivalent rank of the States shall constitute a Special Task Force which shall ensure that the investigation is properly conducted and witnesses are produced on the dates fixed before the trial courts.

(vi) Adequate steps shall be taken by the High Courts to provide child friendly atmosphere in the Special Courts keeping in view the provisions of the *POCSO Act* so that the spirit of the Act is observed.

The Registry is directed to communicate this order to the Registrar General of the High Courts so that it can be immediately implemented.

With the aforesaid directions, the writ petition stands disposed of.

Presumption as to age of discretion is rebuttable—conviction upheld—Supreme Court—1977

Hiralal Mallick v State of Bihar,

AIR 1977 SC 2236 : (1977) 4 SCC 44 : 1978 SCR (1) 301

Facts: The appellants, a 12 year old boy, along with two others were convicted of murdering a person. In appeal, the High Court set aside the conviction for murder and convicted him under *section 326 of IPC, 1860*. Further, the sentence of the appellant was reduced on the ground of him being under age of 12.

Per Krishna Iyer, J:

Was Hiralal Mallick guilty under *section 326 of the IPC, 1860* as the High Court has found, or was he liable only under section 324 as the counsel for the appellant urges?

He was 12; he wielded a sword; he struck on the neck of the deceased; he rushed to avenge; he ran away like the rest. No evidence as to whether he was under twelve, as conditioned by section 83 of the Code is adduced; no attention to feeble understanding or youthful frolic (lively way) is addressed. The prima facie inference of intent to endanger the life of the deceased with a sharp weapon stands unrebutted. Indeed, robust realism easily imputes *doli capax* to a 12 year old, who cuts on the neck of another with a sword; for, if he does not know this to be wrong or likely to rip open a vital part he must be very abnormal and in greater need of judicial intervention for normalisation.

The conviction under *section 326, IPC, 1860*, therefore, must be reluctantly sustained. Fettered by the law, the conviction was upheld.

Juvenility – Determination thereof – section 7A of Juvenile Justice (Care and Protection of Children) Act 2000 and rule 12 of Juvenile Justice (Care and Protection) Rules, 2007 – The benefit of the principle of benevolent legislation attached to the Act would apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well-planned manner reflecting his maturity of mind

rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue. [27] – Supreme Court 2016

Parag Bhati (Juvenile) thr. Legal Guardian-Mother-Smt. Rajni Bhati v State of UP[58]

Per AK Sikri, J:

The appellant-accused was convicted under *sections 302*, *394*, *504* and *506* of the *Penal Code of India*. The accused got arrested with regard to the crime in question and was produced before the Juvenile Court and was remanded and kept in Juvenile Home. The Chief Medical Officer opined that the age of the appellant was about 19 years and was a major and accordingly, transferred the case before the Chief Judicial Magistrate. The appellant preferred an appeal against the said decision before the District and Sessions Judge which was dismissed. Revision filed by the appellant in the High Court was dismissed.

While dismissing the appeal the Apex Court held: (i) Under section 7A of the Act, the court is enjoined to make an inquiry and take such evidence as may be necessary to determine the age of the person who claims to be a juvenile. However, under rule 12, the Board is enjoined to take evidence by obtaining the matriculation certificate if available, and in its absence, the date of birth certificate from the school first attended and if it is also not available then the birth certificate given by the local body. In case any of the above certificate are not available then it can seek medical opinion from a duly constituted medical board to determine the age of the accused person claiming juvenility. [16] (ii) The Board, on merits, conducted proceedings to register a case against father of the appellant for producing forged evidence and giving false statement before the Court which fact had already been proved that the documents which were produced on behalf of the appellant were forged. [21] (iii) The Board did not give the benefit of one year as provided in rule 12 of the rules in favour of the appellant on the ground that the complainant had filed the photocopy of Panchayat Electoral Roll, according to which, the age had been mentioned as 19 years which was issued much before the date of the incident. Therefore, the Board rightly did not give the benefit of one year to the appellant under the rules. [22] (iv) If there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of incident and the documentary evidence at least *prima facie* proves the same, he would be entitled to the special protection under the Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach cannot be permitted as the Courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice.

Appeal dismissed.

84. Act of a person of unsound mind.—Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

---

45 *Blackstone's Commentaries,* vol IV, pp 20, p 22. Blackstone states that, infancy is a defect of the understanding, and infants under the age of discretion ought not to be punished by any criminal prosecution whatsoever. Hale PC 27, p 28; *Marsh v Loader,* (1863) 14 CHNS 535; See Ratanlal and Dhirajlal, *Law of Crimes,* 23rd Edn, 1991, pp 220-221.

46 Children and Young Persons Act 1989 (V16) section 127; Children's Protection and Young *Offenders Act* 1979 (SA), section 66. See L Waller and CR Williams, *Criminal Law: Text and Cases,* 7th Edn, Butterworths,1993, p 11.

47 "Forty-second Report of the Law Commission of India", 1971, pp 87-89. The full criminal responsibility, in India, commences after one has attained the age of 12 years, though civil liability commences only after one has completed 18 years.

48 Source: Basic materials of Juvenile justice system compiled by UN Institute for Asia and Far East, Thailand.

49 Crime in India-2015 p 93.

***** Collecting since 2014 in the revised proformae

***** Collecting since 2014 in the revised proformae

***** Collecting since 2014 in the revised proformae

***** Collecting since 2014 in the revised proformae

data collected under minor in place of girls only

data collected under minor in place of girls only

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***** Collecting since 2014 in the revised proformae

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***** Collecting since 2014 in the revised proformae

***** Collecting since 2014 in the revised proformae

***** Collecting since 2014 in the revised proformae

& included for the first time in 2015

***** ***Cases of attempt to commit murder, Transplantation of Human Organs Act, Importation of girls from foreign country, Buying of minors for prostitution, Abetment of suicide of child, Selling of minors for prostitution, the *Immoral Traffic (Prevention) Act*, Foeticide, Infanticide, the Child Labour (Prohibition & Regulation) Act, the *Prohibition of Child Marriage Act*, Insult to the modesty of women (girls children) have been clubbed in Other Crimes.**

50 Juvenile Justice Act 1986 is repealed *vide* section 69 (1) of the Act 56 of 2000.

51 The Act 56 of 2000 envisages to consolidate and amend the law relating to "juveniles in conflict with law" and "children in need to care-and-protection", by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of the matters in the best interest of the children and for their ultimate rehabilitation through various institutions.

52 *Section 2 (d) of the Juvenile Justice (Care and Protection of Children) Act*, "child in need of care and protection" means a child—

(i) who is found without any home or settled, place or abode and without any ostensible means of subsistence,

(ii) who resides with a person (whether a guardian of the child or not) and such person—(a) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or (b) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person,

(iii) who is mentally or physically challenged or ill children or children suffering from terminal disease or incurable disease having no one to support or look after,

(iv) who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,

(v) who does not have parent and no one is willing to take care of or whose parents have abandoned him or who is missing and run away child and whose parents cannot be found after reasonable inquiry,

(vi) who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,

(vii) who is found vulnerable and is likely to be inducted into drug abuse or trafficking,

(viii) who is being or is likely to be abused for unconscionable gains,

(ix) who is victim of any armed conflict, civil commotion or natural calamity.

53 Section 4 provides for the *constitution* of Juvenile Justice Board for a district or group of districts for discharging the duties, conferred or imposed on such Boards in relation to the juveniles in "conflict with law". The Board shall consist of a metropolitan magistrate or a judicial magistrate of first class and two social workers of whom one shall be a woman, forming a Bench and every such Bench shall have powers conferred on a metropolitan magistrate *vide Code of Criminal Procedure 1973*. Sections 5 and 6 provide for procedure to be followed for discharging its duties assigned under the Act.

54 **See** Times of India, dated 23 April, 2015, at pp 1, 9 (Pune edition).

55 See Sweta Rajpal, *Hindustan Times,* 29 October 2000, p 11; See KD Gaur, *A Textbook on the Indian Penal Code,* 6th Edn, 2016, commentary under sections 82-83.

56 Vandana Majumdar, "Growing Up Violent", *Hindustan Times,* 29 October 2000, p 11. See also Vandana Majumdar, "Alarming Increase in Violence Among Children", *Hindustan Times,* New Delhi edition, 29 October 2000, p 11.

57 *AIR 2018 SC 2440* : *2018 (3) Bom CR 746* : 2018 (2) Crimes 324 : 2018 Cr LJ 2929 : 2018 (2) Jab LJ 259 : JT 2018 (4) SC 625 : *2018 (7) Scale 88* : 2018 SCC Online SC 478. Decided on 1 May 2018. Dipak Misra, CJ and AM Khanwilkar and DY Chandrachud, JJ delivered the judgment.

58 *AIR 2016 SC 2418* : 2016 (2) ALD (Cri) 212 (SC) : 2016 (4) ALJ 266 : 2016 (95) All CC 552 : 2016 Cr LJ 2928: 2016 (2) Crimes 268 (SC) : 2016 (3) JCC 1836 : 2016 (2) RCR (Criminal) 1031: 2016 (5) Scale 298 : *2016 (12) SCC 744* : 2016 (4) Supreme 174, AK Sikri and RK Agrawal, JJ.

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3.9 Unsoundness of Mind

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

3 GENERAL EXCEPTIONS

3.9 Unsoundness of Mind

Unsoundness of mind is a complete defence to a criminal charge. It is based on the assumption that one who is insane has no mind and hence, cannot have necessary mens rea to commit a crime.[59]

Being deprived of free will, a mad man is placed in an even worse condition than a child, because the latter can at least control his will and regulate his conduct, whereas the former cannot. Moreover, the act of an insane man, being unintentional and involuntary, no court can correct him by way of punishment.[60] At the same time, people are to be protected from being attacked by maniacs and accordingly, a provision has been made under *Code of Criminal Procedure 1973* for the detention and care of persons of unsound mind.[61]

Unsoundness of mind or insanity,[62] according to medical science, is a disease of the mind, which impairs the mental faculty of man. In law, insanity means a disease of mind which impairs the cognitive faculty, namely, the reasoning capacity of a man to such an extent as to render him incapable of understanding the nature and consequences of his act. It excludes from its purview, the insanity caused due to emotional and volitional factors. It is only insanity of a particular or appropriate kind, which is regarded as insanity at law that will excuse a man from criminal liability. The legal concept of insanity widely differs from that of the medical concept.

A number of tests were laid down from time to time for the purpose.[63] The kind and degree of insanity available as a defence to a crime has many times been defined. However, the most notable of all is the “right and wrong test” formulated in *R v M’Naghten*.[64] The law of insanity is stated in the form of replies given by the fifteen judges of the House of Lords to the five questions put to them with a view of getting the law clarified on the subject. These questions and particularly answers to the second and the third questions have assumed great significance in as much as they find place in the penal codes of almost all the countries in the world. These questions were:

> *Question II—What are the proper questions to be submitted to the jury where a person, alleged to be afflicted with insane delusion respecting one or more particular subject or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?*

> *Question III—In what terms ought the question to be left to the jury as to the prisoner’s state of mind at the time when the act was committed?*

The answers to these questions were:

Every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and the quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Section 84 of IPC, 1860 has been drafted in the light of the replies to the second and the third questions. These rules are known as the *McNaughten* Rule. However, section 84 uses a more comprehensive term— "unsoundness of mind" instead of "insanity". As stated by Huda:[65]

> The use of the term "unsoundness of mind" has the advantage of doing away with the necessity of defining insanity and of artificially bringing within its scope various conditions and affections of the mind which ordinarily do not come within its meaning, but which nonetheless stand on the same footing in regard to exemption from criminal liability.

Section 84 embodies two different mental conditions to claim exemption from criminal liability, namely:

(i) the accused was incapable of knowing the nature of the act, owing to unsoundness of mind, or

(ii) the accused was precluded by reason of unsoundness of mind from understanding that what he was doing was either wrong or contrary to law.

The first case covers two situations, namely, involuntary actions and mistake of fact on account of unsoundness of mind. For instance, if a mad man cuts off the head of a person, whom he found sleeping on the road, because he thinks it would be fun to watch him looking about for his head when he wakes up, the act shows that that he did not know the nature and quality of his act. In fact, he had no idea that his fun would be lost, the moment the head is separated from the rest of the man's body and the man would never recover consciousness.

The second case covers those situations where a man by reason of delusion is unable to appreciate the distinction between right and wrong. For instance, in a case where the accused killed his uncle, by cutting his head and neck with a sword, and shouted "victory to *kali*" and thereafter, attempted to strike others including his father, it was held that the accused's case fell within the latter part of the section.[66] It was found that the accused was suffering from a fit of insanity when he attacked the deceased with the sword and was by reason of unsoundness of mind, incapable of knowing that he was doing an act which was wrong or contrary to the law and hence, was acquitted of the charge of murder.

The law on the point has been well summarised by their Lordships of the Calcutta High Court in *Queen-Empress v Kader Nasayer Shah, (*1896) ILR 23 Cal 604, in the following words:[67]

> It is only unsoundness of mind which materially impairs the cognitive reasoning faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act or that he is doing what is wrong or contrary to law... A person strikes another, and in consequence of an insane delusion thinks he is breaking a jar. Here he does not know the nature of the act. Or he may kill a child under an insane delusion that he is saving him from sin and sending him to heaven. Here he is incapable of knowing by reason of insanity, that he is doing what is morally wrong. Or he may, under insane delusion, believe an innocent man whom he kills, to be a man who was going to take his life; in which case, by reason of his insane delusion, he is incapable of knowing that he is doing what is contrary to the law.

Insanity in law defence to a charge of crime: test laid down—House of Lords— (Full Bench)—1843

R v Daniel McNaughten,

[1843] Revised Reports, vol 59 : 8 ER 718 (HL) : (1843) 10 Cl & F 200

Facts: The accused, Daniel McNaughten was charged for the murder of Edward Drummond (Secretary to the Prime Minister, Sir Robert Peel), by shooting him in his back, as he was walking. The accused was suffering from an insane delusion that Sir Robert Peel had injured him. He mistook Drummond for Sir Robert and so shot and killed him. The accused pleaded not guilty on the ground of insanity, his obsession with certain morbid (horrible) delusions.

The jury returned a verdict of not guilty on the ground of insanity.

This verdict and the question of the nature and extent of the unsoundness of mind, which would excuse the commission of a crime, attracted considerable attention. The matter was also debated in Parliament and it was

decided that the opinion of the judges of the House of Lords should be taken with a view to getting the law clarified on the point. Accordingly, the judges were requested to give their opinion to the five questions put to them. The famous *McNaughten rule,* which formulates the law of insanity, is based on the answers to the second and third questions.

Per Lord Tindall, CJ:

The first question is:

> What is the law with respect to alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons, as, for instance, whether at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

It was held, those persons who labour under such partial delusions only, and are not in other respects insane, notwithstanding the fact that the accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law.

If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree or reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

> If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?

The answer must of course, depend on the nature of the delusion, but, assuming that he labours under such partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempted from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The question last posed is,

> Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was laboring under any and if yes then what delusion, at the time?

In answer thereto, the medical man, under the circumstances supposed, cannot in strictness be asked about his opinion in the terms above stated, because each of those questions involve the determination of the truth of the facts deposed to, which is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted and are not disputed and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form though the same cannot be insisted on as a matter of right.

In *Mizzi v The Queen*,[68] the High Court of Australia held that when a defence of insanity to a criminal charge is strongly supported by expert evidence that the accused was suffering from a disease or disorder of the mind, namely paranoiac schizophrenia,[69] at the time of the commission of the offence; the charge should explain not only the test to be applied to determine the defence, but also the real meaning of expert evidence in its bearing upon

that test, and the considerations which may properly be used in deciding whether to accept or reject the evidence advanced.

This is an application for special leave to an appeal from an order of the full court of the Supreme Court of Victoria, refusing leave to appeal from a conviction for murder. The decision was that of majority of the court, Herring CJ and Gavan Duffy J, Monahan J dissenting.

On 23 December 1959 the prisoner killed a woman named Myrtle Bourke by stabbing her with a knife which he took from kitchen where they were at the time. She lived some door up the street. They had become acquainted and had established a sexual association.

He left her on the kitchen floor and went off to the police station and signed a written statement recounting what had occurred. At the trial his defence was insanity. The defence was supported by three physicians, psychiatrists, who were called to the prisoner. No evidence was called by the crown in rebuttal. The three physicians - two government officers and one private deposed to the paranoiac schizophrenia, as a result of which he had stabbed the women. They considered that in consequence of this disease or disorder he had no appreciation of the wrongness of his act and they went as far as saying that it might well be that he had not a full or sufficient appreciation of the nature and quality of his act. All three experts were of the opinion that he should be certified as an insane person.

While allowing the appeal, the court said:

We set aside the sentence and verdict upon the prisoner to enter a verdict of ‘not guilty upon the ground of insanity’ and to direct that the appellant be kept in strict custody, until becomes cure as per doctor’s observation.

***Sections 84*, *302* and *504 IPC* - Defence of Unsoundness of mind not tenable:**

The defence has not been successful in proving that “at the crucial point of time” or “at the time of doing the act” by unsoundness of mind, the accused/ appellant was incapable of knowing the nature of his act. Hence not entitled to the benefit of Exception 84 unsoundness of mind for murder – Supreme Court 2016. Appeal dismissed.

Uttam Nandram Somwanshi v State of Maharashtra[70]

Sessions Court acquitted accused/appellant on charge of murder under section 302 read with section 504 of Code, 1860 – Division Bench of High Court set aside acquittal order by holding accused guilty for offence of murder – Hence, present appeal – Whether accused was entitled for benefit of section 84 of Code Facts: The Division Bench of the High Court set aside the order of acquittal passed by the Sessions Court on the charge of murder under section 302 read with section 504 (intentional insult with intent to provoke breach of peace) of *Indian Penal Code, 1860* holding the accused/appellant guilty for the offence of murder. Hence, the present appeal. Held: (i) The Division Bench of the High Court with reference to the conduct of the accused seen before the incident, concluded that he was working to a plan. On the day he was produced before the Magistrate, there were no signs of unsoundness of mind. The defence had not been successful in proving that “at the crucial point of time” or “at the time of doing the act” by unsoundness of mind, the accused was incapable of knowing the nature of his act. Regarding evidence of unsoundness of mind brought on record was not regarding unsoundness of mind soon before or after the incident. Soon before the incident, the accused appeared to have conscientiously acted upon the plan and, therefore, the Division Bench of the High Court was rightly not agreed with the finding of fact recorded by the Trial court on the charge holding him not guilty. The case of the Accused did not fall within the purview of general exceptions available under *section 84 of IPC, 1860*. The conclusion arrived at by the Division Bench was based on proper appreciation of the evidence. More so, there was absence of defence for unsoundness of mind the accused on the date of the incident.

Appeal dismissed conviction upheld.

Irresistible impulse per se no defence to a charge of crime—Appeal Allowed-Trial Court, verdict of conviction upheld—Privy council—1960

Attorney General for the State of South Australia v John Whelan Brown,

[1960] AC 432 (PC) : *[1960] 1 All ER 734* :

[1960] UKPC 10 : [1960] WLR 588

Facts: The respondent was charged of murder by shooting the station manager through the head. The only evidence pleaded by the accused was insanity. The medical evidence for the respondent was inter alia that he was a schizoid (mental disease) personality and that at the moment of shooting, he knew the nature and quality of his act, but did not know that what he was doing was wrong. The trial judge directed the jury that "uncontrollable impulse" was no defence in law. The respondent was found guilty and sentenced to death, and his first appeal having been dismissed, he appealed to the High Court of Australia, who quashed the conviction and ordered a new trial.

The judgment and order of the High Court of Australia was reversed and the trial court verdict was upheld by the Privy Council.

Per Lord Tucker:

The words "true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree" in the above passage in the High Court's judgment implied erroneously, "that the law knew and recognized uncontrollable impulse as a symptom of legal insanity within the meaning of the *McNaughten Rules,* and that it was the judge's duty to instruct the jury as a matter of law, and in the absence of any medical evidence, that it might afford a strong ground for the inference that the prisoner was labouring under such a defect of reason from disease of mind as not to know that he was doing what was wrong". Where, however, evidence had been given that irresistible impulse was the symptom of the particular disease of mind, from which a prisoner was said to be suffering, and as to its effect on his ability to know the nature and quality of his act or that his act was wrong, it would be the duty of the judge to deal with the matter in the same way as any other relevant evidence given at the trial.

There was on the evidence ground for surmising that the respondent might have suffered from such abnormality of mind as might, under the amendment of the law in England (Homicide Act 1957) section 2 (1) be held to diminish his responsibility.

Diminished responsibility is a partial defence to a charge of murder. It reduces the criminal liability for murder to manslaughter. The rule of diminished responsibility is invoked, where the accused, charged of murder, is suffering from a disease of mind which has substantially impaired his mental responsibility. However it does not fall within the provisions of the *McNaughten Rule.* In such a case, the accused is charged of manslaughter (i.e. culpable homicide) and not murder. See Chapter 10 under Exception to section 300 under caption Diminished Responsibility for Homicide Act 1957, section 2 and commentary.

Diminished Responsibility: Alcoholic dependency syndrome caused by involuntary drunkenness that substantially impaired mental capacity entitles the defence of diminished responsibility—UK Supreme Court—2010

R v Stewart,

[2009] 1 WLR 2507 : (2010) All ER 260

The defendant and the victim had been drinking heavily and were intoxicated. During the course of night the defendant attacked the victim, causing him fatal injuries that resulted in his death. He was charged and convicted for murder.

Allowing the defendant's plea that his consumption of liquor was involuntary and that his action at the time when he killed the decreased resulted from abnormality of mind caused by disease or injury, and so he was entitled to the defence of diminished responsibility and was held liable for manslaughter and not murder.

Diminished responsibility - Defendant charged with murder after killing partner while being affected by drink - Whether voluntary acute intoxication is capable of founding partial defence of diminished responsibility.

Regina v Dowds,

[2012] EWCA Crime 281 : *[2012] 1 WLR 2576*

The defendant killed his partner by inflicting 60 knife wounds on her. At his trial for murder his evidence was that, although not an alcoholic, he was a binge (excessive) drinker and had been so drunk at the time of killing that he could not remember it. He sought to rely on the partial defence of diminished responsibility, pursuant to section 2 (1) of Homicide Act 1957, as substituted by section 52 (1) of Coroners and Justice Act 2009, contending that acute intoxication was a "recognised medical condition" within section 2 (1)(a), as substituted, and so capable of giving rise to mental abnormality so as to found the partial defence. The judge ruled that simple voluntary and temporary drunkenness was incapable of founding the partial defence of diminished responsibility and, consequently, diminished responsibility was not raised before the jury. The defendant was convicted.

On defendant's appeal—

Held, dismissing the appeal, that the amendments to section 2 of the Homicide Act 1957 introduced by section 52 of Coroners and Justice Act 2009 had been made against the background of a well-established rule that the voluntary intoxication could not, without more, found diminished responsibility; that there had been no dissatisfaction with that rule of law and if the parliament had meant to alter it or depart from it, it would have made its intention explicit; that such an intention could not be inferred from the adoption in new formulation of diminished responsibility of the expression "recognised medical condition" in section 2 (1)(a) of the Act, which has been intended to enable law to respond to developments in medicine and the psychiatric field, rather than to alter the law on voluntary acute intoxication and was not capable of being relied upon to found the partial defence of diminished responsibility.

Inability to exercise will power to control physical acts due to abnormality of mind entitles the accused the benefit of diminished responsibility—Court of Criminal Appeal—1960

R v Bryne,

(1960) 2 QB 396 (CCA, England)

Facts: The accused was charged for strangling a girl and mutilating her dead body. It was found that the accused was a sexual psychopath and that he could not control himself at the material time. The trial judge directed the jury to the effect that if he killed the girl under an abnormal sexual impulse or urge which was so strong that he found it difficult or impossible to resist, but otherwise he was normal, the plea of diminished responsibility would fail. He was convicted of murder. The Court of Appeal substituted a verdict of manslaughter within the meaning of section 2 of Homicide Act of 1957.

Per Lord Parker, CJ:

"Abnormality of mind" means a state of mind so different from that of ordinary human beings that a reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment. The expression "mental responsibility for his acts" points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts...

The question was whether the abnormality substantially impaired his mental responsibility for his acts in doing or being a party to the killing. This is a question of degree, essentially one for the jury. Medical evidence is, of course, relevant, but the question involves a decision not merely as to whether there was some impairment of the mental responsibility of the accused for his acts but whether such impairment can properly be called "substantial", a matter upon which juries may quite legitimately differ from doctors.

Furthermore, in a case where the abnormality of mind is one which affects the accused's self-control the step between:

(i) "he did not resist his impulse" and;

(ii) “he could not resist his impulse” is, as the evidence in this case shows, one which is incapable of scientific proof.

The medical evidence as to the appellant’s ability to control his physical acts at the time of the killing was all one way. The evidence of the revolting circumstances of the killing and the subsequent mutilations, as of the previous sexual history of the appellant pointed, to the conclusion that the accused was what would be described in ordinary language as on the border-line of insanity or partially insane.

Appeal allowed.

Barbados: Nature of killing, conduct of the accused, before, at the time of and after the killing, including history of abnormality of mind of the accused required to determine diminished responsibility—Privy Council—1978

Walton v Queen,

(1978) All ER 542 (PC) : *[1978] AC 788* : (1978) 66 Cr App R 25

The appellant, who was convicted of murder, moved the Privy Council for substituting the charge to manslaughter under “diminished responsibility” in the light of the medical evidence. The Privy Council held that the jury were bound to consider not only the medical evidence, but the whole of the evidence as to the facts and circumstances of the case, including the nature of killing, the conduct of the accused, before, at the time of and after the killing and any history of mental abnormality and that they were entitled to conclude that on a balance of probabilities, the plea of diminished responsibility had not been established.

The appeal was dismissed.

Test of diminished responsibility is not whether a person can be described in popular language as partially insane or on borderline of insanity.

Murder - Diminished responsibility - Directions to jury

R v John Samuel Seers,

(1984) 79 Cr App R 261

The test of diminished responsibility is not whether, “a person can be described in popular language as partially insane or on the borderline of insanity”. Seers stabbed his estranged wife, and he was tried for murder. At his trial he raised the defense of diminished responsibility. The prosecution accepted that he was suffering from depression but disputed its severity. The judge directed the jury that the test was “whether he could be described in popular language as partially insane or on the borderline of insanity”.

Seers appealed on the ground of misdirection.

Held, allowing the appeal on the ground that this was the wrong test, and that the evidence in this case which amounted to less than that could properly have resulted in a verdict of manslaughter.

Theft committed during attacks of fit due to diabetic depression—a defect of reason—McNaughten Rule applicable—Court of Criminal Appeal—1972

R v Clarke,

(1972) 1 All ER 219

Mrs Clarke, the accused, was charged for committing theft in a supermarket in as much as she did not pay for the goods she removed from the market’s basket to her own. The Court of Appeal rejected her plea that she had no intention to commit theft and that she acted in a moment of absent-mindedness caused due to a diabetic depression brought on by sugar deficiency. The court ruled out that the diabetic temporary fit of absent-mindedness owing to sugar deficiency is a defect of reason within the meaning of the McNaughten rule.

Automatism—defence to a charge of crime of Assault held not guilty—appeal allowed—Court of Criminal Appeal—1973

R v Quick and R v Paddison,

(1973) 3 All ER 347 (CA) : *[1973] QB 910* (CA)

The appellant, a nurse at a mental hospital, was charged with assault occasioning actual bodily harm to a paraplegic spastic patient at the hospital.

The accused pleaded not guilty to the assault occasioning actual bodily harm to a paraplegic on the ground of automatism. The accused had admitted that he had been drinking which included whiskey and quarter bottle of rum. It was found that the accused had been a diabetic since the age of seven, and on the morning of the day in question, he had taken insulin as prescribed by the doctor. Medical evidence showed that at the time of assault, the appellant was suffering from hypoglycaemia, a deficiency of blood sugar after an insulin injection.

It was held that the accused was entitled to plead automatism, but not insanity. In order to sustain a defence of insanity on the ground that the accused was suffering from a disease of the mind, the accused had to show a malfunctioning of the mind caused by disease; a malfunctioning of the mind of transitory effect caused by the application to the body of some external factor, such as violence, drugs, including anesthetics, alcohol and hypnotic influence, could not be said to be due to disease.

The mental condition from which the appellant alleged that he had been suffering had not been caused by his diabetes, but by the use of insulin prescribed by the doctor, the alleged malfunctioning of his mind had, therefore, been caused by an external factor and not by a bodily disorder in the nature of a disease.

The appeal was allowed.

Motive and conduct of the accused as well as time of incident is material to prove insanity—Allahabad High Court—1963

Lakshmi v State,

AIR 1959 All 534 : 1959 Cr LJ 1033

Per Beg, J:

The appellant Lakshmi has been found guilty of having murdered his stepbrother Chhedi Lal. The appellant was addicted to taking *ganja* and wine. He used to make demands for money from the deceased Chhedi Lal who was opposed to this life style of the appellant, and would not accede to his requests to advance to him money to enable him to indulge in these vices. Preceding the incident, he had beaten his mother and wife. At that time, the deceased and other persons had intervened and prevented him from doing so. On the appellants' refusal to obey him, the deceased had chained him. The appellant had run away after breaking the chains. Some days after that, the deceased was approached by villager for *ganja* and *bhang.* Chhedi Lal, however, did not accede to his request. Thereafter it is said that Lakshmi stopped speaking to Chhedi Lal.

On the evening of 6 October 1954, at about 8 pm, Chhedi Lal was attacked by the appellant with a *pharsa*. Chhedi Lal raised an alarm hearing which a number of persons reached the spot on. On the arrival of these persons the appellant fled outside the village taking the *pharsa* along with him. Chhedi Lal died within an hour or two... Death in the opinion of the doctor was due to shock and haemorrhage as a result of the injuries sustained by the deceased. The appellant, however; surrendered himself in court on 8 October 1954.

...[T] he question for decision was whether the act of the appellant in murdering Chhedi Lal fell under *section 84 of the Indian Penal Code, 1860*.

...To sum up, there is evidence of motive against the appellant. His conduct prior to the incident as well as at the time of the incident does not support the contention that he was insane at the time when the offence was committed. His conduct subsequent to the incident also does not lend any support to this contention. The conduct

and history of the appellant also militate/operate against the contention that the appellant was liable to recurring fits of insanity at short intervals.

...The significant word in section 84 is “incapable”. The fallacy of the above view lies in the fact that it ignores that what section 84 lays down is not that the accused claiming protection under it should not know an act to be right or wrong, but that the accused should be “incapable” of knowing whether the act done by him is right or wrong. The capacity to know a thing is quite different from what a person knows. The former is a potentiality, the latter is the result of it. If a person possesses the former, he cannot be protected in law, whatever might be the result of his potentiality. In other words, what is protected is an inherent or organic incapacity, and not a wrong or erroneous belief which might be the result of a perverted potentiality.

“Legal insanity” is not the same thing as “medical insanity” and a case that falls within the latter category need not necessarily fall within the former. The case where a murderer is struck with an insane delusion is different from the case of a man suffering from organic insanity.

Mayne, quoting from Draft *Penal Code* of 1879, has stated the principle applicable to cases of delusions, to be as follows:

> A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, unless the delusions caused him to believe in the existence or some state of things which, if it existed, would justify or excuse his act.

There is evidence of motive, and, the conduct of the appellant at the time of the incident as well as his antecedent and subsequent conduct both negative the plea of insanity under *section 84 of the IPC, 1860*. Further, there is no evidence of any hereditary insanity. There is also nothing to indicate that the accused was, at any time, overtaken by any fit of insanity after the crime.

The appeal is dismissed.

Crucial point of time for ascertaining insanity is when the offence is committed Supreme Court—appeal dismissed, conviction upheld—1964

Dahyabhai Chhaganbhai Thakkar v State of Gujarat[71]

Per Subba Rao, J:

...The first question is, what is the motive for the appellant to kill his wife in the ghastly manner he did by inflicting forty-four knife injuries on her body?

The murder took place on the night before *chaitra sudi I.* It is also not denied that though the accused was in Ahmedabad for ten months, he did not take his wife with him. We accept the evidence of Natvarlal and hold that the accused did not like his wife and, therefore, wanted his father-in-law to take her away to his home and that his father-in-law promised to do so before *chaitra sudi I.*

The next question is, what was the previous history of the mental condition of the accused?

Here again, the prosecution witnesses, PWs 2 to 7, deposed for the first time in the sessions court that four or five years before the incident, the accused used to get fits of insanity. But all these witnesses stated before the police that the accused had committed the murder of his wife, indicating thereby that he was sane at that time. Further, their evidence is inconsistent with the facts established in the case. During this period, it was admitted by the father that the accused was not treated by any doctor. These facts lead to a reasonable inference, that the case of the accused, that he had periodical fits of insanity, was an afterthought and false. We, therefore, hold that the accused had no antecedent history of insanity.

If the accused had a fit of insanity, is it likely that his wife would have slept with him in the same room? We, must, therefore, hold that it had not been established that, two or three days before the incident, the accused had a fit of insanity.

The entire conduct of the accused from the time he killed his wife up to the time the sessions proceedings commenced is inconsistent with the fact that he had a fit of insanity when he killed his wife...

To summarise, the accused did not like his wife, even though he was employed in Ahmedabad and stayed there for about 10 months, he did not take his wife with him he wrote a letter to his father-in-law to the effect that the accused did not like her and that he should take her away to his house; the father-in-law promised to come on *Chaitra Sudi.* The accused obviously expected him to come on 9 April 1959 and tolerated the presence of his wife in his house till then; as his father-in-law did not come on or before 9 April 1959, the accused in anger or frustration killed his wife. It has not been established that he was insane; nor is the evidence sufficient even to throw a reasonable doubt that the act might have been committed when the accused was in a fit of insanity. The appeal is dismissed.

When the appellant was not insane at the time of killing—not entitled to claim exemption; and Burden of proof to claim exemption under section 84 rests on accused—Supreme Court—1969

Jai Lal v Delhi Administration[72]

To avail the benefit of exception under section 84, it must be proved that the accused was insane at the time of the commission of the offence.

Per Bachawat, J:

To establish that the acts done are not offences under section 84, it must be proved clearly that at the time of the commission of the act, the appellant by reason of unsoundness of mind was incapable of either knowing that the acts were either morally wrong or contrary to law. The question is whether the appellant was suffering from such incapacity at the time of the commission of the acts. On this question, the state of his mind before and after the crucial time is relevant. There is medical evidence, that between 12 October 1960 and 12 January 1961, he was suffering from schizophrenia. He was completely cured of this disease on 12 January 1961, when he resumed his normal duties, he was found to be normal. He had a highly-strung temperament and was easily excitable. But there is positive evidence that even at the moment of his greatest excitement, he could distinguish between right and wrong. From January 12 to 24 November 1961, he attended his office and discharged his duties in a normal manner. On the morning of 25 November 1961, he was normal. He went to and returned from his office alone. He wrote a sensible application asking for casual leave for one day. At 1.45 pm, he stabbed and killed a child and soon thereafter he stabbed two other persons. On his arrest soon after 2.45 pm he gave normal and intelligent answers to the investigating officers. Nothing abnormal in him was noticed.

The appellant accordingly was not insane at the time of the killing by stabbing and he knew the consequences of his acts. Appeal dismissed.

Mischief by fire: crucial point of time to establish insanity (unsoundness of mind) is when offence was committed—Appeal allowed—Conviction set aside—Supreme Court—1971

Ratanlal v State of MP[73]

Facts: The appellant was caught red handed at the spot while setting fire to the grass lying in the *khalyan* of Nemichand. The accused was arrested and remained in the police custody for ten days. Thereafter, he was sent to jail. The assistant surgeon, the civil surgeon, and the psychiatrist of the mental hospital to which the appellant was referred reported that he was depressed and silent. According to the psychiatrist he was a lunatic in terms of Indian Lunacy Act 1912. The report stated that the accused—(1) remained depressed, (2) did not talk, (3) was a case of maniac-depressive psychosis, and (4) needed treatment.

The trial court held that the accused who was caught red handed while setting fire to grass lying in the *khalyan* of Nemichand was not liable to punishment under *section 435 of IPC, 1860* (mischief by fire with intent to cause damage) as he was insane at the time of the commission of the offence and did not know that he was doing anything wrong or contrary to law. The High Court reversed the trial court's finding and held the accused liable for the offence.

The crucial point of time at which unsoundness of mind should be established is the time when the offence was committed. There was no reason why the defence witnesses should not be believed who testified that the accused was mentally unsound. They were no doubt relatives of the appellant but it is the relatives who are likely to remain

in intimate contact. The behaviour of the appellant on the day of occurrence, and the medical evidence indicated that the appellant was insane within the meaning of *section 84 of the IPC*.

The Supreme Court allowed the appeal and set aside the conviction.

Every person is presumed sane unless proved contrary. Absence of motive by itself is not proof of insanity or lack of mens rea—Supreme Court—conviction upheld—1972

Sheralli Wali Mohammed v State of Maharashtra[74]

Per Mathew, J:

The appellant was convicted under *section 302, IPC, 1860* for committing the murder of his wife and female child and sentenced to life imprisonment.

The appellant pleaded exemption from criminal liability under section 84, on the ground of not being in a sound state of mind at the time he committed the acts.

As to the contention whether the accused was in an unsound state of mind at the time of the commission of the acts attributed to him, PW 3, one of the brothers of the accused stated that the accused used to become excited and uncontrollable, that sometimes he behaved like a mad man, and that he was treated by Dr Deshpande and Dr Melville. The same was confirmed by his brother another appellant.

There was no evidence to show that, at the time of the commission of the acts, the accused was not in a sound state of mind. On the other hand PW 8, Rustom Mirja, has stated in his deposition that the accused has been working with him as an additional motor driver for the last eight or ten years and that his work and conduct were normal. He also stated that the accused worked with him on 6 March 1968, till 4 pm Dr Karloorkar, who examined the accused at 7.20 am on the day of the occurrence, has stated in his deposition that he found that the accused was in normal condition.

There no evidence to show that the accused was insane at the time of the commission of the acts attributed to him, but that there is nothing to indicate that he did not have necessary mens rea when he committed the offence. The law presumes every person of the age of discretion to be sane unless the contrary is proved.

The defence of insanity can not be inferred from the character of the crime. The mere fact that no motive has been proved as to why the accused murdered his wife and child or, that he made no attempt to run away when the door was broken open, would not indicate that he was insane or, that he did not have the necessary mens rea for the commission of the offence.

Appeal is dismissed.

To prove unsoundness of mind, epileptic fit must be of the same degree as described under section 84 at the time of offence—Appeal allowed: conviction set aside—Supreme Court—1961

State of MP v Ahmadulla[75]

The plea of insanity under an epileptic fit can succeed only if it is established that at the very time when the offence was committed, the accused was under the epileptic seizure which rendered him incapable of knowing the nature of the act.

The accused bore an ill-will against his mother-in-law. One day he managed to enter her house, and her room and killed her by severing her head with a knife. He had the head, the knife and the torch.

The accused pleaded unsoundness of mind in his defence and in support of the plea two doctors and the father of the accused were examined. The civil surgeon deposed that he had examined the accused two years ago, he had epileptic type of insanity. The other doctor deposed that he found the accused suffering from epileptic insanity two months after the incident. The father stated that he found the accused in a disturbed mental state of mind for two days and that in the morning after the crime, he found the accused unconscious with his hands and feet stiffened, a symptom found in epilepsy.

The burden to prove that the mental condition of the accused at the crucial point of time when the offence was committed was of such a degree as described in *section 84 of IPC, 1860* lay on the person who claimed the benefit of this exception [*Indian Evidence Act 1872, section 105*, illustration (a)].

Applying the above principles to the facts and circumstances of the case, the court observed that there was no evidence for finding that at the crucial time when the accused killed his mother-in-law, he was incapable, from unsoundness of mind, of knowing that what he was doing was wrong. The plea of insanity under an epileptic fit could succeed only if it was established that at the very time when the murder was committed, the accused was under an epileptic seizure which rendered him incapable of knowing the nature of his act. It was not enough to show that some months before or after the incident, the accused was found to be suffering from epileptic insanity. Moreover, the circumstances, in which the murder was committed at the dead of night, showed that the crime was committed not in a sudden fit of insanity (epilepsy), but was one that was proceeded by careful planning and exhibited cool calculation in execution of the plan and was directed against a person who was considered to be an enemy of the accused.

The appeal was allowed, the order of acquittal was set aside, and the accused was convicted under *section 302 of the Indian Penal Code, 1860*.

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59 See Gour Hari Singh, *The Penal Law of India,* vol I, 11th Edn, 2000, pp 620-630. “A mad man has no will”: *Furious nulla voluntas est; Furious absentis loco est*: “A mad man is like one who is absent”.

60 Jerome Hall, *General Principles of Criminal Law,* 2nd Edn, 1960, p 499.

61 Sees *Code of Criminal Procedure 1973*, Chapter XXV, sections 328-339.

62 See *Forty-second Report of Law Commission of India*, 1971, pp 89-96; RB Tewari, *“Law Governing Insanity: Essays on the Indian Penal Code”*, Journal of the Indian Law Institute, 1962, pp 73-83.

63 RC Nigam, *Principles of Criminal Law,* vol I, 1965, p 364: to determine insanity judges and jurists have propounded “wild beast test”, “counting twenty pence test”, “good and evil test” etc.

64 *(1843) 8 ER 718* : (1843) 10 Cl & F 200.

65 SS Huda, *Principles of Law of Crimes in British India*, ILL, 1902, reprint 1982, p 271.

66 *Shibo Koeri,* (1905-06) 10 Cal WN 725.

67 (1896) ILR 23 Cal 604, pp 607-08. The Allahabad High Court has not accepted the Calcutta view. They held that exemptions on the ground of “saving a man from sin” would be untenable; *Lakshmi v State,* AIR 1963 All 534; *“The Law Governing Insanity”* in *Essays on the Indian Penal Code,* pp 73-83.

68 (1960) 105 CLR 659, Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer, JJ delivered the judgment.

69 Schizophrenia is a mental disorder characterized by systematized delusions.

70 2016 (13) SCC 205 : *2016 (3) Scale 287* : 2017 Cr LJ 1103, V Gopala Gowda and RK Agrawal, JJ.

71 *AIR 1964 SC 1563* : *[1964] 7 SCR 361*, Subba Rao, J, KC Das Gupta and Raghubar Dayal, JJ.

72 *AIR 1969 SC 15* : *[1969] 1 SCR 140* per Bachawat and AN Grover, JJ.

73 *AIR 1971 SC 778* : *(1970) 3 SCC 533* : 1971 Cr LJ 654 : *1971 (3) SCR 251* per SM Sikri, V Bhargava and D Dua, JJ.

74 AIR 1972 SC 2443 : (1973) 4 SCC 79 : 1972 Cr LJ 1523 : 1973 (5) UJ 204 SC per Methew, J and SM Sikri, CJ, AN Ray, P Jagamohan Reddy, JJ.

75 *AIR 1961 SC 998* : *[1961] 3 SCR 583* per Ayyangar,, J, AK Sarkar and Rajagopal, JJ.

3.10 Intoxication

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

3 GENERAL EXCEPTIONS

3.10 Intoxication

85. Act of a person incapable of judgment by reason of intoxication caused against his will.—Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law; provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

86. Offence requiring a particular intent or knowledge committed by one who is intoxicated.—In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

Sections 85 and *86* of *IPC, 1860* have codified the law relating to intoxication. Section 85 gives the same immunity to a man intoxicated involuntarily, as section 84 gives to a man of an unsound mind.

A man in order to claim exemption from criminal liability under *IPC, 1860, section 85* on the ground of involuntary drunkenness must establish that he was (i) incapable of knowing the nature of the act, or (ii) that he was doing what was either wrong or contrary to law, and (iii) that the thing which intoxicated him was given to him without his knowledge or against his will.

An offence committed under intoxication caused due to fraud or coercion, has been mentioned under section 85. In such cases, the intoxicated man may not be said to have acted on his own accord, and therefore, is not responsible for the consequences of his acts.[76] The justification for such a provision is based on the contention that the accused had himself not contributed towards his drunkenness, which was not likely to be repeated as in case of voluntary drunkenness.

Section 86 deals with that class of cases where a man gets intoxicated voluntarily. It imputes the same knowledge to such a man as he would have had he had not been intoxicated, ie, the knowledge of a sober man with regard to the consequences of his acts.[77] One who sins when drunk be punished when he is sober, *qui peccat ebius luat sobrius*.[78] The justification for punishment in such cases is based on the principle that intoxication is the result of the voluntary act of the accused and he must answer for it, although he might not have been capable of self-restraint at the time when the crime was committed. If *A*, a man, who had consumed too much of liquor, takes a knife from his house and goes along the road shouting his intention to kill *B,* with whom he had quarreled earlier, and kills *C,* who tried to pacify him, *A* would be imputed with the same knowledge as he would have had, had he been sober and his act would amount to murder.[79]

Self-induced intoxication is no defence—House of Lords–appeal allowed— Conviction upheld—House of Lords—1920

Director of Public Prosecutions v Beard,

(1920) AC 479 (HL)

Facts: The accused was convicted of murder of a child of 13 years and sentenced to death. The Court of Criminal Appeal quashed the conviction and substituted a verdict of manslaughter.

Self-induced intoxication is no defence to a charge of crime, i.e. the accused gave way to some violent passion or that he did not know what he was doing wrong. However,

(i) if actual insanity supervenes as a result of alcoholic excess it furnishes as complete an answer to a criminal charge as insanity induced by any other cause; and

(ii) through self-induced intoxication, the accused lacked the specific intent necessary to constitute the offence, the accused has a defence—partial exemption from liability. Murder reduced to manslaughter.

Per Lord Birkenhead LC:

Cases tracing the development of law on drunkenness were discussed. The conclusions may be stated under three heads:

(1) That insanity, whether produced by drunkenness or otherwise, is a defence. The distinction between the defence of insanity in the true sense caused by excessive drinking, and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention, has been preserved throughout the cases. The insane person cannot be convicted of a crime as stated in *Felshead v King*.[80] The law does not take note of the cause of the insanity. If actual insanity in fact supervenes as a result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause.

(2) That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.

(3) That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

I now come to *Rex v Meade,* *(1909) 1 KB 895*. The prisoner was charged with murder. He brutally ill-treated the deceased woman during the night of her death; broke a broomstick over her, and struck her a violent blow with his fist rupturing an intestine and causing her death. The defence was that he was drunk and did not intend to cause death or grievous bodily harm, and consequently that the verdict should be manslaughter.

A man is taken to intend the natural consequences of his acts. This presumption may be rebutted (i) in the case of a sober man, in many ways; (ii) it may also be rebutted in the case of a man who is drunk, by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, ie, likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted.

In *Meade,* the crime charged was that the death arose from violence done with intent to cause grievous bodily harm. In this case the death arose from a violent act done in furtherance of what was in itself a felony of violence. In *Meade's* case, therefore, it was essential to prove the specific intent; in Beard's case it was only necessary to prove that the violent act causing death was done in furtherance of the felony of rape.

Drunkenness in this case could be no defence unless it could be established that Beard, at the time of committing the rape, was so drunk that he was incapable of forming the intent to commit it, which was not the actual reality, and manifestly, having regard to the evidence, could not be contended. For in the present case the death resulted from two acts or from a succession of acts; the rape and the act of violence causing suffocation. These acts cannot be regarded separately and independently of each other. The capacity of the mind of the prisoner to form felonious intent which murder involves, is in other words to be explored in relation to the ravishment; and not in relation merely to the violent acts which gave effect to the ravishment.

In the present case... there was... no evidence that he [the accused] was too drunk to form the intent of committing rape. Under these circumstances, it is proved that death was caused by an act of violence done in furtherance of

the felony of rape. Such a killing is murder. The decision of the trial court is restored and that of the Court of Appeal quashed.

The appeal is allowed.

Intoxication - Extreme Intoxication and Insanity - Intoxication and insanity are two legal concepts.

R v Bouchard-Lebrun,

2011 SCC 58 (Canada)

Self-induced intoxication and insanity are two different concepts

While on drugs, the accused illegally entered the building where the victim lived and brutally attacked him by punching and kicking him many times. Another occupant of the building went to the victim's aid but the accused threw him down the stairs and then stomped on his head. The accused was arrested and charged with committing aggravated assault and with breaking and entering a dwelling-house with the intent to commit an indictable offence and attempting to break and enter. The accused pleaded not guilty to all the charges against him.

The trial judge accepted psychiatric evidence that, at the material time, the accused was suffering from toxic psychosis caused by the voluntary consumption of drugs, because of that state of extreme intoxication, the accused had to be acquitted on the counts of breaking and entering with intent to commit crime and attempting to break and enter.

He then convicted the accused on the counts of aggravated assault on the basis that self-induced intoxication cannot be a defence to an offence against the bodily integrity of another person. The accused was sentenced to imprisonment for five years.

The accused appealed against his conviction, arguing that the trial judge had confused the insanity defence under section 16 of the Criminal Code with the defence of self-induced intoxication and that his psychosis should have led to a verdict of not being criminally responsible on account of the mental disorder under section 16 of the Code.

The Quebec Court of Appeal pointed out, that transitory psychosis induced by drug-use, could not be considered a "disease of the mind" within the meaning of sections 2 and 16 of the Code. Thus, it dismissed the appeal. The accused appealed before the Supreme Court of Canada.

Held, the appeal was dismissed.

Per LeBel, J:

The only issue raised here was whether the psychosis suffered by the accused resulted from a "mental disorder" within the meaning of section 16 of the Code. An accused who wishes to successfully raise the insanity defence must: *Firstly,* show that he was suffering from mental disorder in the legal sense at the time of the alleged events; and

Secondly, that owing to his mental condition, the accused was incapable of knowing that the act or omission was wrong.

Intoxication and insanity are two distinct legal concepts. To distinguish toxic psychoses that result from mental disorders from those that do not, the Supreme Court of Canada proposed an approach structured around two analytical tools. The internal cause factor, the first of the analytical tools, involves comparing the accused with a normal person, that is, a person suffering from no disease of mind. Here, the court considered that drug-taking was an external cause. Indeed, the evidence showed that the psychotic symptoms experienced by the accused began to diminish shortly after he took the drugs and continued to do so until disappearing completely. This led the court to conclude that the accused suffered from no disease of the mind before committing the crimes and once the effects of his drug-taking had passed.

The second analytical tool, the continuing danger factor, is directly related to the need to ensure public safety. In this case there was no evidence indicating that the accused's mental condition was inherently dangerous in any way, provided that he abstained from such drugs in the future.

Section 33.1 of the Code is intended to prevent an accused from avoiding criminal liability on the ground that his or her state of intoxication at the material time rendered the accused incapable of forming the mental element or having the voluntariness required to commit the offence. The court noted that no distinction was based on this provision. It therefore, applied to any mental condition that is a direct extension of a state of intoxication, including toxic psychosis as in the present case. Therefore, the court of appeal did not err and the conviction was confirmed also by the Supreme Court of Canada.

Merely because one after another, five lives were taken and that too of four young children, does not entitle the accused to avail of the benefit of section 85—Death sentence confirmed—Rarest of Rare case—Supreme Court—2007

Bablu alias Mubarik Hussain v State of Rajasthan,[81]

AIR 2007 SC 697 : (2006) 13 SCC 116 : 2007 Cr LJ 1160 : 2006 (14) Scale 15

Dismissing the appeal, the Supreme Court held defence of drunkenness can be availed of only when intoxication produces such a condition as the accused loses the requisite intention for the offence. The onus of proof about reason of intoxication due to which the accused had become incapable of having particular knowledge in forming the particular intention is on the accused. Basically, three, propositions as regards the scope and ambit of *section 85, IPC, 1860* are as given below:

(1) The insanity whether produced by drunkenness or otherwise is a defence to the crime charged;

(2) Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should taken into account with the other facts proved in order to determine whether or not he had this intent; and

(3) The evidence of drunkenness failing short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind is affected by drink so that he more readily give to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

The court stated:

> In the present case, the plea of drunkenness can never be an excuse for the brutal diabolic acts of accused. The trial court and the High Court have rightly treated the case to be one falling in rarest of rare category thereby attracting the death sentence as the appellant had acted in a most cruel and diabolic manner. He deliberately planned and meticulously executed the same. There was not even any remorse for such gruesome acts. On the contrary, he was satisfied with what he had done. He made a declaration of his act of abusing his wife and children.
>
> Death sentence confirmed and upheld... Appeal dismissed.

Lack of specific mens rea is no defence in case of self induced intoxication— Appeal dismissed conviction upheld—House of Lords—1976

Director of Public Prosecution v Majewski,

(1976) 2 All ER 142 (HL) : [1976] UKHL 2 : [1976] 2 WLR 623

A disturbance occurred in a public house and the accused was ordered to leave by the landlord. Thereafter the accused was ejected from the bar but he re-entered. He punched the landlord and started swinging a piece of broken glass at the landlord and a customer, cutting the landlord's arm. The landlord managed to restrain the accused until the police arrived, whereupon a fierce struggle took place to get him into a police car, during which he kicked three police officers. Later he struck a police inspector who entered his police cell.

The accused was charged on four counts of assault occasioning actual bodily harm and three counts of assaulting a police constable in the execution of his duty. His case was that, at the material time, he was acting under the

influence of a combination of drugs (not medically prescribed) and alcohol, to such an extent that he did not know what he was doing.

The jury, having been directed that self-induced intoxication was no defence to an offence not requiring a specific intent, such as the assaults in issue, convicted him on six of the seven counts. The Court of Appeal concurred with the lower court's verdict.

Majewski's appeal to the House of Lords was dismissed. The point of law of importance was whether a defendant may properly be convicted or an assault notwithstanding that, by person of his self-induced intoxication, he did not intend to do the act alleged to constitute the assault.

The appeal was dismissed.

Per Lord Elwyn-Jones LC:

The crux of the case for the Crown was, that the judges have evolved, for the purpose of protecting the community, a substantive rule of law that in "crimes of basic intent", as distinct from "crimes of specific intent", self-induced intoxication provides no defence and is irrelevant to offences of basic intent, such as assault.

What then is the mental element required to be established in assault? This question has been most helpfully answered in the speech of Lord Simon of Glaisdale in *Director of Public Prosecution v Morgan*.[82]

By "crimes of basic intent", I mean those crimes whose definition expresses (or, more often, implies) a *mens rea* which does not go beyond the *actus reus*. The *actus reus* generally consists of an act and some consequence. The consequence may be very closely connected with the act or more remotely connected with it; but with a crime of basic intent the *mens rea* does not extend beyond the act and its consequence, however remote, as defined in the *actus reus*. I take assault as an example of a crime of basic intent where the consequence is very closely connected with the act. The *actus reus* of assault is an act which causes another person to apprehend immediate and unlawful violence. *The mens rea* corresponds exactly.

The prosecution must prove that the accused foresaw that his act would probably cause another person to have apprehension of immediate and unlawful violence or would possibly have that consequence, such being the purpose of his act, or that he was reckless whether or not his act caused such apprehension. This foresight or recklessness is the mens rea in assault.

If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of mens rea, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary mens rea in assault cases. The drunkenness is itself an intrinsic, and integral part of the crime, the other part being the evidence of the unlawful use of force against the victim, which amount to criminal recklessness.

As to the effect on the criminal responsibility of the accused, of drink or drugs or both, their Lordships observed that whenever death or physical injury to another person results from something done by the accused for which there is no legal justification and the offence with which the accused is charged is manslaughter or assault at common law or the statutory offence of unlawful wounding; it is no excuse in law that, because of drink or drugs which the accused himself had taken knowingly and willingly, he had deprived himself of the ability to exercise self-control, to realise the possible consequences of what he was doing or even to be conscious that he was doing it.

The appeal is dismissed.

Voluntarily intoxicated man is presumed to have the same knowledge as that of a sober man—Appeal Dismissed: conviction upheld Supreme Court—1956— Self Induced Intoxication—No defence

Bas Dev v State of Pepsu[83]

Per Bhagwati, J:

The appellant Bas Dev, a retired military Jamadar, was charged with the murder of a young boy named Maghar Singh, aged about 15 or 16 years. Both of them alongwith others went to attend a wedding.

The marriage party seems to have made itself very merry and much drinking was indulged in. The appellant Jamadar boozed quite a lot and he became very drunk and intoxicated. The judge says “he was excessively drunk” and that “according to the evidence of one witness Wazir Singh Lambardar he was almost in an unconscious condition”.

This circumstance and the total absence of any motive or premeditation to kill were taken by the sessions judge into account and the appellant was awarded the lesser penalty of transportation for life (i.e. life imprisonment).

An appeal to the High Court at Patiala proved unsuccessful. Special leave was granted by this court limited to the question whether the offence committed by the petitioner fell under *section 302* or *section 304* of *IPC* having regard to the provisions of section 86 of Code?

It is no doubt true that while the first part of the *section 86 IPC, 1860* speaks of intent or knowledge, the latter part deals only with knowledge and a certain element of doubt in interpretation may possibly be felt by reason of this omission. If involuntary drunkenness, knowledge is to be presumed in the same manner as if there was no drunkenness, what about those cases where mens rea is required?

Are we at liberty to place intent on the same footing, and if so, why has the section omitted intent in its latter part?.... [t] he reason for such omission may be briefly summarised as follows:

So far as knowledge is concerned, we must attribute to the intoxicated man the same knowledge as if he was quite sober. But so far as intent or intention is concerned, we must gather it from the attending general circumstances of the case paying due regard to the degree of intoxication.

Was the man beside his mind altogether for the time being?

If so, it would not be possible to fix him with the requisite intention. But if he had not gone so deep in drinking and from the facts it could be found that he knew what he was about, we can apply the rule that a man is presumed to intend the natural consequences of his act or acts.

Of course, we have to distinguish between motive, intention and knowledge. Motive is something which prompts a man to form an intention, and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things...

In *Rex v Meakin, (1836) 173 ER 131*, Baron Alderson has very nicely illustrated as to nature of instrument and on element to determine intention of the accused in the following words: “...If a man used a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as he would if he had used a different kind of weapon; but where a dangerous instrument is used, (knife) which, if used must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party.”

...The learned judges have found that although the accused was under the influence of drink, he was not so much under its influence that his mind was so obscured by the drink that there was incapacity in him to form the required intention as stated.

The accused had, therefore, failed to prove such incapacity as would have been available to him as a defence, and so the law presumes that he intended the natural and probable consequences of his act, that he intended to inflict bodily injury to the deceased and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death.

On this finding, the offence is not reduced from murder to culpable homicide not amounting to murder under the second part of *section 304 of IPC, 1860*.

Effect of intoxication on individual and upon marriage - Matrimonial Causes Act - Petition for dissolution of

marriage by husband against wife - On the ground of "intoxication" by stimulating drugs resulting in neglect of husband's duties - Onus on petitioner - Petition dismissed.

Sweetman (Husband) v Mrs Sweetman (Wife),

14 FLR 409 (1964)

In an interesting case, husband brought a suit of dissolution of marriage and divorce on the ground of intoxication by wife resulting in the failure to discharge her household duties, and on the ground of desertion.

In this petition, petitioner asserts that since about the year 1955, the respondent has been addicted to Dexedrine-type drugs and in particular to a drug known as "tenuate". He asserts that for more than four years from December 1964 to December 1966, the respondent habitually took Dexedrine-type drugs and "tenuate" in excess and that she had been habitually intoxicated by these drugs. He asserted that she received medical and hospital treatment and that she had neglected her household duties.

By section 28 (f) of the Matrimonial Causes Act 1959-1966, a petition under the Act by a party to a marriage for a decree of dissolution of marriage may be based on the ground that, since the marriage, the other party to the marriage has for a period of not less than two years, habitually been intoxicated by reason of taking or using in excess any sedative, narcotic or stimulating drugs or preparation.

The court held that, "intoxication" means, in relation to stimulating drugs, a state of drunkenness involving excitement and depression with external symptoms. The effect of intoxication upon an individual person and upon the marriage itself must be considered and, to establish the ground of intoxication by stimulating drugs, the effect upon the marriage of such intoxication must be shown to have been material as opposed to minimal effect.

The court said that, throughout the particular period as relied upon by the petitioner, *viz.,* December 1964 to December 1966, the respondent used to take massive doses of drugs compared to the ordinary prescribed doses for them, and that she was addicted to these drugs. The evidence supports a conclusion that during this period she was habitually intoxicated by the drug, but to what degree she was intoxicated is a matter which is not easy to determine based on the evidence.

The legal meaning of "ground of intoxication by drugs" introduced into Australia by Matrimonial Causes Act 1959 section 28 (f), described the ground as follows:

> *that, since the marriage, the other to the marriage has, for a period of not less than two years… (ii) habitually been intoxicated by reason of taking or using to excess any sedative, narcotic or stimulating drug or preparation.*

The question arises as to what is meant by the section with the use of the words "*intoxicated by reason of taking or using to excess"* the drugs mentioned.

In relation to stimulating drugs, the word "intoxication" means, a state of drunkenness involving excitement and depression with external symptoms. Intoxication caused by alcoholic liquor can be of varying degrees, ranging from a condition with very minimal effects to a condition where a person can become comatose. In making these grounds as for the dissolution of a marriage, the legislature intended that before a marriage could be dissolved the effect of the intoxication upon an individual person and, indeed, upon the marriage itself, had to be considered. For the ground to be established, it is necessary to show that the intoxication was of such a degree that it had material effects upon the marriage as opposed to minimal effects.

The meaning of the words, "in a state of intoxication", have some application to a consideration of the present ground. The question was, "whether as a result of consumption of intoxicating liquor, her physical or mental faculties or her judgments are appreciably and materially impaired in the conduct of the ordinary affairs or acts of daily life." Although, these words were used in the context of a criminal activity, their general import can be applied in considering this ground.

It suffices in this case to say that the vital question for consideration when the allegation is made that a man is an habitual drunkard is the condition in which his addiction to drink produces and not necessarily or solely the extent to which he partakes the liquor.

There is nothing in the evidence called on behalf of the respondent to suggest that:

> His drinking habit resulted habitually in drunkenness over the necessary period; on the contrary, it rather suggests that his heavy drinking habits did not habitually produce such a departure from normal standards of conduct as could fairly be classified as drunkenness.

The words italicised above apply to a consideration of the state of habitual intoxication by drugs. The onus of satisfying the court is upon the petitioner and, after a very careful consideration of the evidence and giving due weight to the submissions "the court arrived at the conclusion that the petitioner has not proved the ground relied upon in the petition, that the degree of intoxication resulting from the high dosage of drugs that she was taking materially affected her conduct in the marriage nor that it materially affected her conduct in the ordinary affairs of life".

Petition Dismissed.

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76 1 Hale PC 32; *Bishop's Criminal Law,* p 482.

77 However, in case of *delirium tremens,* a form of insanity produced by habitual excessive drinking, which leads to change in brain tissue producing such a degree of madness as to render a person incapable of distinguishing between right and wrong, the disease is looked upon as *insanity protanto* and the accused is put on the same footing as that in the case of involuntary drunkenness.

78 Ratanlal and Dhirajlal, *The Law of Crimes,* 23rd Edn. 1991, p 248; RC Nigam, *"Principles of Law of Crime"*, vol I, pp 388-95.

79 See *Subbai Goundam,* (1937) Mad WN 1329.

80 *Felshead v King*, *(1909) AC 534*.

81 Per Arijit Pasayat and SH Kapadia JJ. The accused killed his wife Anisha, three daughters namely, Gulfsha, Nislia and Anta @ Munni aged nine years, six years and four years respectively and son Babu aged two and a half years. The Additional Sessions Judge (Fast Track), Nagaur had found the charge for commission of offence under *section 302, IPC* to be proved and imposed the death sentence. The plea of the accused that since he was in a state of drunkenness and did not know the consequences of what he did and therefore, death sentence should not have been awarded *vide section 85, Indian Penal Code, 1860*, was rejected.

82 *(1975) 2 All ER 347* (HL). See for facts and decision chapter 8 under commentary to section 375.

83 *AIR 1956 SC 488* : *1956 SCR 363*, per Bhagwati and Chandrashekhar Aiyar, JJ.

3.11 Consent

KD Gaur: Criminal Law-Cases and Materials, 9th ed

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Part I General Principles

3 GENERAL EXCEPTIONS

3.11 Consent

Sections 87-89 and *92* of *IPC, 1860* lay down the law relating to consent as a defence to a criminal charge. *Section 87 of IPC* gives protection from criminal liability on the ground of consent in general, whereas *sections 88-89* and *92* of the *IPC, 1860* provide immunity in those cases only where harm is caused during the course of doing an act for the benefit of the consenting party or the person on whose behalf consent was obtained by the person empowered to do so.

87. Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death, or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

Illustration

A and *Z* agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play, and if *A*, while playing fairly, hurts *Z, A* commits no offence.

88. Act not intended to cause death, done by consent in good faith for person's benefit.—Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take risk of that harm.

Illustration

A, a surgeon, knowing that a particular operation is likely to cause the death of *Z*, who suffers under a painful complaint, but not intending to cause *Z's* death, and intending, in good faith, *Z's* benefit, performs that operation on *Z*, with *Z's* consent, *A* has committed no offence.

89. Act done in good faith for benefit of child or insane person, by or by consent of guardian.—Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person:

Provisos.—Provided—

First.—That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely

to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly.—That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;

Fourthly.—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustration

A, in good faith, for his child's benefit without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. *A* is within the exception, in as much as his object was the cure of the child.

90. Consent known to be given under fear or misconception.—A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person.—if the consent is given by a person who, from unsoundness of mind or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.—unless the contrary appears from the context, if the consent given by a person who is under twelve years of age.

91. Exclusion of acts which are offences independently of harm caused.—The exceptions in sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Illustration

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence, independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence "by reason of such harm"; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

92. Act done in good faith for benefit of a person without consent.— Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit:

Provisos.—Provided—

First.—That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly.—That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;

Fourthly.—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustration

(a) *Z* is thrown from his horse, and is insensible. *A*, a surgeon, finds that *Z* requires to be trepanned. *A*, not intending *Z's* death, but in good faith, for *Z's* benefit, performs the trepan before *Z* recovers his power of judging for himself. *A* has committed no offence.

(b) *Z* is carried off by a tiger. A fires at the tiger knowing it to be likely that the shot may kill *Z*, but not intending to kill *Z*, and in good faith intending *Z's* benefit. *A's* ball gives *Z* a mortal wound. A has committed no offence.

(c) *A*, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. *A* has committed no offence.

(d) *A* is in a house which is on fire, with *Z*, a child. People below hold out a blanket. *A* drops the child from the house-top, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here, even if the child is killed by the fall, *A* has committed no offence.

Explanation.—Mere pecuniary benefit is not benefit within the meaning of Sections 88, 89 and 92.

Sections 88, 89 and 92 safeguard the interests of doctors, philanthropists, etc, against the acts done for the benefit of the man with or without his consent. The policy behind condonation from criminal liability in cases of consent is based on the principle that a man is the best judge of his own interest and that no man will consent to what he considers injurious to his or her own interest and if a man decided to suffer a harm voluntarily, he cannot complain of it when it comes about.[84]

Section 87 provides that a consent given by a man above eighteen years of age for an act being done against him, which will cause injury or which is known to be likely to cause injury, will exonerate a person from criminal liability. For instance, if *A* sells his teeth to a dentist for Rs 60 and permits the dentist to pull them out, the dentist is not liable for causing injury to *A's* person. It is only after *A* permitted the dentist for removal that he pulled them out, *A* is therefore estopped from making complaint afterwards. However, the immunity granted would not extend to the intentional causing of death or grievous bodily injury or any harm, which is known by the doer to be likely to cause death or grievous hurt.

Consent will not exempt a man, if in the course of a fight with deadly weapons, one of the participants is killed. It was apparent from the very nature of the game that it could result in death or grievous bodily injury to someone. Moreover, such types of games are prohibited by law. By an agreement, one cannot do what the law says shall not be done.

The consent may be express or implied. An implied consent may be inferred from the conduct of a man, the nature of the operation and the like. For instance, when a man takes part in a lawful game, say hockey or cricket, it is obvious that by participating in the game, he has given his implied consent to the infliction upon him of a certain amount of bodily injury implicit in the game. But, if the bodily injury is inflicted in violation of the rules of the game namely *A*, while playing hockey hits *B* on the head fracturing his skull, *A* is responsible for it; the consent is deemed to have been withdrawn *ab initio*.[85]

Implied consent: Defendant injuring another player in amateur football match is not a criminal conduct punishable under section 20 of the Offences Against the Person Act, 1861—United Kingdom

R v Barnes,

[2004] EWCA Cr 3246 : *(2005) 2 All ER 113*

During an amateur football match, the defendant tackled (stopped the opponent carrying the ball by seizing him and bringing him down) another player, who as a result sustained a serious leg injury. The defendant was convicted for being so reckless that it could not have been in legitimate sport and so was tantamount to an assault.

Allowing the appeal and setting aside conviction of the defendant, the Court of Appeal held that criminal prosecution should be reserved for those situations where the conduct was sufficiently grave, properly to be categorized as criminal. Most organized sports had their own disciplinary procedures for enforcing their particular rules and

standards of conduct and as a result there was not only no need for criminal proceedings but it was undesirable that there should be any. Further, in addition to criminal prosecution, there was the possibility of an injured player obtaining damages in a civil action from another player, if that player had caused him injuries through negligence or an assault.

The players in a football match implicitly consented to take part in a game assisted in identifying the limits of the defence, if what occurred went beyond what a player could reasonably be regarded as having accepted by taking part in the sport, that indicated that the conduct would not be covered by the defence.

Whether conduct reached the objectives threshold level for it to be criminal depended on all the circumstances. The fact that the play was within the rules and practice of the game and did not go beyond it would be firm indication that what had happened was not criminal. It had to be borne in mind that in highly competitive sports conduct outside the rules could be expected to occur in the heat of the moment, and even if conduct justified not only being penalized but also a warning or even a sending off, it still might not reach the threshold level required for it to be criminal. The type of sport, the level at which it was played, the nature of the act, the degree of force used, the extent of the risk of injury and the state of mind of the defendant were all likely to be relevant in determining whether the defendant's action went beyond the threshold.

Implicit consent: Teacher taking employment in school for children with behavioural problem undertaking risk of violence from children does not consent to assault—QBD—2010

R v Crown Prosecution Service,

(2010) 4 All ER 264 : *[2012] QB 257* : *[2012] 2 WLR 296*

H, a pupil aged 15 year, at a community special school for children with emotional, behavioural and social needs picked up a hammer and grabbed *C*, Deputy Head of the school by the collar and tie, and with one hand on his throat pushed him back against the wall where *C* struck his head. Again three weeks later when *C* was on playground duty *H* pinned *C* against a bunker grabbed his collar and twisted it affecting *C*'s ability to breath. *H* was charged and convicted for common assault.

Dismissing *H*'s appeal against conviction on the ground that *C* should be regarded as having accepted the risk of physical violence when he had taken his teaching assignment in community special school for children with special needs including those with behavioural problems, did not impliedly regarded as having consented to be assaulted, even if the risk of assault could not be excluded in such a school.

Section 88 extends the operation of consent to all acts, except that of causing death intentionally, provided the act is done in good faith for the benefit of the consenting party. As stated in the illustration appended to the section, the surgeon is not liable for causing the death of the patient because the operation was performed in good faith for the benefit of the patient and with his consent. The surgeon had neither ill will against the patient nor was the operation performed with the intention of causing death of the patient, rather it was to cure him. The surgeon will be protected from criminal prosecution under this section. However, if the surgeon, while performing the operation, leaves a needle inside the abdomen of the patient who dies owing to septic infection which developed on account of the needle being left in his body, the surgeon will not be protected from criminal prosecution. He would be liable under *section 304A of IPC, 1860* for causing death by negligence, because he did not perform the operation with due care and caution.[86]

Likewise, if a doctor performs an operation for internal piles with an ordinary knife which results in death of the patient due to haemorrhage (profuse bleeding), the doctor is not entitled to protection under *section 88 of the Indian Penal Code, 1860* as he did not act in good faith.[87] Consent will not absolve a man from criminal liability, if the man is careless and negligent in doing an act. There was no consent for performing the operation in careless and negligent manner and so he would be answerable for it in law for causing death by negligence under *section 304A of IPC, 1860*.

Section 89 is a corollary of section 88 with a difference that in case of a child below 12 years of age[88] and in case of a man of unsound mind, who are not competent and capable of giving consent at law, the consent may be obtained by the guardian or the person having lawful charge of such persons. The consent of the guardian will have the same effect, as it would have had if the sufferer were of ripe age and of sound mind. As stated in the illustration to the section, the guardian will not be liable for any offence if the child dies during the course of the operation, because the consent was given in good faith for the benefit for the child.

Likewise, if a parent whips his child moderately for the child's benefit, the guardian is protected under this section. However, if a parent kills his daughter, aged ten years, from fear of her being abducted by robbers, the parent is not protected from criminal liability, though the act was done in good faith. The very first proviso to the section excludes intentional killing from the purview of exemptions from criminal liability. Similarly, if A, a guardian, in good faith for the child's pecuniary benefit emasculates him, he is answerable for it by virtue of proviso three to section 89 for causing grievous hurt to the child (*IPC, section 322*).

Section 92 extends protection to those persons who cause harm to another during the course of performing an act, though without consent, provided the act is done in good faith and for the benefit of that person.

This provision has been enacted to cover those class of cases where, because of the extreme situations, either it is impossible for the person to signify his consent, or he is incapable of giving consent and there is no other person to signify consent on his behalf. For instance, if a person falls down in an epileptic fit (loss of sense and motion usually through haemorrhage in brain), and bleeding alone can save him, but he is unable to signify his consent to be bled because of unconsciousness, the surgeon who bleeds him commits no offence. He will be protected under this section, inspite of the fact that the surgeon is not the patient's guardian and had no authority from any such guardian, because the act was done in good faith for saving the life of the person. Likewise, *A* is not liable for killing a child, though he knew that the act of dropping the child from the house-top (which is on fire) would very probably kill the child and he was neither the parent, nor the guardian of the child, nor was consent obtained from any such person, because the act was done in good faith for the benefit of the child with a faint hope that the child may be caught in the blanket and saved.[89] In such cases, the law presumes temporary guardianship with the very person because of the exigencies and the purity of motive with which the act is done, and therefore such persons are exempted from criminal responsibility in case of any eventuality.

Section 91 states that the provisions relating to *sections 87*, *88* and *89* of *IPC, 1860* would not apply to acts which are offences independently of any harm caused, or intended to be caused, or known to be likely to be caused to the person giving consent, or on whose behalf consent is given. As stated in the illustration appended to the section, causing miscarriage is not only an injury to the woman alone, but an offence against the life of the child as well. The mother's consent will, therefore; be of no avail, for the child's consent and the person causing miscarriage could not be protected. The consent may wipe off an injury to the person concerned, but not an injury caused to someone else who never consented to it.

Again, consent will not condone a man from criminal liability in respect of offences against the state,[90] public health, safety, convenience, decency, morality and the like. A person will not be protected from prosecution for obscene publication, indecent exhibition and public nuisance etc, even if the act is done with consent. Such offences affect the state generally and the harm caused to the society predominates and so no two individuals can agree to violate these provisions. It is only in cases of property offences and offences against human body that consent may wipe off the criminal liability.

Section 90 explains as to when a consent may not be treated as consent for the purposes of condoning a man from criminal liability. The section states that a consent[91] is no answer to a charge of crime where it has been obtained by putting a man under fear of injury, or under misconception of fact, or the consent is given by a person, who by reason of unsoundness of mind, or intoxication, or immaturity of age, (namely, a child below twelve years) is incapable of understanding the nature and consequences of the act to which he gives his consent.

A, a girl of 19 years of age, goes to *B,* a doctor, to consult him with respect to an illness from which she was suffering. *B,* advised her for a surgical operation, and under the pretence of performing it, had sexual intercourse with *A. A's* consent will not exonerate *B* from conviction. There was a misconception regarding the nature of the act and whatever consent was given by the girl was for the purposes of surgical operation and not for sexual connection and this fact was known to the doctor. Hence, *B* will not be protected from prosecution for committing rape by reason of the consent of the girl, this is evident from the case of *Flattery* discussed below.

Consent is no defence to a charge of assault in public place—Court of Appeal—1981

Attorney General's Reference (No 6 of 1980),

[1981] 2 All ER 1057 CA : *[1981] 3 WLR 125* : *[1981] QB 715*

The parties to the suit had agreed to have a fist-fight in a public street as a result of which, one was injured. The

defendant was acquitted after the judge directed the jury that if the other party consented and the force used was reasonable, the defendant was not guilty. On a reference to the question of whether consent could be a defence to a fight in a public place, it was held that public interest required that it could not, whether the offence was committed in a public or a private place.

Refusal of parents to consent for their child's operation is not bar to operation, if necessary to save the child's life—Family Court—1982

Re B (A minor) (Wardship: Medical Treatment),[92]

2 (1982) 3 FLR 117-123 : *[1981] 1 WLR 1424* : *[1990] 3 All ER 927*

It was held that the issue for the court to decide was whether or not to allow the operation to take place which might result in child living for 20 to 30 years as a mongoloid; it could not be said to what extent the child's mental or physical defects would be apparent or whether she would suffer or be happy in part, but there was no evidence that her life would be intolerable, therefore, in the interests of the child the operation should be carried out and she should be given the chance to live the normal span, with the handicaps and defects, of a mongoloid child.

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84 The provision is based on the common-sense principle of *volenti non fit injuria,* i.e. a person who consents suffers no injury.

85 Consent may reduce the gravity of the offence in some cases. See *Indian Penal Code, 1860, section 300*, exception 5—death by consent reduces liability from murder to culpable homicide not amounting to murder.

86 See commentary under introduction to *IPC, section 304A*.

87 *Sukaroo Kobiraj v The Empress,* (1887) ILR 14 Cal 566.

88 A child above 12 years is competent to give consent under *section 88 of Indian Penal Code, 1860*, whereas a child below 18 years is not competent to give a valid consent for the purposes of contract and the like under section 3 of Indian *Majority Act 1875*.

89 See *Draft IPC,* note B, p 109; illustration to section 92.

90 RC Nigam, *"Law of Crimes in India"*, vol 1, pp 397-98.

91 *Section 13, Indian Contract Act 1872* defines consent:

> Two or more persons are said to consent when they agree upon the same thing in the same sense and section 14 defines free consent:
>
> Consent is said to be free when it is not caused by: (1) coercion, (2) undue influence (3) fraud, (4) misrepresentation or (5) mistake.

92 Where parents refused to give permission for operation on their child who was born with Down's syndrome and intestinal blockage that required urgent operation, failing which she would die, a local authority made the child a ward of the court and appealed to the court to order for the operation to be carried out and to enable the child to have life, even though her survival of the operation would have left her handicapped, physically and mentally.

3.12 Communication made in Good Faith

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

3 GENERAL EXCEPTIONS

3.12 Communication made in Good Faith

93. Communication made in good faith.—No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

Illustration

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. *A* has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

Section 93 extends protection to a man from criminal prosecution for making a communication in good faith for the benefit of the person to whom it is made.

For instance, as stated in the illustration to *section 93, IPC*, though the surgeon knew that the communication of his opinion might cause the patients death, a doctor cannot be held to have committed an offence. The doctor might have thought it necessary to give the patient timely warning of his approaching end so that he might settle his worldly affairs. However, the protection does not extend if the communication is not made in good faith for the benefit of the person to whom it is made.

3.13 Trifles cannot be Offences

Part I General Principles

3 GENERAL EXCEPTIONS

3.13 Trifles cannot be Offences

95. Act causing slight harm.—Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

Section 95 is intended to provide an exception from criminal liability in respect of those acts which, though falling within the letter of the law, are yet not within its spirit, and are considered innocent.[93]

It is theft to dip a pen in another man's ink-pot, or to take a sheet of paper from another's drawer; it is causing hurt to a man by pressing against him while getting into a railway compartment, or into a theatre hall; it is an insult to call a man a liar and the like, but the law will not take notice of such acts. If it were punishable, all free movement and intercourse in society will come to an end and men will not be able to live together. A man would be subjected to criminal trial for every petty act which he may do in his life and thus he will be exposed to all the troubles and vagaries of the criminal process. Accordingly, the law has provided that it will not take account of trifles, namely, *de minimis non curat lex,*[94] and the parties can settle the matter between themselves outside the court of law.

In *Kishori Mohan v State of Bihar,*[95] the fraternity of non-gazetted employees, who were on strike, sought to make fun of the complainant who was a loyal co-worker and had not been participating in the strike. The fun was in the nature of having taken a photograph of the loyal worker with a garland of shoes around his neck. No photograph was shown to the complainant nor was any such photograph published anywhere.

In a prosecution filed under *section 504 of the Indian Penal Code, 1860* for having insulted the complainant, the submission was made on behalf of the accused that the triviality of the act with a view to making a fool of a member of the fraternity should operate as a bar to the wrong alleged.

The plea was not sustained and it was held that the complainant had been subjected to indignity, although the court took a lenient view of the matter by merely admonishing the accused.

It is important to note that in case of socio-economic offences, the courts are reluctant to allow the defence of trifles. For instance, the High Courts of Bombay, Karnataka and Orissa, while deciding the cases under the *Prevention of Food Adulteration Act 1954* (Repealed) and Drugs Price Control Order 1954, rejected the plea of "slight harm" as an excuse as provided under *section 94 of the IPC*.

In *State of Maharashtra v Taherbhai,* 1978 Cr LJ 820, two accused were found guilty of selling hard-boiled sugar confectionery in contravention of the rules framed under *Prevention of Food Adulteration Act 1954* (Repealed). Allowing the appeal by the State against the acquittal of the accused (by the magistrate by giving them benefit under *section 95 of IPC, 1860*) the High Court held that section 95 shall not be applied to any offence under *Prevention of Food Adulteration Act 1954* (Repealed).

A slight deviation from the standard fixed under the rules is not going to cause slight harm as contemplated under *section 95 of the IPC, 1860*. Likewise, the Orissa High Court rejected the appellant's plea in *Bichintrananda v State of Orissa*,[96] that the quality of the mustard oil for sale was slightly inferior to the purity standard fixed by the rules framed under *Prevention of Food Adulteration Act, 1954 (Repealed)* and so the appellant was protected under *section 95 of IPC, 1860*.

Triviality of an offence depends on the nature of injury, position of parties, knowledge or intention etc—appeal dismissed—Accused not liable—Supreme Court—1978

Veeda Menezes v Yusuf Khan Haji Ibrahim Khan[97]

Facts: Yusuf Khasn was a tenant of Mrs Menzes. Robert, who was Mrs Menezes' servant, abused Yusuf Khan's wife, following which Yusuf slapped Robert. This was followed by heated exchange between Mrs Menezes and Yusuf, wherein Yusuf threw a file at Mrs Meneze causing a scratch. Mrs Menezes complained at the police station that Yusuf had committed house trespass, thrown a shoe at her, slapped Robert and caused her a bleeding incised wound on the forearm.

Per Shah J:

The trial magistrate held that simple injuries were caused to Robert and to the appellant and for causing those injuries he convicted the first respondent of the offence under *section 323 of the Indian Penal Code, 1860* and sentenced him to pay a fine of Rs 10 on each of the two counts. Against the order of conviction, a revisional application was preferred to the High Court at Bombay. The High Court was of the view that the appellant had grossly exaggerated her story, that the injuries caused to the appellant and to Robert were "trivial" and set aside the conviction and acquitted the first respondent. Hence this appeal.

The expression "harm" has not been defined in the *Penal Code of India*. In its dictionary meaning it connotes hurt, injury, damage, impairment, moral wrong or evil. The expression "harm" is used in many sections differently. In sections 81, 87, 88, 89, 91, 92, 100, 104 and 106, the expression can only mean physical injury. In section 95 it means an injurious mental reaction. In section 415, "harm" means injury to a person in body, mind, reputation or property. In sections 469 and 499, "harm" connotes the loss of reputation of the aggrieved party. Section 95 has a wide connotation, inclusive of physical injury, and there is no reason to suppose that the legislature intended to use the expression "harm" in section 95 in a restricted sense.

Section 95 is intended to prevent penalisation of negligible wrongs or of offences of trivial character. Whether an act which amounts to an offence is trivial or not would undoubtedly depend upon the nature of the injury, the position of the parties, the knowledge or intention with which the offending act is done, and other related circumstances. There can be no absolute standard or degree of harm, which may be, regarded as so slight that a person of ordinary sense and temper would not complain of the harm. It cannot be judged solely by the measure of physical or other injury the act causes. A soldier assaulting his colonel, a policeman assaulting his superintendent, or a pupil beating his teacher, all commit offences, the heinousness of which cannot be determined merely by the actual injury suffered by the officer or the teacher, for the assault would be wholly subversive of discipline.

On the other hand an assault by one child on another, or even by a grown-up person on another, which causes injury, may still be regarded as so slight, having regard to the way and station of life of the parties, relations between them, situation in which the parties are placed, and other circumstances in which harm is caused, that the victim ordinarily may not complain of the harm.

The court upheld the High Court's contention that the harm caused both to the appellant and to Robert was "trivial", and that the evidence justified the conclusion that the injury was so slight that a person of ordinary sense and temper placed in the circumstances in which the appellant and Robert were placed may not reasonably have complained for that harm. The appeal is dismissed.

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93 See *Draft IPC*, note B, pp 109, 110.

94 The law does not concern itself with trifles.

95 1976 Cr LJ 654; see also *"Annual Survey of Indian Law"*, Indian Law Institute, 1978, pp 223-24.

96 1978 Cr LJ 1050; *State of Karnataka v Lobo Medicals,* 1978 Cr LJ 1837; respondent was prosecuted under *Essential Commodities Act 1955* read with Drugs (Price Control) Order for theft of sixty paise. Rejecting the plea of the trifles, the court held that since the act relates to a socio-economic offence, it cannot be considered a trifle offence under *section 95 of Indian Penal Code 1860*.

97 *AIR 1966 SC 1773* : 1966 Supp SCR 123, per Shah, KN Wanchoo and SM Sikri, JJ.

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3.14 Private Defence

KD Gaur: Criminal Law-Cases and Materials, 9th ed

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Part I General Principles

3 GENERAL EXCEPTIONS

3.14 Private Defence

The right of private defence is codified in *sections 96* to *106* of *IPC, 1860* as stated below:

96. Things done in private defence.—Nothing is an offence which is done in the exercise of the right of private defence.

97. Right of private defence of the body and of property.—Every person has a right, subject to the restrictions contained in section 99, to defend—

First.—His own body, and the body of any other person, against any offence affecting the human body;

Secondly.—The property, whether moveable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass or which is an attempt to commit theft, robbery, mischief or criminal trespass.

98. Right of private defence against the act of a person of unsound mind, etc.—When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

Illustrations

(a) *Z*, under the influence of madness, attempts to kill *A*; *Z* is guilty of no offence. But *A* has the same right of private defence which he would have if *Z* were sane.

(b) *A* enters by night a house in which he is legally entitled to enter. *Z*, in good faith, taking *A* for a house-breaker, attacks *A*. Here *Z*, by attacking *A* under this misconception, commits no offence. But *A* has the same right of private defence against *Z*, which he would have if *Z* was not acting under that misconception.

99. Acts against which there is no right of private defence.—There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act, may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction, may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which the right may be exercised.—The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority, if demanded.

100. When the right of private defence of the body extends to causing death.—The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:—

First.—Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly.—Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly.—An assault with the intention of committing rape;

Fourthly.—An assault with the intention of gratifying unnatural lust;

Fifthly.—An assault with the intention of kidnapping or abducting;

Sixthly.—An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

Seventhly.—An act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act.

Note: Clause “seventhly” in *section 100 of Indian Penal Code, 1860* has been added *vide Criminal Law (Amendment) Act* (13 of 2013) with effect from 3 February 2013.

101. When such right extends to causing any harm other than death.— If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99, to the voluntary causing to the assailant of any harm other than death.

102. Commencement and continuance of the right of private defence of the body.—The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

103. When the right of private defence of property extends to causing death.—The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely:—

First.—Robbery;

Secondly.—House-breaking by night;

Thirdly.—Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

Fourthly.—Theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

104. When such right extends to causing any harm other than death.—If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrong-doer of any harm other than death.

105. Commencement and continuance of the right of private defence of property.—The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass, or mischief continues as long as the offender continues in the commission of criminal trespass, or mischief.

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.

106. Right of private defence against a deadly assault when there is risk of harm to innocent person.—If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

Illustration

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. *A* commits no offence if by so firing he harms any of the children.

The law of private defence provides that when a person is suddenly faced with an attack to his person or property and immediate aid from the State machinery is not available, that person is entitled to defend himself and resist the attack and to inflict on the attacker any harm that is necessary for the purpose of defence.[98] The right of private defence serves a social purpose. There is nothing more degrading to the human spirit than to run away in the face of peril.

It is important to note that Indian law on the subject of private defence is much wider in scope than the Anglo-American legal system. According to the Anglo-American law, a person is not justified in using extreme force in self-defence unless he has first retreated as far as possible, if retreat-is consistent with safety, whereas under *IPC, 1860*, there is no such restriction for the exercise of the right of private defence. The force which a person is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is necessarily apprehended and must not exceed its legitimate purpose, and that the exercise of the right must not be vindictive or malicious.

The right of private defence is absolutely necessary for the protection of one's person, habitation or property against the assailant who manifestly intends and endeavours to take them away.[99] No doubt, it is the primary duty of the State to protect the life and property of its individuals, but no state, no matter how large its resources might be, can depute a policeman to watch the activities of each and every individual and protect him. There may be situations where help of the State authorities cannot be obtained in order to repel an unlawful aggression either because no time is left to ask for such a help or for any other reason. To meet such exigencies, the law has given the right of private defence to every individual.[100] *Section 96 of IPC* gives statutory recognition to the right of private defence by stating, "nothing is an offence which is done in the exercise of the right of private defence". However, the right is not absolute and is subject to limitations contained in *sections 99* to *105* of *IPC*.

Section 97 gives every man the right to use necessary force against an assailant and to cause harm for the purpose of protecting his own body, and the body of any other person against any offence affecting the human body; and to defend his own property and property of any other person against theft, robbery, mischief, or criminal trespass or an attempt to commit any one of these offences. The owner of a land has the right to use necessary force, if the trespasser fails to remove the trespass.[101] However, if the trespasser is in settled possession of the land, the owner has no right to dispossess the trespasser by force, and in such a case, unless he is evicted by law, he is entitled to defend his possession even against the true owner.

The Supreme Court held in *Puran Singh v State of Punjab*[102] that in order to claim the right of private defence, the trespasser must be in actual physical possession of the property over a sufficiently long period; the possession must be to the knowledge either express or implied of the owner, or without any attempt at concealment and which contains an element of *animus, possidendi*; the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced in by the owner and in the case of cultivable land, whether or not, after having taken possession, the trespasser had grown any crop. The nature of possession of the trespasser is a matter to be decided on the facts and circumstances of the case.

The right of private defence rests even in strangers for the defence of the body and property of others against offences mentioned in *section 97 of IPC, 1860*. However, no one can take sides in a quarrel between two or more persons and inflict injuries on the one or the other on the mere pretext of exercise of the right of private defence. In a free fight, there is no right of private defence to either party. Each one is responsible for his own acts.[103]

The right of private defence is also available against an offence committed by a person who might not be criminally liable for his act, either by reason of the doer being a man of unsound mind, or because of want of maturity of understanding, or by reason of any misconception on the part of that person. For instance, if A, a man of unsound mind attempts to kill B, A is guilty of no offence. But B will have the same right of private defence against A, which he would have if A were sane [Illustration (a) to *section 98, IPC, 1860*].

The right of private defence is essentially a defensive right circumscribed by the statute, available only when circumstances clearly justify it. The right is not to be allowed to be pleaded or availed of as a pretext for a vindictive, aggressive or retributive purpose. The right is available against an offence and so an aggressor cannot claim the right of self-defence. The right cannot be used as a shield to justify an act of aggression. If a person goes to kill another with a gun, the intended victim is entitled to exercise the right of private defence, and if he does so, there is no right of private defence in the former to kill the latter. No one is allowed to devise a mechanism, whereby an attack may be provoked as pretence for killing.[104]

There is no right of private defence against the act of a public servant, acting in good faith in the discharge of his legal duty, provided the act is not illegal.[105] A police officer, while acting bona fide under the colour of his office, arrests a person, the person so arrested has no right of private defence, even if the police officer had no authority to arrest. There is no right of private defence in cases in which there is time to have recourse to the protection of public authorities, and the right in no cases extends to the infliction of more harm than is necessary for the defence.[106]

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98 *State of Orissa v Chenu,* 1978 Cr LJ pp 262, 264 :respondent was charged under *section 302 of IPC, 1860* for murdering his brother, but was acquitted by the trial court and the High Court confirmed the acquittal on the ground that the death was caused while exercising the right of private defence. The deceased and the respondent were heavily drunk and had a quarrel. In the course of quarrel, the deceased rushed towards the respondent with a *lathi* to assault him, and apprehending danger to his life, the respondent gave a *tangi* blow on the head of the deceased resulting in his death. Considering the fact that the deceased and respondent were *adhivasis* (tribals) and that *adhivasis* were volatile in nature, the High Court felt that there was imminent danger to the person of the respondent and as such he had the right of private defence of his person; *Jai Dev v State of Punjab,* AIR 1963 SC 612 : [1963] 3 SCR 489—the accused fired shots; by that time all the attackers had run away, and shot down persons who were standing at a long distance away from them. Held, the accused could not claim the right of private defence and were guilty of murder.

99 *Russell on Crime*, vol 1, 12th Edn, p 442; *Draft Penal IPC,* note B, p 110.

100 Gour Hari Singh, *Penal Law of India,* vol I, 10th Edn, p 724, Bentham, *Principles of Penal Law,* p 209. According to Bentham:

> "The vigilance of a magistrate can never make up for the vigilance of each individual on his own behalf. The fear of the law can never restrain bad men as the fear of sum total of individual resistance. Take away this right and you can become in so doing the accomplice of all bad men".

101 *Hukam Singh v State of UP,* AIR 1961 SC 1541 : [1962] 1 SCR 601—a man committing criminal trespass upon the land of another, has to abide by the direction of the owner and go back however inconvenient it might be. In case the trespasser uses violence, he would be responsible for it; *Munshi Ram v Delhi Administration,* AIR 1968 SC 702 : [1968] 2 SCR (2) 408—a casual act of possession by the trespasser cannot deprive the owner of his right to re-enter and reinstate himself provided he does not use more force than necessary.

102 AIR 1975 SC 1674 : 1975 SCR 299 : (1975) 4 SCC 518; *Ram Rattan Singh v State of UP,* AIR 1977 SC 619 : 1977 SCR (2) 232 : (1977) 1 SCC 188; one of the tests to find out as to when the possession of a trespasser becomes final is to find out who had grown the crop on the land in dispute. *Kishan v State of MP,* AIR 1974 SC 244 : (1974) 3 SCC 623; *Jumman v State of Punjab,* AIR 1957 SC 469; *Gurbachan Singh v State of Haryana,* AIR 1974 SC 496 : (1974) 3 SCC 667; there is no right of private defence against an unarmed and unoffending individual who had fallen and was trying to get up.

103 *Vishwa Aba Kurane v State of Maharashtra,* AIR 1978 SC 414 : (1978) 1 SCC 474; *Munney Khan v State of MP,* AIR 1971 SC 1491 : 1971 SCR (1) 943; when two parties are having a free fight without disclosing as to who is the initial aggressor no sympathiser can exercise the right of private defence; *Jumman v State of Punjab,* AIR 1957 SC 469 : 1957 Cr LJ 586—held, the right of private defence is not available to either side to a free fight when there is no clear evidence to show which side was the aggressor.

104 *State of UP v Ram Swarup,* AIR 1974 SC 1570 : (1974) 4 SCC 764 : 1975 SCR (1) 409.

105 *Kanwar Singh v Delhi Administration,* AIR 1965 SC 871 : [1965] 1 SCR 7. Held, there is no right of private defence against the act of a public servant seizing stray animals under the authority of law.

106 *Ghunnu v State of UP,* AIR 1980 SC 864 : 1980 Supp SCC 384 : 1978 (10) UJ 924 SC. Held, the right of private defence exceeded the lawful limits, although the attack was made by the accused after a gunshot was fired by the persons belonging to the prosecuting party. The use of force by the accused to defend himself by snatching the pistol had led to the presumption that the cause for apprehension of death or grievous hurt had receded; *Parichhat v State of MP,* (1972) Cr LJ 322 : AIR 1972 SC 535 : (1972) 4 SCC 694. Held, to use a sharp edged weapon in the absence of apprehension of death or grievous hurt is tantamount to exceeding the right of private defence.

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3.15 Private Defence of Body

Part I General Principles

3 GENERAL EXCEPTIONS

3.15 Private Defence of Body

Section 100 declares that the right of private defence of body extends to causing death of the assailant, if the offence which occasions the exercise of the right is an assault of any one of the description enumerated in that section, namely, apprehension of causing death; or of causing grievous hurt; or of committing rape; or of gratifying unnatural lust; or of kidnapping or abducting,[107] or of wrongfully confining a person which may reasonably cause the apprehension that the man may not be able to contact public authorities for help or when there is apprehension of throwing or attempting to throw acid. That may reasonably cause grievous hurt or will otherwise be the consequence of such act. In *Rama v State*[108] the Judicial Commissioner of Goa, Daman and Diu held that four cardinal conditions must exist to justify the plea of right of private defence in causing the death of the assailant. The first condition being that the accused must not be responsible in bringing about an encounter, secondly, there must be an impending peril to life, or of grievous bodily injury, either real or so apparent as to create honest belief of exceeding necessity, thirdly, there must be no safe or reasonable mode of escape by retreat, fourthly, there must have been necessity for taking the life.

The right of private defence to a person also extends to the taking of risk to life of innocent persons where there is a reasonable apprehension of death and the person is so situated that he cannot effectively exercise the right of private defence without doing harm to such persons. A is attacked by a mob, which attempts to murder him and he is so situated that he cannot protect himself without firing on them, and he cannot fire without the risk of harming young children who are mingled with the mob. A commits no offence, if by so firing he injures any one of the children (Illustration to *section 106, IPC*).

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107 *Nankan v State,* (1977) Cr LJ (NOC) 116 (All). Held the paramour and his brother were justified in exercising the right of private defence against the husband who had intention to forcibly abduct his wife against her will to go away from her paramour's house.

108 (1978) Cr LJ 1843; *Rahman v State,* (1977) Cr LJ 1293 (Gau); *MC Datta v State,* (1977) Cr LJ 506 (Gau). See Pandey and Bagga, *"Right to Private Defence"*, Annual Survey of Indian Law, VIII, 1972, pp 60-62.

3.16 Private Defence of Property

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Part I General Principles

3 GENERAL EXCEPTIONS

3.16 Private Defence of Property

The right of private defence of property extends to voluntarily causing of death of the assailant in cases of danger to property, resulting from any one of the offences set out in section 103, namely, robbery, house-breaking by night, mischief by fire to any building, tent or vessel used for the purpose of dwelling or custody of property, theft, mischief or house-trespass under such circumstances as may reasonably cause the apprehension that death or grievous hurt may be caused.

In cases other than those mentioned in sections 100,103 and 106, the right of private defence of body and of property extends to the voluntary causing of any harm short of death to the assailant (sections 101 and 104).

The right of private defence commences as soon as a reasonable apprehension of danger[109] to human body or to property of himself or another person arises from an attempt or threat to commit the offence, though the offence may not have been committed.[110] The right comes to an end as soon as the threat of assault has ceased and the apprehension of danger has been removed.[111] The continuance of the right of private defence depends on the nature of the offence in question. In case of theft, the right of private defence continues till the offender has effected his retreat with the property; in case of robbery, as long as the offender causes or attempts to cause death to any person, or hurt or wrongful restraint or fear of any one of such of the offence continues; in case of criminal trespass or mischief, so long as the accused continues in the commission of such offence; in case of house-breaking by night, so long as the house-breaking continues.[112]

Leading Cases

Sections 96, 100 of Indian Penal Code, 1860: Darshan Singh—Right of Private Defence: Extent and Scope: Guidelines and Principles for application of Right of Private Defence—Supreme Court—2010

Darshan Singh v State of Punjab[113]

The Supreme Court after marshalling and scrutinizing the entire evidence set aside the conviction of the appellant Darshan Singh under *section 302, IPC* for murder of Guru Charan Singh allowing him the benefit of private defence *vide* section 100 clause (1), *IPC*. To simplify the law in case of private defence, the court in an elaborate judgment has set out following principle that emerged on the scrutiny of various cases.

(1) Self-preservation is a basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free democratic and civilized countries recognize the right of private defence within certain reasonable limits.[114]

(2) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.[115]

(3) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed, if the right of private defence is not exercised.[116]

(4) The right of private defence commences as soon as a reasonable apprehension arises and it continues with the duration of such apprehension.[117]

(5) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.[118]

(6) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.[119]

(7) It is a well settled principle that even if the accused does not plead self-defence, it is open to the court to consider such a plea, if the same arises from the material on record.[120]

(8) The accused need not prove the existence of the right of private defence beyond reasonable doubt.[121]

(9) The *Indian Penal Code, 1860* confers the right of private defence only when that unlawful or wrongful act is an offence.[122]

(10) A person who is in imminent and reasonable danger of losing his life or limb may exercise right of self-defence and inflict any harm even extending to causing death on his assailant either when the assault is attempted or directly threatened apprehending that death will otherwise be consequence of such assault.[123]

Right of private defence extending to voluntary causing of death is available only if accused shows that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. Accused has to place necessary material on record either by himself adducing positive evidence or by eliciting necessary positive evidence or by eliciting necessary fact from prosecution witnesses—Degree of proof however is not beyond reasonable doubt but mere preponderance of probability

Arjun v State of Maharashtra,

AIR 2012 SC 2181 : *(2012) 5 SCC 530*

KS Radhakrishan, KS Radhakrishan and Dipak Misra, JJ:

The appellant, a retired army service man was convicted under *section 302, IPC, 1860* for murder of one Jagannath Rambhau Shirsath and under *section 326, IPC, 1860* for causing grievous hurt to Muktabai, wife of the deceased.

The deceased Jagannath and Muktabai (PW 8), parents of Rangnath (PW 1), his brothers Ashok Gahininath and Rajendra were all living together at Taklimanur, Taluka Pathardi, District Ahmednagar. There was some property dispute between the first accused (appellant) and the deceased-Jagannath for which, the appellant had filed a civil suit. In the village Taklimanur, there was an annual fair on 30 July 2002. At about 4 pm, on that date when the deceased came in front of the appellant's shop, the appellant abused the deceased. Later, when the deceased, his wife, Muktabai and son Rangnath were going to Ambikanagar to worship the Goddess, the appellant, his brothers Babasaheb (Accused No. 8), Buvasaheb (Accused No. 2), Suresh, son of Buvasaheb (Accused No. 7), Dnyandeo (acused No. 4), Bhimrao (Accused No. 5), Patilba (Accused No. 3) and Ramnath (Accused No. 6) attacked the deceased on the road near a Tamarind tree. The appellant was armed with a large knife, accused No. 3 was armed with an axe and others were carrying sticks. The appellant inflicted three blows on the head of the deceased with a large knife (Sura-Article No. 13) and deceased fell down. When PW 8 (Muktabai) intervened to rescue her husband, the appellant inflicted blows on her head, back and shoulder. Again, when PW 10 (Karbhari) (brother-in-law of PW 8) and his son Ambadas (PW 11) came to their rescue; the appellant assaulted both of them. Due to the injuries, the deceased died on the spot.

While altering the conviction from *section 302 IPC* for murder to section 304 Part I of *Indian Penal Code, 1860* for culpable homicide not amounting to murder, Apex Court said:

> Considering the background facts as well as the fact that there was no premeditation and the act was committed in a heat of passion and that the appellant had not taken any undue advantage or acted in a cruel manner and that there was a fight between the parties, we are of the view that this case falls under the fourth exception to *section 300 IPC* culpable homicide not amounting to murder and hence it is just and proper to alter the conviction from *section 302 IPC* to section 304 Part I *IPC*.

While rejecting the pleas of private defence raised by the accused, the Apex Court said:

> We are of the view that in the instant case, as rightly held by the High Court and Trial Court, there is nothing to show that the deceased, his wife (PW 8), his son (PW1) or others had attacked the appellant, nor the surrounding circumstances would indicate that there was a reasonable apprehension that the death or grievous hurt was likely to be caused to the appellant by them or others. The plea of private defence is, therefore, has no basis and the same is rejected.

Sections 96, 302, IPC, 1860: Appellant firing on unarmed deceased with gun causing death cannot claim Right of Private Defence—Supreme Court—2010

Narinder Kumar v State of J & K[124]

On 13 April 1992, the deceased Kola Ram along with his brothers, Balwant Raj and Tirath Ram the appellant and a large number of other people were returning home after celebrating Baisakhi Mela. While returning from the mela there was an exchange of hot words between the appellant and deceased that led the appellant firing at the deceased from close range causing his death.

Having been convinced by the evidence led by prosecution the trial court convicted the appellant under *section 302, Indian Penal Code, 1860* and sentenced him to life imprisonment. The High Court confirmed the verdict.

Dismissing the appeal, the Apex Court held in the light of the consistent version given by all these eye witnesses, both the courts below were justified in holding that the prosecution had beyond any shadow of doubt proved the guilt of the accused appellant especially when there was no prior enmity between the appellant and the witnesses or their respective families to even suggest the possibility of false implication.

Regarding plea of private defence the courts below have rightly said that since the trial court and also the High Court have come to the conclusion that the deceased was not armed nor was any attempt made by him on the life of the appellant the plea of the private defence is rejected.

In the totality of the above circumstances, the Apex Court declined to interfere with the judgment of High Court. The appeal was dismissed.

Plea of self-defence under sections 100 and 302 of Indian Penal Code, 1860 is not tenable when the appellant accused fired gunshots in discriminately, on being angered by the criminal when they were not aiming to cause any harm or injury to the accused, resulting in death of a woman and injuring a child. Plea of self defence rejected – Appeal dismissed – Supreme Court held accused liable for murder 2017.

Brij Lal v State of Rajasthan[125]

JS Khehar, J:

The Sessions Judge acquitted the appellant for murder under *section 302 IPC, 1860* by accepting the plea of self-defence raised by him by invoking the second exception exceeding the right of private defence under *section 300 of Indian Penal Code, 1860*. The State preferred appeal to assail the acquittal order. The High Court accepted the appeal preferred by the State. The judgment rendered by the Sessions Judge was set aside. The appellant was found guilty of having committed the offence punishable under *section 302 of IPC, 1860*.

The appellant has approached Apex Court, to assail the impugned judgment, rendered by the High Court.

Held, while dismissing the appeal:

(i) There was overwhelming evidence produced by the prosecution, affirming that the crowd which had gathered at the place of occurrence, consequent upon the shouting of prosecution-witness-1, was unarmed. All the villagers were only persuading the accused-appellant and his co-accused, not to insist on carrying out their threat, to murder prosecution-witness-15. The testimony of the prosecution witnesses also demonstrated, that there was substantial distance between the villagers, and the place at which the accused were standing. Not only prosecution witness-1, but also prosecution witness-15, expressly deposed that none of the neighbours and co-villagers, was armed. Moreover, the reiteration by the witnesses, that the crowd comprised of men, women and children, by itself is sufficient, to infer that the

neighbours and co-villagers were not aiming at causing any harm or injury to the accused-appellant or the co-accused. It could not be overlooked, that one of the deceased was a woman, and one of the injured was a child. There was absence of any material evidence produced by the appellant to demonstrate that gunshots fired by them were in self-defence. [15]

(ii) The evidence produced by the prosecution demonstrates, that the accused had fired gunshots indiscriminately, on being angered by the gathering, which was trying to persuade them from carrying out their singular objective – to cause harm to the person of prosecution witness-15. The signatures of the appellant were obtained on the "mazhar" prepared at the time of recovery. All the relevant prosecution witnesses, duly identified the appellant. It was not possible to accept, that the appellant deserved to be acquitted, because of the acquittal of co-accused in the separate trial conducted against him.

> The prosecution has clearly demonstrated through the testimony recorded on oath, that none of the persons gathered at the place of occurrence was armed in any manner. It was only because of their desire to retaliate against the crowd, consequent upon the crowd having gathered to protect prosecution witness-15, could not be a satisfactory reason for the appellant to fire gunshots indiscriminately. [18], [19], [20] and [21].

(iii) The High Court relied upon cogent evidence, to set aside the order of acquittal passed by the Sessions Judge. The trial court had overlooked vital evidence recorded on behalf of the prosecution, specially during the cross-examination of the prosecution witnesses, whereupon, the position of there being any second way of viewing the facts, was absolutely out of question. [24]

Section 100—plea of private defence: accused need not prove right of defence beyond reasonable doubt—Supreme Court—conviction set aside—appeal allowed—2006

Krishnan v State of Tamil Nadu[126]

Per Raveendran J:

Allowing the appeal and setting aside the conviction, the Supreme Court said that it is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case, the court can consider it even if the accused has not taken it.

An accused taking the plea of the right of private defence is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

Where the plea of the accused, when read with the evidence of the eye witnesses, brings out a set of facts and circumstances showing that the accused acted in exercise of the right of private defence, the fact that the accused in his statement only referred to the acts of the deceased and his son hitting him and did not admit that he hit back the deceased, is not a ground to reject the plea of private defence. The approach of the trial court to the plea of private defence was erroneous. The High Court did not go into this aspect at all.

The deceased and his wife and son were the root-cause for the quarrel as they put thorny sticks at the place where appellant was tethering his cattle. The defence version that the deceased and his son had hit the appellant with sticks on his head and the blows landed on his elbows when he raised his hands to protect his head, and that at that stage, the appellant picked up one of the thorny sticks which were lying at the spot and hit the deceased, to protect himself and not with the intention of killing him.

Conviction under sections 302 and 323 was set aside and the appellant was acquitted.

Right of private defence extends to the extent of causing death in case of apprehension of death or grievous bodily harm—Supreme Court—1952

Amjad Khan v State[127]

Facts: A communal riot broke out between some Sindhi refugees and the local Muslims. The appellant stated that the mob broke into the building where his brother's shop was located and looted it. The mob was beating on his doors where he fired two shots which caused the death of a man and injured three others. The Supreme Court held that these circumstance in which the appellant was placed were amply sufficient to give him a right of private defence of the body, even to the extent of causing death. *Section 99 IPC, 1860* clearly demonstrates that "As soon as reasonable apprehension of danger to the body arises", right to private defence evidences.

Right of private defence extends to causing death if property sought to be protected is public property—provided building is used for human dwelling or for custody of property—Accused Liable—Supreme Court—1952

Bhupendrasinh AV Chudasama v State of Gujarat,

[1997] INSC 810

Per Thomas J:

A constable of Special Reserved Police shot at his immediate superior (Head Constable) while the latter was perambulating around a Dam site (in Gujarat State) during dusk hours. The victim died on the spot. The post-mortem examination of the dead body revealed that the death of deceased was due to piercing of bullets from a firearm. The appellant was charged and tried for murder, but the trial judge entertained doubt about his complicity and acquitted him.

However, a Division Bench of the High Court of Gujarat, while reappraising the whole evidence on an appeal filed by the state, held that it was cold blooded murder perpetrated by the appellant. Accordingly, the acquittal was reversed and the appellant was sentenced to imprisonment for life.

The appellant in defence, said:

> I was doing patrolling duty with the service rifle, and at about 7.45 pm when it was absolutely dark, I came near the bridge for proceeding towards the valve tower. Then I saw a flame near the tower and saw somebody moving. I suspected that some miscreant was about to commit mischief with fire on the valve tower. As I could not identify the moving person due to want of light I shouted at him to stop. But there was no reply. So I proceeded further and repeated the same again, but still there was no reply. I had to open fire in discharge of my duties. I fired first in the open air and then fired two more rounds. I heard the sound of something falling down. I then reported the incident to the persons who were in the office. When Constable Laxman Singh (PW 2) and Jayantraj Sinha) (PW 3) arrived after seeing the body of the victim they informed me that it was Ukadbhai Radvabhai who received butted injuries.

The trial court felt that defence version is quite probable and he is entitled to the benefit of doubt. The High Court found that the trial court was wrong in entertaining such a doubt on the facts of the case.

No doubt right of private defence would commence when a reasonable apprehension of danger to property commences and such right can extend to the killing of another person even if there was only an attempt to commit any of the offences mentioned in the section. The right subsumed in the section is an expansion of the basic right of private defence founded in section 97. When the two sections are telescoped with each the right of private defence can be stretched up to the extent of killing another person in defending the property of not only his own but even of another person, such right would be available to a public servant if the property sought to be protected is public property. But there is a condition for claiming such an extended right if the property sought to be protected is a building. It should be a building used for human dwelling or for custody of property. If it is not a building of that type the person exercising right of private defence cannot go to the extent of killing another person, unless the threatened mischief has caused a reasonable apprehension that death or grievous hurt would otherwise be the consequence.

Appeal dismissed, conviction upheld.

Right of private defence of body extends to the extent of causing death under clause (5) to section 100 IPC, 1860 against any assault for abduction—Appeal allowed—Conviction set aside—Supreme court—1960

Vishwanath v State of UP[128]

Facts: The deceased, Gopal was married to the sister of the appellant and was living with her family. They did not, however, get on well together and the deceased moved into a separate quarter. Gopal was keen to take away his wife and asked Banarsi and his sons to help him in bringing back his wife. Banarsi also arrived and then all four of them went to bring back the girl. Banarsi and his two sons stood outside while Gopal went in and came out of the quarter dragging his reluctant wife behind him.

The appellant was also there and shouted to his father that Gopal was adamant. Badri thereupon replied that if Gopal was adamant, he should be beaten. On this the appellant took out a knife from his pocket and stabbed Gopal once. Steps were taken to revive Gopal but without success.

The sessions judge held that the appellant had the right of private defence of person and that this right extended even to the causing of death of Gopal as it arose on account of an assault on his sister with intent to abduct her, and therefore, the appellant was acquitted.

The acquittal of the appellant was set aside by the Allahabad High Court on the ground that the case was not covered by the fifth clause of section 100, and that the right of private defence of person in this case did not extend to the voluntary causing of death to the assailant and, therefore, it was exceeded. The appellant was therefore, convicted under section 304 Part II of *IPC* and sentenced to three years rigorous imprisonment. Hence, the appeal to the Supreme Court.

Per KN Wanchoo and S Jaffar Imam, JJ:

The question is whether the appellant had exceeded the right of private defence of person.

Section 100 gives an extended right of private defence to person in cases where the offence, is of any of the six descriptions enumerated therein. It extends even to the causing of death.

For example, the first clause says that the assault must be such as may reasonably cause the apprehension of death. Now death is not an offence anywhere in the *Indian Penal Code, 1860*. Therefore, when the word “abducting” is used in clause 5, the clause requires is that there should be an assault which is an offence against the human body and that assault should be with the intention of abducting, and whenever these elements are present the clause will be applicable.

Further the definition of “abduction” is in two parts, namely (i) abduction where a person is compelled by force to go from any place and (ii) abduction where a person is induced by any deceitful means to go from any place. Now the fifth clause of section 100 contemplates only that kind of abduction in which force is used and where the assault is with the intention of abducting, the right of private defence that arises by reason of such assault extends even up to the causing of death. It would be not right to expect from a person who is being abducted by force to pause and consider whether the abductor has further intention as provided in one of the sections of *IPC, 1860* quoted above, before he takes steps to defend himself, even to the extent of causing death of the person abducting.

When the appellant’s sister was being abducted, even though by her husband, and there was an assault on her and she was being compelled by force to go away from her father’s place, the appellant would have the right of private defence of the body of his sister against an assault with the intention of abducting her by force and that right would extend to the causing of death.

The next question is whether the appellant was within the restrictions prescribed by section 99. The appellant gave only one blow with a knife which he happened to have in his pocket. It is unfortunate that the blow landed right into the heart and therefore Gopal died. But considering that the appellant had given only one blow with an ordinary knife, which if it had been a little this way or that, could not have been fatal, it cannot be said that he inflicted more harm than was necessary for the purpose of defence.

We, therefore, allow the appeal and hold that the appellant had the right of private defence of person under the fifth clause of section 100 and did not cause more harm than was necessary and acquit him.

Right of private defence of body is justified to use minimum and proportionate force—When exceeds liable under Exception 2 to section 300 punishable under section 304 Part I—Supreme Court—1971

Munney Khan v State of MP[129]

Facts: This was an appeal by special leave by one Munney Khan who had been convicted for the offence of murder punishable under *section 302 of the IPC, 1860*. According to the prosecution, a short scuffle arose between Reotisingh (the deceased), the appellant and his brother. However, the same subsided on intervention by others, thereafter, when the deceased was returning from his house, he met the appellant and his brother, which resulted in the scuffle being resumed.

In the scuffle that followed, the deceased overpowered the brother of the appellant, sat on his chest and started giving him first blows. On seeing the same, the appellant stabbed the deceased on the back with a knife, which resulted in his death.

In these circumstances, Reotisingh (the deceased) was the aggressor, and was causing hurt to Zulfiquar, the brother of the appellant, so that a right of self-defence of body of his brother had accrued to the appellant.

That right, however, could not justify the act of appellant in stabbing Reotisingh in his back so as to cause his death. The right of private defence was a very limited one. It only extended to causing hurt of some kind to Reotisingh, but it did not provide any justification for giving a fatal blow. Such a right of private defence is governed by *section 101 of IPC, 1860*, and is subject to two limitations likely in exercise of this right of private defence, namely, any kind of hurt can be caused but not death and that the use of force does not exceed the minimum required to save the person in whose defence the force is used.

In the present case, when Zulfiquar was being given fist blows, there could be no justification at all for the appellant to stab Reotisingh with a knife and particularly to give him a blow which could prove fatal by aiming it on his back. The use of the knife itself was in excess of the right of private defence and it became much more excessive when the blow with the knife was given on a vital part of the body which, in the ordinary course of nature, was likely to cause the death of Reotisingh.

From the fact that the blow was given in the back, with a knife, an inference follows that the appellant intended to cause death or at least intended to cause such injury as would, in the ordinary course of nature, result in his death. In adopting this course, the appellant would have been clearly guilty of the offence of murder had there been no right of private defence of Zulfiquar at all. Since such a right did exist, the case would fall under the Exception (2) to *section 300, IPC, 1860* under which culpable homicide does not amount to murder on the ground that the death was caused in exercise of right of private defence, but by exceeding that right, an offence of this nature is made punishable under the first part of *section 304 of IPC, 1860*.

Section 100 clause (iii) IPC : Right of private defence extends to the extent of causing death when daughter was being sexually assaulted—Accused entitled to right to defence—Appeal Allowed, Conviction quashed—Supreme Court—1992

Yeshwant Rao v State of MP,[130]

AIR 1992 SC 1683 : (1993) Supp (1) SCC 520 : 1992 Cr LJ 2779

Per Yogeshwar Dayal, J:

Facts: The deceased, Lakhan Singh was engaged in a sexual intercourse with the daughter of the appellant.

On witnessing the same, the appellant assaulted the deceased on the head with a spade. The post mortem revealed that the cause of death was due to the rupture of liver which could be either by falling on a hard object, or as a result of the blow given by the appellant.

The trial court convicted the appellant under *section 325, IPC, 1860* for causing hurt and the High Court confirmed the conviction. In appeal, the Supreme Court set aside the conviction and held that the right of private defence was fully applicable to the facts of the case *vide sections 96*, *97* read with *section 100* of *IPC, 1860*. Whether it was a case of sexual intercourse with or without consent, the fact remains that the daughter was of fifteen years of age and, therefore the act of deceased would amount to rape within the meaning of section 375, clause (6) of *IPC*.

Use of "deadly force" (Excessive Force) and its Permissibility: A police officer's attempt to terminate a

dangerous high speed car chase, when it places the fleeing motorists at risk of serious injury of death violate the Fourth Amendment right of the petitioner—US Supreme Court—2007

Timothy Scott v Victor Harris,

550 US 372 : 172 S Ct 1769 (April 30, 2007)

In March 2001, a Georgia county deputy chased respondent's vehicle traveling at 73 miles per hour on a road with a 55 miles per hour speed limit. The deputy activated his blue flashing lights indicating that respondent should pullover, instead the respondent sped away, initiating a chase down. In the midst of the chase, the respondent lost control of his vehicle, which left the roadway, ran down on an embankment, (*bandh*) overturned and crashed and was badly injured and was rendered a quadriplegic (paralyzed-all the four limbs and became paralyzed).

Respondent filed suit against Deputy Scott alleging *inter alia* a violation of his federal constitutional rights under the Fourth Amendment which prohibits the use of "deadly force" and that the use of such force in this context "would violate his constitutional right to be free from excessive force during a seizure."

The United States Court of Appeal for the Eleventh Circuit affirmed respondent's fourth Amendment claim against Scot. Deputy moved the US Supreme Court against the Court of Appeal verdict. Dismissing the appeal the US Supreme Court held that:

> Though refusal of the motorist to stop and subsequent flight was a serious offence that merited severe punishment, it was not however a capital offence, or even an offence that justified the use of deadly force rather than abandonment of the chase. They had his license plate number. Even if that were not true, and even if he would have escaped any punishment at all, the use of deadly force in this case was no more appropriate considering the nature of the case. Use of excess force is in violation of petitioner's Forth Amendment Right.

Reasonable step taken to prevent entry of intoxicated patrons "during the function at the Gold Club Day" in 2009 by the appellants – This exonerates them from criminal liability for an offence permitting intoxicated persons on licensed premises contrary to the provisions of section 73 (1)(a) of Liquor Act 2007 (NSW)

Christine Maree Williams v The Department of Arts, Sports and Recreation,

2010 WL 585612 (2010)

Per English, J:

> The appellant appeals against her conviction by the Wagga Wagga local court on 7 June 2007 (a) of Liquor Act 2007 an offence of licensing permitting intoxicated persons on licensed premises. The offences are alleged to have taken place on 1 May 2009.
>
> A statutory defence is available to the appellant as provided for in section 73 (4) of the Liquor Act and that is that she took all reasonable steps to prevent intoxication. The appellant is the chief executive officer of Murrumbidgee Turf Club and she is the nominated licensee under the governor's license number 240028889. It is an online license, and she has held that license since 2 May 2000. 1 May 2009 was the Wagga Wagga Gold Cup event, a major regional race meeting day in the New South Wales racing calendar. On that particular day, the patronage was estimated to be between 10,000 and 12,000 attendees. The offences are said to arise in relation to intoxicated persons detected at the race-track on that day. The first such intoxicated person was a female. Miss Lessie Black; the second, a male intoxicated person, George Wood; the third, a male described as wearing a white shirt, black socks; the fourth male patron wearing a pink suit and a hat; and the fifth wearing a light blue dress over which was worn a male black suit jacket.
>
> While allowing what steps are to be taken, it will never be possible to prevent some or the other form of intoxication on the licensed premises. I find myself satisfied that she undertook all reasonable steps that could have been taken to prevent the presence of intoxicated patrons at the Gold Cup Day in 2009. They were steps as ought to be reasonably taken by way of precaution against the occurrence of intoxication and to prevent intoxicated persons being served alcohol or remaining on the premises. The fact that only five persons were discovered is a testament to the success of the plan and the appellant is

to be commended rather than condemned for the successful outcome of the Gold Cup Day.

Appeal Allowed

Causing death to repel attack does not amount to exceeding of right of defence—Appellant entitled to Right of Defence—Supreme Court—1991

Buta Singh v State of Punjab,

AIR 1991 SC 1316 : (1991) 2 SCC 612 : 1991 Cr LJ 1464 : 1991 (1) Scale 597

Per Ahmadi, J:

The deceased and his companions had gone to the disputed land with DW 1 to have it tilled. When the appellant's son frustrated their efforts, they were annoyed and enraged. They, therefore, went to the *dera* of the appellant and launched an attack. The appellant and his wife fought to repel the attack and in the course of the incident both sides sustained injuries.

Held, the appellant had not exceeded his right of private defence. Both the appellant and his wife were attacked. They had sustained injuries. In the course of assault on them they caused injuries to the deceased and the prosecution witnesses. It is true that the High Court has come to the conclusion that all the injuries caused to the deceased were caused by the appellant Buta Singh. Even if it were so, having regard to the nature of the incident, it is difficult to say that he exceeded the right of private defence for the obvious reason that he could not have weighed in golden scales, in the heat of moment, the number of injuries required to disarm his assailants who were armed with lethal weapons. The submission of the learned counsel for the State cannot be accepted in the facts and circumstances of this case.

The appellant and his wife were clearly defending themselves and, hence; they had a right of private defence.

An aggressor cannot claim right of private defence—Accused being aggressor— Liable for murder—Appeal dismissed—Supreme Court—1974

Kishan v State of MP,

AIR 1974 SC 244 : (1974) 3 SCC 623 : 1974 Cr LJ 324

and

State of UP v Pussu,[131]

1983 AIR 867 : 1983 SCR (3) 294 : (1983) Cr LJ 1356 (SC) : 1983 Scale (1) 655

The appellant along with other co-accused went to the house of the deceased with the intention of causing physical harm to him. They pulled the deceased out of his house and subjected him to punching and kicking. The deceased managed to escape from their grip, and caught hold of a *khutai* and struck three blows on the head of one of the accused. The appellant snatched the *khutai* from the hands of the deceased and gave two or three blows on his head causing profuse bleeding inside his brain, which proved fatal and the man died.

It was held that the accused were the aggressors and hence they could not claim the right of private defence. In fact, the deceased was acting in the exercise of right of private defence of body. The accused was held liable under section 300, clause (3) of *IPC* for murder. Appeal Dismissed

A true owner cannot claim right of private defence against settled possessors— Exceeded right to private defence against settled possessors Liable under section 304 Part I IPC, 1860—Supreme Court—1977

Ram Rattan v State of UP,

AIR 1977 SC 619 : (1977) 1 SCC 188 : 1977 SCR (2) 232

It is a peculiar feature of our criminal law that where a trespasser has succeeded in taking wrongful possession of the property vested in the public for common enjoyment, the members of the village or the real owner are not entitled in law to throw out the trespasser. They have to take recourse to the legal remedies available and if any member of the public tries to secure public property from the possession of the trespasser he is normally visited with the onerous penalty of law.

A person in peril cannot weigh in golden scales the necessary force to be used—Supreme Court—1980

Yogendra Morarji v State of Gujarat,

AIR 1980 SC 660 : (1980) Cr LJ 459 : (1980) 2 SCC 218

Facts: The appellant was approached by certain people demanding from him the dues payable to them. On being denied the same, they waited for the appellant and as soon as the appellant left the house, the assailants blocked the path of the appellant and signalled him to stop.

The appellant, apprehending an attack, fired three rounds from his revolver, which resulted in the death of one of the assailants.

Per Sarkaria, J:

The right of private defence of-body for the purpose of repelling unlawful aggression has been regulated and circumscribed by several principles and limitations. The most important of these are:

First, there is no right of private defence against an act which is not an offence under *IPC, 1860*.

Secondly, the right commences as soon as and not before a reasonable apprehension of danger to the body arises from an attempt or threat to commit some offence although the offence may not have been committed and it is coterminous with the duration of such apprehension (section 102). That is to say, right avails only against a danger imminent, present and real.

Thirdly, it is a defensive and not a punitive or retributive right. Consequently, in no case the right extends to the inflicting of more harm than it is necessary to inflict for the purpose of the defence (section 99).

In other words, the injury which is inflicted by the person exercising the right should be commensurate with the injury with which he is threatened. At the same time, it is difficult to expect from a person exercising this right in good faith, to weigh with golden scales what maximum amount of force is necessary to keep within the right. Every reasonable allowance should be made for the bona fide defender if he with the instinct of self-preservation strong upon him, pursues his defence a little further than may be strictly necessary in the circumstances to avert the attack. It would be wholly unrealistic to expect a person under assault to modulate his defence step by step according to the attack.

Fourthly, the right extends to the killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the atrocious crimes enumerated in the six clauses of section 100. For our purpose, only the first two clauses of section 100 are relevant. The combined effect of these two clauses is that taking the life of the assailant would be justified on the plea of private defence, if the assault causes reasonable apprehension of death or grievous hurt to the person exercising the right. In other words, a person who is in imminent and reasonable danger of losing his life or limb may in the exercise of right of self-defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. This principle is also subject to the preceding rule that the harm or death inflicted to avert the danger is not substantially disproportionate to and in commensurate (out of proportion) with the quality and character of the perilous act or threat intended to be repelled.

Fifthly, there must be no safe or reasonable mode of escape by retreat, for the person confronted with an impending peril to life or of grave bodily harm, except by inflicting death on the assailant.

Sixthly, the right being, in essence, a defensive right does not accrue and avail where there is time to have recourse to the protection of the public authorities.

The surrounding circumstances and probabilities of the case clearly indicate that these five persons had attempted

to stop the vehicle of the accused in order to wrongfully restrain or gherao the accused in prosecution of their avowed common object of getting money from him by putting him in fear of physical harm. In short, the common object of this assembly of five persons in attempting to intercept and stop the vehicle of the accused was to extort money from him by putting him in fear of injury, m the circumstances, as soon as assailants raised their hands to stop the jeep of the accused and then tried to follow and close on it, it was not unreasonable for the accused to apprehend some physical harm at their hands. Therefore, under *section 102 of the Indian Penal Code, 1860*, a right of private defence of the body had accrued to the accused.

The accused should not have fired all the three rounds in quick succession. He should have after firing one round waited for a second or two to see its effect on the persons attempting to gherao him. If that fire did not have the desired effect, then he should have fired the next round. Of course, a person in peril is not expected to weigh "in golden scales", what amount of force is necessary to keep within the right. Thus, this is a case in which the accused has exceeded his limit of the right of private defence available to him under *section 101 of IPC, 1860*. Nevertheless, this is a circumstance, which can be taken into account in mitigation of the sentence.

The sentence is reduced.

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109 See *Baburao Vithal Survade v State of Gujarat,* 1972 Cr LJ 1574. The court observed that if, in view of the manner of attack the accused has a genuine apprehension that the person assaulting him would either cause his death or grievous hurt to him, he would be justified in causing the death of his assailant in exercise of the right of private defence irrespective of the fact whether the assailant was armed or not.

110 *Amjad Khan v State of MP,* AIR 1952 SC 165 : 1952 SCR 567. In *Parichhat v State of MP,* AIR 1972 SC 535 : 1972 Cr LJ 322, p 328, the Supreme Court held that if the threat to the person or property which the accused was entitled to defend was real and immediate he was not required to weigh in golden scales the kind of instrument and the force which he used at the spur of the moment.

111 *Jai Dev v State of Punjab,* AIR 1965 SC 612 : [1963] 3 SCR 489; See *Indian Penal Code, 1860*, *sections 102*, *105*.

112 See RC Nigam, *Law of Crimes in India,* vol I, pp 353-55 for conflicting views on the point.

113 AIR 2010 SC 1212 : (2010) 2 SCC 333 per Dalveer Bhandari and Ashok Kumar Granguly, JJ.

114 *Mahandi v Emperor,* (1930) 31 Criminal Law Journal 654 (Lahore); *Alingal Kunhinayan v Emperor,* Indian Law Report 28 Mad 454; *Ranganadham Perayya*, *Re*, (1957) 1 Andh WR 181.

115 *State of Orissa v Rabindranath Dalai,* 1973 Cr LJ 1686 (Ori); *Laxman Sahu v State of Orissa,* AIR 1988 SC 83 : 1988 Cr LJ 188 : 1986 (1) Supp SCC 555.

116 *Raghavan Achari v State of Kerala,* 1993 Supp (1) SCC 719 : AIR 1993 SC 203; *Jagtar Singh v State of Punjab,* AIR 1993 SC 970 : 1993 Cr LJ 306.

117 *Puran Singh v State of Punjab,* (1975) 4 SCC 518 : AIR 1975 SC 1674.

118 *Bhagwan Swaroop v State of MP,* AIR 1992 SC 675 : (1992) 2 SCC 406 : 1992 SCR (1) 466.

119 *Kashmri Lal v State of Punjab,* (1996) 10 SCC 471 : AIR 1997 SC 393.

120 *James Martin v State of Kerala,* (2004) 2 SCC 203 : (2004) 10 Scale 742; *Gotipulla Venkatasiva Subbrayanam v The State of AP,* (1970) 1 SCC 235 : 1970 SCR (3) 423 : AIR 1970 SC 1079.

121 *Mahabir Choudhary v State of Bihar,* (1996) 5 SCC 107 : AIR 1996 SC 1998 : 1996 Supp (2) SCR 165; *Munshi Ram v Delhi Administration,* AIR 1968 SC 702 : (1968) 2 SCR 455 :1968 SCR (2) 408.

122 *State of MP v Ramesh,* (2005) 9 SCC 705 : AIR 2005 SC 1186; *Triloki Nath v State of UP,* (2005) 13 SCC 323 : AIR 2006 SC 321.

123 *Vidhya Singh v State of MP,* AIR 1971 SC 1857 : (1971) 3 SCC 244 : 1971 Cr LJ 1296; *Jai Dev v State of Punjab,* AIR 1963 SC 612 : (1963) 3 SCR 489; *Buta Singh v The State of Punjab,* (1991) 2 SCC 612 : AIR 1991 SC 1316 : 1991 (1) Scale 597.

124 AIR 210 SC 3015 : (2010) 9 SCC 259, per Aftab Alam & TS Thakur, JJ.

125 AIR 2016 SC 3875 : 2016 (3) Crimes 363 (SC) : 2016 (3) RCR (Criminal) 1044 : 2016 (8) Scale 83 : 2016 (6) Supreme 365 : 2016 (3) ACR 2382, per JS Khehar and Arun Mishra, JJ delivered the judgments.

126 AIR 2006 SC 3037 : (2006) 11 SCC 304 : 2006 (3) Crimes 257 : JT 2006 (7) SC 392, per GP Mathur and RV Raveendran, JJ. The appellant was convicted by the Sessions Judge, South Arcot district in Tamil Nadu and Madras High Court and under *section 302 IPC* for life imprisonment for murder of his elder brother and for causing hurt to his

brother's son along with his son. *Kasam Abdullah Hafiz v State of Maharashtra,* AIR 1998 SC 1451 : (1998) 1 SCC 526, KD Gaur, *Criminal Law: Cases and Materials*, 5th Edn, p 179.

127 AIR 1952 SC 165 : 1952 SCR 567. See KD Gaur, *Criminal Law: Cases and Materials*, 3rd Edn, pp 166, 167 for details.

128 AIR 1960 SC 67 : (1960) 1 SCR 646, per KN Wanchoo and S Jaffer Imam, JJ.

129 AIR 1971 SC 1491 : (1970) 2 SCC 480 : 1971 SCR (1) 943, per Bhargava and LD Dua, JJ.

130 *Hansa Singh v State of Punjab,* AIR 1977 SC 1801 : 1977 Cr LJ 1448 : (1976) 4 SCC 255 discussed in exception I to *section 300, IPC* under "grave and sudden provocation".

131 A person who is an aggressor cannot rely on the right of self-defence if, in the course of the transaction, he deliberately kills another whom he had attacked earlier.

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4.1 Vicarious Liability under the Indian Penal Code, 1860

Part I General Principles

4 VICARIOUS LIABILITY

4.1 Vicarious Liability under the Indian Penal Code, 1860

In criminal law, unlike in the law of torts, a master is not held vicariously liable for the acts of his servants or agents on the principle of respondent superior. That is to say, it is only the man who commits a crime who is liable for it. However, *IPC, 1860* makes a departure from the general rule in a few cases, on the principle of respondent superior.[1] In such a case a master is held criminally liable under *sections 154* to *156* of the *IPC* for acts committed by his agents or servants.

Section 154 holds owners or occupiers of land, or persons having or claiming an interest in land, criminally liable for intentional failure of their servants or managers in giving information to the public authorities, or in taking adequate measures to stop the occurrence of an unlawful assembly or riot on their land. The liability on the part of owners or occupiers of land has been fixed on the assumption that such persons, by virtue of their position as land-holders, possess the power of controlling and regulating such type of gatherings on their property, and to disperse if the object of such gatherings becomes illegal.[2]

Section 155 fixes vicarious liability on the owners or occupiers of land or persons claiming interest in land, for the acts or omissions of their managers or agents, if a riot takes place or an unlawful assembly is held in the interest of such class of persons.

Section 156 imposes personal liability on the managers or agents of such owners or occupiers of property on whose land a riot or an unlawful assembly is committed.

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1 Gour Hari Singh, *The Penal Law of India,* vol II, 11th Edn, 2000, pp 1467-1472.

2 In certain cases, a fellow criminal may be liable for the acts committed by the other accused on the principle of vicarious liability. *Barker v Levinson,* [1951] 1 KB 342 : [1950] 2 All ER 825: a master is not criminally liable for the acts committed by his agents or servants in the course of employment in case such acts are outside the general scope of that employment.

4.2 Vicarious Liability under Special Statutes

Part I General Principles

4 VICARIOUS LIABILITY

4.2 Vicarious Liability under Special Statutes

The doctrine of vicarious liability is more frequently invoked under special enactments, such as Defence of India Rules 1962, Indian *Army Act* 1911, *Prevention of Food Adulteration Act 1954* (Repealed), *Drugs and Cosmetics Act 1940*, etc. A master is held criminally liable for the violation of rules contained under the aforesaid statutes, provided that his agent or servant, during the course of his employment, committed such act. If the statute imposes strict liability, a master is held responsible for the criminal acts of his servants or agents even where he had no knowledge of the act performed and for which he had given no authority.[3]

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3 *Chairman, Railway Board v Chandrima Das,* AIR 2000 SC 988 : (2000) 2 SCC 465.

4.3 Liability of Master

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

4 VICARIOUS LIABILITY

4.3 Liability of Master

An innocent master is not criminally liable for acts of servants in case of clause 22, of Motor Spirit Rationing Order 1941, but in case of absolute prohibition under clause 27A the master is liable—Supreme Court—1951

Ravula Hariprasada Rao v State of Madras,[4]

AIR 1951 SC 204 : 1951 SCR 322

It was held that the licensed victualler was liable to be convicted although he had no knowledge of the act of his servant. In dealing with the case, Blackburn, J, observed: "If we hold that there must be a personal knowledge in the licensed person, we should make the enactment of no effect." The appeal was allowed in part, and while the conviction and sentence imposed on the appellant on the first charge in both the cases were quashed, the conviction and sentence on the third charge in the second case were affirmed.

4 See KD Gaur, *Criminal Law: Cases and Materials,* 4th Edn, 2005, p 180.

4.4 Liability of Corporations for Criminal Wrongs

Part I General Principles

4 VICARIOUS LIABILITY

4.4 Liability of Corporations for Criminal Wrongs

A corporation is a legal entity, incorporated by law for preserving certain rights in perpetual succession. In other words, a corporation is a group of human beings, authorised by law to act as a legal unit, endowed with a legal personality,[5] and has a seal of its own. However, a corporation, owing to its peculiarity, is not put on the same footing for its deeds with respect to criminal liability as a human being.

At one time, it was thought that a penal liability could not be fastened on a corporation for the acts of its servants or agents. It was contended that a corporation, being devoid of mind and body, cannot have the necessary guilty mind to commit a crime and that the corporation cannot be sentenced to imprisonment. Again, a corporation can act only through its resolutions at a meeting and the resolutions must not be ultra vires its *constitution*. Therefore, any resolution for doing a *criminal act* is bound to be ultra vires and hence the corporation was not subject to criminal liability.

However, since the beginning of the nineteenth century, the number of corporations increased enormously owing to industrialisation and therefore, it was considered that the absolute criminal immunity to corporations with respect to criminal acts would lead to grave public danger. Accordingly, a distinction was made between offences of non-feasance and misfeasance. In the case of the latter category of offences, the individual wrongdoer is made liable, whereas in the case of the former, it is the corporation. Gradually, the criminal liability of corporations was extended to criminal acts, which are more or less in the nature of civil wrongs, and fines are the usual mode of punishment. For instance, a corporation is liable for offences of quasi-criminal nature, such as non-repair of highways, bridges, nuisance, trespass, forgery, etc, for which fine is either the only punishment or an alternative to imprisonment. However, a corporation would not be criminally liable for offences like murder, robbery, dacoity, offences against the State, public tranquility and the like, for which the imprisonment or death sentence is the punishment prescribed by law.

A corporation's penal liability, in brief, depends on the nature of the offence, the relative position of the individual vis-à-vis the corporate body and other relevant facts which could show that the corporate body, as such, meant or intended to commit that act. In other words, a corporation is only liable for those acts of officers, directors or employees, which could reasonably be conceived of as having been undertaken in the corporate interest and in addition, for which they had the power to represent the corporation in that particular field of authority in which the *criminal act* was done.[6]

Corporation is liable for criminal acts of its directors and agents—Bombay High Court—1964

State of Maharashtra v Syndicate Transport,

AIR 1964 Bom 195 : (1964) 66 Bom LR 197 : (1964) Cr LJ 276

Per Paranjpe, J:

The agreement was that the bus would be transferred in the name of the complainant, and would be run by the company on the hire purchase agreement till the satisfaction of the advance money.[7]

But the bus was not transferred to the complainant, as per the agreement. Consequently, the complainant moved the trial magistrate who framed charges against the company, its managing director, directors and the shareholders under *sections 403*, *406* and *420*, *IPC, 1860* for violating the terms and condition of agreement. The company preferred a revision before the sessions court to quash the charge against the company. The Session's Judge was of the view that since a corporate body acts only through its agents or servants, the *mens rea* of such agents or servants cannot be attributed to the company, and he referred it to High Court for quashing charges.

While accepting the reference and quashing the charge, the court sent back the case for trial in accordance with law. The court said that the scope within which criminal proceedings can be brought against institutions which have become so prominent a feature of everyday affairs ought to be widened so as to make corporate bodies indictable for offences flowing from the acts or omissions of their human agents. Ordinarily, a corporate body like a company acts through its managing directors or board of directors or authorised agents or servants and the *criminal act* or omission of an agent including his state of mind, intention, knowledge or belief ought to be treated as the act or omission, including the state of mind, intention, knowledge or belief of the company. As adumbrated, a company cannot be indictable for offences like bigamy, perjury, rape, etc, which can only be committed by a human individual; or for offences punishable with imprisonment or corporal punishment. Barring these exceptions, a corporate body ought to be indictable for criminal acts or omissions of its directors, or authorised agents or servants, whether they involve mens rea or not, provided they have acted or have purported to act under authority of the corporate body or in pursuance of the aims or objects of the corporate body.

Reference accepted.

Corporation is liable for contempt of court—Supreme Court—1970

Aligarh Municipal Board v Ekka Tonga Mazdoor Union,

AIR 1970 SC 1767 : (1970) 3 SCC 98 : 1970 Cr LJ 1520

In this appeal by special leave, the Aligarh Municipal Board challenged the order of the Allahabad High Court for having disobeyed the stay order passed by it.

There was some dispute with regard to the realisation of fees claimed by the Municipal Board of Aligarh from *"Ekkawalas"* and *"Tongawalas"* for the use of the municipal stands at various places in Aligarh city. The two suits filed by the *Ekka Tonga Mazdoor Union* in this connection had been decided in its favour. As the Board persisted in realising the fees, the said union, along with six of its members, filed a writ petition against the Board in the Allahabad High Court. This petition was admitted. The court also made an interim order of stay as follows: "During the pendency of the application, the respondent shall not realise any fees for the use of stands on Hathras Road, Bannadevi Road, Shri Sikandra Rao Road and Chatari Road from petitioners Nos 2 to 7." The order was not obeyed.

In regard to the appeal by the municipal board, it was contended that the Board being a corporation, acted through natural persons and therefore, could not be convicted of contempt of court.

Per Dua, J:

The law as it exists today admits of no doubt that a corporation is liable to be punished by imposition of fine and by sequestration for contempt for disobeying orders of competent courts directed against them. A command to a corporation is in fact a command to those who are officially responsible for the conduct of its affairs. If they, after being apprised of the order directed to the corporation, prevent compliance or fail to take appropriate action, within their power, for the performance of the duty of obeying those orders, they and the corporate body are both guilty of disobedience and may be punished for contempt.

Appeal on behalf of the Municipal Board fails and is dismissed.

Corporation is liable for criminal prosecution under the Food Adulteration Act—Delhi High Court—1975

Municipal Corporation of Delhi v JB Bottling Company,

1975 Cr LJ 1148 : ILR 1975 Delhi 739

Facts: The defendant company manufactured carbonated water bottles. It was alleged that a bottle of Gold Crush Orange was found with a dead fly in it. Consequently, the company was convicted under *section 7* read with *section 16* of *Prevention of Food Adulteration Act 1954* (Repealed).

Per Yogeswar Dayal, J:

Section 7 of Prevention of Food Adulteration Act 1954 (Repealed) provides as under:

No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute—

(i) any adulterated food;

(ii) any misbranded food;

(iii) any article of food for the sale of which a licence is prescribed except in accordance with the condition of the licence;

(iv) any article of food the sale of which is for the time being prohibited by the Food (Health) Authority in the interest of public health; or

(v) any article of food in contravention of any other provision of this Act or on any rule made thereunder.

Section 17 of the Act postulates an offence under the Act being committed by the company and where an offence is committed by a company, persons guilty of the offence committed by a company (unless such persons prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent the commission of such offence) are:

(i) every person who, at the time of the offence, was in charge of and was responsible to the company for the conduct of the company;

(ii) the company itself; and

(iii) the director, manager, secretary or other officer, of the company against whom it has been proved that the offence has either, been committed with his consent or connivance or is attributable to any neglect on his part.

Held, that a company, as defined in *section 17 of Prevention of Food Adulteration Act 1954* (Repealed), does not enjoy immunity from prosecution. In case such company is found guilty of such an offence, it can be punished with fine.

The reference is answered accordingly.

Corporation is liable for manslaughter by gross negligence of its employees— Court of Appeal—2000

Attorney General's Reference (No 2 of 1999),

[2000] 3 All ER 182 (CA)

Per Rose, LJ:

The court's opinion was sought in relation to two questions referred by the Attorney General under section 36 of Criminal Justice Act 1972, i.e.

(1) Whether a defendant can be convicted of manslaughter by gross negligence in the absence of evidence of his state of mind?

(2) Whether a non-human defendant can be convicted of the crime of manslaughter by gross negligence in the absence of evidence establishing the guilt of an identified human individual for the same crime?

The defendant stated that it was a condition precedent to a conviction for manslaughter by gross negligence for a guilty mind to be proved and that where a non-human defendant was prosecuted, it may only be convicted via the guilt of a human being with whom it could be identified.

According to the prosecution, the train operated by the defendant collided with a freight train which resulted in the death of several passengers and the injury of 150 passengers. The prosecution contended that the causes for the collusion were:

(i) the driver's failure to see or heed the double yellow and single yellow signals warning of impending red; and

(ii) the defendant's manner of operating the High Speed Train.

It was contended that the defendant owed a duty to take reasonable care for the safety of its passengers.

The court answered the first question in the affirmative and the second in the negative. The court said:

(1) A defendant could properly be convicted of manslaughter by gross negligence in the absence of evidence of his state of mind. Although there might be cases in which the defendant's state of mind was relevant to the jury's consideration of the grossness and criminality of his conduct, evidence of his state of mind was not a prerequisite to a conviction.

(2) A non-human defendant could not be convicted of the crime of manslaughter by gross negligence in the absence of evidence establishing the guilt of an identified human individual. The courts had not started a process of moving from identification to personal liability, as a basis for corporate liability for manslaughter and the authorities did not support such a contention. It had not been suggested or implied that the concept of identification was dead or moribund in relation to common law offences. Thus the identification principle remained the only basis in common law for corporate liability for gross negligence manslaughter.[8]

Reference answered.

State is liable for the criminal acts of its employees—Supreme Court—1967

Superintendent and Remembrancer of Legal Affairs, WB v Corpn of Calcutta,

AIR 1967 SC 997 : *[1967] 2 SCR 170*

Fact: A Full Bench of nine judges was constituted to consider the correctness of the decision of the Supreme Court in *Director of Rationing and Distribution v Corporation of Calcutta*.[9] The State of West Bengal was carrying on the trade of a daily market without obtaining a licence as required under section 218 of Calcutta Municipal Act 1951. The Corporation of Calcutta filed a complaint against the State of West Bengal in the Court of the Presidency and Municipal Magistrate, Calcutta under section 541 of the Act for contravening the provisions of section 218 thereof.

The main contention of the government was that the State was not bound by the provisions of the Act. The magistrate, accepting the said contention, acquitted the State. On appeal, the High Court of Calcutta held that the State was carrying on the business of running a market and therefore, it was as much bound as a private citizen to take out a licence. It distinguished the decision of this court in *Director of Rationing v Corporation of Calcutta* on the ground that the said decision was concerned with the sovereign activity of the State. Resultantly, the State of West Bengal was convicted and sentenced to pay a fine of Rs 250 to the Corporation.

The Advocate-General for the State of West Bengal raised the following points:

(1) The State is not bound by the provisions of a statute unless it is expressly named or brought in by necessary implication.

(2) The said principle equally applies to sovereign and non-sovereign activities of a State.

Per Subba Rao, CJ (for himself and for Wanchoo, Sikri, Ramaswami, Shelat, Bhagava and Vaidialingam, JJ):

The rule of construction that the King is not bound by a statute unless he is expressly named or brought in by necessary implication is inconsistent with and incongruous in the present set-up. We have no Crown; the archaic rule based on the prerogative and perfection of the Crown has no relevance to a democratic republic; it is inconsistent with the rule of law based on the doctrine of equality. It introduces conflicts and discrimination. There is

no justification for this court to accept the English canon of construction, for it brings about diverse results and conflicting decisions.

On the other hand, the normal construction, namely, that the general Act applies to citizens as well as to State unless it expressly or by necessary implication exempts the State from its operation, steers clear of all the said anomalies. It, prima facie, applies to all States and subjects alike, a construction consistent with the philosophy of equality enshrined in our *Constitution*... The State can make an Act, if it chooses, providing for its exemption from its operation. Such an Act, provided it does not infringe fundamental rights, will give the necessary relief to the State.

Even so, it was contended that by necessary implication the State was excluded from the operation of section 218 of the Act. It was contended that, as the infringement of the said provision entailed a prosecution and, on conviction, imposition of fine and imprisonment, and that as the State could not obviously be put in prison and as the fine imposed on the State would merge in the consolidated fund of the State, it should necessarily be implied that the State was outside the scope of the section.

Under section 218 (1) every person who exercises or carries on, in Calcutta, any of the trades shall annually take out a licence...

Under section 541 (1)(b) if any person exercises... any profession, trade or calling without having the...he shall be punished with fine; and under section 541 (2) such fine, when levied shall be taken in full satisfaction of the demand on account of the said licence.

Under section 547A ... in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to pay a fine, it shall be competent to the court to direct that in default of payment of the fine the offender shall suffer imprisonment for such term or further term not exceeding six months as may be fixed by the court. Under the Act there is a distinction between fines imposed under section 537 and under section 541 of the Act. The fines under section 537 are in respect of offences enumerated therein and they certainly go to the coffers of the States. In respect of such offences, it may be contended that, as the fines paid reach the State itself, there is an implication that the State is not bound by the sections mentioned therein, for a person who receives the fine cannot be the same person who pays it. This incongruity may lead to the said necessary implication.

The same cannot be said in respect of the provisions covered by section 541. Under the said section the fine recovered for the infringement of the said provisions, when levied, shall be taken in full satisfaction of the demand on account of the licence not taken thereunder. Though the expression “fine” is used, in effect and substance, section 541 is a mode of realisation of the fee payable in respect of the licence; it goes to the Municipal Fund and forms part of it. In this context, section 115 of the Act is relevant under that section, there shall be one Municipal Fund held by the Corporation in trust for the purposes of the Act to which the moneys realised or realisable under the Act (other than fine levied by Magistrate) and all moneys otherwise received by the Corporation shall be credited. Reliance is placed upon the words within the brackets, viz, “other than fine levied by Magistrates” and an argument is raised that the fine levied under section 541 will not be credited to the Municipal Fund.

The interpretation brings that section into conflict with section 512. On the other hand a harmonious construction of these two provisions makes it clear that the fine mentioned in section 115 is the fine imposed under section 537 for section 541 (2) in terms directs that the fines shall be credited to the demand. All amounts credited towards demands, it cannot be denied, necessarily have to be credited in the Municipal Fund. Nor section 547A detracts from our conclusion. Under that section in every case of an offence where the offender is sentenced to pay a fine, it shall be competent to the court to direct that in default of payment of the fine the offender shall suffer imprisonment. It was said that this section necessarily implied that the State could not be hit by section 218 as it could not obviously be imprisoned for default of payment of fine. It will be noticed that this section only confers a discretionary power on the court and the court is not bound to direct the imprisonment of the defaulter. It is only an enabling provision. There are other ways of collecting the money from persons against whom an order under section 547A is made. This enabling provision does not necessarily imply an exemption in favour of the State.

The State is not exempted from the operation of section 218 of the Act. Appeal Dismissed.

Public servant liable to imprisonment for contempt of court—Supreme Court—1995

TR Dhananjaya v J Vasudevan[10]

While dismissing an appeal against the decision of a Division Bench of the Karnataka High Court, the Supreme Court made certain observations in favour of a government employee who later retired. The court directed that if necessary, the employer, i.e. the Bangalore Municipal Corporation could create a supernumerary post of a chief engineer for the period in question to give the said benefits to the petitioner and further directed the State government to issue necessary orders in that regard. Consequently, the State government issued necessary direction in pursuance whereof the Bangalore Municipal Corporation resolved to create a supernumerary post of additional chief engineer and to promote the petitioner to that post. Instead of implementing the order, an attempt was made to circumvent the same and deny the benefits to the petitioner. The Corporation contended that according to the rules, the petitioner was eligible only for the post of superintending engineer and not a chief engineer.

The court held that when the direction was given, it was not brought to the notice of the court that the petitioner was not eligible for promotion in contradiction with any other person. When the claim *inter se* had been adjudicated and the claim of the petitioner had become final and that of his rival was negatived, it was no longer open to the government to go behind the orders and truncate the effect of the orders passed by the Supreme Court by hovering over the rules to get around the result, to legitimate legal alibi to circumvent the orders passed by the Supreme Court. The respondent had deliberately and wilfully, with an intention to defect the orders of the Supreme Court, passed the impugned order. The respondent - Vasudevan was held guilty of contempt.

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5 *Indian Penal Code, 1860, section 11*. See Hall, Livington, *Cases on Criminal Law and Its Enforcement,* 1958, pp 43, 439; Law Commission (Published) Working Paper (UK, No 14) for Corporate Liability.

6 *Kenny's Outlines of Criminal Law,* 19th Edn, 1966, pp 75-78; *"Criminal Liability of Corporations for the Acts of their Agents*," Harvard Law Review, no 60, 1946, p 283; Sayre, *"Criminal Responsibility for the Acts of Another"*; Canfield, *"Corporate Responsibility for Crimes,"* Columbia Law Review, no 14, 1914, pp 469, 480; Francis, *"Criminal Responsibility of the Corporation,"* (1924) 18 LR 305; SS Huda, *Principles of Criminal Law in British India*, Calcutta: Butterworth, 1903, pp 20-33.

7 See KD Gaur, *Criminal Law: Cases and Materials,* 4th Edn, 2005, pp 185-188 for details of the case.

8 See *R v Adomako, [1994] 3 All ER 79* : *[1995] 1 AC 171*; *Meridan Global Fund Management Asia Ltd v Securities Commission,* [1994] 3 All ER 918 : [1995] UKPC 5 : *[1995] 2 AC 500*.

9 *AIR 1960 SC 1355* : *[1961] 1 SCR 158*. The bench comprised of five judges—BP Sinha, CJ, SJ Imam, Syed Jaffar, AK Sarkar, KN Wanchoo and JC Shah, JJ.

10 *AIR 1996 SC 302* : *(1995) 5 SCC 619* : JT 1995 (6) 234 : 1995 Scale (5) 34, per K Ramaswamy and BL Hansaria, JJ.

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5.1 Introduction

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Part I General Principles

5 JOINT LIABILITY

5.1 Introduction

A crime may be committed by an individual or in collaboration with others. An individual committing a crime would be punished according to the nature of the offence committed. However, the difficulty arises when several persons are engaged in the commission of an offence in different capacities. While one of them might be engaged in the actual commission of the offence, say murder, the other might have assisted the assailant by placing a knife in his hand, and another might have chalked out the plan but stayed away from the scene of occurrence throughout the commission of the act. In such cases, a distinction is drawn between the acts of each of such individuals according to their mode and degree of participation or involvement in the commission of the offence for ascertaining guilt and awarding punishment. Such persons may broadly be classified into principals and abettors.[1]

A principal is a person who either actually commits a crime or aids in the commission of a crime while being present at the place of the occurrence. Such a person is held liable as the actual offender under the specific sections or under the provisions governing joint and constructive liability.

On the other hand, an abettor is a person who directly or indirectly aids, assists, counsels, procures or encourages another to commit a crime.[2]

In a case, where two or more persons are involved, either jointly or in group and it is not possible to apportion criminal guilt of each of the participants, all the participants are held jointly liable for the offence committed by any one or all the members of the group. This is based on the contention that the presence of the accomplice gives encouragement, protection and support to the person actually engaged in the commission of an unlawful act.[3] The doctrine of group liability (joint liability) is justified on the common sense principle that if two or more persons do an act conjointly, it is just the same as if each of them has done it individually. Since the purpose is common, the responsibility is joint. The man who actually strikes is no more liable than the man ready to place a knife in the hands of an assailant for the purpose.[4]

The provisions relating to joint liability (also called constructive liability) have been elaborately dealt with in *sections 34-38*, *120A*, *120B*, *149*, *396* and *460* of *Indian Penal Code, 1860*. These provisions may be classified into three categories:

(i) first, where the offence is committed with the common intention of the group (sections 34-38);

(ii) secondly, where the accused is a member of a conspiracy to commit an offence (sections 120A, 120B); and

(iii) thirdly, where the offence is committed with the common object of an unlawful assembly (section 149).[5]

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1 According to English law, criminals are classified into four categories on the basis of their participation in the act. These are: (i) principal in the first degree, (ii) principal in the second degree, the person who being present at the scene of

occurrence aids and assists in the commission of a crime, (iii) accessory before the fact (commission of crime) and (iv) accessory after the fact. Under Indian law, there is no distinction between the principals as there is no practical utility (after the commission of crime) of such a classification since the punishment prescribed for both the categories of criminals is one and the same.

2 Abettors are similar to that of “accessories before the fact”. “Accessory after the fact” is one, who knowing the fact, that a crime has been committed gives shelter, protection in order to enable a culprit to escape punishment. In India, there is no separate category of ‘accessory after the fact’. However, the *IPC, 1860* has made aiding escape of, rescuing or harbouring an offender, a deserter, etc, punishable. See *Indian Penal Code, 1860*, *sections 130*, *136*, *157*, *201*, *212*, *216*: See KD Gaur, *A Textbook an Indian Penal Code,* 3rd Edn, 2004, pp 159-174; Commentary under *sections 107-120*, *IPC, 1860*.

3 Gour Hari Singh, *The Penal Law of India,* vol I, 11th Edn, 2000, pp 969-995. See VI ASIL, 1970, pp 480-82; VIII ASIL, 1972, pp 58-60.

4 *Wayam Singh v State,* (1941) ILR Lah 423; *Kamraj Gounder,* (1959) Mad 1032; RC Nigam, *Principles of Criminal Law*, vol I, p 181.

5 Ratanlal and Dhirajlal, *The Law of Crimes,* 24th Edn, 1997, pp 396-414; *Indian Penal Code, 1860*, also incorporates the principle of joint liability. Section 396 and 460 imposes joint liability where a person is conjointly engaged in the commission of dacoity with murder, and section 460 where a person is concerned in the commission of lurking, house-trespass or house-breaking by night where death or grievous hurt is caused.

End of Document

5.2 Liability on the Basis of Common Intention

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Part I General Principles

5 JOINT LIABILITY

5.2 Liability on the Basis of Common Intention

34. Acts done by several persons in furtherance of common intention.— When a *criminal act* is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

35. When such an act is criminal by reason of its being done with a criminal knowledge or intention.— Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

36. Effect caused partly by act and partly by omission.—Whenever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

Illustration

A intentionally causes *Z's* death partly by illegally omitting to give *Z* food and partly by beating *Z. A* has committed murder.

37. Co-operation by doing one of several acts constituting an offence.—When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

Illustrations

(a) *A* and *B* agree to murder *Z* by severally and at different times giving him small doses of poison. *A* and *B* administer the poison according to the agreement with intent to murder *Z*. *Z* dies from the effects of the several doses of poison so administered to him. Here *A* and *B* intentionally cooperate in the commission of murder and as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate.

(b) *A* and *B* are joint jailors and as such, have the charge of *Z*, a prisoner, alternately for six hours at a time. *A* and *B* intending to cause *Z*'s death, knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance to furnish *Z* with food supplied to them for that purpose. *Z* dies of hunger. Both *A* and *B* are guilty of the murder of *Z*.

(c) *A*, a jailor, has the charge of a prisoner. *A*, intending to cause *Z*'s death, illegally omits to supply *Z* with food; in consequence of which *Z* is much reduced in strength, but the starvation is not sufficient to cause his death. *A* is dismissed from his office, and *B* succeeds him. *B*, without collusion or co-operation with *A*, illegally omits to supply *Z* with food, knowing that he is likely thereby to cause *Z*'s death. *Z* dies of hunger. *B* is guilty of murder, but, as *A* did not co-operate with *B*, *A* is guilty only of an attempt to commit murder.

38. Persons concerned in *criminal act* may be guilty of different offences.—Where several persons are engaged or concerned in the commission of a *criminal act*, they may be guilty of different offences by means of that act.

Illustrations

A attacks *Z* under such circumstances of grave provocation that his killing of *Z* would be only culpable homicide not amounting to murder. *B*, having ill-will towards *Z*, and intending to kill him, and not having been subject to the provocation, assists *A* in killing *Z*. Here, though *A* and *B* are both engaged in causing *Z*'s death, *B* is guilty of murder, and *A* is guilty only of culpable homicide.

End of Document

5.3 Liability on the Basis of Common object

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Part I General Principles

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5.3 Liability on the Basis of Common object

149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

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5.4 Common Intention

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5 JOINT LIABILITY

5.4 Common Intention

Sections 34-38 in Chapter II of *IPC, 1860* dealing with "General Explanations" state the conditions in which a person may be held constructively liable for the acts committed by the other members of a group.

Section 34 does not create any specific offence; it only lays down the principle of joint criminal liability. The two necessary conditions for the application of section 34 are:

(a) common intention to commit an offence and

(b) participation by all the accused in doing such act or acts constituting that offence in furtherance of that common intention.

Hence, if two or more persons, with a common intention to commit murder participated in the acts done in furtherance of that common intention, would all be guilty of murder.[6]

It is important to note that the original section 34 did not have the words "in furtherance of the common intention of all". This was added by *Amending Act* of 1870[7] to put the Indian law on par with the English law under which a person not cognizant of the intention of his companions to commit an offence is not held liable, though he might have joined the group to commit an unlawful act. In fact, the courts in India adopted this view even before the sections had been formally amended.[8] However, the above mentioned expression has become the cause of conflicting interpretation as to the scope of the sections.

The essence of joint liability, under section 34, lies in the existence of a common intention, an overt act indicative of a common intention to do a *criminal act* in furtherance of common intention of all of them.[9] The word common intention implies a prior concert, that is, a prior meeting of the minds and participation of all the members of the group in the execution of that plan.[10] The acts done by each of the participants may be different and may vary in their character but they must be actuated by the same common intention. For example: *A*, an accused along with other two co-accused *B* and *C* proceeded to *D's* house in order to take revenge of an insult by the brother of *D.* They opened fire on the members of *D's* family. It was found that the shots of *A* did not hit anybody but the shots of *B* and *C* succeeded in killing *D*. Since the act of firing was done in furtherance of the common intention of the group to take revenge, *A* is as much liable for the offence of murder as are *B* and *C*.[11]

In the absence of common intention, the criminal liability of the members of the group might differ according to the degree and, mode of the individual's participation in the act. For instance, where *X, Y* and *Z* with the intention of assaulting *A*, gave him a beating and in the course of which, *X* stabbed *A* in the abdomen resulting in *A's* death, the act of stabbing was not done in furtherance of the common intention of the group. The common intention in this case was merely to inflict simple bodily injury. Hence *Y* and *Z* would be liable for causing simple hurt only, while *X* for causing murder of *A*.

The plan to execute a crime need not be elaborate. The scheme may be chalked out suddenly but all the members must have consented to it.[12] Although the law requires that the accused must be present at the place of commission of the crime the accused need not be physically present at the actual place of the occurrence and might remain in

the vicinity ready to warn and assist his fellow criminals.[13] In crimes like forgery, deceit, conspiracy, etc, where the offences are of diverse nature and might be committed at different times and places the persons might not be required to be physically present at the actual place of the occurrence.[14]

Section 34 could be invoked even in those cases where some of the co-accused were acquitted provided it could be proved either by direct evidence or inference that the accused and others had committed the offence in pursuance of the common intention of the group.[15] A single accused could also be convicted by reason of the application of section 34, if it is established beyond doubt that such an accused shared the common intention to commit the offence with some person other than the one who was acquitted.[16]

Section 35, complementary to section 34, deals with cases where a *criminal act* is done by reason of participation in action and section 34 deals with cases where a *criminal act* is done by virtue of participation in intention. Section 35 states that when an act is criminal by reason of its being done with a criminal intention or knowledge, each of such persons who joins in the act with the same knowledge or intention is responsible for the act in the same manner as if it were done by him alone. In other words, the measure of liability is dependent on the basis of intention or knowledge of the accused. For example, *A* and *B* beat *C*, in consequence of which *C* dies. It is proved from the nature of injuries inflicted by *A* that he intended to kill *C. A* had inflicted a fatal knife blow in *C's* abdomen. Whereas *B* only intended to cause simple hurt in as much as *B* inflicted slight injuries in *C's* legs and arms. Accordingly, *A* would be liable for causing murder of *C* whereas, *B* for causing simple hurt only.

Section 36 states that when an offence is the effect partly of an act of commission and partly of an act of omission, the legal consequences would be the same. *A* intentionally causes *Z's* death, partly by illegally omitting to give him food and partly by causing physical hurt, that is beating him. Here *A* has committed murder in as much as the effect of *A's* act of omission to provide food to *Z* and *A's* act of beating *Z* has resulted in *Z's* death (Illustration to section 36).

Section 37 provides that when an offence is committed as a result of several acts or omissions, the doing of any one of such acts or omissions with an intention to co-operate in the offence would make the doer liable for the commission of the offence. For example, *A* and *B* are joint jailers, and have the charge of *Z*, a prisoner, alternatively for six hours at a time. *A* and *B* intending to cause *Z's* death, knowingly and intentionally stop supplying food to *Z*. Consequently *Z* dies of starvation. Here both *A* and *B* are guilty of the murder of *Z*.

Section 38 speaks of a situation where persons engaged in the commission of a *criminal act* might be guilty of different offences, by reason of the act being done without a common intention. In other words, section 38 deals with those cases where the act is done with different intentions, unlike section 34, where the act is committed with a common intention. For instance, *A* attacks *Z* under such circumstances of grave and sudden provocation that his killing of *Z* would be only culpable homicide not amounting to murder. *B* having ill-will towards *Z* and intending to kill him, and not having been subject to the provocation assists *A* in killing *Z*. Here, though *A* and *B* are both engaged in causing *Z's* death, *B*, is guilty of murder (under *section 302 of the Indian Penal Code, 1860*), because he acted with the intention to kill *Z*, whereas *A* is guilty of culpable homicide only (under *section 304 of the Indian Penal Code, 1860*), since he killed *Z* under the influence of grave and sudden provocation (see *Firstly* Exception to *section 300 of IPC, 1860*).

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6 *Gurdatta Mal v State of UP,* AIR 1965 SC 257 : 1965 Cr LJ 242.

7 *Amending Act* 26 of 1870, section 1.

8 See Gour Hari Singh, *Penal Law of India,* vol I, 11th Edn, 2000, pp 260-264; *Goarchand Gope,* BLR (Supp vol) 448 (FB). It is this judgment which influenced the amendment of 1870; See MM Tripathi, *Essays on the Indian Penal Code,* ILI, 1962, pp 94-106.

9 *Shiv Prasad Chunni Lal Jain v State of Maharashtra,* AIR 1965 SC 264 : [1964] 6 SCR 920; *Banwari Lal v State of UP,* AIR 1962 SC 1198; *Jumman v State of Punjab,* AIR 1957 SC 469.

10 *Pandurang Tukia and Bhillia v State of Hyderabad,* AIR 1955 216 : 1955 SCR (1) 1083; *Khacheru Singh v State of UP,* AIR 1956 SC 546; *Baleshwar Rai v State of Bihar,* (1964) Cr LJ 564; *Abrahim Sheikh v State of WB,* AIR 1964 SC 1263; *Mathulal Sheikh v State of WB,* AIR 1965 SC 132.

11 *Sher Khan v State,* AIR 1940 Lah 485; *Barendra Kumar Ghosh v KE,* (1924-25) LR 40 (PC); *State of UP v Iftikhar Khan,* AIR 1973 SC 863; *Jaikrishnadas Manohardas Desai v State of Bombay,* AIR 1960 SC 889 : 1960 SCR (3) 329. Participation in action is the leading feature of section 34, and to establish joint responsibility for an offence the *criminal*

act must be done by several persons in furtherance of common intention; *Rishi Deo v State of UP,* AIR 1955 SC 331 : 1955 Cr LJ 873. Common intention can develop on the spot and may be inferred from the facts and circumstances of the case and conduct of the accused.

12 *Kripal v State of UP,* AIR 1954 SC 706; *Rishi Deo Pande v State of UP,* AIR 1955 SC 331; *Zabar Singh v Slate of UP,* AIR 1957 SC 465.

13 *Tukaram Ganpat Pandare v State of Maharashtra,* AIR 1974 SC 514 : (1974) 4 SCC 544—joint responsibility for *criminal act* is not excluded by mere distance of accused from the scene of crime.

14 *Mubarik Ali Ahmed v State of Bombay,* AIR 1957 SC 837; *JM Desai v State of Bombay, AIR 1960 SC 889* : 1960 SCR (3) 329.

15 *Prabhu Babaji Navle v State of Bombay,* AIR 1956 SC 51; *Wasim Khan v State of UP, AIR 1956 SC 400* : *1956 SCR 191*.

16 *Sukh Ram v State of UP, AIR 1974 SC 323* : *(1974) 3 SCC 656*; *Krishna Govind Patil v State of Maharashtra, AIR 1963 SC 1413* : 1964 SCR (1) 678.

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5.5 Criminal Conspiracy

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Part I General Principles

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5.5 Criminal Conspiracy

Section 120A of the Indian Penal Code, 1860, holds members of a group of criminal conspirators jointly liable for the conspiracy to commit an offence and section 120B provides for punishment in such cases.[17] The parties to an agreement are guilty of criminal conspiracy, irrespective of the fact whether the illegal act has been accomplished or not.[18] The gist of the offence of criminal conspiracy is an agreement to break the law, whereas the commission of a *criminal act* is the gist of the offence under *section 34 of IPC, 1860*.

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17 See Chapter V for the provisions relating to criminal conspiracy. See also Gour Hari Singh, *The Penal Law of India,* 11th Edn, 2000, pp 1101-1131.

18 *Barsay, Major EG v State of Bombay,* AIR 1961 SC 1762 : [1962] 2 SCR 195.

5.6 Common Object

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Part I General Principles

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5.6 Common Object

Section 149 of Chapter VII of *IPC, 1860* dealing with the "Offences against Public Tranquillity" creates a specific offence and declares that a member of an unlawful assembly[19] is liable for any offence committed by the other fellow members of that assembly. However, it is not that a member of an unlawful assembly is answerable for every offence committed by one of his associates during the time they are engaged in the commission of an offence. It is only in two cases, where a person is held criminally liable for the offence committed by another member of an unlawful assembly. Firstly, where the offence is committed in prosecution of the common object of the unlawful assembly, and secondly, where the members of the unlawful assembly knew that such an offence is likely to be committed in prosecution of that common object.

In other words, in order to invoke section 149 of th *IPC, 1860* the accused must be guilty either of rioting or of being a member of an unlawful assembly, that is, he must be convicted either under section 147 (punishment for rioting) or under section 143 (punishment for being member of an unlawful assembly); and the accused must be aware of the likelihood of the commission of the offence.[20] The essence of joint liability under section 149, therefore, is that the *criminal act* must have been done with a view to fulfill the common object of an unlawful assembly. In the absence of proof of a common object, a member of an unlawful assembly cannot be held liable for the offence committed by another member of such an assembly.

Let us take an illustration. Twenty members of a group *X*, decide to beat the members of the opposite group *Y* with an intention to take revenge. During the course of the quarrel *A,* one of the members of the group *X*, stabbed *B* in his heart who was one of the members of the opposite group *Y*, as a result of which *B* died. Since the act of stabbing by *A*, was not an act done in furtherance of the common object of the assembly, nor were the members of the assembly aware that such an act would take place, as it was not the common object of the group, therefore, the members of the assembly could not be liable for the act of *A. A*, alone would be liable for the murder of *B.* The other members of the assembly would be liable only for causing hurt.

Similarly, any sudden and unpremeditated act done by a member of an unlawful assembly would not render the other members of the assembly liable. Again, mere presence at the scene of occurrence, without proof of having done anything more is not enough for conviction under section 49.[21]

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19 *Indian Penal Code 1860, section 141*, explains when an assembly is designated as "unlawful assembly".

20 *Gajanand v State of UP,* AIR 1954 SC 595; *Mathew KC v State of Travancore-Cochin,* AIR 1956 SC 241, *Hukam Singh v State of UP,* AIR 1961 SC 1541; *Mizaji v State of UP,* AIR 1959 SC 572. The knowledge of the acts likely to be committed is an essential requirement under *Indian Penal Code, 1860, section 149*.

21 *Baladin v State of UP,* AIR 1956 SC 181. Proof of some overt act, establishing that the accused shared the common unlawful object is an essential condition for conviction. See also *Masalti v State of UP,* AIR 1965 SC 202. However, an overt act is not an inflexible rule of law. The crucial question is whether the assembly entertained a common unlawful

object and whether the accused was one of the members of such an assembly by intentionally joining it or by continuing in it being aware of the facts which rendered the assembly unlawful. See *Balwant Singh v State of Haryana,* *AIR 1972 SC 860* : *(1972) 3 SCC 769*.

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5.7 Distinction Between Section 34 and Section 149 of Indian Penal Code, 1860

Part I General Principles

5 JOINT LIABILITY

5.7 Distinction Between Section 34 and Section 149 of Indian Penal Code, 1860

Both sections 34 and 149 hold person (s) acting in concert with others to accomplish an unlawful object, criminally responsible for such acts on the principle of joint and constructive criminal liability. However, there is a clear distinction between the elements and scope of section 34 and section 149. Some of the distinguishing points are as follows:

First, section 34 is an explanatory section, that is, of general nature, and enunciates a principle of criminal liability but creates no offence, whereas section 149 creates a specific offence in the membership of an unlawful assembly itself for which the participants may be liable for punishment.[22]

Secondly, section 34 imposes liability on the basis of participation of the members in the execution of common intention of the group, whereas section 149 lays stress on the membership of an unlawful assembly. In other words, the element of participation in action, which is the leading feature of section 34, is replaced in section 149 by membership of the assembly at the time of the commission of the offence.

Thirdly, the scope of section 34 is limited to the extent of those acts only, which are committed in furtherance of the common intention of the group, whereas section 149 renders every member of an unlawful assembly liable for not only those acts for which there had been deliberation but also for those acts which could have been committed in prosecution of the common object of such an assembly.

Fourthly, there is a difference in the scope of “intention” and “object” used in sections 34 and 149. The former requires much more deliberation than the latter. A common intention pre-supposes prior concert and meeting of minds, whereas a common object may be formed without that. There may be cases where the object of a group is one, but intention of the participants differs.[23]

Lastly, section 34 can be invoked even if two persons are involved in a crime, whereas section 149 postulates the existence of an unlawful assembly, which can be formed only if the members of the group are five in number.[24]

Section 34 IPC, 1860—All are equally liable for acts done in furtherance of common intention—Appeal dismissed, Accused convicted—Privy Council—1925

Barendra Kumar Ghosh v King Emperor,

AIR 1925 PC 1

Facts: A sub-postmaster counting money at his table while at Sankuntalla post office in Bengal was shot and he died almost at once. The accused ran without taking the money and one man was caught while the others escaped. He was sentenced to death by the sessions court which was confirmed by the High Court. Hence, the appeal to Privy Council.

Per Lord Summer, Lord Atkinson and Sir John, JJ:

The effect of *section 34 of the Indian Penal Code, 1860* is that, where each of several persons does something criminal, all acting in furtherance of a common intention, each is punishable for what he has done, as if he had done it by himself. Such a proposition was not worth enacting, for if a man has done something criminal in itself, he must be punishable for it, and none the less so that others were doing other criminal acts of their own at the same time and in furtherance of an intention common to all. In effect, this means that, if three assailants simultaneously fire at their victim and lodge three bullets in his brain, all may be murderers, but, if one bullet only grazes his ear, one of them is not a murderer and, each being entitled to the benefit of the doubt, all must be acquitted of murder, unless the evidence inclines in favour of the marksmanship of two or of one.

This argument evidently fixes attention exclusively upon the accused person's own act. Intention to kill and resulting death accordingly are not enough, there must be proved an act, which kills, done by several persons and corresponding to, if not identical with, the same fatal act done by one. The answer is that, if this construction is adopted, it defeats itself, for several persons cannot do the same act as one of them does. They may do acts identically similar, but the act of each is his own, and because it is his own and is relative to himself, it is not the act of another or the same as that other's act. The result is that section 34, construed thus, has no content and is useless. ... Suppose two men tie a rope round the neck of a third and pull opposite ends of the rope till he is strangled. This they said really is an instance of a case under section 34. Really it is not. Obviously each is pulling his own end of the rope, with his own strength, standing in the position that he chooses to take up, and exerting himself in the way that is natural to him. In effect each pulls as hard as the other and at the same time and that both equally contribute to the result. Still the act, for which either would be liable, if done by himself alone, is precisely not the act done by the other person. There are two acts, for which both actors ought to suffer death, separately done by two persons, but identically similar.

Let us add the element that neither act without the other would have been fatal; so that the fatal effect was the cumulative result of the acts of both. Even this does not make either person do what the other person does; it merely makes the act, for which he would be liable if done by himself alone, an attempt to murder and not an act of murder, and accordingly the case is not an illustration of section 34.

To this, the reply was made before the High Court, that, in a case where death results from the cumulative effect of different acts whether because it cannot be shown that it was not his act or acts, each actor must be deemed guilty of murder, though alone which took the victim's life, it is not easy to determine. The section really means "when a joint *criminal act* has been done by the acts of two persons in furtherance of a common intention each is liable for that joint *criminal act* as if he had done it all by himself".

On the other hand, if it is read as the appellant reads it, then, returning to the illustration of the rope, if both men are charged together but each is to be made liable for his act only and as if he had done it by himself, each can say that the prosecution has not discharged the onus, for no more is proved against him than attempt, which might not have succeeded in the absence of the other party charged. Thus, both will be acquitted of murder, and will only be convicted of an attempt, although the victim is and remains a murdered man. If, on the other hand, each were tried separately by different juries, either jury or both might return unimpeachable verdicts of murder, and then both men would be justly hanged...

There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of section 34, is replaced in section 149, by membership of the assembly at the time of the committing of the offence.

Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus, they have a certain resemblance and may to some extent overlap, but section 149 cannot at any rate relegate section 34 to the position of dealing only with joint action by the commission of identically similar criminal acts.

As to section 114, it is a provision, which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition.[25]

Abetment is a crime apart does not in itself involve the actual commission of the crime abetted. ... Because participation de facto (as this case shows) may sometimes be obscure in detail, it is established by the presumption

juris et dejure that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by section 114 brings the case within the ambit of section 34.

The appeal is dismissed.

Penal Code Common intention under section 34 read with 302: The liability of one person for an offence committed by the other in the course of criminal act perpetuates to all other persons, under section 34 IPC, 1860 if such criminal act is done in furtherance of the common intention of the person who joins in committing the crime.

Kuria v State of Rajasthan,

AIR 2013 SC 1085 : 2012 Cr LJ 4707 : *2012 (9) Scale 42*

Per Swatanter Kumar and Fakkir Mohamed and Fakir Mohamed Ibrahim Kalifulla, JJ:

Around 15 accused persons have faced trial for offence under sections 302 and 364 read with *section 34 of IPC, 1860* before the court of the Additional Session judge, Banswara (Rajasthan). Vide its judgment dated 5 September 2003, the trial court acquitted all the accused persons except Laleng, son of Bajeng, Laleng son of Dalij and Kuriya, son of Laleng. These three accused were convicted for both these offences and were directed to undergo rigorous imprisonment for life with fine of Rs 4,000/- each. During the pendency of the appeal before the High Court, Laleng, son of Bajeng died. Vide its judgment dated 25 May 2008, the Division Bench of the High Court of Rajasthan at Jodhpur confirmed the judgment of conviction and order of sentence against the remaining two accused, i.e., Kuria, son of Laleng and Laleng son of Dalji.

While discussing the appeal the Apex Court said, all the accused had committed *criminal act* punishable under the provisions of *IPC*. They had done so with common intention, as is evident from the statement of the witnesses and the document on the record. And lastly, each one of them, whether he actually made an assault on the body of the deceased or not, dragged him and threw his body in the gully or not, shall all be deemed to have committed the offence with the aid of section 34. The court has to examine the prosecution evidence in regard to application of section 34 cumulatively and if the ingredients are satisfied, the consequences must follow. It is difficult to state any hard and fast rule which can be applied universally to all cases. It will always depend on the facts and circumstances of the given case whether the person involved in the commission of the crime with a common intention can be held guilty for the main offence committed by them together. The provisions of *section 34 IPC, 1860* come to the aid of law while dealing with the cases of *criminal act* and common intention of all and each of such persons is liable for that act in the same manner as if it was done by him alone.[26]

Common intention – Accused coming with weapon to assault deceased - Deceased first assaulted on road then taken into house, assaulted again and then thrown out on road – Accused having motive to kill deceased- clear case of common intention – All accused irrespective whether they have assaulted deceased or not are liable to be convicted for murder.

The testimony of an eye witness if found truthful, cannot be discarded merely because the eye witness was a relative of the deceased. Where the witness is wholly unreliable, the court may discard the statement of such witness, but where the witness is neither wholly reliable nor wholly unreliable (if his statement is fully corroborated and supported by other ocular and documentary evidence), the court may base its judgment on the statement of such witness. Of course, in the latter category of witnesses, the court has to be more cautious and see if the statement of the witness is corroborated.

To apply common intention under section 34 of the Indian Penal Code, it is not necessary to show overt act on the part of the accused—Supreme Court

Chimanbhai Jagabhai Patel v State of Gujarat[27]

The complainant Kalaben and accused No 1 Jayantibhai were in love with each other. The complainant became pregnant. The accused Jayantibhai advised the complainant to get the child aborted, but she declined. The complainant asked the accused Jayantibhai to marry her. But he did not marry the complainant.

To get rid of the complainant, accused No 1 Jayantibhai Patel tried to kill her on 26 November, 1987 around 07:30 pm with the help of accused No 2, Jagabhai Patel. The appellant, accused No 2 Chimanbhai Jagabhai, caught hold

of the complainant and accused No 1 Jayantibhai, took out a bottle of poisonous medicine named as “Eka Laxys EC.25” used as insecticide in chilly crop, forcibly poured the same in the mouth of the complainant. As the complainant was caught hold of by the accused No 2 Chimanbhai Jagabhai, she could not shout. On medicine being administered to the complainant, she fainted and the accused ran away from the place.

The trial court found the appellant guilty under sections 307 read with *sections 34* and *120B* of *Indian Penal Code, 1860* and sentenced him to five years of imprisonment. The High Court upheld the conviction of the appellant for attempt to murder under *section 34* read with *section 307* of *Indian Penal Code, 1860*. Dismissing the appeal, the apex court held that the trial court and the High Court were justified in holding that the appellant was guilty of offence punishable under *section 307* read with *section 34* of *Indian Penal Code, 1860*. The section does not say “the common intention of all”, nor does it say “and intention common to all”. Under the provisions of section 34 the essence of the liability is to be found in the existence of a common intention animating from the accused leading to the commission of a *criminal act* in furtherance of such intention.[28]

Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying section 34 it is not necessary to show some overt act on the part of the accused.

Common intention is different from same or similar intention—Appeal Allowed —conviction of accused-appellant quashed; Privy Council—1945

Mahbub Shah v Emperor[29]

Per Sir Mahadevan Nair:

This is an appeal by special leave against a judgment of the Lahore High Court... confirming on appeal the conviction of the appellant of the murder of one Allah Dad and the sentence of death passed on him by the sessions judge... The main question... is whether the appellant has been rightly convicted of murder upon the true construction of *section 34 of IPC, 1860*.

The deceased Allah Dad died as the result of gunshot wounds inflicted on him. One Wali Shah, who is said to have fired the shot that killed the deceased, is a fugitive from justice.

...On 25 August 1943, at sunrise, the deceased, Allah Dad, and a few others had left their village Khanda Kel, by boat for cutting reeds growing on the banks of the Indus river. When they had travelled for about a mile downstream, they saw Mohammad Shah, father of Wali Shah (absconder) bathing on the bank of the river. On being told that they were going to collect reeds, he warned them against collecting reeds from land belonging to him. Ignoring his warning they collected about 16 bundles of reeds, and then started for the return journey. While the boat was being pulled upstream by means of a rope, Ghulam Quasim Shah, nephew of Mohammad Hussain Shah (acquitted) who was standing on the bank of the river, asked Allah Dad to give him the reeds that had been collected from his uncle’s land. He refused... Quasim Shah then caught the rope and tried to snatch it away. He then pushed Allah Dad and gave a blow with a small stick, but it was warded off on the rope. Allah Dad then picked up the *lari* from the boat and struck Quasim Shah. Quasim Shah then shouted out for help and Wali Shah and Mahbub Shah came up. They had guns in their hands.

When Allah Dad and Hamidullah tried to run away, Wali Shah and Mahbub Shah came in front of them and Wali Shah fired at Allah Dad who fell down dead and Mahbub Shah fired at Hamidullah, causing injuries to him. [*Lari* is a bamboo pole for propelling the boat, about ten feet long and six inches thick.]

On the above facts the learned judges of the High Court came to the conclusion that Ghulam Quasim was wrongly convicted of murder under *section 302*/*34* of *IPC, 1860* on the following reasons.

Bhandari, J with whom Teja Singh, J concurred, first held that Ghulam Quasim had no common intention of killing any member of the complainant party when he went to the bank of the river in order to demand the bundles of reeds which has been collected from his uncle’s lands.

Then the learned judge addressed himself to the question “whether a common intention” to commit the crime which was eventually committed by Mahbub Shah and Wali Shah came into being when Ghulam Quasim Shah shouted to his companions to come to his rescue and both of them emerged from behind the bushes and fired their respective guns. This he answered in the negative, holding that so far as Quasim Shah was concerned he did no more than ask his companions to come to his assistance when he was knocked with a pole by the deceased and that he could

not have been aware of the manner in which assistance was likely to be rendered to him or his friends were likely to shoot at and kill one man and injure another. In the result he was acquitted of all offences.

The learned judge stated that the case of Mahbub Shah, who was armed with a single barrelled gun, and of Wali Shah, who had a double-barrelled gun, however stood on different footing on the following ground: ‘

As soon as they ran to the assistance of Ghulam Quasim Shah, they fired simultaneously in the direction of the complainants killing Allah Dad on the spot and causing injuries on the person of Hamidullah Khan. It is difficult to believe that when they fired the shots they did not have the common intention of killing one or more of the complainant party. If so, both of them are guilty of murder notwithstanding the fact that the fatal shot was fired by only one of them, namely, Wali Shah, absconder.

According to the learned judge a common intention to commit the crime came into being when the appellant and Wali Shah fired the shots.

Their Lordships will now proceed to consider whether the above reasoning is correct, and *section 34 of IPC, 1860* has been rightly applied to the facts of the case. As it originally stood, the section was in the following terms: “When a *criminal act* is done by “several persons”, each of such persons is liable for that act in the same manner as if the act was done by him alone.”

In 1870, it was amended by the insertion of the words “in furtherance of the common intention of all” after the word “persons” and before the word “each”, so as to make the object of the section clear. Section 34 lays down a principle of joint liability in the doing of a *criminal act*. The section does not say “the common intentions of all” nor does it say “an intention common to all”. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a *criminal act* in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the *criminal act* complained against was done by one of the accused persons in furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the *criminal act* was done in concert pursuant to the prearranged plan.

...In the present case, there was no evidence and there were no circumstances from which it might be inferred that the appellant must have been acting in concert with Wali Shah in pursuance of a concerted plan when he along with Wali Shah rushed to the rescue of Ghulam Quasim... . There was no evidence to indicate that Ghulam Quasim was aware that the complainant party had been cutting reeds from his uncle’s lands, or that the appellant and Wali Shah had been kept behind the bush to come and help him when called upon to do so. The evidence shows that Wali Shah “happened to be out on a shooting game” and when he and the appellant heard Ghulam’s shouts for help they came up with their guns; the former shot the deceased, killing him and the appellant shot at Hamidullah inflicting injuries on his person.

The sole point which requires consideration now is whether a common intention to commit the crime came into being when Ghulam shouted to his companions to come to his rescue and both of them emerged from behind the bushes and fired their respective guns.

Having answered the above question in the negative, as regards Ghulam Quasim, the learned judges thought as Bhandari, J, has expressly stated that with respect to the appellant and Wali Shah, it must be held that the common intention of killing one or more of the members of the complainant party came into being later, when they fired the shots.

Their Lordships cannot agree with this view. Their Lordships are prepared to accept that the appellant and Wali Shah had the same intention, namely, the intention to rescue Quasim if need be by using the guns and that, in carrying out this intention, the appellant picked out Hamidullah for dealing with him and Wali Shah, the deceased, but where is the evidence of common intention to commit the *criminal act* complained against, in furtherance of such intention? Their Lordships find none. Evidence falls far short of showing that the appellant and Wali Shah ever entered into a premeditated concert to bring about the murder of Allah Dad in carrying out their intention of rescuing Quasim Shah. Care must be taken not to confuse same or similar intention with common intention; the partition, which divides “their bounds”, is often very thin; nevertheless, the distinction is real and substantial. The appellant was therefore not rightly convicted of the offence of murder under section 302 read with section 34.

The appeal is allowed.

Absence of charge against two out of five remaining three cannot be convicted under section 149—Appeal partly Allowed—Supreme Court—1955

Pandurang v State of Hyderabad,

AIR 1955 SC 216 : *(1955) 1 SCR 1083*

Per Bose, J:

Five persons including the three appellants—Pandurang, Tukia and Bhilia, (Tukaram and Nilia) were prosecuted for the murder of one Ram Chander Shelke and each was sentenced to death by the Sessions Judge. In the High Court, Ali Khan and VR Deshpande, JJ, who heard the case differed from each other. The former upheld the conviction, but was of the opinion that the sentence in each case be commuted to imprisonment for life. The latter favoured acquittal in all five cases.

Hence, the matter was referred to the third judge, PR Reddy, J. He favoured the former view and upheld the conviction of all the accused under *section 302 IPC, 1860*. However, on the question of sentence he awarded death sentence to Pandurang, Bhilia and Tukia and life imprisonment to Tukaram and Nilia (they did not prefer an appeal).

On 7 December 1950, about 3 pm, Ramchandra Shilke, who had gone to his field near a river called Papana, was attacked by five accused with axe and stick, resulting in his death on the spot, almost immediately. Rasika Bai (deceased's wife) and Subhana (servant) who were present at the scene have stated that (i) Tukia struck Ramchander on his cheek and also on his head; and (ii) Pandurang hit him on the head. After Ramchander fell down Bhilia hit him on the neck.

The medical evidence shows that the injury that caused the death of Ramchander was the one on the neck and Bhilia was responsible for that for which he was charged and was rightly convicted under *section 302 of the IPC, 1860*. His conviction was accordingly upheld by the court.

As regards Tukia, it was proved that Tukia alone caused the fatal injury on the cheek which caused a lacerated wound on the left side of the face which crushed the upper and lower jaws including the lips and teeth. The court accordingly held that his conviction under section 302 was justified.

In case of Pandurang it was proved that he caused a non-fatal injury on the head, which was not sufficient to cause the death of the deceased.

While setting aside the conviction of Pandurang under section 302 with the aid of either *section 34* or *section 149* of *IPC, 1860* the Supreme Court said that none of the provisions could be invoked in this case. As regards application of *section 149 of IPC* the court said, that when a person is not charged under *section 149 of IPC*, even if it is possible to convict under that section the court would not do so. Nevertheless, in the present case there was no evidence indicating any common object between the accused to attract *section 149 of the Indian Penal Code, 1860*. All that was said was that the deceased Ramchander bought a field from one Shivamma Patelni about a year before the murder. It is said that the three accused Nilia, Bhilia and Tukia used to live in that field. When Ramchander bought it he turned them out, which might be cause for enmity against him. The court said even if this might be indicative of prior concert, it only embraces Nilia, Bhilia and Tukia and not Pandurang. Hence from the facts no inference of common object could be inferred. Pandurang, though armed with an axe, only inflicted a slight blow on the scalp which did not break any of the fragile bones, and from the fact that two others (Tukaram and Nilia) who were lightly armed with sticks inflicted no injuries at all, section 149 was out of question.

As regards the application of *section 34 of IPC, 1860* the court said that it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the *criminal act* of another, the act must have been done in furtherance of the common intention of them all. Since there is no evidence of any prior meeting between the accused before the attack or even immediately before the question of application of *section 34 of IPC, 1860* does not arise. Each case must rest on its own facts and the mere similarity of the facts in one case cannot be used to determine a conclusion of fact in another.

Careful perusal of the facts in *Pandurang's* case do not warrant an inference of common intention. Hence, even if a charge to this effect had been made, no conviction could take place on that basis. Pandurang could be liable only for what he actually did. His case accordingly falls under section 326 (voluntarily causing grievous hurt by dangerous weapon). A blow on the head with an axe which penetrates half an inch into the head is "likely to endanger life" (section 326) and is not sufficient to cause death (section 302).

The court accordingly set aside the sentence of death in case of Pandurang and altered it to ten years of rigorous imprisonment. In case of the other, two accused death sentence was commuted to life imprisonment.

Appeal partly allowed and order passed accordingly.

Common intention must be anterior in time to the commission of crime— Appeal Dismissed —Supreme Court—1963

Ram Tahal v State of UP[30]

Facts: Six accused were charged with offences under section 302 read with *sections 148*, *149* and *307* of *Indian Penal Code, 1860* for having formed an unlawful assembly with the common object of demolishing the thatched roof of the complainant's house, and having committed the murder of two persons.

Per P Jagmohan Reddy, J:

A five-judge Bench of the court in *Mohan Singh v State of Punjab,* AIR 1963 SC 174 : 1962 Supp (3) SCR 848, has further reiterated this principle where it was pointed out that like *section 149 of IPC*, *section 34 of IPC* also deals with cases of constructive liability but the essential constituent of the vicarious criminal liability under section 34 is the existence of a common intention, but being similar in some ways the two sections in some cases may overlap. Nevertheless, common intention, which section 34 has as its basis, is different from the common object of unlawful assembly. It was pointed out that common intention denotes action in concert and necessarily postulates a prearranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character but-must be actuated by the same common intention which is different from same intention or similar intention... the question is whether the convictions under section 302 and section 307 can be sustained on the ground that they had a common intention to commit the said offence.

There is no doubt that a common intention should be anterior in time to the commission of the crime showing a pre-arranged plan and prior concert, and though, it is difficult, in most cases to prove the intention of an individual, it has to be inferred from the act or conduct or other relevant circumstances of the case. This inference can be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination and concert with which the beating was given or the injuries caused by one or some of them, the acts done by others to assist those causing the injuries, the concerted conduct subsequent to the commission of the offence for instance, that all of them had left the scene of the incident together and other acts, which all or some may have done, as would help in determining the common intention. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted.

The Supreme Court had held in the *Krishna Govind Patil case,* AIR 1963 SC 1413 : [1964] 1 SCR 678, that the pre-arranged plan may develop on the spot during the course of the commission of the offence but the crucial circumstance is that the said plan must precede the act constituting the offence. When on the shouts for help given by the complainant and the injured, others came to their rescue, all of them ran away together. In our view the totality of circumstances indicate without doubt the inference that there was a pre-concerted plan and a common intention to remove the thatch and to attack any person if he resisted. The accused in the furtherance of that common intention began to remove the *chhaper* and when Ram Harakh obstructed, they beat him and others who came to resist their attack and aggression.

The appeal was dismissed.

Mere innocent presence of a bystander does not make him member of an unlawful assembly—Appeal partly allowed—Supreme Court—1976

Musa Khan v State of Maharashtra[31]

Facts: A band of ruffians committed vandalism and damaged the properties of rivals and enemies in order to wreak vengeance for boycotting of the National Hotel which belonged to some of the appellants, by the students of a local Engineering College. Some differences had arisen between the management of the hotel and the students as a result of which the students completely boycotted the National Hotel and transferred their patronage to Bharat Lodge. As a result of this change in the attitude of the students the owners of the National Hotel nursed a serious grudge not only against the students, but also against Bharat Lodge which was being patronised by them as a result of which the main business of the National Hotel almost came to a standstill.

Per SM Fazal Ali, J:

This appeal by special leave is directed against the judgment of Bombay High Court dated 4/8 November 1971 dismissing the appeal of the appellants affirming the convictions and sentences passed on them by the Session Judge, Aurangabad, who convicted 14 out or 24 accused under various sections of *IPC, 1860*. The High Court acquitted 6 but upheld the conviction of others.

The immediate provocation for massive raid conducted by the appellant and others was an incident which happened on 21 August 1968 when some of the students of the Engineering College indulged in a small rioting and caused damage to the National Hotel, Paradise Hotel, cycle shop, a tailoring shop owned by A 16 and A 17 and a dispensary of Dr Syeed.

The damage caused by the students was in the neighbourhood of Rs 3000 to Rs 4000. About two months later, on 20 October 1968 an employee of the National Hotel sustained some injuries and was removed to the hospital in a rickshaw. Thereafter, 20-25 persons assembled near the National Hotel and after constituting an unlawful mob these persons moved towards the Shivaji Hotel and A-8 rushed towards PW 10 Anand Muley but the other students who were sitting in the Shivaji Hotel fearing trouble at the hands of the mob ran towards their hostel but were hotly chased by the mob which entered the premises and caught hold of one of the students, and further, the mob armed with stories, iron bars, brickbats etc caused damage to the hostel building, by pelting stones and also caused injuries to PW 11 Mangilal who was the watchman of the Hostel. Not satisfied with this, the mob consisting of several persons proceeded to Bharat Lodge, which was owned by PW 1 Prakash and his father PW 16 Vishwanath. Having reached the Bharat Lodge the mob became violent and damaged the furniture, the glass panes and some of the members of the mob went to the extent of stealing away the cash box which was kept in the lodge, proceeded near the *chawl* belonging to Jogindra Singh, and set fire to some of its doors and other property including a scooter.

The appellants pleaded innocence and averred that they had been falsely implicated due to enmity and had not participated in the riot. Both the courts below have accepted the main facts leading to the occurrence as also participation of the appellants in the rioting.

It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all these stages.

...It would appear from the evidence that out of the mob the only persons who had actually participated in removing the cash box and committed dacoity were All Mohd Eqbal, A 7 Sardar Khan, A 20 Sabar Ali and A 22 Mohd Azam. This admission of the witness, therefore completely excludes the possibility of any other appellant having taken part in this separate incident of dacoity. It is not uncommon that an unruly crowd on the rampage may contain some miscreants who may go beyond the common object and commit ad hoc crime graver than the mob had as its objective.[32]

As, however, the appellant was a boy of twenty years, his case clearly falls within the purview of *Probation of Offenders Act 1958*. *Probation of Offenders Act 1958* is a social legislation which is meant to reform juvenile offenders so as to prevent them from becoming hardened criminals by providing an educative and reformative treatment to them by the government.

Conviction and sentence imposed on Musa Khan was accordingly set aside and he was released on probation on his entering into a bond for a period of one year to keep the peace and be of good behaviour.

The appeal is partly allowed.

When some members of an unlawful assembly are acquitted others are also entitled to acquittal—Supreme Court—1978

5.7 Distinction Between Section 34 and Section 149 of Indian Penal Code, 1860

Muthu Naicker v State of TN[33]

Per Desai, J:

Whenever in uneventful rural society something unusual occurs, more so, where the local community is faction ridden and a fight occurs amongst factions, a good number of people appear on the scene not with a view to participating in the occurrence but as curious spectators. In such an event mere presence in the unlawful assembly should not be treated as leading to the conclusion that the person concerned was present as a member of the unlawful assembly.

Held, in appeal that it would not only be unfair but self-contradictory to sustain the conviction of the remaining accused for the offence under *sections 326*/*149* of *IPC, 1860*. That would be an unequal treatment and, therefore, even though as members of the unlawful assembly they could have been fixed with vicarious liability, in view of the situation obtaining on the finding of the High Court, the Supreme Court has no option but to acquit them.

In a case arising out of an occurrence in a village involving rival factions, if some persons belonging to party *X* had collected at one place and, on seeing *G*, belonging to party *Y*, alighting from the bus, emerged from that place and chased him and some of them attacked him, it can be said that they had met for a purpose and had a common object and acted in concert.

If some persons combined to attack *G* and if they emerged together one can say that those, who were the members of that assembly shared the common object of the assembly likely to assault and even to cause hurt to *G*. That, at that stage an unlawful assembly was formed is unmistakably established.

The accused was convicted under *section 149 of the Indian Penal Code, 1860* in respect of specific offences committed by each individual accused.

Held that on the other hand, in a case where a large crowd collected, all of whom are not shown to be sharing the common object of the unlawful assembly, a stray assault by any one accused on any particular witness could not be said to be an assault in prosecution of the common object of unlawful assembly, so that the remaining accused could be imputed with the knowledge that such an offence was likely to be committed in prosecution of the common object of the unlawful assembly.

It is ordered accordingly.

Overt act (s) must be done in furtherance of common intention or common object of all—Appeal allowed—Conviction set aside—Supreme Court—1989

Rambilas Singh v State of Bihar,

AIR 1989 SC 1593 : *(1989) 3 SCC 605* : 1989 (1) Scale 876

It is true that in order to convict persons vicariously under section 34 or section 149, it is not necessary to prove that each and every one of them had indulged in overt acts. Even so, there must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused, or in prosecution of the common object of the members of the unlawful assembly.

Where it was alleged in the first information report that before one accused caused a stab wound the accused, 16 in number, had lain in wait and surrounded the deceased in retaliation to an incident earlier and the co-accused were convicted for murder on the ground that the act of the accused was in furtherance of the common intention of all the accused assembled or in prosecution of a common object formed by all of them, the conviction was not sustainable when a significant factor to be borne in mind was that there was no evidence to show that the co-accused had known that the accused was carrying a knife when they surrounded the deceased and the accused had come without any weapons. If the co-accused had no knowledge that the accused was carrying a knife, they could not even have remotely thought that he would be inflicting a stab injury on the deceased. Further, if it was the intention of all of the accused that the deceased should be done to death, it was inconceivable that they would have come without any weapons except for the knife brought by one of the accused and that they would not have launched an attack on the deceased and would have rested content with the single stab inflicted by the accused. The decision of Patna High Court was set aside. The appeal was allowed.

When out of two only one inflicted injury and other's participation is disbelieved, he cannot be convicted—Appeal partly Allowed—Supreme Court—1990

Hem Raj v State (Delhi Administration),

AIR 1990 SC 2252 : 1990 Cr LJ 2665 : 1990 Supp SCC 291

Per Ratanvel Pandian, J:

The appeal to the Supreme Court is preferred by the second accused Hem Raj challenging the correctness of the judgment of the High Court of Delhi confirming the verdict of the trial court convicting the appellant under *section 302 of IPC* and sentencing him to imprisonment for life.

On 5 October 1972 at about 7.30 am while PW 16 was standing in the verandah of his house, the appellant alongwith the acquitted accused persons came there and shouted. On hearing the hue and cry, Ravinder Kumar came outside. Accused Madan and Naresh (since acquitted) caught hold of Ravinder and Daulat (since acquitted) instigated the appellant to kill Ravinder. The appellant took out a knife from his pyjama and inflicted a stab on the chest of Ravinder. When PW 16 tried to intervene, he was hit with a stone on his nose by Daulat Ram. After causing injuries to Ravinder and PW 16, all the accused took to their heels by the side of Desh Bandhu Gupta Road. Ravinder ran after the accused for a short distance and fell down and died in the hospital. The occurrence had happened in a spur of moment and in the heat of passion upon a sudden quarrel.

The above inference is fortified by the admission of PW 17 admitting that both the appellants and the deceased suddenly grappled with each other and the entire occurrence was over within a minute. Thus, it is clear that it was during the course of the sudden quarrel the appellant gave a single stab which unfortunately landed on the chest of the deceased causing an injury which in the opinion of the medical officer was sufficient in the ordinary course of nature to cause death.

Held, the offence committed by the appellant is the one punishable under section 304 Part II but not under *section 302 of the Indian Penal Code, 1860*.

The appeal is partly allowed.

Mere presence of accused not indicative of sharing of common intention— Appeal Allowed, Conviction set aside—Supreme Court—1983

Ghanshyam v State of UP,

AIR 1983 SC 293 : (1982) 2 SCC 400 : 1982 (1) Scale 540

Facts: In an accidental occurrence three persons including *K* a 15 year old boy attacked *D* who died as a result of the attack. The question before the court was whether *K* shared the intention of his father and elder brother in beating up *D*.

It was held that the meeting of *K* at a place where the incident is alleged to have occurred was purely accidental because there is no evidence to show that the accused knew in advance that the deceased and his companions were to pass by that route, and that he might have been present at the time of occurrence, but mere presence in the circumstances of this case is not indicative of sharing the intention of the father and brother. Therefore, the judges were satisfied that there is no convincing and reliable evidence to hold that the present appellant shared the common intention of his father and brother and participated in the assault on the deceased and hence his conviction and sentence was, therefore, unsustainable.

Benefit of doubt—In the absence of definite role played by the accused appellants in group rivalries and enmity between two groups resulting in murder, accused appellants are entitled to be acquitted by giving them benefit of doubt under sections 149/300 of the Indian Penal Code, 1860

Eknath Ganpat Aher v State of Maharashtra,

AIR 2010 SC 2657 : *(2010) 6 SCC 519* : (2010) 2 OLR 258

Dr Mukundakam Sharma and VS Sirpurkar, JJ:

Two appeals were filed in the Apex Court by the 14 accused who had been convicted and sentenced under *sections 149*/*300 IPC, 1860* by the 2nd Additional Sessions Judge, Ahmednagar, which have been upheld by the High Court of Bombay. The accused were charged for committing offences including of being members of an unlawful assembly for causing grievous hurt in prosecution of the common object of the unlawful assembly and also for committing murder of the members of the other group.

Allowing the appeal and setting aside the conviction the Apex Court held that:

> It is an accepted proposition that in the case of group rivalries and enmities, there is a general tendency to rope in as many persons as possible as having participated in the assault. In such situation, the courts are called upon to be very cautious and analyse the evidence with care. Where after a close scrutiny of the evidence, a reasonable doubt arises in the mind of the court with regard to the participation of any one of those who have been roped in, the court would be obliged to give the benefit of doubt to them.

Credibility of testimony – Sections 149 and 302 of Indian Penal Code, 1860 the credibility and trustworthiness of all (these) eye witnesses could not be shaken by the accused persons. The conviction can be based on their testimonies even if they were related to the deceased. Supreme Court 2017

Kamta Yadav v State of Bihar,

AIR 2016 SC 4866 : *(2016) 16 SCC 164* : 2017 Cr LJ 145

AK Sikri, J:

Five Appellants, who were tried for offence under *section 302* read with *section 149* of *Indian Penal Code, 1860* and convicted by the Trial Court have approached Apex Court after their conviction was upheld by the High Court. During the pendency of this appeal, one of the accused died. The remaining four accused-appellant questioned validity of judgment of the Courts below:

To trace out the prosecution case in brief, it may be mentioned that on 16 November 1991, at about 9:00 am, Ajodhaya Yadav, armed with a lathi, and other four Appellants armed with bhala, were ploughing a field belonging to the informant while Kashinath Yadav exhorted others to kill the informant Ramji Yadav. Hiralal Yadav caused a bleeding injury on the head of the informant with a bhala. The informant in order to save his life shouted on which his uncle Ramayan Yadav (deceased), his father Dharichhan Yadav (PW-1) and his brother Bir Bahadur Yadav (PW-3), came in order to save him. Hiralal Yadav then caused a bhala injury on the chest and abdomen of the deceased who fell down and became unconscious. PW-1 also fell down as he was assaulted with bhala by Kashinath Yadav and Kamta Yadav causing injuries on his abdomen, back of the body and hand. PW-3 was also assaulted by Ajodhaya Yadav with lathi and also by Bhim Yadav with bhala on head causing bleeding injury. On the shouts raised by the informant and his party, Dudhnath Yadav (PW-2) and Jagdish Yadav came and saved them. Other persons from the village also came and thereafter the accused persons stopped assaulting and fled away. The reason for the occurrence was said to be a dispute over the land and litigation in the past which had resulted in filing of a court case also.

While dismissing the appeal Apex Court said: (i) There were six eye witnesses and three of them were injured eye witnesses, which was a heavy factor to show the actual presence of witnesses at the scene of occurrence.

The only requirement is to examine their depositions with greater caution and deeper scrutiny is needed, which exercise was done by both the courts below. In fact, when the accused were confronted with the factual and legal position, they could not even provide any answer to the same. The accused could not point out as to how non-examination of independent persons acted to the prejudice of them. [10] and [11]

Appeal dismissed.

Indian Penal Code, 1860, sections 149, 141, 362, 53 Unlawful assembly Common object Accused persons armed with sticks and sharp weapons allegedly assaulting deceased resulting in his death. All 10 accused found present on place of occurrence and participating in assault on deceased. Common intention of all

accused proved regardless of weapon of offence. Accused liable to be convicted under sections 326, 149, 53 (Para 7). Keeping in view severity of assault by accused persons with dangerous weapons, accused sentenced to RI for seven years with fine of Rs 2000 each. (Para 8).

State of Rajasthan v Hazi Khan[34]

These appeals by the State of Rajasthan are against the acquittal of the accused respondents of the charges framed against them under sections 148, 302, 307, 323/149, 324/149, 326/149, 324, 326 and 323 of *Indian Penal Code, 1860*. Allowing the appeal partially Apex Court held insofar as the substantive offence under *section 302, IPC* or under *section 307, IPC, 1860* with the aid of either *section 34, IPC* and *section 149, IPC* has been framed. The evidence on record is not sufficient to attribute any specific injury suffered by the deceased to any particular accused. In such a situation, the High Court was perfectly justified in acquitting the accused of the offences under *section 302, IPC* or under *section 307, IPC*.

However, we have noticed that charge was also framed against the accused respondents under *section 326* read with *section 149*, *IPC*. If all the accused were present at the place of occurrence and had participated in the assault on the deceased regardless of the weapon that the accused were carrying, all the accused would be liable with the aid of *section 149, IPC, 1860*. In the present case, there is no doubt that consequent to the assault committed by the accused, the injuries, had been caused to the deceased. If that is so, all the accused can be held to be constructively liable with the aid of *section 149, IPC*. A reading of the medical evidence would go to show that serious injuries *i.e.,* injury Nos 4, 5 and 6 had been caused to the deceased. In such situation, we will have no hesitation to hold all the accused respondents liable for the offence under *section 326* read with *section 149*, *IPC, 1860*.

Having regard to the circumstances in which the crime was committed; the fact that ten (10) persons had assaulted the deceased in the middle of the night with dangerous weapons we are of the view that the ends of justice would be met if each of the accused respondent is sentenced to suffer rigorous imprisonment for a period of seven years and to pay a fine of Rs 2000 each. We order accordingly.

Appeal allowed.

Indian Penal Code, 1860, sections 149, 300 – Murder: Unlawful assembly Common object: Intention of members of unlawful assembly can be gathered by nature, number and location of injuries inflicted. Accused persons going to house of first informant fully armed with gun and lathis. Repeated gun-shots fired by one of accused on person of deceased. Injuries also inflicted by lathies by other accused on first informant and his brother on their heads. Common object was not only to cause grievous hurt but to cause murder. Held liable under sections 302/109 IPC for murder – Supreme Court 2017.

Ganga Ram Sah v State of Bihar[35]

AK Sikri, J:

The case of the prosecution, which has been successfully established before the Trial Court as well as the High Court, is an follows:

Additional Sessions Judge after analysing the evidence and material produced before him came to the conclusion that charges under section 302 reach with *section 149 IPC* against the accused persons had been satisfactorily proved by the prosecution. Ram Chandra Sah was sentenced to undergo rigorous imprisonment for life for the offence punishable under *section 302 IPC* and rest of the accused persons Ganga Ram Sah, Pitambar Sah, Jagdish Sah (dead) Sitaram Sah (dead) were also sentenced to undergo rigorous imprisonment for life for the offence punishable under *section 302/109 IPC*. High Court upheld Trial Court verdict.

Dismissing the appeal Apex Court said the accused persons had gone to the house of the complainant fully armed with gun and lathis. This visit was preceded by a scuffle which had taken place just before that. One person was carrying gun whereas others were armed with lathis. The moment they reached the house of the complainant, who was there with his family members, appellant No 1 directed others to attack the victims party. On this exhortation, Ram Chandra Sah pulled his gun and shot twice at Ram Udgar Sah Other accused persons started assaulting Uday Chandra Sah who sustained wounds on his chest, neck and face. They also assaulted the complainant as well his brother Uday Chandra Sah with lathis. Complainant sustained injuries on the right side of the head and right hand whereas Uday Chandra Sah sustained injuries on his head and had to be carried to hospital for treatment. All

these acts and events taken together proved beyond doubt that the common object of the unlawful assembly was not only to cause grievous hurt but to kill the members of the opposite camp. (Para 12)

It is trite law that the common object of the unlawful assembly has to be inferred from the membership, the weapons used and the nature of the injuries as well as other surrounding circumstances. Intention of members of unlawful assembly can be gathered by nature, number and location of injuries inflicted. In the instant case, repeated gunshots fired by Ram Chandra Sah on the person of deceased Ram Udgar Shah, and the injuries caused by lathis by other accused persons on the complainant and his second brother on their heads, clearly demonstrate the objective to cause murder of these persons. We, thus, do not find merit in this appeal which is, accordingly, dismissed. (Para 13)

Appeal dismissed.

Indian Penal Code, 1860, sections 302, 149, 34 Evidence Act, section 3 Unlawful assembly and murder, common object. Appreciation of evidence. All accused gathering at place of occurrence, armed with deadly weapons. Accused asking whereabouts of deceased to first informant. On appearance of deceased at scene of incident, accused directing co-accused to finish him. Co-accused firing at deceased, on exhortation of accused. All members of unlawful assembly vicariously liable for acts done by such assembly. Accused having common object to kill deceased and other family members conviction, proper Supreme Court 2017

Iqbal v State of UP[36]

In the night of 23rd/24th March 1985, the complainant-Netrapal, along with his father Sonpal, was sleeping in the verandah of their sitting room and his uncle Raghuvar Dayal, along with the brother of the complainant, viz., Bhoop Singh, was sleeping inside of the said sitting room. At about 12.30 am, six accused, viz., Genda Lal, Ganpat, Sripal, Virendra, Ram Shankar Lodha and Iqbal came there armed with rifles and katta. They woke up the complainant's father-Sonpal. On seeing Bhoop Singh, Ganpat shouted loudly that he was Bhoop Singh and he could be killed as he was their enemy. On hearing this, Genda fired with his rifle at Bhoop Singh which hit Bhoop Singh and as a result thereof he fell down on the spot. Other persons also started firing from their rifles/weapons. Bhoop Singh succumbed to the injuries suffered by him.

The two appellants along with four other persons, were charged and convict for committing offences under sections 148, 302, 302/149 as well as *section 307*/*149* of the *Indian Penal Code, 1860* and sentenced to life imprisonment and fine.

After analysing the evidence, the Trial Court came to the conclusion that five of the accused persons were armed with rifles and one with katta and they had formed an unlawful assembly with the common object of killing the persons from the victim's side. It is with this common object, they had fired on the family members of the complainant which resulted in the death of Bhoop Singh and the nature of injuries of PW-2 and PW-3 showed that there was an attempt to commit their murder as well. On the basis of these findings, all the six accused were convicted for offences under section 148, section 302 read with section 149 as well as *section 307* read with *section 149 IPC*.

All the six convicted persons filed appeal in the High Court at Allahabad which has been dismissed by the High Court confirming the conviction as well as sentences imposed by the Trial Court. Four of the convicted persons have died in the meantime. It is for this reason that there are only two appellants in the present appeal viz, Iqbal and Virendra.

Dismissing the appeal and confirming the conviction by the two courts below Apex Court said:

In the instant case, where the moot question is as to whether there was common objective, if that is proved, then, in any case, the separate roles played by all the accused persons need not be examined as all the members of unlawful assembly would be vicariously liable for the acts done by the said assembly. There is a clinching evidence produced by the prosecution to show that all the six persons had come to the place of occurrence armed with deadly weapons. The moment they reached the house of the complainant and found the complainant along with his father Sonpal (PW-3) sleeping there, they woke them up and first asked as to where Chandrapal was. When they were told that Chandrapal was away to Delhi, they immediately asked for the whereabouts of Bhoop Singh. The moment Bhoop Singh appeared on the scene, Ganpat pointed out at him and told other members of the assembly

that he was the person who could be finished. Immediately upon the exhortation of Ganpat in the aforesaid manner, Genda Lal fired at Bhoop Singh and other members, who were carrying rifles, also started firing.

Appeal dismissed conviction confirmed.

Indian Penal Code (45 of 1860), sections 300, 326, 149, unlawful assembly. One member found guilty of offence of murder. Other can be convicted under section 326 read with section 149. (Para 15) Accused infuriated on being questioned by informant. Going along with others to place of complainant and assaulting complainant and others. No previous enmity between parties. Assault was intended only to show superiority and teach lesson to complainant. One member of complainant party however dying because of injury caused by one of accused. From mere fact that accused persons carried dangerous weapons, it cannot be inferred that all accused knew that murder was likely to be committed. All members of accused party cannot be convicted for murder with aid of section 149. (Para 13)

Najabhai Desurbhai Wagh v Valerabhai Deganbhai Vagh[37]

L Nageswara Rao, J:

The second fast track Judge, Amreli convicted accused Nos 1 to 15 respondents for committing an offence under section 302 (murder) read with *section 149*/*34 IPC, 1860* and sentenced them to life imprisonment and a penalty of Rs 5000. The accused were also found guilty for the offences under sections 324 and 325 read with 149/34 *IPC, 1860* for which they were sentenced to six months rigorous imprisonment and fine of Rs 1000.

Accused Nos 1, 2 and 10 were directed to pay Rs 10,000 each as compensation to the heirs of the deceased Unadbhai Desurbhai under *section 357 of the Criminal Procedure Code 1973*. The remaining accused were directed to jointly pay Rs 20,000 as compensation to the heirs.

Accused Nos 1 to 14 filed an appeal before the High Court of Gujarat at Ahmedabad challenging their convictions and sentences. The High Court allowed the appeal partly by acquitting accused Nos 1 and 2 of the charge under section 302 read with *section 34*/*149 IPC*. The convictions and sentences under sections 324 and 325 read with *section 34*/*149 IPC* in respect of accused Nos 1, 2 and 3 were maintained. The convictions and sentences of accused No 3 to 9 and 11 to 14 under section 302 read with *sections 34*/*149 IPC, 1860* and 324 and 325 read with *sections 34*/*139 IPC* were set aside. The conviction of accused No 10 under section 302 read with section 149/34 was converted to a conviction for the offence under *section 302 IPC, 1860* simpliciter and he was sentenced to undergo rigorous imprisonment for life.

Allowing the appeal partly Apex Court said:

> The background in which the attack was made by the accused does not show that there was a common object of a murder amongst the accused. Accused No 1 was infuriated on being questioned by the appellant regarding the damage to the electric pole near his house. Accused No 1 along with the other accused intended to show their superiority and teach a lesson to the Appellant. There is nothing on record to suggest any previous enmity between the parties. Common object to commit a murder cannot be inferred only on the basis that the weapons carried by the accused were dangerous. The above facts would indicate that no knowledge about the likelihood of an offence of murder being committed can be attributed to the members of the unlawful assembly, barring Lakshmanbhai Bhikabhai Vagh (A-10) who has been convicted under *section 302 IPC*.

It is no more *res integra* that a finding of the commission of the offence under section 326 read with section 149 can be recorded against members of an unlawful assembly even if it is established that the offence under section 302 was committed by one member of such assembly. (See: *Shambhu Nath Singh v State of Bihar*)

The High Court found that the conviction of the accused under *section 302* read with *section 149 IPC, 1860* cannot be upheld as there was neither an unlawful assembly nor a common object to cause death. The High Court miserably failed to consider the facts and circumstances of the case before coming to such conclusion. *Section 149 IPC* does not become inapplicable in all situations where there is a cross case by the accused. The High Court ought to have taken note of the acquittal of the appellant and others in the said cross case on 24 June 2003. The judgment of the High Court was delivered on 29 July 2009 by which date there was no cross case pending against

the appellants. Recording a finding of acquittal without re-appreciation of evidence by the Appellate Court would result in flagrant miscarriage of justice and that is exactly what happened in this case.

The appeal is partly allowed and the accused Valerbhai Deganbhai Vagh (A-1), Unadbhai Deganbhai Vagh (A-2), Bhimabhai Deganbhai Vagh (A-3), Unadbhai Bhagabhai Vagh (A-5), Bhagwanbhai Bhikabhai Vagh (A-7), Bhikabhai Jinabhai Vagh (A-8), Hasurbhai Bhikhabhai Vagh (A-11), Bhanabhai Bhikabhai Vagh (A- 12), Patabhai @ Aatabhai Bhikabhai Vagh (A-13) and Bhavabhai Jikarbhai Vagh (A-14) are convicted under *section 326* read with *149* of the *Indian Penal Code, 1860* and sentenced to the period undergone.

Order accordingly.

Sections 302, 147, 148, 149, 307 and 504 IPC, 1860 the appellate Court, while dealing with an appeal against acquittal, has no absolute restriction in law to review and relook the entire evidence on which the order of acquittal is founded. If the appellate Court, on scrutiny, finds that the decision of the Court below is based on erroneous views and against settled position of law, then the interference of the appellate Court with such an order is imperative. – Supreme Court 2016

Sadhu Saran Singh v State of UP[38]

NV Raman, J,

These appeals are directed against the judgment passed by the High Court of Allahabad by which the High Court has allowed the appeals filed by the accused-respondents and acquitted them for the offences under *sections 147*, *148*, *149*, *302*, *307* and *504* of *Indian Penal Code, 1860* (rioting, rioting armed with deadly weapon, unlawful assembly, murder, attempt to murder and intents and insult with intent to provoke breach of peace). Bhola Singh (PW 1)—the informant is a resident of village Kanso, district Mau and on 4 October 1994 at about 8 am when his sons namely Sheo Kumar, Avdhesh and Yogendra (all three deceased) were repairing the cattle trough[39] in presence of one Ganga Singh, brother-in-law of the informant and one Baijnath Singh (PW 2), the accused Ramashraya Singh, Satyendra Singh, Brijendra Singh along with their father Ramchandra Singh armed with deadly weapons came to the Baithka of the informant-Bhola Singh with the company of Kamla Singh and Ram Saran Singh hurling filthy abuses. While Ramchandra Singh exhorted his sons to eliminate the whole family of the victim, the accused Ramashraya Singh and Kamla Singh opened fire with guns while Satyendra Singh and Brijendra Singh attacked with *katta* upon the three sons of Bhola Singh (PW 1). The other accused also attacked the victim party with their respective weapons. In the assault, the three sons of PW 1 sustained injuries and fell on the ground and Ganga Singh, brother-in-law of PW 1 sustained firearm injuries.

The attack resulted into the death of two sons of the informant i.e. Shivshankar and Avadesh on the spot while another son i.e. Yogendra breathed his last on the way to the hospital.

The Trial Court, after a full-fledged trial, came to the conclusion that the accused were guilty of committing a cruel and heinous offence and by its detailed judgment dated 22 May 2003 sentenced Ram Saran Singh, Satyendra Singh and Brijendra Singh to undergo life imprisonment for the offence under *section 302*/*149*, *Indian Penal Code, 1860* and imposed fine of Rs 10,000.

Aggrieved thereby, all the five accused persons preferred criminal appeals before the High Court. The High Court recorded complete disagreement with the findings given by the Sessions Judge and allowed the appeals of the accused by setting aside the judgment of the Trial Court and acquitted them of the charges and also rejected the reference for confirmation of death sentence of the accused Ramashraya Singh and Kamla Singh.

Dissatisfied with the order of acquittal passed by the High Court, the brother of the deceased informant filed the present appeals by way of special leave.

While allowing the appeal and restoring the conviction awarded by the Trial Court the Apex Court said:

> Reason is the heartbeat of every conclusion, without proper reason the conclusion becomes lifeless. Having carefully considered the impugned judgment and order passed by the High Court as also that of the Trial Court and after perusing the records and giving anxious consideration to the facts of the case on hand in the light of well-settled law, in our considered opinion the judgment of the High Court deserves to be set aside on the ground of lack of reasoning. [21]

5.7 Distinction Between Section 34 and Section 149 of Indian Penal Code, 1860

The Trial Court has awarded death sentence to Ramashraya Singh and Kamla Singh. On this issue, we are not able to concur with the view taken by the Trial Court as the reasoning of the Trial Court does not convince us that this is the rarest of the rare cases which warrants the penalty of death sentence.

While allowing these appeals by setting aside the impugned judgment and order passed by the High Court and modify the judgment and order passed by the Trial Court by convicting all the accused Respondents to life imprisonment under *section 302/149 Indian Penal Code* with a fine of Rs 10,000 instead of death sentence to Ramashraya and Kamla Singh the Apex Court pronounced the judgment.

Once it is proved that Z1 was member of unlawful assembly he is responsible for everything that any member does if it is done

> "in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object." – Supreme Court 2017

Kattukulangara Madhavan v Majeed[40]

There was some dispute between people belonging to RSS and CPI (Marxist) party in connection with the festival at Korattikara Vishnu Bhagwati Temple in Thrissur, Kerala. In the night of 3 March 1993 deceased Suresh Babu was travelling in a bus. When the bus reached Ottappilavu junction, a group of persons entered the bus, pulled Suresh Babu out of the bus and took him to the front side of the bus and attacked him. A1 inflicted a stab injury on the back of the left side of the chest of Suresh Babu. The deceased fell down and A1 inflicted two more stab injuries. When the deceased was struggling to stand up and escape the other accused indiscriminately beat him with a reaper cutting machine and sticks. The time of attach was 08:25 pm Suresh Babu died. The post-mortem certificate referred to 26 injuries on the body of the deceased Suresh Babu and the cause of death was stated as "the deceased died of multiple injuries sustained to chest". The Trial Court convicted the group of accused but the High Court of Kerala acquitted a few while making *subjective inquiry of individual role*. The High Court referred to the clash between the supporters of CPI (M) and BJP workers. It held that the deceased was attacked due to political rivalry. But the High Court found that there is no evidence to show that the members of the unlawful assembly (especially A3, A4, A14, A15 and A18) had a common object to commit murder of Suresh Babu. The reasoning (para 12 in judis.nic.in) given by the High Court was (a) the accused were not aware that the deceased was travelling in the bus, and (b) there was no evidence to show that they formed an unlawful assembly with a view to attack and commit his murder.

Allowing the appeal and upholding the conviction awarded by the Trial Court against accused. The Supreme Court through, L Nageswara Rao, J, rightly held that

> The deceased and accused belong to two political parties opposed to each other. There were three other incidents of clashes between the rival groups. The existence of a CPI (M) office at Ottappilavu junction near incident place is proved. The accused along with others assembled and were searching for BJP workers travelling in the buses that were passing through the junction. The common object of the members of the unlawful assembly was to attach any BJP supporter who was passing through Ottappilavu junction. Unfortunately, Suresh Babu was in the bus and he was killed in the attack.

Justice SA Bobde, who rightly limited himself only to this issue, also explained the joint liability jurisprudence which will be a beacon in future decision making. His *ratio decidendi can be found in this statement:*

But having participated and gone along with the others, an inference whether inculpatory or exculpatory can be drawn from the conduct of such an accused. The following questions arise with regard to the conduct of such an accused:—

(i) What was the point of time at which he discovered that the assembly intended to kill the victim?

(ii) Having discovered that, did he make any attempt to stop the assembly from pursuing the object?

(iii) If he did, and failed, did he dissociate himself from the assembly by getting away?

5.7 Distinction Between Section 34 and Section 149 of Indian Penal Code, 1860

Under *section 149 of Indian Penal Code, 1860* the prosecution is required to prove three things beyond reasonable doubts. One, the accused was a member of unlawful assembly (section 142). Crime was committed in prosecution of common object (141/149).

A curious onlooker or a bystander is not a member of unlawful assembly because he lacks intention to become member of unlawful assembly (section 142).

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22 *Sheo Mahadeo Singh v State of Bihar,* AIR 1970 SC 1492 : (1970) Cr LJ 1389; *Barendra Kumar Ghosh v KE,* (1924-25) LR 40 (PC); *Nanak Chand v State of Punjab, AIR 1955 SC 274*; *Sukha v State of Rajasthan, AIR 1956 SC 513*; *Sunder Singh v State of Punjab, AIR 1962 SC 1211*; *Parichhat v State of MP,* AIR 1972 SC 535; *State of UP v Iftikhar Khan, AIR 1973 SC 863*.

23 *Mohan Singh v State of Punjab, AIR 1963 SC 174*; *Mahbub Shah v Emperor,* AIR 1945 PC 118; *Krishna Govind Patil v State of Maharashtra, AIR 1963 SC 1413*.

24 *Bharwad Mepa Dana v State of Bombay,* 1960 AIR 289 : [1962] 1 SCR 172. Twelve persons were charged for the offence, under *section 302* read with *section 149* of *Indian Penal Code, 1860*. The sessions judge acquitted seven of them and convicted the remaining five. The High Court acquitted one of them and affirmed the conviction of remaining four. The Supreme Court approved of the High Court's contention and held that the unlawful assembly consisted of the four convicted persons and some unidentified persons who together numbered more than five; *Kartar Singh v State of Punjab,* 1961 AIR 1787 : *[1962] 2 SCR 395*; *Mohan Singh v State of Punjab, AIR 1963 SC 174*.

25 *Abhi Misser v Lachmi Narain,* (1900) 27 ILR 566.

26 *Shyamal Ghosh v State of WB,* 2012 AIR SCW 4162 : *2012 (6) Scale 381* : *2012 Cr LJ 3825* : *2012 (6) JT 404*; *Hemchand Jha v State of Bihar*, *(2008) 11 SCC 303* : *2008 (9) Scale 211* : 2008 Cr LJ 3203.

27 *AIR 2009 SC 3223* : *(2009) 11 SCC 273* : JT 2009 (4) SC 102 : *2009 (4) Scale 188*, Dr Arijit Pasayat and Dr Mukundakam Sharma, JJ.

28 As was observed in *Chinta Pulla Reddy v State of AP,* AIR 1993 SC 1899 : 1993 AIR SCW 1843 : 1993 Supp (3) SCC 134 : JT 1993 (3) SC 633.

29 AIR 1945 PC 118 : (1945) 47 Bom LR 941, per Sir Mahadevan Nair, Lord Thankerton, Sir John Beaumont, JJ.

30 *AIR 1972 SC 254* : *(1972) 1 SCC 136* : 1972 SCR (2) 423, per P Jagmohan Reddy and DG Palekar, JJ.

31 AIR 1976 SC 2566 : (1977) 1 SCC 733 : 1976 Cr LJ 1987, per SM Fazal Ali, PN Bhagwati and VR Krishna Iyer, JJ.

32 *Hoshiar Singh v State of Punjab, AIR 1992 SC 191* : 1992 Supp (1) SCC 413. Held, in a murder case where a large number of persons are prosecuted, the fact that some of the accused were acquitted on possible view taken on cautious approach and some by giving benefit of doubt does not justify the acquittal of the accused by application of the maxim *falsus in uno falsus in omnibus,* when it is proved that the accused was involved in murder by independent evidence of neighbours.

33 *AIR 1978 SC 1647* : *(1978) 4 SCC 385* : *1978 Cr LJ 1713*, per D Desai and PN Shinghal, JJ.

34 AIR 2017 SC 4001. Ranjan Gogoi, J, Nageswara Rao and Navin, JJ, delivered the judgment.

35 *AIR 2017 SC 655*, AK Sikri and RK Agrawal, JJ delivered the judgment.

36 *AIR 2017 SC 1127* : JT 2017 (2) SC 445 : *2017 (3) Scale 277*, AK Sikri and Dr DY Chandrachud, JJ, delivered the judgment.

37 *AIR 2017 SC 2827* : *2017 (2) Scale 122* : *(2017) 3 SCC 261*. SA Bobde and L Nageswara Rao, JJ delivered the judgment.

38 *AIR 2016 SC 1160* : 2016 Cr LJ 1908 : 2016 (1) Crimes 248 (SC) : *2016 (2) Scale 629* : *(2016) 4 SCC 357* : 2016 (2) SCJ 687, Dipak Misra and NV Ramana, JJ.

39 *Trough:* A long narrow box like object especially for holding water or food for animals.

40 *AIR 2017 SC 2004* : 2017 (4) Scale 123 : JT 2017 (3) SC 506. Decided on 30 March 2017, ILI Newsletter Volume XIX, Issue – 1 (January-March 2017) p 20.

6.1 Introduction

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

6 PRELIMINARY CRIMES

6.1 Introduction

The law of crimes is mostly concerned with the last proximate act that produces the evil effect. However, there may be cases where the desired end is not achieved. That is to say, the offence contemplated by the accused is not committed, or no injury is caused to the person. Nevertheless, the very involvement of a man in such criminal activities is dangerous to the society by reason of its close connection with the contemplated *criminal act*. This may lead to many undesirable consequences. The *Indian Penal Code, 1860* has accordingly made provision for the punishment of persons involved in such preparatory acts in order to prevent the crimes from being committed. This is based on the contention that prevention is better than cure. For instance, if A instigates B to murder C, A is held guilty of abetting B to commit murder and is punished accordingly, even if B refuses to act on A's instigation.[1]

Likewise, if *A* enters into a conspiracy with *B* to administer a dose of poison to *C* in order to kill *C,* then *A* and *B* are guilty of the offence of criminal conspiracy.[2]

Similarly, if *A*, intending to murder *Z*, fires the gun at *Z, A* is guilty of an attempt to commit murder.[3]

Such crimes are called either preliminary crimes or incomplete crimes or inchoate crimes, because each of these crimes is effected as a means of reaching a desired end.[4] The preliminary crimes may be classified into:

(i) abetment,

(ii) criminal conspiracy and

(iii) criminal attempt.

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1 See *Indian Penal Code, 1860, section 108*.

2 *Indian Penal Code, 1860*, *sections 120A*, *120B*.

3 *Indian Penal Code, 1860, section 307*. See Law Commission of India's 42nd Report, on The *Indian Penal Code*, 1971, Chapter V, pp 111-139.

4 Re *Maragatham, AIR 1961 Mad 498* : 1961 Cr LJ 781.

6.2 Abetment

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

6 PRELIMINARY CRIMES

6.2 Abetment

107. Abetment of a thing.—A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration

A, a public officer is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, willfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Commentary

The law relating to the offence of abetment is contained in sections 107- 120, Chapter V of *IPC, 1860*. Abetment is punishable because it leads to the commission of a crime. Many a crime would not be committed but for the aid, assistance, encouragement and support received from others. Abetment may be committed in any one of the three ways, namely,

(i) by instigating the commission of an offence, or

(ii) by engaging in a conspiracy to commit an offence, or

(iii) by intentionally aiding the commission of an offence.[5]

It is not necessary for abetment that the act abetted should have been actually committed. In other words, a man may be guilty as an abettor, whether the offence is committed or not, provided the act of a man falls within the definition of “abetment” given in *section 107, IPC*.

6.2.1 Abetment by Instigation

Instigation to commit an offence is an act of inciting or urging or prompting a man to do a thing prohibited by law. An act, in order to be called instigation requires that some active role must be played by the abettor. Mere acquiescence or silence does not amount to instigation. For example, *A* says to *B*, "I am going to stab *C*." *B* replies, "You may do as you wish and take the consequences." *A* goes and stabs *C*. *B* cannot be said to have instigated *A* to stab *C*.

There might be occasions when the approval of an act leads to an instigation in the particular circumstances of the case. In *Queen v Mohit,* 3 NWP 316 it was held that the persons who followed a woman preparing herself for *sati* to the pyre, and chanted "Rama Rama", were guilty of abetment by instigation to lead that woman to commit suicide. The very fact that such persons approved of the woman's act by participating in the procession gave encouragement to the woman to commit suicide.

Instigation may also take place by wilful misrepresentation or by wilful concealment of a material fact which a man is bound to disclose. *A*, a public officer, is authorised by a warrant from a court of law to arrest *Z*. *B* knowing that fact and also that *C* is not *Z*, wilfully represents to *A* that *C* is *Z*, and thereby intentionally caused *A* to apprehend *C*. Here, *B* abets by instigation the arrest of *C*. *B* knowing the fact that *C* is not *Z*, wilfully misrepresented the public officer to believe a thing which was false.[6]

6.2.2 Abetment by Conspiracy

A person is said to abet the commission of an offence by conspiracy if he enters into an agreement with one or more persons to do a legal act by illegal means, or to do an illegal act, and some act is done in pursuance thereof. For instance, *A*, a servant enters into an agreement with thieves to keep the doors of his master's house open in the night so that they might commit theft. *A*, according to the agreed plan, keeps the doors open and the thieves take away his master's property. *A* is guilty of abetment by conspiracy for the offence of theft.

6.2.3 Abetment by Aid

A person is said to abet the commission of an offence if he intentionally renders assistance or gives aid by doing an act or omitting to do an act prohibited by law. Mere intention to render assistance is not sufficient. There must be some active conduct on the part of the abettor and the act must be accomplished in pursuance thereof. *A* incites *B* to kill *C* by uttering the words *"maro, maro"* ("beat him, beat him") and *D* puts a knife in *B's* hand. Here, both *A* and *D* are guilty of abetting the offence of murder, one by instigation and the other by aiding to commit the offence.

Aid may be given both by an act of commission as well as by an act of illegal omission. For instance, if a police officer keeps himself away from place knowing that certain persons were likely to be tortured for the purpose of extorting confession, he is liable for abetting the offence of extortion[7] by an act of omission.

108. Abettor.—A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1.—The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

Explanation 2.—To constitute offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.[8]

Illustrations

(a) *A* instigates *B* to murder *C*. *B* refuses to do so. *A* is guilty of abetting *B* to commit murder.

(b) *A* instigates *B* to murder *D. B* in pursuance of the instigation stabs *D. D* recovers from the wound. *A* is guilty of instigating *B* to commit murder.

Explanation 3.—It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

Illustrations

(a) *A*, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as *A.* Here *A*, whether the act be committed or not, is guilty of abetting an offence.

(b) A, with the intention of murdering *Z*, instigates *B,* a child under seven years of age, to do an act which causes *Z's* death. *B*, in consequence of the abetment, does the act in the absence of *A* and, thereby, causes *Z's* death. Here, though B was not capable by law of committing an offence. *A* is liable to be punished in the same manner as if *B* had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.

(c) *A* instigates *B* to set fire to a dwelling-house, *B*, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. *B* has committed no offence, but *A* is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment, provided for that offence.

(d) *A*, intending to cause a theft to be committed, instigates *B* to take property belonging to *Z* out of *Z's* possession. *A* induces *B* to believe that the property belongs to *A. B* takes the property out of *Z's* possession, in good faith, believing it to be *A's* property. *B*, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But *A* is guilty of abetting theft, and is liable to the same punishment as if *B* had committed theft.

Explanation 4.—The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

Illustrations

A instigates *B* to instigate *C* to murder Z. *B* accordingly instigates *C* to murder *Z*, and *C* commits that offence in consequence of *B's* instigation. *B* is liable to be punished for his offence with the punishment for murder; and, as *A* instigated *B* to commit the offence, *A* is also liable to the same punishment.

Explanation 5.—It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.

Illustrations

A concerts with *B* a plan for poisoning *Z*. It is agreed that *A* shall administer the poison. *B* then explains the plan to *C* mentioning that a third person is to administer the poison, but without mentioning *A's* name. *C* agrees to procure the poison, and procures and delivers it to *B* for the purposes of its being used in the manner explained. *A* administers the poison; *Z* dies in consequence. Here, though *A* and *C* have not conspired together, yet *C* has been engaged in the conspiracy in pursuance of which *Z* has been murdered. *C* has, therefore, committed the offence defined in this section, and is liable to the punishment for murder.

6.2.4 Abetment in India of Offences Outside India

Section 108A is, in substance, another explanation of what constitutes an abetment. The section states that a person would be guilty of an abetment, if he abets the commission of an act outside India, which if done in India, would constitute an offence. *A*, in India, instigates *B,* a foreigner in Nepal, to commit murder in Nepal. *A* is guilty of abetting murder, since *A* would have been liable for abetting murder, had the person abetted been in India.

6.2.5 Punishment for Abetment

Section 110 makes an abettor liable for the act abetted in the same manner and to the same extent, even if the person abetted does the act with a different intention from that of the abettor. The variation between the intention and knowledge of the abettor and the person abetted is immaterial so long as the act done is the same as the act abetted.

A, intending to cause a theft to be committed, instigates *B* to take property belonging to *Z* out of *Z's* possession. *A*

induces *B* to believe that the property belongs to *A. B* takes the property out of *Z's* possession, in good faith believing it to be *A's* property. Since *B* was acting under misconception of fact and had no dishonest intention, he is not liable for theft, but *A* is guilty of abetting theft, and is liable to the same punishment as if *B* had committed theft.

6.2.6 Liability of Abettor When Different Act is Done

An abettor is liable for the act he abets and not for any other act that might have been committed by the person employed for the purpose. Sections 111 and 113 provide two exceptions to this general rule.

Section 111 extends the liability of an abettor in respect of an act done which was not contemplated for by the abettor provided, the act done was the probable consequence of the act abetted.

An act is said to be the probable consequence of another act, if it can reasonably be expected to take place from such an act. *A* instigates a child to put poison into the food of *Z*, and gives him poison. The child, in consequence of the instigation by mistake puts the poison into the food of *Y*, who is sitting by the side of *Z*. Since the child was acting under the influence of *A's* instigation, and the act done was under the circumstances—a probable consequence of the abetment, *A* is liable in the same manner and to the same extent as if *A* had instigated the child to put the poison into the food of *Y*.

However, an unusual consequence, which could not be expected to ensue as a result of an act, cannot be said to be the probable consequence of an act of abetment. For instance, *A* instigates *B* to burn *Z's* house. *B* sets fire to the house and at the same time, *B* commits theft of property. *A*, though guilty of abetting the burning of the house, is not guilty of abetting the theft, for theft was a distinct act, and not a probable consequence of the burning.

Section 113 is complimentary to section 111. Section 113 extends the liability of an abettor to a situation where the act done causes a different effect from that intended by the abettor. In such a case, the abettor would be liable for the effect caused in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act was likely to cause that effect. *B,* in consequence of *A's* instigation, causes grievous hurt to *Z*, who dies. Here, if *A* knew that the grievous hurt abetted was likely to cause *Z's* death, *A* is liable to be punished for murder.

Section 112 provides for cumulative punishment in cases covered under section 111. An abettor is liable to punishment both for the offence that was abetted, as well as for the offence that was the probable consequence of the abetment, provided, cumulative sentence could be passed in that particular case. For instance, when *A*, by putting *B* under fear of instant death, induces *B* to burn a stock of corn belonging to *Z, A* is liable both for abetting *B* to burn the stock of corn, and also for putting *B* under fear of death.

Section 114 says that if an abettor is present at the time when the offence abetted is committed, "he shall be deemed to have himself committed such offence." In such cases, an abettor is liable to the same punishment as that accorded to a principal offender. The actual presence coupled with the prior abetment amounts to the commission of the offence.[9]

6.2.7 Quantum of Punishment

Sections 109, 115 and 116 state the quantum of penalty to be accorded in different cases of abetment.

Section 109 says that in the absence of an express provision for the punishment of an act abetted, the abettor shall be subject to the same punishment as that accorded to the principal offender if the act abetted was committed, provided there was identity of intention in their acts and the offence was committed in pursuance thereof. For instance, if *A* and *B* conspire to poison *Z*, and *A*, in pursuance of the conspiracy, procures the poison and delivers it to *B* in order that he may administer it to *Z* in *A's* absence and thereby causes *Z's* death, *B* is guilty of murder and *A* is guilty of abetting the offence of murder by conspiracy, and is liable to the punishment for murder.

Section 115 provides that in cases of offences punishable with death, or life imprisonment (and where no express provision is made for punishment), the abettor may be liable to imprisonment which may extend upto seven years and fine, if the act abetted has not taken place, and upto 14 years of imprisonment and fine, if harm is caused in pursuance, thereof.

For example, if *A* instigates *B* to murder Z, three possibilities may arise:

First, if *B* murders Z, both *A* and *B* would be liable to death sentence or imprisonment for life.

Secondly, if the offence is not committed, *A* would be liable for imprisonment for a term which may extend to seven years and also to a fine.

Thirdly, if hurt is caused to *Z* in consequence of the abetment, *A* would be liable to imprisonment, which may extend to 14 years and fine.

Section 116 provides for punishment in cases of abetment of the offences punishable with imprisonment. In case the offence is not committed in consequence of the abetment, and no express provision is made for the punishment of such abetment, the abettor is liable to one-fourth of the term of imprisonment or with fine or with both as is provided for the offence. If the abettor is a public servant, he would be liable to one-half of the punishment provided for that offence.

6.2.8 Abetting Commission of Offence by Public

Section 117 contemplates of a situation where abetment is made for the commission of an offence to the public generally, or to any class of persons exceeding ten in number. In such a case, an abettor is liable to punishment upto three years of imprisonment, or with fine or with both. *A* affixes in a public place a placard instigating a sect consisting of more than 10 members to meet at a certain time for the purposes of attacking the members of an adverse sect, while engaged in a procession. *A* has committed the offence defined in section 117.

6.2.9 Penalty in Case of Abetment by Concealment

Sections 118 to 120 provide for penalty in cases of abetment by concealment. If a person conceals of a design to commit an offence, or knowing the existence of a design to commit such offence, gives false information of such design, he is said to have abetted the commission of an offence by concealment. The obligation to give information in such cases arises only where there is a legal obligation as provided by *CrPC, 1973*.[10] In such cases, the abettor is punished according to the provisions of sections 118 and 120, and if he happens to be a public servant, according to *section 119, IPC, 1860*.

When principal offender of abetment is acquitted, the person accused for aiding him also entitled to acquittal—conviction set aside—Supreme Court —1959

Faguna Kanta Nath v State of Assam,

AIR 1959 SC 673 : 1959 Supp (2) SCR 1

One day, Narendra Nath was carrying paddy to sell in the bazaar when he was stopped by an inspector, Khalilur Rahman, accompanied by the appellant and two others. The inspector demanded Rs 200 as bribe but he offered Rs 80 but ultimately paid Rs 150, and was forced to execute a promissory note for a sum of Rs 70 in favour of the appellant. The appellant was tried and convicted under *section 165A of IPC, 1860* for having abetted Khalilur Rahman for taking gratification other than legal remuneration in respect of an official act by the latter under *section 161, IPC, 1860*.[11] The High Court maintained the conviction of the appellant.

Per JL Kapur and KN Wanchoo, JJ:

In the present case, the person who demanded the illegal gratification ... was Khalilur Rahman who had the authority to do or not to do a particular act and all that the appellant is alleged to have done was to receive the money at the instance of Khalilur Rahman for counting and then paid the money to him.

The appellant received the money for and on behalf of Khalilur Rahman and the evidence of the complainant is that Khalilur Rahman had asked him to hand over the money to the appellant. If Khalilur Rahman is acquitted, and, therefore, the offence under section 161 is held not to have been committed then in this case no question of intentionally aiding, by any act or omission, the commission of the offence by the appellant under *section 165A, IPC, 1860* arises.

The appeal is allowed; conviction is set aside.

Abettor's conviction is valid even though principal offender might be acquitted because of lack of evidence—Supreme Court—1958

Gallu Sah v State of Bihar,

AIR 1958 SC 813 : *1959 SCR 861*

Facts: *A* was charged under *section 436, IPC, 1860* for setting fire to a hut, and *B* under *section 436* read with *section 109*, *IPC, 1860* for instigating *A* to set fire to the hut. *A* was acquitted because of infirmity in the evidence against him, but *B's* conviction was upheld by the High Court.

It was held that it is not necessary in every case that the principal offender must be convicted of the offence charged before the abettor can be convicted of the abetment of that offence. The conviction of *B*, under *section 436* read with *section 109*, *IPC, 1860* on whose instigation the hut was set on fire was not bad merely because the evidence had not been considered sufficient for conviction of *A*.

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5 *Faguna Kanta Nath v State of Assam, AIR 1959 SC 673* : 1959 (2) SCR 1.

6 *Indian Penal Code, 1860, section 107*, Illustration to Expln 1.

7 *Indian Penal Code, 1860, section 383*.

8 *Kehar Singh v Delhi Administration, AIR 1988 SC 1883* : *(1988) 3 SCC 609* : 1988 (3) JT 191 : 1988 (2) Scale 117. See chapter 10 for text of the case.

9 *Mathurala Adi Reddy v State of Hyderabad,* AIR 1956 SC 177 : 1956 Cr LJ 341.

10 See *Code of Criminal Procedure 1973*, *sections 39* and *40* for obligation of the public and an officer employed in connection with the affairs of a village to inform the public authorities of certain facts which might lead to the commission of an offence.

11 *Sections 161-165A* of *Indian Penal Code, 1860* have been repealed by *Prevention of Corruption Act 1988* and incorporated in sections 7-12 of the said Act.

6.3 Criminal Conspiracy

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

6 PRELIMINARY CRIMES

6.3 Criminal Conspiracy

120A. Definition of criminal conspiracy.—When two or more persons agree to do, or cause to be done,—

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

120B. Punishment of criminal conspiracy.—(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid, shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

Commentary

Chapter V A is a later addition to the *Indian Penal Code, 1860*. It was added in 1913 by The Indian *Criminal Law (Amendment) Act* 1913, as an emergent piece of legislation in order to make criminal conspiracy a substantive offence.[12]

The gist of the offence of criminal conspiracy is an agreement to do an illegal[13] act or legal act by illegal means. No overt act or consummation of crime is required to bring conspiracy within the purview of the criminal law.[14] The inference, of an agreement to commit an offence, can be drawn from the acts or conduct of the person charged of criminal conspiracy.[15]

Before the enactment of Chapter VA, conspiracy, in India, was not punishable per se, except conspiracy to commit offences like waging or attempting to wage war against the Government of India.[16] Conspiracy was punishable only when such act amounted to an offence and some overt act was done in pursuance thereof.[17] As stated by Huda:

> An agreement implies the meeting of two minds with reference to a particular matter, and so long as, matters are discussed and views are interchanged, but the plan of action has not been settled by the occurrence of any two or more of the conspirators, the stage of criminal conspiracy would not be considered to have been reached.[18]

It is only when two or more persons agree to carry a plan into effect, that the very agreement becomes punishable in law. *A* and *B* made a plan to murder *C*, letters passed between them as to the movement of *C*. *A* and *B* are liable for criminal conspiracy since there was an agreement between *A* and *B* to do an illegal act, namely, to commit murder.

Section 120B prescribes punishment for criminal conspiracy. The section has classified conspiracy into two classes, for punishment. In the first case, where no express provision has been made in the code for the punishment of a conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, the person would be liable to be punished in the same manner as if he had abetted such an offence.

In the other cases of conspiracy, the punishment contemplated is imprisonment of either description for a term not exceeding six months, or with fine, or with both.

Under section 120B IPC for criminal conspiracy when all except one acquitted, conviction of remaining is illegal—Appeal allowed—Conviction set aside— Supreme Court—1956

Topan Das v State of Bombay,

AIR 1956 SC 33 : *[1955] 2 SCR 881*

Facts: The appellant along with the other three named accused (acquitted) were charged under section 120B read with *sections 471* and *420*, *IPC, 1860* for conspiring to use forged documents and thereby induced the Controller of Imports to grant import licences. The magistrate acquitted all the accused. But the High Court, on State appeal, reversed the order of acquittal of the appellant and convicted him for the substantive offence as well as conspiracy to commit such offences under *section 120B, IPC* but maintained acquittal of others.

Held, the appellant could not be convicted of the offence under *section 120B, IPC* when his alleged co-conspirators were acquitted of the offence. When all the accused, except one, are acquitted of the charge, the remaining one cannot be convicted, unless the charge against him has been that he conspired to commit an offence not only with the acquitted co-accused but also with some other persons who have not been tried because the offender happens to be absconding or is insane or is a minor below seven years of age, or because of any other reason and such a charge is proved.

The appeal was allowed and the conviction was set aside.

A person charged of substantive offence may be convicted for conspiracy, even though acquitted of substantive offence—Appeal dismissed—Supreme Court—1956

Bimbadhar Pradhan v State of Orissa,

AIR 1956 SC 469 : *1956 SCR 206*

The appellant, a government servant, and four other accused, who were his subordinates, were charged under *sections 120B*, *409* and *477-A*, *IPC*, for entering into a conspiracy to misappropriate government funds placed at their disposal and in pursuance of that conspiracy, misappropriated the money and falsified official records to cover up their actions. One of the accused turned approver and the other three accused were acquitted by the court by giving them benefit of doubt but convicted the appellant.

Held, the conviction of the appellant is perfectly legal and justified. The case is distinguishable from the *Topan Das* case. In this case, besides the four named accused, who were acquitted, there was also one other accused, who was later granted immunity from prosecution because he turned to be an approver. Under the circumstances, the conviction of the accused is not vitiated by reason of absence of two persons. The very requirement of the concept of agreement as embodied in *section 120B, IPC* is satisfied when the charge proves the presence of the appellant and the approver in the act of conspiracy to misappropriate government account and falsify official records.

The appeal was rejected.

Section 120B/300, IPC, 1860—Framing of charges for criminal conspiracy and murder under section 120 B/300, IPC is not prejudicial against the appellant when he allegedly conspired with his father and brother

to finish the deceased for non-fulfillment of "Rangdari", when it was established that applicant had been demanding "Rangdari" (money) from the deceased on telephone—Supreme Court—2010

Sanichar Sahni v State of Bihar,

AIR 2010 SC 3786 : (2009) 7 SCC 198

Per Dr BS Chauhan and Dr Mukundakam Sharma, JJ:

Dismissing the appeal, the apex court held that in the absence of any prejudice, caused in framing of charge against the appellant under *section 120B, IPC, 1860* or during the course of the trial and having not raised any objection for quashing the charge by filing any petition, it cannot be held that even by any stretch of imagination that any prejudice has been caused to the appellant.

To convict a person for conspiracy to commit the offence of converting sterling out of the proceeds of criminal conduct, the prosecution must prove that the conspirator knew that the property was proceeds of criminal misconduct. Mere suspicion is not ground for conviction—House of Lords—2006

R v Saik[19]

While allowing the appeal and setting aside conviction of the appellant-defendant, the House of Lords held that a person could not be convicted of a statutory crime of conspiracy to contravene section 93C (2) of 1988 Act (now repealed by the Proceeds of Crime Act 2002, sections 456, 457 with effect from 24 February 2003), if he entered into an agreement to convert property in respect of which he had reasonable grounds to suspect and did not actually know that it was the proceeds of crime. Suspicion was not sufficient in respect of a fact to which section 1 (2) of 1977 Act applied. The substantive offence under section 93C (2) of 1988 Act requires that the accused actually suspects that the money was the proceed of crime.

In criminal conspiracy there must be direct or circumstantial evidence to prove agreement between two or more persons to commit offence—lack of agreement entitles acquittal—Appeal dismissed—Supreme Court—1980

State (Delhi Administration) v VC Shukla, Sanjay Gandhi,

AIR 1980 SC 1382 : 1980 Supp SCC 249 : 1980 SCR (3) 500

Per Fazal Ali, S Murtaza, PS Kailasam and Koshal, JJ:

The appellants, accused VC Shukla (A-l) and Sanjay Gandhi (A-2), were convicted under various sections of the Code, namely, section 120B read with sections 409, 435, 411, 414 and 201, of the *Indian Penal Code, 1860*, by the Session Judge, Delhi in respect of burning of all prints of the film *Kissa Kursi Ka* and awarded sentences of various terms of imprisonment not exceeding two years and fine. The State went in appeal for enhancement of sentence and the accused, against the conviction in Delhi High Court. All these appeals stood transferred to the Supreme Court.

The story begins with the production of a film called *Kissa Kursi Ka* by Amrit Nahata, PW 1, a member of Parliament, in 1975. The film, according to the prosecution, was a grotesque satire containing a scathing criticism of the functioning of the Central Government and was open to serious objections, which were taken even by the Central Board of Film Censors. After the film was ready for release, PW 1, Amrit Nahata, applied for certification of the film... before the Board. The film was viewed... by an examining committee of the Board and while three members were of the opinion that a certificate for exhibition, after drastic cuts, should be given, another member NS Thapa, the chairman, disagreed with the opinion of his colleagues and accordingly referred the matter to the reviewing committee, which by a majority of 6:1 agreed for certification of the film, the dissent having been voiced by Thapa, the Chairman and accordingly under Rule 25 (ii) of Cinematograph (Censorship) Rules, 1958, a reference was made to the Central Government... Amrit Nahata was directed to deposit the positive print of the film... In the meantime, emergency was proclaimed on the night between 25th and 26th of June 1975 and soon thereafter A-1 took charge as the Union Minister of Information and Broadcasting and he was of the opinion that the film should be banned...in pursuance of the decision taken by the Central Government, the coordination committee directed seizure of the film and that its negatives, positives and all other materials relating to it be taken in the

custody of the Central Government. The Bombay police seized the entire film...and deposited the same in the godown of the Board.

...there is no evidence to show that there was any meeting of minds between A-1 and A-2 nor is there any material to indicate that A-2 played any role in the banning of the film. The decision to ban the film appears to have been taken by the Ministry, headed by A-1, on the merits of the case. No motive is attributable to A-1, at this stage because even the chairman of the Board, PW 8, Thapa, who was an independent witness, was of the view that the film should not be certified for public exhibition. Similarly, this step taken by the officers of the Ministry in pursuance of the banning of the film, namely, the seizure of the film at Bombay and its transfer to Delhi appear to be in the nature of routine to see that the decision taken by the Government was implemented.

...in order to prove a criminal conspiracy there must be direct or circumstantial evidence to show that there was an agreement between two or more persons to commit an offence. This clearly envisages that there must be meeting of minds resulting in an ultimate decision taken by the conspirators regarding the commission of an offence. It is true that in most cases it will be difficult to get direct evidence of an agreement to conspire but a conspiracy can be inferred even from circumstances, giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence. No acceptable evidence connecting either of the appellants with the existence of conspiracy and the destruction of the films have been proved.

The prosecution having, thus; failed to prove the case against the appellants, their appeals are allowed, the convictions recorded against, and the sentences imposed on the appellants are set aside and they are acquitted of all the charges framed against them. The appeal filed by the State is dismissed.[20]

Conspirator in Murder—Prison inmate convicted as accomplice and co-conspirator in murder - Held not entitled to acquittal [Federal habeas corpus relief] as there was sufficient evidence to support conclusion that inmate assisted murderer in leading victim into alley (narrow street) to facilitate murder - US Supreme Court - 2013.

Coleman v Johnson,

132 S Ct 2060 (2012) : 2012 US Lexis 3943 : 182 L Ed 2d 978

Respondent Lorenzo Johnson was convicted as an accomplice and co-conspirator in the murder of Taraja Williams, who was killed by a shotgun blast in the chest in early morning hours of 15 December 1995, in Harrisburg, Pennsylvania. After his conviction was affirmed in state court, Johnson exhausted his state remedies and sought a writ of *habeas corpus* in Federal District Court pursuant to the Anti- terrorism and Effective Death Penalty Act 1996. The District court denied *habeas* relief but the US Court of Appeals for the Third Circuit reversed, holding that the evidence at trial was insufficient to support Johnson's conviction.

While reversing the judgment of the court of appeal, the US Supreme Court held that the trial testimony revealed that Johnson and Walker "ran the streets together", and had attempted to collect a debt from Williams earlier on the day of the murder. Williams resisted the collection, managing to humiliate Walker in the process by giving him a public thrashing with a broomstick. This enraged Walker to the point that he repeatedly declared over the course of the day in Johnson's presence that he intended to kill Williams. Then, while Walker was noticeably concealing a bulky object under his trench coat, Johnson helped escort Williams into an alley, where Johnson stood at the entryway while Walker pulled out a shotgun and shot Williams in the chest.

On the basis of these facts, a rational jury could infer that Johnson knew that Walker was armed with a shotgun; knew that he intended to kill Williams; and helped usher Williams into the alleyway to meet his fate. The jury in this case was convinced, and the only question under Jackson is whether that finding was so insupportable as to fall below the threshold of bare rationality. The State court of last review did not think so, and that determination in turn is entitled to consider difference.

Affording due respect to the role of jury and the state courts, we conclude that the evidence at Johnson's trial was not nearly sparse enough to sustain a due process challenge under *Jackson.* The evidence was sufficient to convict Johnson as an accomplice and co-conspirator in the murder of Taraja Williams. The commonwealth's petition of *Certiorari* and the motion to proceed *in forma pauperis* are granted, the judgment of the court of appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

Withdrawal of conspiracy charge - Beyond limitation period: Burden of proof for withdrawal of prosecution for a charge of conspiracy is on the petitioner because the action is barred by the five-year limitation period.

Statute under 18 US CS section 3282 - Since the petitioner spent last six years in prison, burden is on the petitioner - Establishing individual withdrawal was a burden that rested firmly on petitioner regardless of when the purported withdrawal took place - US Supreme Court - 9 January 2013.

Smith v US,

133 S Ct 714 (1013) : 2013 US Lexis 601 : 184 L Ed 2d 570 (2013)

Petitioner was convicted of charges that included conspiracy to distribute and to possess with intent to distribute narcotics, in violation of 21 USCS section 846, and Racketeer Influenced and Corrupt Organizations Act [RICO] conspiracy under 18 USCS section 1962 (d). The United States Court of Appeals for the District of Columbia Circuit affirmed the conspiracy convictions. The Supreme Court granted *certiorari.*

6.3.1 Overview

Petitioner claimed that the conspiracy counts were barred by the five-year limitations period under 18 USCS section 3282 because he spent the last six years of the charged conspiracies in prison.

The trial court instructed the jury that the burden was on the petitioner to prove withdrawal from the conspiracy by a preponderance of the evidence. Petitioner argued that once he presented evidence supporting a withdrawal defence, the government had burden to prove beyond a reasonable doubt that he did not withdraw outside the limitations period. The Supreme Court held that establishing individual withdrawal was a burden that rested firmly on petitioner regardless of when the purported withdrawal took place. Allocating to petitioner the burden of proving withdrawal did not negate an element of the charged conspiracy crimes. Although union of withdrawal with a statute of limitations defense could have freed petitioner of criminal liability, it did not place upon the prosecution a constitutional responsibility to prove that petitioner did not withdraw.

6.3.2 Outcome

The court of appeal's judgment was affirmed unanimously by all nine judges with 9-0 decision of the US Supreme Court.

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12 See *Gazette of India*, 1913, Pt V, p 44.

13 The *Indian Penal Code, 1860, section 43* reads: "Illegal", "Legally bound to do",—The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

14 *Bimbadhar Pradhan v State of Orissa, AIR 1956 SC 469* : *1956 SCR 206*; In *Harihar Prasad v State of Bihar,* (1972) Cr LJ 707 : (1972) 3 SCC 89, it was held that the gist of the offence of criminal conspiracy as contained in *section 120A of Indian Penal Code, 1860* is the agreement itself and where the object of the agreement is to do an unlawful act, or to do a lawful act by unlawful means, the offence is complete. To invoke the provisions of the section it is enough to specify the unlawful object of the group without mentioning the means or measures taken by the members of the group of conspirators to achieve that object.

15 Re *Mendekar,* (1972) Cr LJ 978.

16 The *Indian Penal Code, 1860, section 121A*, provides punishment for conspiracy to commit offences punishable by section 123 (waging or attempting to wage war against Government of India etc). The section was added by The *Indian Penal Code* (Amendment) Act of 1870.

17 Conspiracy is also punishable as a form of abetment under section 107 (2), *Indian Penal Code, 1860*.

18 SS Huda, *The Principles of Law of Crimes in British India,* TLL, 1902, reprint 1982, pp 106, 98-130; See also RC Nigam, *Law of Crimes in India,* vol I, pp 154-177; *Essays on the Indian Penal Code*, Indian Law Institute, 1962, pp 87-93; *Annual Survey of Indian Law*, no VIII, 1972, pp 63, 64.

19 *(2006) 4 All ER 866* (HL) : [2006] Cr LR 998 : *[2006] 2 WLR 993*. The Bench consisted of Lords Nicholls, Lord Steyn, Lord Hope, Lord Brown and Baroness Hale of Richmond.

20 See *Kehar Singh v State (Delhi Administration)*, *AIR 1988 SC 1883* : *(1988) 3 SCC 609* : 1988 Scale (2) 117, under section 302, for distinction between sections 107 (2) and 120A, *Indian Penal Code, 1860*. See also *R v Ford, [1978] 1 All ER 1129*, discussed under *section 377, Indian Penal Code, 1860*.

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6.4 Criminal Attempt

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

6 PRELIMINARY CRIMES

6.4 Criminal Attempt

There are four stages in the commission of an offence, namely, intention, preparation, attempt and the actual commission of the offence. This can be illustrated with the help of an example. *A* killed *B* with a gun. The act of *A*, in firing at *B*, can be split into four stages:

The first stage is the stage of contemplation or emergence of an evil intention[21] in the mind of the accused. The very formation of an evil intent in the mind of *A* to kill *B* is the first step in the direction of the commission of the offence of murder.

The next step is preparation. Preparation consists in arranging or devising means or measures necessary for the commission of an offence.[22] The act of procuring a gun or pistol or some other deadly weapon for the purpose of killing would amount to preparation.

The third step in the series is the attempt to commit the offence. The word attempt, as stated by Cockburn CJ, "conveys with it the idea that if the attempt had succeeded the offence charged would have been committed".[23] For example *A*, after procuring a loaded gun aims at *B* and fires in order to kill him. In case *B is* not killed either because the injuries do not prove fatal, or because *A* misses the mark or because of any other reason beyond his control, *A*, is said to have attempted to murder.[24] If *A* succeeds in killing *B*, he would be guilty of murder.[25]

As stated earlier, the *Indian Penal Code* does not punish mere evil intention unaccompanied by an overt act. The devil himself does not know the thought of a man, so it is absolutely difficult to define the contemplation in the mind of an individual and punish him for the idea in his head.[26] Likewise, the act of preparation in general is not punishable.[27] A preparation, apart from its motive, would generally be a harmless act.

If intention and preparation were made punishable, it would be impossible to prove that the object of an accused was to commit an offence. For instance, a man might purchase a gun for self-defence or for any other purpose not necessarily for committing murder. Again, the act of mental determination and that of preparation are too remote from the completion of the crime. On the other hand, attempt takes the offender very close to the successful completion of the crime and so it is punishable in law like the commission of an offence.

6.4.1 Criminal Attempt and Preparation Distinguished

The intricate problem that arises in this connection is how to draw a dividing line between a preparation and an attempt, in other words, what are the tests to ascertain when an act has crossed the boundary of preparation and travelled ahead to the point of becoming an attempt? It is a difficult task. No clear dividing line has so far been drawn between the two. The *Indian Penal Code, 1860* is silent on the point. It has neither defined "attempt" nor explained when an act would amount to an attempt. Every case is to be judged according to the facts and circumstances of its own. However, some tests have been evolved by the courts to determine at what stage an act or a series of acts done towards the commission of the intended offence would become an attempt. These tests are: proximity, *locus poenitentiae,* equivocality, impossibility and social danger.[28]

6.4.1.1 *Proximity Test*

An act of attempt must be sufficiently proximate to the crime intended, it should not be remotely leading towards the commission of an offence. The act of the accused is proximate if, though it is not the last act that he intended to do, it is the last act that was legally necessary for him to do, if the contemplated result is afterwards brought about without further conduct on his part.[29] Let us take an example. *A*, intending to murder *Z*, buys a gun and loads it with the intention to kill *Z. A* is not yet guilty of an attempt to murder. *A* fires at *Z*, but misses the mark for want of skill or due to some defect in the gun. Since the act of *A* could not bring the desired effect, say, death of *Z, A* could not be held liable for murder. However, *A* would be liable for attempt to murder, because *A* has done what was legally necessary for him to do under me circumstances. If *A* could not succeed in his object, it was not because of his desisting from the act of killing, but because of something beyond his control.

In *Sudhir Kumar and Shamlal Shaw v State of WB,* AIR 1973 SC 2655 : (1974) 3 SCC 357, the Supreme Court has reaffirmed its earlier view taken in the *Abhayanand Mishra* case with regard to the definition of an "attempt", which is as follows:

A person commits the offence of "attempt to commit a particular offence" when (i) he intends to commit that particular offence, and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence, but must be an act during the course of committing that offence.[30]

6.4.1.2 *Locus Poenitentiae Test (Time for Repentance)*

An act would amount to preparation and not an attempt, if a person voluntarily gives up the idea of committing a crime before the *criminal act* is carried out; so long as the steps taken by the accused leave room for a reasonable expectation that he might, either of his own accord, or because of the fear of the consequences that might befall him as a result, desist from the act to be attempted, he would still be treated on the stage of preparation.

A, intending to murder *Z* by poisoning, purchases poison and mixes the same with food which remains in *A's* keeping; *A* is not yet guilty of an attempt to murder; because there is still time when better reason might prevail any moment and *A* might change his mind and desist from giving that food to *Z*.[31]

6.4.1.3 *Impossibility Test*

An act which is impossible to commit cannot be attempted and so is not culpable.[32] Accordingly, to shoot at a shadow, or to administer sugar mistaking it for arsenic; or to kill a man by witchcraft is not attempt in law. In such cases, there is no probability of realising the accused's goal. Moreover, the acts in such cases do not cause alarm or a sense of insecurity in the society. The impossibility must, however, be absolute and not relative, so that this doctrine would not apply in the case of an inadequate dose of arsenic where the victim is saved.

6.4.1.4 *Social Danger Test*

The seriousness of the crime attempted and the apprehension of the social danger involved is taken into account to distinguish an act of "attempt" from that of "preparation". *A*, gives some pills to a pregnant woman to procure abortion, but it had no effect because the drug turned out to be innocuous. *A*, would be guilty of attempt to cause miscarriage since the act would cause an alarm to society and will have social repercussions.[33]

6.4.1.5 *Equivocality Test*

To constitute an attempt, the act must be such as to clearly and unequivocally indicate the intention to commit the offence. If what is done indicates beyond reasonable doubt that the end is towards which it is directed, it is an attempt, otherwise it is a mere preparation.[34] The act must refer to the commission of the crime and it must be evident and clear on examination. The acts must speak for themselves.

6.4.2 Criminal Attempt under The Indian Penal Code, 1860

The *Indian Penal Code, 1860* has dealt with criminal attempts in four different ways, viz,

(i) first, the attempt to commit offences in general under *section 511 of IPC*;

(ii) secondly, attempt to commit capital offences, like murder, culpable homicide and robbery;[35]

(iii) thirdly, attempt to commit suicide;[36] and

(iv) fourthly, attempt to commit offences against the State, head of the State, sedition etc.[37] In such cases in view of the gravity of nature of the offence, attempt to commit it as well as the commission of the offence carry the same punishment.

6.4.2.1 *Attempts to Commit Offences (in General)*

The last chapter of *IPC, 1860*, consisting of one section, section 511, is of general nature. It provides punishment in case of attempts that are not made punishable by other specific sections. Under this section, attempts to commit offences punishable with imprisonment, or to cause such an offence to be committed, is punishable with imprisonment of any description which may extend to one-half of the imprisonment for life or one-half of the longest term of imprisonment provided for that offence or with such fine as is provided for the offence or with both. However, section 511 is not exhaustive. It leaves unpunished attempts of those minor offences, which are punishable with fine only.[38]

Suicide death higher among men then women[39]: A study conducted by Central Bureau of Health Intelligence said:

In 2005 and 2010, suicides increased to 1,13,914 and 1,34,599, respectively. Data shows suicide deaths were higher among men. As many as 91,528 committed suicide in 2015, as against 66,032 in 2005 and 87,180 in 2010. Among women, the number of suicides increased marginally during 2000-2015.

The average life expectancy in India is 68.35 years.

Experts say socio-cultural issues, discrimination, and competition for highly paid jobs are the most common reasons for suicide among youth. Compounding the problem is a system that barely recognises mental health issues, they say—India in 2017 has put in place a mental health policy to focus on creating awareness and infrastructure to address such problems.

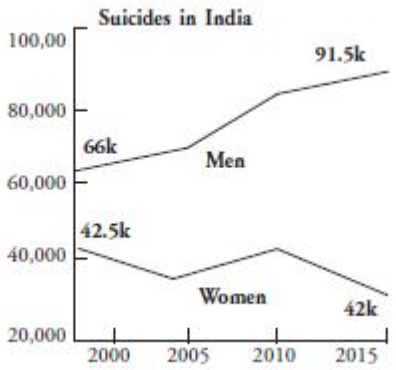
According to the WHO's Mental Health Atlas 2017, very few countries have suicide prevention strategies despite an estimated 8,00,000 such cases being reported every year. The report highlighted a global shortage of personnel trained in mental health issues and lack of investment in community-based mental health facilities.

Beside deaths, a large number of people suffered non-fatal injuries, including disability, the NHP report prepared by Central Bureau of Health Intelligence (CBHI) said.

Suicides in the country increased by 23% from 2000 to 2015 with the maximum number of such deaths being reported in the 30-45 age group, followed closely by young adults between 18 and 30 years, according to data released by the National Health Profile, 2018.

Of the 1,33,623 suicide deaths in India in 2015, as compared to 1,08,593 in 2000, over 33% (44,593 deaths) were in the age group of 30-45, while the 18-30 age group accounted for 32.8% (43,852) of deaths. The two age groups together accounted for more than 66% of suicides in 2015.

Children below 14 and those between 14 and 18 accounted for nearly 1% and 6%, respectively, of the total suicides in 2015. Around 19% in the age group of 45-60 and those above 60 accounted for 7.8% deaths.



511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.—Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life, or as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.

Illustrations

(a) *A* makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there are no jewels in it. He has done an act towards the commission of theft, and therefore, is guilty under this section.

(b) *A* makes an attempt to pick the pocket of *Z*, by thrusting his hand into *Z's* pocket. *A* fails in the attempt in consequence of *Z's* having nothing in his pocket. *A* is guilty under this section.

Submission of forged certificates to the university for permission to appear in examination amounts to taking necessary steps towards attempting to commit offence—Appeal Dismissed—Conviction upheld—Supreme Court—1961

Abhayanand Mishra v State of Bihar,

AIR 1961 SC 1698 : *(1962) 2 SCR 241*

Facts: The appellant applied to the Patna University for permission to appear for the MA examination in English as a private candidate, representing that he was a graduate and that he had been teaching in a school. In support of his application, he attached certain forged certificates. Accepting the appellant's statement the university gave permission and the admit card was dispatched. However, in the meantime, information reached the university about the appellant being neither a graduate nor a teacher. On inquiry, it was found that the certificates attached to the application were forged and that he had been debarred from taking any university examination on account of his having indulged in corrupt practices at a university examination. In consequence, the matter was reported to the police, who, on investigation, prosecuted the appellant under *section 420*/*511 IPC* for attempting to cheat.

The appellant was acquitted of the charge of forging those certificates, but was convicted of the offence of attempting to cheat. The appellant raised the contention that the facts proved do not go beyond the stage of preparation for the commission of the offence of "cheating", and do not make out the offence of attempting to cheat.

Justices Raghubar Dayal and K Subbarao held:

The first step in the commission of the offence of cheating... must be an act, which would lead to the deception of the person sought to be cheated. The moment a person takes some step to deceive the person sought to be cheated, he has embarked on a course of conduct which is nothing less than an attempt to commit the offence, as contemplated by section 511. He does the act with the intention to commit the offence and the act is a step towards the commission of the offence.

…the question whether a certain act amounts to an attempt to commit a particular offence is a question of fact dependent on the nature of the offence and the steps necessary to take in order to commit it.

We do not agree that the "act towards the commission of such offence" must be "an act which leads immediately to the commission of the offence". We may summarise our views about the construction of *section 511, IPC* thus:

A person commits the offence of "attempt to commit a particular offence" when

(i) he intends to commit that particular offence; and

(ii) he having made preparations and with the intention to commit the offence does an act towards its commission; and such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.

In the present case, the appellant intended to deceive the University and obtain the necessary permission and the admission card ...there is, hardly any scope for saying that what the appellant had actually done did not amount to his attempting to commit the offence and had not gone beyond the stage of preparation. The preparation was complete when he had prepared the application for the purpose of submission to the University.

The moment he dispatched it, he entered the realm of attempting to commit the offence of "cheating". He did succeed in deceiving the University and inducing it to issue the admission card. He just failed to get it and sit for the examination because something beyond his control took place in as much as the University was informed about his being neither a graduate nor a teacher.

The appeal is dismissed.

An attempt is a mixed question of law and fact, depending on the circumstances of the particular case—Appeal allowed—Conviction set aside—Supreme Court—1980

State of Maharashtra v Mohd Yakub[40]

Facts: The accused was convicted by the trial court for attempting to smuggle silver out of India in contravention of *Customs Act 1962* and *Foreign Exchange Regulation Act* 1947. The sessions court in appeal acquitted the accused on the ground that the facts proved by the prosecution fell short of establishing that the accused had attempted to export silver in contravention of the law, because the facts proved, showed no more than that the accused had only made preparations for bringing this silver to the creek and had not yet committed any act amounting to a direct movement towards the commission of the offence. Appeal against acquittal was dismissed by the High Court and State appealed to the Supreme Court.

Justices Sarkaria and O Chinnappa Reddy, JJ held:

But for the intervention of the officers of law, the unlawful export of silver would have been consummated. The clandestine disappearance of the sea- craft, when the officers intercepted and rounded up the vehicles and the accused at the creek, reinforces the inference that the accused had deliberately attempted to export silver, by sea, in contravention of law.

...Smuggling is an anti-social activity which adversely affects the public revenues, the earning of foreign exchange, the financial stability and the economy of the country. A narrow interpretation of the word "attempt", therefore, in these penal provisions which will impair their efficacy as instruments for combating this baneful activity has to be eschewed. These provisions should be construed in a manner which would suppress the mischief, promote their object, prevent their subtle evasion and foil their artful circumvention. Thus construed, the expression "attempt" within the meaning of these penal provisions is wide enough to take in its fold any or series of acts committed, beyond the stage of preparation in moving the contraband goods deliberately to the place of embarkation, such act or acts being reasonably proximate to the completion of the unlawful export. The inference, arising out of the facts and circumstances established by the prosecution, unerringly pointed to the conclusion, that the accused had committed the offence of attempting to export silver out of India by sea, in contravention of law.

Appeal allowed and acquittal of respondent set **aside.**

No attempt if a man has chance to give up plan of commission of crime— principle of Locus Laws Poenitentiae (time for repentance) applicable— Conviction set aside—Supreme Court—1970

Malkiat Singh v State of Punjab,

AIR 1970 SC 713 : (1969) 1 SCC 157 : [1969] 2 SCR 663

The appellant, a truck driver, who was carrying paddy out of Punjab without a licence in violation of Punjab (Export) Control Order 1959, was stopped 14 miles away from the Punjab-Delhi Border and was convicted for an attempt to contravene the said Order. The Supreme Court, while allowing the appeal, held that the act of carrying paddy did not amount to a criminal attempt and held:

The test of determining whether the act of the appellant constituted an attempt or preparation is, whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless. In the present case it is quite possible that the appellants may have been warned that they had no licence to carry the paddy and they may have changed their minds at any place... not have proceeded further in their journey.

Thus, the offence alleged to be contemplated was so far removed from completion in that case that the offender had yet ample time and opportunity to change his mind and proceed no further, his earlier acts being completely harmless.

It is clear that the test is propounded with reference to the particular facts of the case and not as a general rule. Otherwise, in every case where an accused is interrupted at the last minute from completing the offence, he may always say that when he was interrupted he was about to change his mind.

The measure of proximity is not in relation to time and action but in relation to intention. In other words, the act must reveal with reasonable certainty, in conjunction with other facts and circumstances and not necessarily in isolation. Though the act by itself may be merely suggestive or indicative of such intention, it must be indicative or suggestive of the intention.

Appeal allowed and conviction of appellants set aside.

Absence of penetration would not absolve the accused from attempt to commit rape—Appeal dismissed—accused liable—Supreme Court—1998

Madan Lal v State of J&K,

AIR 1998 SC 3869 : (1997) 7 SCC 677

Per GB Pattanaik, J, held:

This appeal is directed against the judgment of the High Court of Jammu and Kashmir, convicting the appellant under *section 376* read with *section 511*, *IPC, 1860* and sentencing him to undergo rigorous imprisonment for a period of five years and pay a fine of Rs 2000. The appellant, the headmaster of a middle school, was charged with the offence of “attempt to commit rape” on the prosecutrix, his student, under *sections 376*/*511*, *IPC, 1860*.

Sub-judge, Judicial Magistrate, convicted the accused for the commission of offence under *sections 376*/*511* of the *Indian Penal Code, 1860*, read with section 342.[41] However, the sessions judge acquitted the accused as he found some contradictions between her statements to the police under section 161,[42] *Code of Criminal Procedure 1973* and came to the conclusion that the statement of the prosecutrix does not inspire any confidence and the said statement is unworthy of acceptance.

On an appeal the High Court reversed the order of acquittal and restored the sentence under *section 376* read with *section 511*, *IPC*.

...the difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her

flat on the ground undresses himself and then forcibly rubs his erected penis on the private part of the girl but fails to penetrate the same into vagina and on such rubbing ejaculates himself, then, it cannot be said that it was a case of mere assault under *section 354, IPC, 1860* and not as attempt to commit rape under *section 376* read with *section 511*, *IPC*.

In the facts and circumstances of the case the offence of an attempt to commit rape by accused has been clearly established and the accused was rightly convicted under *section 376* read with *section 511*, *IPC*.

Appeal dismissed.

A person would be liable for attempt to harbour a controlled drug, though it was found harmless—House of Lords—1987

Regina v Shivpuri,

[1987] AC 1 (HL) : [1986] UKHL 2 : *[1986] 2 All ER 334*

The appellant Shivpuri was convicted on counts of attempting to be knowingly concerned in dealing with and harbouring a controlled drug, namely, heroin, the importation of which was prohibited contrary to section 1 (1) of Criminal Attempts Act 1981[43] and section 170 (b) of Customs and Excise Management Act 1979.[44] He was carrying a package containing a powdered substance that was merely vegetable material akin to snuff (powered tobacco). Dismissing the appeal, their Lordships held that where a person was charged with being knowingly concerned in harbouring or dealing with goods the importation of which was prohibited, it was sufficient to prove that the person knew that the goods concerned were prohibited goods. It was immaterial that the appellant was unsure of the exact nature of the substance in his possession.

The court overruled *Anderton v Ryan*,[45] and held that the distinction which the House previously sought to draw with regard to section 1 of Criminal Attempts Act 1981 between “acts which were objectively innocent” and “those which were not”, could not be maintained, and that the case, therefore, was wrongly decided. In the impugned case, the defendant was acquitted for attempting to handle a video cassette recorder contrary to section 1 (1) of Criminal Attempts Act 1981, when, in fact, the goods were not stolen. The court said a defendant is not liable for an offence where whatever his belief, the completed act intended by him could not, on the true facts, have amounted to an offence.

The court further held that section 1 (1) of the Act of 1981 applied because the offence was not exempted under section 1 (4)[46] and it is immaterial that the offence would not have been completed if his acts had not been interrupted by the substance not being heroin; that the acts were more than merely preparatory within section 1 (1) and by virtue of section 1 (2).[47] The appellant had the requisite intent within section 1 (3)[48] because he delivered the substance knowing it to be a controlled drug the importation of which was prohibited, and the only reason why he did not and could not, achieve his purpose was that the facts were such that the commission of the offence was impossible. Accordingly appeal is dismissed.

Goods being in custody of the police ceased to be stolen goods—not liable for attempt to commit theft—House of Lords—1975

Reg v Smith (Roger),

[1975] AC 476 (HL) : [1973] UKHL 4

Facts: Police officers stopped a large van on a motorway and found it containing stolen goods whereupon they took the driver and another man in the van to the police station. The police then decided to allow the men to continue their journey along the motorway to a service area but with two police officers in the van and other police officers following. At the service area, there were a number of people including the respondent, who took a leading part in arranging for the future disposal of the goods. The respondent was arrested and on indictment, he was charged and convicted under section 22 (1)[49] of Theft Act 1968, of attempting to handle stolen goods.

The Crown conceded that at the time of the alleged offence the goods being in the lawful custody of the police ceased to be stolen goods by virtue of section 22 (3)[50] of Theft Act 1968. Accordingly, the Court of Appeal acquitted the accused.

Dismissing the appeal by the Crown, the House of Lords held, that for the purpose of section 22 (1) of Theft Act 1968 in order to constitute the offence of handling the goods specified in the particulars of offence, it must not only be believed to be stolen, but actually continue to be stolen goods at the time of handling. It was not possible to convert a case of handling, which was not itself criminal because it was not the handling of stolen goods, into a *criminal act* by alleging that it was an attempt to handle stolen goods, since at the time of handling the accused falsely believed them still to be stolen.

Conviction for attempted rape and attempted murder of a seven year old child upheld - High Court of Australia - 1970.

Lucus v The Queen,

44 ALJR 193 : (1970) ALR 835 : 1970 WL 95747 : (1970) HCA 14 (Australia)

Per Barwick CJ, Owean and Walsh, JJ:

(i) The appellant was convicted in the Supreme Court of the Northern Territory of Australia on 8 August 1968 of the offences of attempted to murder and attempted rape of a seven-year-old child. He was sentenced to imprisonment with hard labour for seven years for the attempted murder and for five years for the attempted rape, the sentences to be served concurrently and to commence from 23 September 1968. The date they were imposed.

(ii) In an application for leave appeal from the Supreme Court of the Northern territory, to the High Court of Australia against conviction for attempted murder and attempted rape the applicant relied, as establishing the defence of insanity, first, upon a claim that he had been in a state of *delirium tremens* at the time of commission of the offence from an excessive consumption of methylated spirits, and secondly, upon statements attributed to him indicating a lack of comprehension of events that had been taking place.

While dismissing two appeals the learned Judge held:

> The defence pleaded an absence of intent in the case of each charge due to the state of intoxication at the relevant time and insanity at the time of performance of the acts constituting the offences due to alcoholic excesses. The material on which the appellant relied as establishing insanity comprised, *firstly*, that due to an excessive consumption of methylated spirit he was in state of *delirium tremens* at the time of commission of the acts constituting the offences and, *secondly*, some statements attributed to accused indicated a lack of comprehension of events that were taking place. No medical evidence was called as to the existence of any mental disease or disorder. Whilst medical evidence may not always be indispensable to the establishment of a defence of insanity, in absence of this case it was insufficient to find such a defence where there was nothing to which it could have been concluded that any mental disease or disorder had supervened so that by reason of that disease or disorder he was unable to know what he was “doing or to appreciate” its quality.
>
> As regards the submission of the defence that the two sentences being excessive should be reduced, the court declined to accept the contentions of the discretion of the court in all the circumstances of the case.

For attempting to commit the offence of causing miscarriage the woman need not be pregnant—section 311/511 of Malaysian Penal Code—1958

Munah Binte Ali v Public Prosecutor,

[1958] 24 Malayan LJ 159 (CA, Malaya)

Facts: The accused while trying to procure an illegal abortion, inserted an instrument into a woman’s vagina with a view to thereby causing a miscarriage. Unknown to the parties, the woman was not in fact pregnant and, thus; it was “impossible” to cause her to have a miscarriage.

The question for decision in this Malaysian case was whether a person can be convicted of an attempt to cause a woman to have miscarriage under section 312 read with section 511 of Malaysian *Penal Code* (similar to *IPC*), if the

woman is not pregnant at the time the attempt is made. The sessions court convicted the accused against which an appeal was filed before the Court of Appeal.

Per Whyatt and Good, JJ (Majority):

Section 511 and the principles embodied in the Illustrations are wide enough to cover a case where an act is done towards the commission of an offence against section 312 notwithstanding that the complete offence cannot be committed by reason of some fact unknown to and independent of the person who seeks to commit the offence...Applying the principles embodied in the Illustrations to the present case in a charge of attempting to cause a woman to have miscarriage it is not necessary for the court to be satisfied that the woman is with child before the court proceeds to convict.

The evidence clearly showed that it was the intention of the appellant to bring about a miscarriage and he could not have made the attempt unless he believed the complainant to be pregnant... His attempt was prevented or frustrated by the non-existence of a circumstance which he believed to exist He is in exactly the same position as the would-be pickpocketer who, believing that there is or may be something capable of being stolen in the pocket which he decides to pick, attempts to steal it and finds his attempt foiled by a circumstance independent of himself, namely, the non-existence of anything capable of being stolen. The circumstances of the present case seem to be exactly covered by the illustrations to *section 511 of Penal Code*, even though these illustrations speak of attempts to commit a different type of offence.

Appeal dismissed.

Thomson, CJ (Dissenting):

The only observation I would make regarding section 312 is that it is quite clear that the expression “causes a woman with child to miscarry” means to causes her to lose from the womb prematurely the products of conception and that therefore, there can be no offence under the section unless there are products of conception. Appeal Allowed; Per Majority—Appeal Dismissed.

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21 Intention is defined as “the direction of the conduct towards the object chosen upon considering the motive which suggest the choice”, *Stephen’s General View of Criminal Law,* 2nd Edn, p 69.

22 Ratanlal and Dhirajlal, *Law of Crimes,* vol 2, 51th Edn, 2007, pp 2883 to 2884.

23 SS Huda, *The Principles of Law of Crimes in British India*, TLL, 1902, reprint 1982, p 41.

24 *Indian Penal Code, 1860, section 307*.

25 *Indian Penal Code, 1860, section 302*.

26 Re *Maragatham, AIR 1961 Mad 498* : 1961 Cr LJ 781; See Law Commission of India’s Forty-second Report on The *Indian Penal Code*, 1971, pp 131-39. See Chapter 3, pp 26-30 for provisions relating to intention.

27 The act of preparation is punishable in those cases only where the offence involved is of serious nature which calls for action at the very initial stage. Such cases are: collecting arms etc, with the intention of waging war against the Government of India (section 122); committing depredation on territories of power in alliance or at peace with the Government of India (section 126); making or selling or being in possession of instruments for counterfeiting coins or stamps (sections 233-235 and 257); being in possession of counterfeit coins, false weights and forged documents (sections 242, 243, 259 and 266); preparation to commit dacoity (section 399).

28 *Essays on the Indian Penal Code*, Indian Law Institute, 1962, pp 107-16; See also Holmes, *The Common Law*, 1881, pp 68-69; Sayer, *“Criminal Attempts”*, Harvard Law Review, vol no 41, pp 821, 845; Arnold, *“Criminal Attempts”*, Yale Law Journal, no 40, pp 53, 73; Hall, *General Principles of Criminal Law,* 2nd Edn, pp 558-99. See KD Gaur, *A Textbook on Indian Penal Code*, 2008, *section 511, IPC*, Commentary.

29 G Williams, *Criminal Law* (*General Part*), p 481.

30 *Sudhir Kumar and Shamlal Shaw v State of WB, AIR 1973 SC 2655* : *(1974) 3 SCC 357,* pp 2657-58; see *Abhayanand Mishra v State of Bihar, AIR 1961 SC 1698* : *[1962] 2 SCR 241*; Re *Maragatham, AIR 1961 Mad 498* : 1961 Cr LJ 781.

31 RC Nigam, *Principles of Criminal Law*, vol I, 1965, p 125; *Malkiat Singh v State of Punjab, AIR 1970 SC 713* : *[1969] 2 SCR 663* : 1969 SCC (1) 157.

32 *Malkiat Singh v State of Punjab,* AIR 1970 SC 713, p 715 : [1969] 2 SCR 663 : 1969 SCC (1) 157. See KD Gaur, *Indian Penal Code,* Oxford IBH, 2nd Edn, 1998, pp 696-707 Cross-reference.

33 *Munah Binti Ali v Public Prosecutor,* (1958) Mad LJ 159 (CA); *R v Osborn,* (1919) 84 JP 63; Rowlett J, *The Modern Approach to Criminal Law*, p 379; *Regina v Shivpuri,* [1986] UKHL 2 : [1987] AC 1 (HL); *Reg v Hussain,* [1969] 2 QB 567 : [1969] 2 All ER 1117.

34 JWC Turner, "Attempt to Commit Offences", in *Modern Approach to Criminal Law,* pp 279, 280. Professor Turner has explained the theory in the following words: The actus reus of an attempt to commit a specific crime is constituted when the accused person does an act which is a step towards the commission of that specific crime and the doing of such act cannot reasonably be regarded as having any other purpose than the commission of that specific crime.

35 *Indian Penal Code, 1860*, *sections 307*, *308* and *393*.

36 *Indian Penal Code, 1860, section 309*.

37 *Indian Penal Code, 1860*, *sections 121*, *124*, *124A*, *125*, *130*, *131*, *152*, *153A*, *161*, *162*, 163, 165, 196, 198, 200, 213, 239, 240, 241, 251, 385, 387, 389, 391, 397, 398 and 460.

38 KD Gaur, A *Textbook on Indian Penal Code,* 4th Edn, 2008, commentary under *section 511, IPC, 1860* Cross-reference.

39 Times of India 21 June 2018 pp 3, 11.

40 AIR 1980 SC 1111 : (1980) 3 SCC 57 : (1980) Cr LJ 793. On receiving information that silver was to be transported in jeeps and trucks and finally smuggled to foreign countries, custom officers halted the vehicle near a bridge at a creek.

41 *Indian Penal Code, 1860, section 342*, prescribes punishment for wrongful confinement.

42 *Code of Criminal Procedure 1973, section 161*, deals with the provisions relating to examination of witnesses by police.

43 Criminal Attempts Act 1981, section 1 (1): "If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence."

44 Criminal Attempts Act 1981, section 170 (1): "If any person (a) knowingly acquires goods with respect to importation, of which any prohibition is in force or (b) is in any way knowingly concerned in harbouring or dealing with any such goods, and does so with intent to evade any such prohibition he shall be guilty of an offence."

45 [1985] 1 AC 560 (HL) : [1985] 2 All ER 355. See *Director of Public Prosecutions v Nock,* [1978] AC 979; *Reg v Donnelly,* [1970] NZLR 980; *Webley v Buxton,* [1977] QB 481; *Rex v Fuschilla,* [1940] 2 All ER 489.

46 Criminal Attempts Act 1981, section 1 (4) reads: "This section applies to any offence which, if it were completed would be triable in England and Wales as an indictable offence...".

47 Criminal Attempts Act 1981, section 1 (2): A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

48 Criminal Attempts Act 1981, section 1 (3): In any case where (a) apart from this sub-section a person's intention would not be regarded as having amounting to an intent to commit an offence but (b) if the facts of the case had been as he believed them to be, his intention be so regarded, then for the purpose of sub-section (1) above, he shall be regarded as having had an intent to commit that offence.

49 Theft Act 1968, section 22 reads: (1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods he dishonestly receives the goods... or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.

50 Theft Act 1968, section 22 (3) reads: But no goods shall be regarded as having continued to be stolen goods after they have been restored or to other lawful possession or custody. Section 22 (4) provides: ...no goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody.

6.5 Attempt to Murder and Attempt to Commit Culpable Homicide

Part I General Principles

6 PRELIMINARY CRIMES

6.5 Attempt to Murder and Attempt to Commit Culpable Homicide

Sections 307 and *308* of *IPC, 1860* deal with offences of attempt to murder and culpable homicide not amounting to murder. In view of the gravity of the offence of murder and culpable homicide, separate sections have been enacted to punish adequately the attempts to commit such offences. For instance, section 307 makes attempt to commit murder punishable up to ten years of imprisonment, and if hurt is caused, then life imprisonment with fine. In case of attempt to commit culpable homicide, section 308 provides punishment for seven years or fine or both if hurt is caused. The offences under the said sections are cognizable,[51] non- bailable,[52] and non-compoundable.[53]

307. Attempt to Murder.—Whoever does any act with such intention or knowledge, and under such circumstance that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and, if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.

Attempts by life convicts.—When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death.

Illustrations

(a) *A* shoots at *Z* with intention to kill him, under such circumstances that, if death ensued, *A* would be guilty of murder. *A* is liable to punishment under this section.

(b) *A*, with the intention of causing the death of a child of tender years, exposes it in a desert place. *A* has committed the offence defined by this section, though the death of the child does not ensue.

(c) *A*, intending to murder *Z*, buys a gun and loads it. *A* has not yet committed the offence. *A* fires the gun at *Z*. He has committed the offence defined in this section and if by such firing he wounds *Z*, he is liable to the punishment provided by the latter part of the first paragraph of this section.

(d) *A*, intending to murder *Z* by poison, purchases poison and mixes the same with food which remains in *A's* keeping; *A* has not yet committed the offence defined in this section. *A* places the food on *Z's* table or delivers it to *Z's* servant to place it on *Z's* table. A has committed the offence defined in this section.

308. Attempt to commit culpable homicide.—Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both, and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Illustration

A, on grave and sudden provocation, fires a pistol at *Z*, under such circumstances that if he thereby caused death

he would be guilty of culpable homicide not amounting to murder. *A* has committed the offence defined in this section.

Section 307 IPC, 1860 Before the actus reus could cause death, an accident intervenes and causes death, accused guilty of attempt to murder and not murder—Madras High Court—1961

Re *Maragatham,*

AIR 1961 Mad 498 : 1961 Cr LJ 781

Justices Anantanarayanan and Ramaswami, JJ held:

The accused, husband and wife, were convicted for the murder of their female infant. Rani, aged about one-and-a-half months, under *section 302, IPC* read with *section 34, IPC* and sentenced to undergo imprisonment for life in each case.

The two accused were starving for about ten days previous to this offence, and could find neither work nor any one to give them food. They determined to put an end to their lives and also to put an end to the life of their female infant Rani. They proceeded to a well and jumped into it, carrying the female infant. They had tied themselves together with a rope, before jumping into the well.

Rajagopal (PW1), who was passing that way managed to drag both of them out of the well. But the child slipped and fell in and was drowned.

The question that arises is, what is the offence thereby committed, with regard to the death of the infant?

Upon the present facts both the elements of mens rea and actus reus are established with regard to the infant. It goes beyond preparation, and *locus poenitentiae* hence ceases to exist; that is available only prior to the actus reus and not once that element is established. As Kenny states: ‘The deed must be one performed “in actual furtherance of the crime intended’ and, in addition, the deed must be such that it raises a presumption that the accused was aiming at the crime in question.”[54]

The difficulty arises in cases of “attempt” in which the object of the offender is frustrated, and there is no successful culmination. Otherwise, the ‘attempt’ would merge in the crime, and would no longer retain its essential character of an “inchoate offence”.

But what happens when some intervening circumstance does prevent the “attempt” from being successful, but nevertheless brings about the same end desired by the offender, through an accident?

The offender cannot be convicted of the offence itself, for the chain of causation has snapped. This can be very simply shown in the present case *section 299, IPC, 1860* applies to one who “causes death by doing an act with the intention of causing death” and *section 300, IPC, 1860* specifies that culpable homicide is murder “if the act by which death is caused is done”.

In the present case, before the actus reus could cause death, an accident intervened, the child slipped and was drowned, and hence it cannot be said that the acts of the accused were the direct cause of the death of the child.

But how far can indirect causation be recognised as operative, in criminal jurisprudence?

A glimmer of light is thrown upon this problem in the case law relating to Explanation 2 to *section 299, IPC, 1860*. If, after the blow or act of injury impugned as homicidal a distinct set of circumstances arises causing a new mischief, “then the mischief will be regarded as the *causa causans* and not the original blow”...

Accordingly, both accused 1 and 2 are guilty only of attempt to murder and not murder. We modify the convictions accordingly.

Section 307 IPC, 1860: Attempt to murder: Supreme Court would interfere and convict the accused, if acquittal could not be justified on evidence. Delay in lodging FIR, if beyond the control of the informant (person concerned) will not vitiate the criminal proceedings

6.5 Attempt to Murder and Attempt to Commit Culpable Homicide

State of AP v M Narasimha Rao,

AIR 2010 SC 377 : *(2010) 9 SCC 166* : *2010 (8) Scale 617* : JT 2010 (9) SC 235

Per Harjit Singh Bedi, J:

Allowing the State appeal against acquittal of the accused under *section 307 IPC, 1860* for attempt to murder, the apex court said that it is true that interference by this court on a reappraisal of the evidence should not ordinarily be made particularly in the case of an acquittal, but if it is found that the judgment of acquittal recorded by the High Court was not justified on the evidence, it would be a travesty of justice for this court to ignore this aspect and the circumstances may, thus warrant that the exercise be performed.

M Narrasimha Rao, the respondent and the decease T Subbaiah were residents of the village Veknuru. The deceased was married with prosecution witness (PW2) and they had two sons PWs. 1 and 3. Some two months prior to the present incident, a quarrel had taken place between the respondent Narrasimha Rao and PWI respondents' wife in which PWI had suffered a beating. In order to avenge this insult, PW3 went to the house of the respondent and gave him a sound thrashing. On 13 September 1995, PW3 planned to go on a religious journey to Pedakakani and while doing so, he requested his mother PW2 and his father to sleep in his house while he was away. Accordingly, the deceased and PW2 went to the house of PW3 to sleep there that night. At about mid-night on the night intervening between 13 and 14 September 1995, the accused respondent reached the house of PW2 armed with a knife and on seeing a person sleeping on the cot in the verandah, and believing him to be PW3, attacked him administering several knife blows. On hearing the commotion, PW2 who was sleeping on a mat besides her husband's cot cried out in alarm also attempted to intervene to save her husband, but the accused pushed her down. In the meanwhile, PW1 whose house was close by also rushed to spot and he also witnessed the incident and attempted to catch the accused who, however managed to run away.

It is obvious that the intended victim of the attack was PW3 and he managed to escape as he was not at home and his aged father paid the penalty on the mistaken impression of the accused. In this background, the evidence of PW1 and PW3 is completely trustworthy. PW2 stated that she had been sleeping beside her husband's cot in the verandah when she had heard a noise and had looked up and seen the accused attacking her husband.

For the High Court to hold PW1 was not an eye witness is erroneous. We (apex court) also see that eye witness account is fully corroborated by the medical evidence. The doctor, PW11 who conducted the postmortem had found several cut injuries on the face and neck of the deceased.

While allowing the State appeal, the apex court held that there was no delay in the lodging of the FIR and if there was some delay, it stood explained. In the face of unimpeachable evidence the late delivery of the special report by itself would do no great damage to the prosecution story. We, accordingly, allow this appeal, set aside the judgment of the High Court under *section 302 of IPC* and sentence the respondent to undergo RI for life and a fine of Rs 100/-.

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51 The *Code of Criminal Procedure 1973, section 2* (c) reads: "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer, may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.

52 The *Code of Criminal Procedure 1973, section 2* (a) defines "non-bailable offence", as any offence which is not shown as "bailable offence" in the First Schedule of the Code.

53 The *Code of Criminal Procedure 1973, section 320*, deals with compounding of offences. Offences specified in the first two columns of the table may be compounded.

54 JWC Turner, *Kenny's Outlines of Criminal Law,* 19th Edn, p 91.

6.6 Attempt to Commit Suicide

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

6 PRELIMINARY CRIMES

6.6 Attempt to Commit Suicide

309. Attempt to commit suicide.—Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year [55][or with fine, or with both].

6.6.1 Introduction

Suicide as such is not a crime under *IPC, 1860*. It is only an attempt to commit suicide that is punishable under this section. In other words, it is only when a person fails in his mission to commit suicide that the Code is attracted. If the person succeeds, there would be no offender who could be brought within the purview of the law. The section is based on the principle that the lives of men are not only valuable to them, but also to the family and the State. The State therefore, is under an obligation to prevent persons from taking their lives as it prevents them from taking the lives of others.

At common law, although the offender who succeeded in an attempt to commit suicide was beyond the reach of law, his guilt resulted in the forfeiture of his property. However, an attempt to commit suicide in England has now ceased to be a crime by virtue of Suicide Act 1961, which says that “the rules of law whereby it is a crime for a person to commit suicide are hereby abrogated.”

6.6.2 An Attempt to Commit Suicide—Meaning

An attempt under *section 309, IPC, 1860* implies at least an act towards the commission of suicide, such as drowning or poisoning or shooting oneself. If *A*, with an object to commit suicide, throws himself into a well, he is guilty of an attempt and is punishable under this section,[56] if rescued.

The essence of suicide is an intentional self-destruction of life. Thus, if a person takes an overdose of poison by mistake or in a state of intoxication, or in order to evade capture by his pursuers,[57] he cannot be booked under this section. Similarly, if a person, because of family discord, distraction, loss of a dear relation or other cause of a like nature overcomes the instinct of self-preservation and decides to take his life, he should not be guilty for an attempt to suicide.[58] In such case, the unfortunate man deserves indulgence, sympathy and consolation instead of punishment.[59]

6.6.3 Euthanasia (Mercy Killing)

Euthanasia is derived from Greek words *eu,* meaning “well” or “good” and *thanatos,* meaning “death”, i.e. “good death”.[60] In common terminology “euthanasia” means the act or practice of putting to death painlessly, especially in order to release a man from incurable suffering. There may be three situations when euthanasia might take place, viz:

(i) voluntarily euthanasia occurs when a person voluntarily requests the termination of his or her life;[61]

(ii) non-voluntarily euthanasia when a person is not mentally fit to make an “informed request” for termination of life;

(iii) "involuntary euthanasia" when a person has not made a request for termination of his or her life.

Euthanasia is popularly taken to mean any form of termination of life by a doctor. The definition, however, is narrower. It must be voluntary, explicit and carefully considered and it must have been made repeatedly. The Netherlands and Belgium are the two countries that have legalised euthanasia. The Dutch Government Commission on Euthanasia 1985 has defined it as: "A deliberate termination of life, on an individual's request, by another. Or, in medical practice, the active and deliberate termination of life on patient's request by a doctor."

Ramchandra Shanbaug v UOI,

AIR 2011 SC 1290 : *(2011) 4 SCC 454* : 2011 (2) Mad LJ 735 :

JT 2011 (3) SC 300 : *2011 (3) Scale 298*

Aruna Ramchandra Shanbaug: While delivering the judgment of the Supreme Court, Justice Katju quoting Mirza Galib said

"Marte hain aarzoo mein marne ki Maut aati hai par nahin aati"

[मरते हैं आरजू में मरने की मौत आती है पर नहीं आती]

It is one of the most important cases in which the Supreme Court of India was faced with the legality of euthanasia.

Euthanasia is one of the most perplexing issues which the Courts and legislatures all over the world are facing today. The Court, in this case, is facing the same issue, and we feel like a ship in an uncharted sea, seeking some guidance by the light thrown by the legislations and judicial pronouncements of foreign countries, as well as the submissions of counsels.

A writ petition under *Article 32 of the Constitution* has been filed on behalf of the petitioner. Aruna Ramachandra Shanbaug by one Ms Pinki Virani of Mumbai, claiming to be a next friend. It is stated in the writ petition that the petitioner Aruna Ramachandra Shanbaug was a staff nurse working in King Edward Memorial Hospital, Parel, Mumbai. On the evening of 27 November 1973 she was attacked by a sweeper in the hospital who wrapped a dog chain around her neck and yanked her back with it. He tried to rape her but finding that she was menstruating, he sodomized, her. To immobilize her during this act he twisted the chain around her lying on the floor with blood all over in an unconscious condition. It is alleged that due to strangulation by the dog chain the supply of oxygen to the brain stopped and the brain got damaged. The Neurologist in the hospital found that she had plantars' extensor, which indicates damage to the cortex or some other part of the brain. She also had brain stem contusion injury with associated cervical cord injury. It is alleged at page 11 of the petition that 36 years have expired since the incident and now Aruna Ramachandra Shanbaug is about 60 years of age. She is featherweight, and her brittle bones could break if her hand or leg are awkwardly caught, even accidentally, under her lighter body. She has stopped menstruating and her skin is now like papier mache' stretched over a skeleton. She is prone to bed sores. Her wrists are twisted inwards. Her teeth had decayed causing her immense pain. She can only be given mashed food, on which she survives. It is alleged that Aruna Ramachandra Shanbaug is in a persistent vegetative state (PVS) and virtually a dead person and has no state of awareness, and her brain is virtually dead. She can neither see, nor hear anything nor can she express herself or communicate, in any manner whatsoever. Mashed food is put in her mouth, she is not able to chew or taste any food. She is not even aware that food has been put in her mouth. She is not able to swallow any liquid food, which shows that the food goes down on its own and not because of any effort on her part. The process of digestion goes on in this way as the mashed food passes through her system. Aruna is virtually a skeleton. Her excreta and the urine is discharged on the bed itself. Once in a while she is cleaned up but in a short while again she goes back into the same sub-human condition. Judged by any parameter, Aruna cannot be said to be a living person and it is only on account of mashed food which is put into her mouth that there is a facade of life which is totally devoid of any human element. It is alleged that there is not the slightest possibility of any improvement in her condition and her body lies on the bed in the KEM Hospital, Mumbai like a dead animal, and this has been the position for the last 36 years. The prayer of the petitioner is that the respondents be directed to stop feeding Aruna, and let her die peacefully.

Apex Court after discussing the pros and cons of the case in depth dismissed the petition and said that in India (mercy killing) euthanasia is illegal and is murder under section 302 or at least, culpable homicide not amounting to murder punishable under *section 304, IPC, 1860*. Physician assisted suicide is a crime under *section 306, IPC, 1860* (abetment to suicide).

In United Kingdom, the Mental Capacity Act 2005 makes provisions relating to persons who lack capacity and to determine what is in their best interests and the power to make declaration by a special Court of Protection as to the lawfulness of any act done in relation to patient.

Common Cause (A registered Society) v UOI[62]

(Dipak Misra) CJI and AM Khanwilkar, AK Sikri, Dr DY Chandrachud, JJ The issue was that whether right to life enshrined in *Article 21 of Constitution* includes right to die? Whether passive euthanasia, voluntary or even, in certain circumstances, involuntary, is legally permissible? And under what circumstances and whether a "Living Will" or "Advance Directive" should be legally recognised and can be enforced? If so, under what circumstances and what precautions are required while permitting it?

This aspect can be dealt with in two ways:

First, because of rampant poverty where majority of persons are not able to afford health services, should they be forced to spend on medical treatment beyond their means and in the process compelling them to sell their house property, household things and other assets which may be means of livelihood.

Secondly, when there are limited medical facilities available, should a major part thereof be consumed on those patients who have no chances of recovery.

Held:

(Dipak Misra) CJI and AM Khanwilkar, J

Right to life and liberty as envisaged under *Article 21 of Constitution* is meaningless unless it encompasses within its sphere individual dignity. Right to live with dignity also includes smoothening of process of dying in case of a terminally ill patient or a person in PVS (Permanent Vegetative Stage) with no hope of recovery.

Failure to legally recognize advance medical directives may amount to non- facilitation of right to smoothen dying process and right to live with dignity. Further, study of position in other jurisdictions shows that Advance Directives have gained lawful recognition in several jurisdictions by way of legislation and in certain countries through judicial pronouncements.

Though sanctity of life has to be kept on high pedestal yet in cases of terminally ill persons or PVS patients where there is no hope for revival, priority shall be given to Advance Directive and right of self-determination.

Concurring (AK Sikri)

All suggestions and various aspects of advance directives have been elaborately considered and detailed directions are given by Hon'ble Chief Justice in his judgment, which is duly concurred. In summation, this Court has, with utmost sincerity, summoned all its instincts for legality, fairness and reasonableness in giving a suitable answer to vexed issue that confronts people on daily basis, keeping in mind competing interests and balancing those interests. It will help lead society towards an informed, intelligent and just solution to the problem.

Concurring (Dr DY Chandrachud)

It is necessary to recognise that our dignity as citizens continues to be safeguarded by *Constitution* even when life is seemingly lost and questions about our own mortality confront us in twilight of existence.

(i) *Constitution* recognizes value of life as its indestructible component. Survival of sanctity principle is founded upon guarantees of dignity, autonomy and liberty;

(ii) Right to a dignified existence, liberty to make decisions and choices and autonomy of individual are central to quest to live a meaningful life. Liberty, dignity and autonomy are essential to pursuit of happiness and to find meaning in human existence;

(iii) Entitlement of each individual to a dignified existence necessitates constitutional recognition of principle that an individual possessed of a free and competent mental state is entitled to decide whether or not to accept medical treatment. Right of such an individual to refuse medical treatment is unconditional. Neither

law nor *Constitution* compel an individual who is competent and able to take decisions, to disclose reasons for refusing medical treatment nor is such a refusal subject to supervisory control of an outside entity;

(iv) Every individual has constitutionally protected expectation that dignity which attaches to life must subsist even in culminating phase of human existence. Dignity of life must encompass dignity in stages of living which lead up to end of life;

(v) Constitutionally recognised right to life is subject to procedure established by law. Procedure for regulation or deprivation must, it is well-settled, be fair, just and reasonable;

(vi) An individual who is in sound and competent state of mind is entitled by means of an advance directive in writing, to specify nature of medical intervention which may not be adopted in future, should he or she ceases to possess mental ability to decide. Such an advance directive is entitled to deference by treating doctor. Treating doctor who, in a good faith exercise of professional medical judgment abides by an advance directive is protected against burden of criminal liability;

(vii) Decision by treating doctor to withhold or withdraw medical intervention in case of patient in terminal stage of illness or in a persistently vegetative state or the like where artificial intervention will merely prolong suffering and agony of patient is protected by law. Where doctor has acted in such a case in best interest of patient and in *bona fide* discharge of duty of care, law will protect reasonable exercise of a professional decision;

(viii) While upholding the legality of passive euthanasia (voluntary and non- voluntary) and in recognizing the importance of advance directives, the present judgment draws sustenance from constitutional values of liberty, dignity, autonomy and privacy. In order to lend assurance to a decision taken by the treating doctor in good faith, this judgment has mandated the setting up of committees to exercise a supervisory role and function. Besides lending assurance to the decision of the treating doctors, the setting up of such committees and the processing of a proposed decision through the committee will protect the ultimate decision that is taken from an imputation of a lack of *bona fides;* and execute an advance medical directive is nothing but a step towards protection of aforesaid right by an individual.

Petition allowed in following manner:

(a) Right to die with dignity as fundamental right has already been declared by *Constitution* Bench judgment of this Court in *Gian Kaur* case which we reiterate.

(b) We declare that an adult human being having mental capacity to take an informed decision has right to refuse medical treatment including withdrawal from life-saving devices.

(c) A person of competent mental faculty is entitled to execute an advance medical directive in accordance with safeguards as referred to above.

In brief, it may be said that *Common Cause (A Registered Society) v UOI* is a milestone verdict expanding the right to life to incorporate the right to die with dignity on 9 March 2018 legalized passive euthanasia and approved “Living Will” to provide terminally ill patients or those in a persistent and incurable vegetative state (PVS) a dignified exist by refusing medical treatment or life support.

The verdict, the latest in a string of boosts for individual freedoms by the Supreme Court, was delivered by a *Constitution* Bench of Chief Justice Dipak Misra and Justices AK Sikri, AM Khanwilkar, DY Chandrachud and Ashok Bhushan.

It empowers a person of sound mind and health to make a Living Will specifying that in the event of his/her slipping into a terminal medical condition in future, his/her life should not prolonged through a life support system. The person concerned can also authorise, through will, any relative or friend to decide in consultation with medical experts when to pull the plug. Given Indian sensitivities about life and death, testing the legality of the idea posed a complex medical, philosophical, constitutional and religious jigsaw for the bench.

With this ruling, the Supreme Court has recognised that an individual with terminal illness or in a state of irreversible vegetative condition has the agency to decide whether he/she would like to die, a sphere which was so far constitutionally reserved for the state, which alone could deprive a person of his/her life in accordance with law.

However, to prevent possible misuse by greedy relatives eyeing the patient’s property, the Supreme Court provided for stringent guidelines for preparing and giving effect to “Living Will” and administration of “passive euthanasia” by involving multiple medical boards comprising several experts and even judicial officers.

6.6 Attempt to Commit Suicide

In a cumulative 538-page judgment containing four opinions, the Supreme Court said passive euthanasia, or a provision for passive euthanasia through “advance directive” or “Living Will” would save “a helpless person from uncalled for and unnecessary treatment when he is considered as merely a creature whose breath is felt or measured because of advanced medical technology”.

> There comes a phase in life when the spring of life is frozen, the rain of circulation becomes dry, the movement of body becomes motionless, the rainbow of life becomes colourless and the word ‘life’ which one calls a dance in space and time becomes still and blurred and the inevitable death comes near to hold it as an octopus gripping firmly with its tentacles so that the person “shall rise up never”, CJI Misra said.
>
> Justice AK Sikri explained,
>
> *Rote hue aate hain sab, hansta hua jo jaayega. Wo muqaddar ka sikandar jaaneman kehlayega.*

The Supreme Court at length explained the guidelines as to who can execute a Will. (1) It can be executed by an adult of sound and healthy mind. (2) It must be voluntarily written, without coercion or compulsion. (3) It must be in writing, stating when treatment may be withdrawn or no specific treatment shall be given that can delay death. Court further said it should contain:

- Circumstances in which to stop treatment
- A mention that the individual/patient can change their mind at any time
- Name of guardian or relative who, in the event of the individual not in a position to take a decision, can consent to stopping treatment
- Must be signed by individual in presence of two witnesses
- Countersigned by relevant Judicial Magistrate of First Class (JMFC)
- Witnesses and JMFC must satisfy that there was no coercion
- JMFC has to preserve a copy and forward one to District Court
- JMFC must inform immediate family members if they are not present at the time of recording the Living Will.

A Will can be given effect to by a person only:

- If executor becomes terminally ill with no hope of recovery or cure, treating physician must check authenticity of Living Will from area Judicial Magistrate of First Class (JMFC)
- Doctor to inform patient or his guardian or close relatives about nature of medical care, consequences of alternative treatment and of remaining untreated
- Hospital to set up medical board comprising head of treating dept and at least three doctors with at least 20 years experience who, in turn, shall visit patient in the presence of his relatives and decide if treatment is to be withdrawn
- If medical board gives go-ahead, hospital shall inform Collector
- Collector must immediately constitute another medical board comprising Chief District Medical Officer and three expert doctors
- Board shall examine patient and take a call
- It will keep JMFC informed before allowing treatment to stop
- JMFC to visit patient and, after examining all aspects, may permit LW be followed through
- The patient/family/doctor/hospital staff can approach High Court

Revocation/Unclear Living Will

- A person can withdraw Living Will any time, but in writing
- If Living Will is unclear, medical boards need not follow through
- If hospital board declines plea, an application can be made to Collector's medical board

Justice Bhushan quoted Plato's famous work "The Republic", in which he wrote, "But if a man had a sickly *constitution* and intemperate habits, his life was worth nothing to himself or to anyone else, medicine was not meant for such people and they should not be treated, though they might be richer than Midas."

Safeguards that are provided by countries that allow Living Wills, specify

- By specifying who may act as witness;
- By allowing a person to change his/her mind;
- By allowing validity of directive to be challenged.

Netherlands: Patients aged 16 or above may make advance directives.

Germany: Court authorization required to stop treatment of minors.

Switzerland: Persons with mental illness cannot discontinue treatment if it is expression or symptom of their mental illness.

UK: Person can alter/withdraw an advance decision at any time he has the capacity to do so.

Hungary: Pregnant women cannot refuse treatment if they are able to carry through the pregnancy.

Australia: Living wills to be signed in presence of two witnesses, with rules on who can be witness: Not if he/she (1) is a substitute decision-maker in the Living Will, (2) stands to profit, directly or indirectly, from the person's estate or (3) is a health practitioner for the person writing the Living Will.

Oregon, United States: Person can change his/her mind at any time and as many times, quash a written request for medication regardless of mental state.

Comments

Bidding farewell to the world with one's head held high is every individual's fundamental as well as inalienable right; we need to welcome the Supreme Court ruling that legalises passive euthanasia.[63] Centuries ago Roman emperor-philosopher Marcus Aurelius wrote in "Dignity in death" (Translated from Latin by Derek A Walcott):

> "How I die is my decision
>
> How I depart is my intention
>
> My life is mine, so is my death
>
> How I depart is my tension."

Dignity in death is most vital to an individual's right to exercise free will. Blessed with Icchha Mrityu, the grand patriarch of Mahabharata, Bhishma, told *Arjuna, "Na kinchitam sarvey pranatohasmi devanam, yatkinchit mrityu parvedham karaunarpite.'"* "This is the manner of death that I've chosen for myself because a sense of awareness in death is far better than being at the mercy of others."

All Greek gymnosophists and philosophers chose how and when to die. Socrates was given a bowl of hemlock to drink because he wanted to stay aware till his last breath. Hemlock causes slow but peaceful death with complete awareness. It was not just Socrates who desired to die consciously like Frencasier, Diostephele and Gurnimoren.

Bishops' council opposes SC verdict

The Kerala Catholic Bishops' Council (KCBC) in Thiruvananthapuram on Friday came out against the Supreme Court verdict allowing passive euthanasia. President of KCBC Soosai Pakiam said the apex court decision was both painful and objectionable. Pakiam said it was unfortunate and objectionable that the Supreme Court observed "opportunity for death in dignity" as a constitutional right of a citizen, while giving conditional approval for mercy killing, killing.

> God is the only custodian of life. Humanitarians cannot approve the killing of another fellow suffering from old age or decease, even if the life is taken off in the name of kindness or pity towards the person who suffers, said the KCBC President.

6.6.3.1 *Physician Assisted Suicide and Euthanasia Distinguished*

In recent years, physician assisted suicide and euthanasia (mercy killing) have been in focus of and debate all over the world. The desirability of punishing a person in such cases are being questioned especially in case of being terminally ill, where it is done either at the patient's own request or at the request of a close relative, to relieve the dying man of pain, misery, mental agony, torture and humiliation. Propagators of euthanasia plead that existence in a Persistent Vegetative State (PVS) is not a benefit to a terminally ill person.

A question therefore arises, in the context of a dying man, who is terminally ill or in a PVS, as to whether he may be permitted to terminate it by a premature extinction of his life, and a person assisting in the process be held criminally liable for causing death of such a person or not.

The opinion is divided on this complex question of life and death. No consensus has emerged in opposing the right of the State to regulate the involvement of others in exercising power over individuals ending their lives, and the individual's freedom to end his or her life. Some of the cases in which the courts have been confronted with the difficult question of permitting or not permitting the withdrawal of artificial measures for continuance of life by a physician assisted suicide are discussed below.

Withdrawal of artificial measures in case of a person in persistent vegetative state is legal—House of Lords—1993

NHA Trust v Bland,

[1993] 2 WLR 316 (HL) : [1992] UKHL 5 : *[1993] AC 789*

Facts: Bland B was one of the victims of the Hillborough Stadium disaster of April 1989 in which many football supporters had been crushed to death. *B* had not been killed in the incident, but had never recovered consciousness, having suffered irreversible brain damage. He was in a PVS. The Trust, with the agreement of the parents sought a declaration from the High Court that it might discontinue the life sustaining treatment including the feeding and all medical treatment except for that which would allow him to die with dignity and least distress. The declaration was granted by the High Court and supported by the Court of Appeal.

The Official Solicitor appealed to the House of Lords against the order of the High Court on the ground that it would constitute murder to discontinue the feeding of the patient.

Dismissing the appeal, the House of Lords held that in a case of withdrawal of artificial measures for continuance of life by a physician, in the context of existence in the PVS (Persistent Vegetative State) is of no benefit to the patient, the principle of the sanctity of life cannot be said to be absolute. In such a case, the court said that a distinction be made between:

(1) cases in which a physician decides not to provide or to continue to provide for his patient, treatment or care which would not or might prolong his life; and

(2) cases in which a physician decides, for example, with the help of a lethal drug, actively to bring his patient's life to end.

After making a careful analysis of the two situations, the court ruled that in the second situation it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering.

Hence, discontinuance of life saving treatment is nothing but honouring the wishes of the person and is legal. A refusal to accede to these wishes thus constituted the tort of trespass, whereas the assisted suicide as interpreted in *Pretty v The United Kingdom,*[64] is illegal.

Withdrawal of artificial apparatus against the patient's wishes violates Article 8 of ECHR—European Commission of Human Rights—2004

R (Burke) v GMC,

[2004] EWHC 1897 (Admin)

Justice Munby stated:

The Court of European Commission of Human Rights in *R (Burke) v GMC*, held that a withdrawal of Artificial Nutrition and Hydration (ANH) apparatus which a competent patient wishes to continue or which an incompetent person has previously, when competent, directed to continue would infringe *Article 8* of the ECHR.

Justice Munby while delivering the judgment summarised his conclusions in the following words:

(1) The personal autonomy which is protected by *Article 8*[65] embraces such matters as one chooses to pass the closing days and moments of one's life and how one manages one's death.

(2) The dignity interests protected by the Convention include, under *Article 8*, the preservation of mental stability and, under *Article 3*,[66] the right to die with dignity and the right to be protected from treatment, or from a lack of treatment, which will result in one dying in avoidably distressing **circumstances.**

Doctor's refusal to give more treatment to a patient is unquestionable—Court of Appeal—1995

R v Cambridge Health Authority,

[1995] 2 All ER 129

The doctors in the university town of Cambridge held that they could not justify chemotherapy and a second bone marrow transplant for the cost of GBP 75,000 for a 10 year old girl suffering from acute myeloid leukemia. The treatment cost could be spent helping others. On the girl's father challenging the decision, the district court asked the authorities to "reconsider" their decision. Justice John Laws said that he could not force the authority to pay up but said "life" was the most fundamental human right and "doctors could not deny her only chance of survival, however slim, while tolling the bell of tight resources."[67]

The Court of Appeal in England refused to overturn the ruling of the lower court that the judges have no right to question a doctor's decision on the treatment. The court's ruling in favour of the health authority sets a vital precedent for terminally ill patients fighting for a share of the limited resources of Britain's State run health services.

Comments

Perhaps the Court of Appeal's verdict needs review in view of the possible abuse of the provision on the ground of limited resources of the State, and as the costs for medical care increases, there is danger that such a provision is likely to be abused.

6.6.4 Right to Refuse Unwanted Medical Treatment

The first landmark decision granting a patient more control over his medical decision in the United States is *Karen Quinlan*[68] from the State of New Jersey. The court has been squarely presented with the issue whether the United States *Constitution* grants a "right to die". Answering in the affirmative, the State Court of Appeal observed that a man has a constitutional right to refuse unwanted medical treatment. Karen Quinlan was twenty years old when she went into a PVS[69] after taking a mixture of drugs and alcohol. After six months, being informed by Quinlan's neurologists that there was no chance of recovery, her parents requested the authorities for removal of respirator. At the time of request Quinlan was not competent to give her consent.

Allowing the plaintiff 's request for removal of respirator, the appellate court after carefully balancing Quinlan's "right to privacy" against "the State's interest in preserving life" held that the State's interest under the circumstances of the case "weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims".

Suicide is an affirmative act to end one's life; on the other hand, refusing treatment is an expression of one's desire. It is not an affirmative act "causing death", but merely a passive acceptance of the natural process of death.[70]

Similarly, in *Mckay v Bergstedt*,[71] a patient who was terminally ill in the State of Nevada, filed a petition to the district court permitting discontinuance of his respirator. The district court granted permission, which in appeal was upheld by the Supreme Court of Nevada.

The court after balancing the interest of the patient against the relevant State interest, affirmed by a majority of two to one the district court's opinion and held that the desire of the patient for withdrawal of respirator did not tantamount to suicide, the same was rather an exercise of his constitutional and common law right to discontinue unwanted medical treatment.

Distinction Between "Assisted Suicide" and "Withdrawing Life Sustaining Treatment"

A fine distinction has been made between "assisted suicide" and "withdrawing life sustaining treatment" on the principle of causation and intent. For instance, when life-sustaining treatment is refused or withdrawn, the cause of death is the underlying disease, whereas in the case of assisted suicide the patient is killed by medication,[72] which is an offence.

The patient's right to forego unwanted medical treatment, including artificially delivered nutrition and hydration, even though it may result in the patient's death, is a constitutional right to decide about his or her life. The court has equated the concept of "right to die", not accepted in India in *Gian Kaur v State of Punjab,* AIR 1996 946 : *(1996) 2 SCC 648*, with the constitutional right to privacy and the common law right of "informed consent". The doctrine of "informed consent" is an extension of the right to "self-determination", which is the "functional equivalent to the moral principle of respect for autonomy."

6.6.4.1 Critical Illness vis-à-vis Right to Suicide

Critical illness is a difficult time for the patients, their families, health care providers, and doctors. Life and death hang in a delicate balance. Adding to the problem is medico-legal uncertainty about the effect of the decisions to start, continue, or to stop treatment.[73] Some critically ill patients find that their life is no longer worth living and prefer to die. The problem becomes more aggravated because of the advanced medical technology that takes control over the patients' life and death. Medical science has made it possible to prolong human life, in many cases, it has also succeeded in keeping people alive longer than before. The problem has further been aggravated by the physician's desire to exhaust all means available in heroic attempts to keep their patients alive mandated by the famous Hippocratic oath.[74] A critically ill person, like any other individual, may lawfully kill himself (i.e. commit suicide) to speed up his death and gain relief from disability or chronic illness in view of the repeal of the offence of suicide in the United States, Canada, England and almost all the western countries. However, it may not be possible for a critically ill man to commit suicide in India, Pakistan, Bangladesh, Sri Lanka, Myanmar and countries of South East Asia, such as Malaysia, Singapore, Thailand etc, where the very attempt to suicide is considered an offence that is punishable under their respective State laws.

6.6.5 Living Will

As a result of judicial and legislative innovations, competent terminally ill patients have a well-recognised right to hasten their death by choosing to withdraw or forego life-sustaining medical treatment including nutrition and hydration.[75]

Judicial creation of a "right to die" in response to technological encroachment on patient self-determination was paralleled by the legislative development of the "Living Wills" in the West. There is a growing concern among people to execute "Living Will"[76] to be sure that they do not receive excessive or burdensome treatment that may simply prolong dying or life in a severely damaged state. A Living Will is a written directive (wish) to the family, physician, health care providers to stop medical care if the person becomes terminally ill and is unable to express his or her wishes about stopping treatment. It is made when a man is capable of understanding the nature and consequences of his act.

It may include instructions to limit, with hold or withdraw treatment. It exempts the physician from civil and criminal liability for withholding treatment or removing artificial respirator etc; and in case, the attending physician does not want to follow the instructions, he has to remove himself from the case, however, in India and in many other countries the concept of “Living Will” is almost unknown.

The first legislation giving legal recognition to “Living Will” was enacted in the United States, in the State of California in 1976. Thereafter, other States followed the suit and enacted “Living Will” legislations thus giving it legal validity.

6.6.5.1 *Oregon’s Death with Dignity Act 1994, United States*

In 1994, Oregon became the first State in the United States to legalise Physician Assisted Suicide (PAS) for competent, terminally ill adults. The Oregon’s Death with Dignity Act of 1994, commonly known as Oregon’s Rights of the Terminally Ill Act 1994, seeks to provide competent terminally ill patients with an opportunity to decide to hasten his or her death with certain safeguards to ensure that no one commits physically assisted suicide (PAS) involuntarily. These safeguards include;

(i) restricted eligibility;

(ii) voluntariness;

(iii) patients’ capacity or competence;

(iv) informed decision-making;

(v) waiting periods;

(vi) second medical opinions and

(vii) witnesses.

According to the Act of 1994, any capable adult (above 18 years of age) suffering from terminal disease[77] with less than six months to live, who is a resident of Oregon, “may make a written request for medication for the purpose of ending his life in a human and dignified manner” provided that the patient has “voluntarily expressed his or her wish to die.”

In *Lee v Oregon,* [1995] 891 F Supp 1421, the court listed five interests that justified operating an exception under the Oregon Act for terminally ill persons; viz:

(i) avoiding unnecessary pain and suffering;

(ii) preserving and enhancing the rights of the competent adults to make their own critical health care decisions;

(iii) avoiding tragic cases of attempted or successful suicides in a less humane and dignified manner;

(iv) protecting the terminally ill and their loved ones from financial hardships;

(v) protecting the terminally ill and their loved ones form unwanted intrusions into their personal affairs.

The attending physician must inform the patient of all the relevant medical facts and results of taking the medication sought, and the patient’s right to rescind the request at any time and that the patient must notify next to kin. After the mandatory 15 days waiting period, the patient may make a second oral request to the attending physician and the physician may point out again that the patient may rescind the request, if so desires. The patient must sign the original written request in the presence of witnesses (two) and wait for additional 48 hours before receiving the request prescription.

Movement for Legalisation of Physician Assisted Suicide in the United States— Right to Assistance in Death vis-á-vis Right to Refuse Medical Treatment Distinguished

The opponents of PAS plead that the right to active assistance in hastening one’s death does not legally or morally flow from a right to refuse or forego medical treatment The distinction between the two is primarily based on ethical and legal distinction between “letting die” and “killing”. It is said that when a person chooses “to refuse life

sustaining devise" the death occurs naturally from the underlying disease; whereas in case of PAS an overt act and riot the disease causes "death".

In one case, it is the disease and in the other case it is physician that brings about death of a man. Accordingly, withdrawing life-sustaining treatment is ethically defensible because the physician's intention is to respect patient wishes, whereas complying with requests for assistance in dying is ethically unacceptable because the physician's intent is to kill the patient. Perhaps this distinction is untenable to appreciate the ethical validity of the double "effect"; if a physician prescribes dose of pain medication with the primary object of relieving the patient's agony, the fact that the physician knows that it will also hasten his death does not constitute an "intent" to kill.

It is claimed that once the PAS is legalised, it will open the floodgates to suicide.

An important dimension in the physician assisted euthanasia debate in the United States is that it has shifted from the abstract to action in the form of voter initiatives,[78] legislation and lawsuits. In addition to the innovation of latest medical technology, perhaps the intense activity to soften the rigors of law is the emergence of AIDS epidemic. This has resulted in the "persistent questioning" of the authority of the establishment including judiciary and skepticism of medical profession towards the "standard medical snobbery" that insists on "life at any cost". The emergence of AIDS plaintiffs is alarming, as typically they represent young to middle-aged people whose life will be cut short by a fatal disease.[79] Thus, AIDS patients add a new dimension to the problem of PAS in as much as they would form a separate category other than of "terminal" and "old" category.

Perhaps the physical and emotional sufferings associated with AIDS patients strongly goes in favour of legalising PAS and making sure that persons with AIDS are included in the list of persons who qualify for PAS. Taking note of the immense pressure from medical profession, public opinion and realising the enormous physical, mental and psychological agony on patients and their families in case of terminally ill patients 18 out of 50 States in the United States have introduced Bills legalising physician assisted suicide to a limited extent that would include "terminally ill persons only". Such legislations have been named as "Death with Dignity" legislations.

It is strongly felt, perhaps rightly that the definition of terminally ill be modified to include cases of "an irreversible and incurable conditions which reduces the quality of life of the patient." This will obviously take care of AIDS and other fatal diseases on a certificate from the physician.

6.6.5.2 *Worldwide Trend to Legalise Suicide in Case of Terminally Ill Patients*

Several countries have taken positive steps in legalising PAS in the case of terminally ill patients with prope safeguards.

Netherlands, according to Meisel and Cerminara,[80] is the first country to begin efforts to legalise both PAS and active euthanasia in 1969.

In 1973, through a series of pronouncements by the Royal Dutch Medical Association and by the courts, a series of guidelines were worked out whereby physicians who would not be prosecuted for murder despite the provision in *Article 293* of Dutch *Penal Code* that anyone who takes another person's life even at his explicit and serious request, will be punished by imprisonment of at most 12 years or a fine of the fifth category.[81] These guidelines are that:

(i) the disease is incurable;

(ii) the patient's suffering is unbearable;

(iii) the patient's condition is terminal;

(iv) the patient requests death.[82]

The judicial and medical guidelines provided physicians with a mechanism for engaging in active euthanasia while avoiding prosecution. The courts exempt physician assisted euthanasia on the basis of the concept of *force majeure,* a situation in which the physicians professional duty to alleviate suffering prevails over the duty to preserve life.[83] Though legally speaking, these cases are nothing but murder,[84] but the courts will excuse them under the *force majeure* defense.

In 1993, the Dutch Parliament enacted legislation explicitly granting physicians immunity form prosecution if they abide by the requirements for justifiable euthanasia.[85] Finally in 2001, the Dutch Parliament legalised the practice

under the Royal Dutch Medical Association Guidelines for Euthanasia.[86] The statute also recognises the validity of written documents leaving the decision up to a physician if the patient is incapacitated.[87]

The Northern Territory of Australia in 1995 enacted a legislation known as the "Right of Terminally Ill", which allowed patients to end their lives with the help of doctors after being diagnosed as terminally ill by two doctors, after a cooling off period. However, the Australian Parliament repealed that legislation, as it has the constitutional authority to do in the case of territorial legislation, but not before at least four deaths pursuant to the legislation occurred.[88]

In early 2001, lawmakers in Belgium,[89] Australia, France[90] and Venezuela[91] all considered various proposals to amend their countries' laws to permit actively hastening death in some form. But only Belgium enacted the Right to Die Bill in 2002, similar to the Netherlands legislation, permitting active euthanasia.[92] In Switzerland, however, State-run retirement homes can now be the sites of assisted suicides. Residents deemed competent to decide to do, so can receive assistance from the German-Swiss assisted suicide association, in ending their lives within the homes.[93]

The Constitutional Court of Colombia, a judicial body with quasi-legislative powers, approved legislation in 1997 allowing active voluntary euthanasia with the written consent of a terminally ill patient.[94]

In the United States, beginning with the State of Oregon, other States, also have now enacted "Living will legislations" which allows people to make a will to opt for euthanasia before they become terminally ill. However, in *Compassion in Dying v State of Washington*,[95] the United States Court of Appeal for the Ninth Circuit, upheld the constitutional validity of the State statute that banned by mentally competent terminally ill adults.

In India, euthanasia is illegal and punishable under section 300, exception 5, *Indian Penal Code, 1860* as culpable homicide not amounting to murder.[96] However, there is a growing awareness amongst jurists and social scientists that euthanasia should be made legal in case of terminally ill persons. It may not be forgotten that legalising assisted suicide and euthanasia could be profoundly dangerous for many individuals who are ill and vulnerable. The risk would be most severe for those who are elderly, poor, socially disadvantaged, or without access to good medical care. Hence, if enacted, such a law must provide sufficient safeguards, appropriate supervision and control to avoid misuse of the provision. It may be noted that euthanasia is not lawful under common law in England, in spite of public demand to this effect, possibly because of its likely misuse.

Resorting to hunger strike does not amount to attempt to commit suicide— Conviction set aside Allahabad HC—1962

Ram Sunder Dubey v State,

AIR 1962 All 262

Facts: The accused an employee of a mental hospital was convicted under *section 309, IPC, 1860* for attempt to commit suicide by resorting to hunger strike to get his demand of reinstatement fulfilled. However, he denied that he had intended only to fast and produced evidence to show that he had consumed lemon juice during the fast. It was held that the life of the accused had not been in danger upto the time he broke his fast and no evidence to prove that he had intended to fast to the point of death.

Justice W Broome held:

The question is whether any offence under *section 309, IPC* has been made out. The peculiar difficulty about suicide by starvation is that it is a long drawn out process, which can be interrupted or given up at any stage (except perhaps the very last). Unless there is some overt declaration by the accused of his intention to fast to death, it is difficult to be sure that he really intended to persevere to the bitter end. And even if there is such an intention at the beginning, one has always to make allowance for the possibility of the accused changing his mind and breaking his fast before it becomes dangerous. Of course, if a person openly declares that he will fast to death and then proceeds to refuse all nourishment until the stage is reached when there is imminent danger of death ensuing, he could be held guilty of the offence of attempted suicide. But in the present case the evidence falls short of this and can scarcely be said to be sufficient to substantiate the charge. The revision is allowed.

Forced-feeding to save the life of a convict on hunger strike in jail is not degrading treatment in violation of ECHR—1983

6.6 Attempt to Commit Suicide

X v Germany,

[1983] 7 EHRR 152

In *X v Germany,* X, while in prison, had gone on hunger strike and had been forcibly fed by the prison authorities. His complaint to the European Commission of Human Rights was of maltreatment contrary to *Article 3*[97] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. The European Commission of Human Rights, while rejecting the complaint, observed:

> Forced feeding of a person does involve degrading elements which in certain circumstances may be regarded as prohibited by *Article 3* of the Convention. Under the convention the contracting parties are, however, also obliged to secure to every one the right to life as set out in *Article 2*. Such an obligation should in certain circumstances call for positive action on the contracting parties, in particular, an active measure to save lives when the authorities have taken the person in question into their custody. When, as in the present case, a detained person maintains a hunger strike this may inevitably lead to a conflict between an individual's right to physical integrity and the high contracting party's obligation under *Article 2* of the convention-a conflict, which is not solved by the convention itself.[98]

Upholding the action of the jail authorities, the commission said:

> It is possible to force-feed a detained person if this person, due to a hunger strike, would be subject to injuries of permanent character, and the forced feeding is even obligatory if an obvious danger for the individual's life **exists.**

Right to life includes right to die—section 309, IPC, 1860 declared unconstitutional vide Article 21 of the Constitution—Supreme Court (1994) (Later overruled in 1996)

P Rathinam v UOI,

AIR 1994 SC 1844 : *(1994) 3 SCC 394*

Justice Hansaria held:

P Rathinam and Nagbhusan Patnaik the two petitioners have assailed the validity of *section 309 of IPC, 1860* by contending that the same is violative of *Article 14* and *21* of the *constitution*.

...*section 309 of IPC* deserves to be effaced from the statute book to humanise our penal laws. It is a cruel and irrational provision, and it may result in punishing a person again who has suffered agony and would be undergoing ignominy because of his failure to commit suicide. An act of suicide cannot be said to be against religion, morality or public policy, and an act of attempted suicide has no baneful effect on society. Further, suicide or attempt to commit suicide causes no harm to others, therefore, the State's interference with the personal liberty of the concerned persons is not called for. Thus, section 309 violates *Article 21*, and so, it is void…

If a person has the right to live *vide Article 21 of the Constitution*, the question is whether he has a right not to live. Logically it must follow that the right to live will include the right not to live, say, the right to die or to terminate one's life. Right to live of which *Article 21* speaks of can be said to bring in its trial the right not to live a forced life.

Morality has no defined contour (boundary) and it would be too hazardous to make a bold and bald statement that commission of suicide is per se an immoral act...

The petition is allowed.

Right to life does not include right to die—P Rathinam, overruled section 309 IPC, 1860 held constitutional—Supreme Court—1996

Gian Kaur v State of Punjab[99]

Justice JS Verma held:

The appellants, Gian Kaur and her husband Harbans Singh, were convicted by the trial court under *section 306,*

IPC, 1860 for abetting the commission of JS Verma, GN Ray, NP Singh, Faizanuddin and GT Nanawati, JJ. of suicide by Kulwant Kaur. On appeal to the High Court, the conviction of both has been maintained.

The conviction of the appellants has been assailed inter alia on the ground that *section 306, IPC, 1860* is unconstitutional. It is urged that "right to die" being included in *Article 21 of the Constitution* as held in *P Rathinam* declaring *section 309, IPC, 1860* to be unconstitutional, any person abetting the commission of suicide by another is merely assisting the enforcement of the fundamental right under *Article 21* and, therefore, *section 306, IPC, 1860* penalising assisted suicide is equally violative of *Article 21*.

The question is whether the scope of *Article 21* also includes the right to die? When a man commits suicide, he has to undertake certain positive overt acts and the genesis of those acts cannot be traced to or be included within the protection of the right to life under *Article 21*. The significant aspect of sanctity of life is also not to be overlooked. *Article 21* is a provision guaranteeing "protection of life and personal liberty" and by no stretch of imagination can extinction of life be read to be included in the protection of life. Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, the court reiterated that it is difficult to construe *Article 21* to include within it the "right to die" as a part of fundamental right guaranteed therein. "Right to life" is a natural right embodied in *Article 21*, but suicide is an unnatural termination or extinction of life, and therefore, incompatible and inconsistent with the concept of right to life.

... section 306 enacts a distinct offence, which is capable of existence independent of *section 309, IPC, 1860*. Section 306 prescribes punishment for abetment of suicide, while section 309 punishes attempt to commit suicide. Abetment of attempt to commit suicide is outside the purview of section 306, and it is punishable only under *section 309* read with *section 107*, *IPC, 1860*. In certain other jurisdictions, even though attempt to commit suicide is not a penal offence, yet the abettor is made punishable. The provision there, provides for the punishment of abetment of suicide as well as abetment of attempt to commit suicide. Thus, even where the punishment for attempt to commit suicide is not considered desirable, its abetment is made a penal offence. In other words, assisted suicide and assisted attempt to commit suicide are made punishable for cogent reasons in the interest of society.

The appeal was dismissed.

Attempt to counsel or procure suicide of another is punishable—Court of Appeal—1977

R v Moshane,

(1977) 121 SJ 632 : 66 Cr App R 97 (CA)

Facts: The appellant's grandmother died leaving the bulk of her estate to her mother having a life interest in the income from it. The mother suffered from fantasies and had threatened suicide for years. In 1975, she had a fall and was admitted into a retreat to convalesce. The appellant visited her mother at this retreat three times and after the second visit, her mother was found in a coma and it was suspected that the appellant had supplied her with drugs. Accordingly, the police arranged to have video and sound recordings made during the next visit of appellant to her mother, with neither of them being aware of the fact.

On this third visit, the appellant was seen to pin a packet containing Nembutal tablets inside her mother's clothing. Suicide was discussed, the appellant told her mother the number of tablets it was necessary to take to get the desired result (suicide), and at the same time the appellant wanted that her name should not be mentioned in connection with her mother's preparation to commit suicide or else she would not inherit under her grandmother's will. She was also heard saying, "Let's do not make a mess of it this time. We thought we had done so well before." The appellant was convicted of, inter alia, attempting to counsel or procure her mother's suicide under section 2 (1) of Suicide Act 1961.[100] She appealed against conviction on the grounds that the court did not disclose an offence known to the law and that the offence was not committed unless the person counselled thereafter formed an intention to commit suicide.

Held, any attempt to commit an offence was an offence at common law and it followed that the appellant had been properly indicted on that count even though, the crime denned in section 2 (1) of Suicide Act 1961 was itself in the nature of an attempt, the suicide involved need not be an actual or attempted suicide and in the instant case appellant had been rightly convicted as the case was one of a suicide pact, and not, in the nature of an attempt to commit an impossible crime, for the mother might have taken Nembutal tablets.

Assisted suicide or euthanasia is illegal—English Law—United Kingdom— ECHR—2002

6.6 Attempt to Commit Suicide

R (on the application of Pretty) v Director of Public Prosecutions,

[2002] 1 All ER 1 (HL) : [2001] UKHL 61 : [2002] ACD 41 : *[2001] 3 WLR 1598*

and

Pretty v United Kingdom,

[2002] 35 EHRR 1 : [2002] ECHR 427 : [2002] All ER (D) 286 (Apr)

Facts: Dianne Pretty, the appellant was suffering from motor neurone disease, a progressive degenerative illness from which she had no hope of recovery. She was mentally alert and wanted to bring her life to a peaceful end but her physical incapacity was such that she could not take her own life without help. With the support of her family, she wished to enlist the help of her husband to that end. Her husband was willing to give such help, but only if he could be sure that he will not be prosecuted under section 2 (1)[101] of Suicide Act 1961 for aiding and abetting her suicide.

Accordingly, Pretty requested the Director of Public Prosecutions (DPP) not to prosecute him for the offence of assisting suicide contrary to section 2 (1) of the Suicide Act 1961. Under section 2 (4), of Suicide Act, no such prosecution could be instituted without DPP's consent. But DPP refused to give such an undertaking.

After the DPP refused to provide the undertaking sought, Pretty applied for judicial review, seeking a declaration that the refusal was unlawful since it infringed certain of her rights under the European Convention for Protection of Human rights and Fundamental Freedoms 1950, as set out in sch 1 to Human Rights Act 1998. On dismissal of her application, she appealed to the House of Lords. The House of Lords dismissed her appeal and some of the significant statements in their judgment were:

(i) Section 2 (1) of the 1961 Act did not treat individuals in a discriminatory manner. The 1961 Act conferred no right to commit suicide and there was no unequal treatment before the law in respect of the offence under section 2 (1).

(ii) There is a risk that assisted suicide may be abused in the sense that such people may be persuaded to die or that they ought to want to die.

(iii) Recognising that a terminally ill or dying person's wish to die cannot of itself constitute a legal justification to carry out actions intended to bring about death.

Having lost the battle in domestic court, for judicial review, Pretty moved the European Court of Human Rights. Pretty placed before the court that the refusal of immunity from prosecution by the United Kingdom, deprived her of rights guaranteed to her pursuant to *Articles 2*, *3*, *8*, *9* and *14*[102] of the European Convention on Human Rights, protecting the "right to life", "prohibition of torture", "right to respect for private and family life", "freedom of thought, conscience and religion" and "prohibition of discrimination" respectively.

However, the European Court of Human Rights refused to intervene and affirmed the judgment of the House of Lords. In so ruling the European Court of Human Rights recognised that *Article 8* ensures a right to autonomy that can encompass decisions about the way in which someone might prefer to die. However, an interference with *Article 8*, right to life is justifiable if it is "in accordance with the law" and "necessary in a democratic society for the protection of the rights and freedoms of others."

The court held that the ban on suicide assistance by the United Kingdom was not unconstitutional. The nature of the ban on Suicide Assistance was not disproportionate because the Director of Public Prosecution (DPP) retained the right to decide not to prosecute and the sentence could very widely, from probations to the maximum of 14 years that can be accorded, according to the nature of case.

As regards Pretty's assertion of discrimination *vide Article 14* in as much as the domestic law permits the able-bodied persons to commit suicide yet prevents an incapacitated person form receiving assistance in committing suicide, the court ruled that *Article 14* had not been violated. The British law distinguishing between those physically capable and those physically incapable of committing suicide had an objective and reasonable justification.

Similarly, the courts in other countries, such as Norway,[103] Alaska, etc, have upheld the convictions both of physicians and others[104] for actively hastening death.[105]

Review petition was dismissed.

Liability for Complicity in Suicide: Suicide Act 1961, section 2 (1)—An offence- specific policy identifying the facts and circumstances to accord consent for prosecution of those assisting in suicide of persons suffering from terminal disease in accordance with their future wish be promulgated—House of Lords—2009

R (on the application of Purdy) v Director of Public Prosecutions[106]

The House of Lords in *R (on the application of Purdy) v Director of Public Prosecutions*, (2009) directed the Director of Public Prosecution to formulate an offence specific policy identifying the facts and circumstances to be taken into consideration for prosecution of persons assisting in suicide of persons suffering from terminal disease envisaging their future wish to commit suicide under section 2 (1)(a) of Suicide Act 1961.[107]

The complainant suffered from the disease of primary progressive multiple sclerosis for which there was no known cure. She expected that there would come a stage in her disease when her continuing existence would become unbearable; when that happened she would wish to end her life whilst she was still physically able to do so. However, by that stage, she would be unable to do so without assistance. She, therefore; would wish to travel to a country where assisted suicide was lawful. Her husband was willing to help her make a journey. Provided an assurance was given by the Director of Public Prosecution that he would not be prosecuted for assisting his wife vide section 2 (4) of Suicide Act 1961.[108]

The claimant therefore wished to know whether her husband would be likely to be prosecuted under section 2 (1)(a) of the 1961 Act in the event that he assisted her in making arrangements to travel aboard for the purpose of committing suicide. She sought judicial review of the failure of the DPP to promulgate a specific policy, in determining in any case whether proceedings for an offence should be instituted as to the factors to be taken into account when deciding whether prosecutions would be brought under section 2 of the Suicide Act 1961. She submitted that in the absence of such a policy the prohibition against assisted suicide interfered with her right to respect for private and family life under *Article 8* (1)[109] of the European Convention for Protection of Human Right and Fundamental Freedoms 1950 (as set out in Schedule 1 to Human Right Act 1998) and was not justified under *Article 8* (2) because it was not in accordance with the law.

Her claim for judicial review was dismissed. The Court of Appeal went on to rule that if there had been an interference with the claimant's right under *Article 8* (1) it had been justified under *Article 8* (2) as being in accordance with the law. The claimant appealed to the House of Lords.

Allowing the appeal the House of Lords held the right to respect for private life under *Article 8* (1) of the European Commission of Human Rights was engaged in the instant case; the way a person chose to pass the closing moments of her/his life was part of the way she/he lived. It was well established that the Convention principle of legality required that the law should be formulated with sufficient precision to enable the individual, if need be with appropriate advice, to regulate her conduct.

The court said the question was, therefore,

(i) Whether the Code satisfied the requirements of accessibility and foreseeability, in an exceptional case such as that to which the circumstances of the claimant in the instant case, depicts; and

(ii) Whether it was in the public interest that proceedings under section 2 (1) should be instituted against those who had rendered assistance, in case where the offence in contemplation was aiding or abetting the suicide of a person who was terminally ill or severely and incurably disabled, who wished to be helped to travel to a country where assisted suicide was lawful and who, having the capacity to take such a decision, and so freely and with a full understanding of the consequences.

Accordingly, the House of Lords with a view to provide the decision making process transparent asked the Director of Public Prosecutions to promulgate an offence-specific policy identifying the facts and circumstances which he would take into account in deciding in a case, such as that which the instant case exemplified whether or not to consent to a prosecution under section 2 (1) of the Suicide Act 1961.

Medical treatment—patient's request for cessation of treatment prevails over the desire of the medical profession to keep the patient alive—FD 2002

Re *B,*

[2002] 2 All ER 449 (FD) : [2002] 1 FLR 1090

Per Dame Elizabeth Butler Sloss:

In 1999, the claimant, *B,* suffered a haemorrhage of the spinal column in her neck. She was admitted to a hospital run by the defendant NHS trust. Although the claimant recovered sufficiently to return to work, her condition deteriorated at the beginning of 2001. She was readmitted to the hospital after suffering an intramedullary cervical spine cavernoma. As a result of the cavernoma, she... suffered complete paralysis from the neck down... She was treated with a ventilator, upon which she had been entirely dependent ever since.

After neurological surgery to remove the cavernous haematoma, she was able to move her head and articulate words. She gave formal instructions to the hospital through her solicitors that she wished artificial ventilators to be removed, even though she realised that would almost certainly result in her death.

However, the treating physicians and doctors, who had developed a close relationship with the claimant, were not prepared to turn off the ventilator, and instead reluctantly agreed to a one-way weaning programme by which, over a period of time assistance form the ventilator would be reduced, with the aim of allowing the claimant's body to become used to breathing again. There was, however, less than a 1% chance of independent ventilation, and the claimant rejected the weaning programme, fearing that it would lead to her suffering a long and painful death.

Instead, she applied to the court for; *inter alia*, a declaration that she had been treated unlawfully from 8 August 2001.

Allowing the petition, the court said that:

(i) The right of a competent patient to request the cessation of treatment had to prevail the natural desire of the medical and nursing profession to try to keep her alive. If mental capacity were not in issue and the patient, having been given the relevant information and offered the available options, chose to refuse treatment, that decision had to be respected by the doctors.

(ii) The doctors were not to allow their emotional reaction to, or strong disagreement with, the patient's decision to cloud their judgment in answering the primary question whether the patient had the mental capacity to make the decision.

(iii) There was a serious danger of a benevolent paternalism, which did not embrace recognition of the personal autonomy of the severely disabled patient.

(v) The claimant had been treated unlawfully by the Trust since 8 August 2001... The claimant was placed in an impossible position, and the Trust had been under a duty to do something effective to resolve the dilemma and to do so with some degree of urgency. Its failure to deal with the issue would result in the court making a small award of damages in addition to granting appropriate declarations.

The hospital authorities were accordingly held liable for ignoring the wishes of the patient to stop treatment.

Petition allowed.

6.6.6 Physician Assisted Suicide is a Crime

In New York, as in most of the States in the United States, it is a crime to aid or assist a man or a woman to commit or to attempt suicide,[110] but patients may refuse even life saving medical treatment.[111]

Right to refuse life saving treatment is patient's constitutional right but assisting a terminally ill person to commit suicide is an offence—US Supreme Court—1997

Vacco v Quill,[112]

521 US 793 (1997)

In *Vacco v Quill*, respondent physicians and three gravely ill patients who have since died, brought action challenging the constitutionality of New York Statutes making it a crime to aid persons in committing suicide or

attempting to commit suicide on the ground that it violates the equal protection clause of the fourteenth amendment to the US *Constitution*.[113] The matter came before US Supreme Court. The doctors asserted that although it would be "consistent with the standards of their medical practice" to prescribe the lethal medication for "mentally competent, terminally ill patients" who are suffering great pain and desire, a doctor's help in taking their own lives, they are deterred from doing so by New York's ban on assisting suicide. Similar was the contention in the *Washington v Glucksberg,* 521 US 702 (1997) : [1997] 117 S Ct 2258.

Rejecting the petitioner-respondent's contention, the US Supreme Court unanimously held that there is a difference between the patients common law right "to refuse treatment", and "assisting a person to commit suicide". It is based not on the principle of "right to hasten death", but on well-established "traditional rights to bodily integrity and freedom from unwanted touching".

The distinction between "refusing life saving treatment" and "assisted suicide" is not arbitrary and "irrational". By permitting one to refuse unwanted medical treatment and while prohibiting another from assisting a suicide, the New York law follows a long-standing and rational distinction under the "due process clause", which supports the distinction between "assistance to suicide", which is banned; and practices, such as "termination of critical life support and death hastening pain medication", which is permitted.

United States—prohibition against assisted suicide does not violate due process clause—US Supreme Court—1997

Washington v Harold Glucksberg,[114]

521 US 702 (1997)

In *Washington v Gluksberg*, five physicians, three terminally ill plaintiffs, who wished to hasten their death and compassion in dying, a non-profit organisation (that counselled people considering physician-assisted suicide), sued in district court seeking a declaration that the Washington law[115] banning assisted suicide is unconstitutional because it places an undue burden "on the exercise of constitutionally protected", "liberty interest", "due process clause" which extends to a personal choice by a mentally competent, terminally ill adult to commit physician assisted suicide, relying primarily on *Planned Parenthood of Southeastern Pennsylvania v Casey*.[116]

The question presented in this case was whether Washington's law prohibiting "caus [ing]" or "aid [ing]" a suicide offends the fourteenth amendment to the United States *Constitution*.[117]

The United States District Court for the Western District of Washington, agreeing with the petitioner's contention, held that Washington law banning assisted suicide is unconstitutional. The Court of Appeal, However, reversed the district courts findings. The physicians moved the US Supreme Court, which rejected the petition.

Chief Justice Rehnquist held that:

(1) Asserted right to assistance in committing suicide was not fundamental liberty interest protected by due process clause, and

(2) Washington's ban on assisted suicide was rationally related to legitimate government interests.[118]

It has always been a crime to assist a suicide in the State of Washington. In 1854, Washington's first territorial legislature outlawed "assisting another in the commission of self-murder."[119]

Unwanted medical treatment in case of mentally ill prisoner dangerous to him does not violate due process clause—US Supreme Court—1990

Washington v Walter Harper,

494 US 210 (1990)

A mentally ill state prisoner filed civil rights action challenging prison policy that authorised his treatment with antipsychotic drugs against his will without judicial hearing. The Washington Supreme Court, found the policy clause as violative of the due process clause and the State appealed before the United States Supreme Court.[120]

Justice Kennedy of the Supreme Court held that the case was not rendered moot by virtue of fact that prisoner was not currently being treated with antipsychotic drugs against his will; treatment of prisoner against his will did not

violate substantive due process where prisoner was found to be dangerous to himself or others and treatment was in prisoner's medical interest; and administrative procedures set by policy including provision for review by administrative panel as opposed to judicial decision maker, comported with requirement of procedural due process.

Withdrawal of unwanted medical treatment by incompetent person not permissible in the absence of clear and convincing evidence of patient's desire—informed consent doctrine—US Supreme Court

Cruzan v Director, Missouri Department of Health,[121]

497 US 261

Nancy Cruzan was in a Missouri State hospital in a PVS (due to an accident), a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function. The State of Missouri was bearing the cost of her care.

Since Nancy had virtually no chance of regaining her mental faculties, her parents (guardian of petitioner) asked hospital authorities to terminate the artificial nutrition and hydration procedures that would finally cause her death.

The hospital refused to honor the request without court approval. The parents then sought and received authorisation from the State trial court for termination. The court found that a person in Nancy's condition had a fundamental right under the State and Federal Constitutions to refuse or direct the withdrawal of "death prolonging procedures".

The court also found that Nancy's expressed thoughts at the age of 25 in a conversation with a housemate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally, suggests that given her present condition she would not wish to continue on with her nutrition and hydration.

The Supreme Court of Missouri reversed by a divided vote. The court found that Nancy's statements to her roommate regarding her desire to live or die under certain conditions were "unreliable for the purpose of determining her intent", "and thus insufficient to support the co-guardians claim to exercise substituted judgment on Nancy's behalf".

In appeal the Supreme Court of the United States affirmed the decision of the Supreme Court of Missouri. The question was whether Cruzan has a right under the United States *Constitution*, which would require the hospital to withdraw life-sustaining treatment from her under these circumstances... The Supreme Court in its earlier decision in *Union Pacific Railway Co v Botsford,* 141 US 250, p 251 (1891): has observed that:

[N] o right is held more sacred, or is more carefully guarded, by me common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. Justice Cardozo, aptly described this doctrine in *Schloendroff v Society of New York Hospital*,[122] that:

Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages. The informed consent doctrine has become firmly entrenched in American tort law...

The logical corollary of the doctrine of informed consent is that the patient generally possesses that right not to consent, that is, right to refuse treatment.

Whether or not Missouri's clear and convincing evidence requirement comports with the United States *Constitution* depends in part on what interests the State may properly seek to protect in this situation.[123] Missouri relies on its interest in the protection and preservation of human life.

Chief Justice Rehnquist held that:

(i) the United States *Constitution* did not forbid State of Missouri form requiring clear and convincing evidence of an incompetent's wishes to the withdrawal of life-sustaining treatment.

(ii) State Supreme Court did not commit constitutional error in concluding that evidence adduced at trial did not amount to clear and convincing evidence of patient's desire to cease hydration and nutrition; and

(iii) due process did not require State to accept substituted judgment of close family members absent substantial proof that their views reflected those of patient.

The judgment of the Supreme Court of Missouri affirmed.

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55 Subs. by Act 8 of 1882, section 7, for the words "and shall also be liable to fine".

56 *Emperor v Mulia,* AIR 1919 All 376; also see In Re *Maragatham,* AIR 1961 Mad 498 : 1961 Cr LJ 781 discussed under *section 307, Indian Penal Code, 1860*.

57 *Dwarka Poonja v Emperor,* (1912) 14 Bom LR 146.

58 *Queen v Ramakka,* (1884) 8 Mad 5.

59 See KD Gaur, *A Textbook on Indian Penal Code,* 4th Edn, 2008, see *Indian Penal Code, 1860, section 309*—Right to Die vis-à-vis Right not to Die—A Constitutional Dilemma.

60 Thomas L Beachan, *"The Justification of Physician Assisted Death",* Indiana Law Review, 1996, no 29, pp 1173, 1175.

61 *Dasrath Paswan v State of Bihar,* AIR 1958 Pat 190 : 1958 Cr LJ 548.

62 AIR 2018 SC 1665 : 2018 (8) Scale 433, Dipak Misra, CJI, AK Sikri, AM Khanwilkar, Dr Chandrachud and Ashok Bhushan, JJ delivered the judgment.

63 *Sunil Paul,* Times of India dated 15 March 2018, p 14 (Pune edition).

64 (2002) 35 EHRR 1 : [2002] ECHR 427 : [2002] All ER (D) 286 (Apr), M Pellonpaa P, J. Discussed under the heading, *English Law—Assisted Suicide or Euthanasia is illegal*.

65 European Commission of Human Rights, *Article 8*—"Right to respect for family and private life:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

66 European Commission of Human Rights, *Article 3*—Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

67 RS Macoy, "Physician Assisted Suicide and Euthanasia", New Strait Times, 2 June 1995.

68 355 A 2d 647 (NJ) : 70 NJ 10 (1976)—certiorari denied, 429 US 922 (1976); see *Union Pacific Railway Co v Botsford,* 141 US 250 (1891).

69 Persistent Vegetative State is the modern nomenclature for "irreversible coma", state of permanent unconsciousness. People in a PVS can be kept alive for years with the aid of life support system to keep them breathing and by providing artificially delivered nutrition and hydration. A man in a PVS is not "terminally ill" (under which a person has less than six months to live). Neurologically, PVS means death of the brain stem the part of the lower brain that controls respiration. Hence, PVS is not included in the definition of 'brain death', which requires that the entire brain) has ceased to function.

70 *Cruzan v Director, Missouri Department of Public Health,* 497 US 261 (SC) 1990.

71 Reported in *P Rathinam v UOI,* AIR 1994 SC 1844 : (1994) 3 SCC 394.

72 *Vacco v Quill,* 521 US 793, p 799 (1997).

73 John A Robertson, "The Rights of the Critically ill", in *An American Civil Liberties Union Handbook,* 1983, pp 1-4.

74 See *"X" v Hospital "Z",* AIR 1999 SC 495, p 498, para 7 : (1998) 8 SCC 296. The Hippocratic oath is an ethical code attributed to the ancient Greek Physician Hippocrates. It is an oath to observe medical code and ethical conduct by medical profession sworn by medical students when they become qualified to become doctor.

75 Carol A Pratt, *"Efforts to Legalize Physician Assisted Suicide in New York, Washington and Oregon: A Contrast between Judicial and Legislative Approaches—Who should decide?"* Oregon Law Review, 1998, pp 1027, 1031.

76 Carol A Pratt, "*Efforts to Legalize Physician Assisted Suicide in New York, Washington and Oregon: A Contrast between Judicial and Legislative Approaches --Who should decide?",* Oregon Law Review, 1998, p 7, "Living Will"

controls events at a later stage when the man is still alive, but is unable to take decision about himself, whereas a "will" devising property assets of a man operates upon his death.

77 "Terminal disease" is defined as "an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months".

78 On 4 November 1997, the effort to repeal Oregon's Death with Dignity Act 1994 was turned down by 60 percent of the voters-nine per cent more than that of 1994 when it was just 51 per cent of the voters who had approved of the Act. This clearly demonstrates that majority is in favour of such a legislation to help the terminally ill patients from undergoing the agony and torture of lingering of life without any reason. Washington and California proposals were narrowly defeated that would have allowed physicians to administer lethal injections.

79 *Washington v Gluksberg,* 521 US 702 (1997).

80 Alon Meisel and Kathy L Cerminara, *The Right to Die—The Law of End-of-Life Decision Making,* 3rd Edn, Aspen Publications, New York, 2005, pp 90-94.

81 Maurice de Wachter, *"Active Euthanasia in the Netherlands"*, The Journal of American Medical Association, no 262, 1989, pp 3316 and 3317. Fine of the fifth category is roughly equivalent to USD 60,000.

82 NS Jecker, "Physician-Assisted Death in the Netherlands and the United States; Ethical and Cultural Aspect of Health Policy Development", *Journal of American Geriatrics Society,* 627, pp 627 and 628; see also John Keown, *"On Regulating Death"*, Hasting Center Report, March-April, 1992, pp 39 and 40, Royal Dutch, Medical Association's, *"Guidelines for Euthanasia"*.

83 Maurice de Wachter, *"Euthanasia in the Netherland"*, Hastings Center Report, no 22, March-April, 1992, pp 23 and 26.

84 Johannes van Delden, et al, *"The Remmelink Study-Two Years Later"*, Hastings Center Report, no 23, November-December 1993, pp 24 and 25.

85 EJ Emanuel, *"Euthanasia—Historical, Ethical and Empiric Perspectives"*, Archives Internal Medicine, no 154, 1994, pp 1890, 1897.

86 See *"Euthanasia, The Netherlands, New Rules",* available at www.justice.nl.; Coral J Williams, *"Netherland OKs Assisted Suicide",* Los Angeles *Times,* 11 April 2001; Dow Jones, *"Dutch Parliament Approves Euthanasia Bill"*, Associated Press, 10 April 2001; see RL Marquet et al, "Twenty-Five Years of Requests for Euthanasia and Physician-Assisted Suicide in Dutch General Practice: Trend Analysis", *British Medical Journal,* no 26, 2003, p 201.

87 Under the law, a patient must be experiencing irremediable and unbearable suffering, have been informed of other medical options and been advised by at least one other doctor beside the one offering suicide assistance. Carol J Williams, *"Netherlands OKs Assisted Suicide"*, Los Angeles *Times,* 11 April 2001.

88 David W Kissane, Annetter Street and Philip Nitschke, "Seven Deaths in Darwin: Case Studies Under the Rights of the Terminally Ill Act, Northern Territory, Australia", Lancet, no 352, 1998, Lancet, p 1097; Bradley Perrett, "Australia Kills Off Pioneering Euthanasia Law", Reuter News Service, 24 March 1998, at A22; see Nadia Miraudo, "Euthanasia is Illegal but One in Three Doctors Has Granted a Terminally Ill Person's Wish to Die", West Australian Sunday Times, 28 May 2000.

89 Kim Wheatley, *"Dying With Dignity Bill to Be Tabled"*, *Advertiser,* 13 March 2001. See Lisa Creffield, *"Euthanasia Legislation Receives New Lease on Life"*, South China Morning Post, 1 December 2001.

90 *"French Minister Takes Dutch Cue to Push Euthanasia",* Reuters English News Service, 16 April 2001.

91 Ruben Armendariz, *"Euthanasia, A Debate With No Reprieve",* Inter Press Service, 4 February 2001.

92 See Paul Meller, *"Belgium: Euthanasia Ban Ends",* New York Times, 24 September 2002; *"Belgium passes Right-to-die Bill",* cnn.com/world, 16 May 2002.

93 *"Swiss to Make Assisted Suicide Legal in State Care Homes",* Agence France-Presse, 27 October 2000.

94 See *"Colombia Allows Euthanasia for Terminally Ill Patients",* Agence France-Presse, 21 May 1997. 95 49 F 3d 586 (US).

95 49 F 3d 586 (US).

96 The *Indian Penal Code, 1860*, Chapter 10.

97 The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, *Article 3* provides: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

98 [1983] 7 EHRR 152, pp 153, 154.

99 AIR 1996 946 : *(1996) 2 SCC 648* : JT 1996 (3) 339 : 1996 Scale (2) 881. The Bench comprised

100 Suicide Act 1961, section 2 (1) reads: A person who aids, abets, counsels or procures the suicide of another, or an attempt by another, to commit suicide, shall be liable to conviction on indictment to imprisonment for a term not exceeding fourteen years.

6.6 Attempt to Commit Suicide

101 The Suicide Act 1961, Act provides as follows:

(1) The rule of law whereby it is a crime for a person to commit suicide is hereby abrogated.

(2) (a) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.

(b) If on the trial of an indictment for murder or manslaughter it is proved that the accused aided, abetted, counselled or procured the suicide of the person in question, the jury may find him guilty of that offence.

102 (2002) 35 EHRRI, *Article 9* of the CHR states: **Freedom of thought, conscience and religion**— 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practices and observance. 2. Freedom to Manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

103 Alan Meisel, Kathy L Cerminara, *Right to Die—The Law of End of Life Decision Making,* 3rd Edn, Aspen Publications, 2005, pp 12-94.

104 *"Norway upholds Euthanasia Conviction"*, Associated Press, 14 April 2000.

105 Craig S Smith, 'Son's to die and mother's help stir French debate', New York Times, 27 September 2003.

106 *(2009) 4 All ER 1147* (HL) : [2010] 1 Cr App R 1 : *[2009] 3 WLR 403*. Lord Phillips of worth Matravers, Lord Hope of Craighead, Baroness Hale of Richmond, Lord Brown of Eaton-Under- Heywood and Lord Neuberger of Abbotsbury.

107 Section 2 of the Suicide Act 1961 provides for criminal liability for complicity in another's suicide; (2)(1)(a) states: A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years. (b) If on the trial of an indictment for murder or manslaughter it is proved that the accused aided, abetted, counseled or procured the suicide of the person in question, the jury may find him guilty of that offence.

108 Section 2 (4) provides that, "no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions".

109 European Commission of Human Right, *Article 8* enumerates—"Right to respect for family and private life", as stated below:

(1) Everyone has the right to respect of his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the rights and freedoms of others.

110 New York Penal Law, section 125.15, Manslaughter in the Second Degree: A person is guilty of manslaughter in the second degree when... (3) He intentionally causes or aids another person to commit suicide.

111 *Quill v Koppell,* [1994] 870 F Supp 78, 84. It is established under the New York law that a competent person may refuse medical treatment, even if withdrawal of such treatment will result in death.

112 The three patients, out of whom two were AIDS patients, stated that they had no chance of recovery, faced "the prospect of progressive loss of bodily function and integrity and increasing pain and suffering" and desired medical assistance in ending their lives.

113 Fourteenth Amendment to the US *Constitution*: "...No State shall deny to any person within its Jurisdiction the equal protection of the laws".

114 Chief justice Rehnquist delivered the opinion of the Court. Justices O'Connor, Scalia, Kennedy, and Thomas joined. Justices O'Connor, Ginsburg and Breyer filed opinions concurring the judgment.

115 Washington Rev Code (RCW 9A, 36.60); (a) A person is guilty of promoting a suicide attempt when he knowingly causes or aids another to attempt suicide. (b) Promoting a suicide attempt is Class C felony.

116 505 US 833 (1992).

117 The Fourteenth Amendment provides that no State shall "deprive any person of life, or property, without due process of law."

118 *Heller v Doe,* 509 US 219-391 (1993). The government interests, inter alia, include prohibiting killing and preserving human life; preventing the serious public health problems of suicide, "especially among the young, the elderly, and those suffering from depression or other mental disorders; protecting the medical professions" integrity and ethics and maintaining physicians "role as their patent healers; protecting the poor, the elderly, disabled persons in other vulnerable groups from indifference."

119 Act of 28 April 1854, section 17 reads: Every person deliberately assisting another in the commission of self-murder, shall be deemed guilty of manslaughter.

120 The Fourteenth Amendment to US *Constitution* says “No state shall... deprive any person of life, liberty, or property, without due process of law; nor deny...the equal protection of the laws”.

121 Chief Justice Rehnquist delivered the opinion of the court, in which White, O’Connor, Scalia, and Kennedy JJ, joined. Justices O’Conner and Scalia, filed concurring opinions. Justice Brennan filed a dissenting opinion, in which Marshall and Blackmum JJ, joined. Justice Stevens filed a dissenting opinion.

122 211 NY 125, pp 129-130 : 105 NE 92, p 93 (1914); Re *Quinlan,* 355 A 2d 647 (NJ) : 70 NJ 10 (1976).

123 *Youngberg v Romeo,* 457 US 307, p 321 (1982).

7.1 Punishment: Meaning, Aims and Objects

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

7 PUNISHMENT

7.1 Punishment: Meaning, Aims and Objects

Punishment may be defined as the sanction imposed on an accused by a court of law for violation of the rules and regulations of society according to norms and established procedures of law. It may be imposed on a person or on the property of the accused, depending on the nature and extent of crime in a particular case. Punishment aims to protect society from mischievous elements, by deterring potential offenders, and preventing actual offenders from committing further offences, to eradicate evils and to reform criminals and turn them into law-abiding citizens.

The object of punishment has been well summarised by Manu, the great Hindu lawgiver, in the following words: "Punishment governs all mankind; punishment alone preserves them; punishment wakes while their guards are asleep; the wise consider the punishment *(danda)* as the perfection of justice."[1]

This object is achieved partly, by inflicting pain in order to deter criminals and others from indulging in crime and partly, by reforming criminals.[2] It is also asserted that respect for law grows largely out of opposition to those who violate the law. The amount of punishment, however, is not uniform in all cases. It varies according to the nature of the offence, intention, age, mental condition of the person (s) and the circumstances in which the offence is committed. For instance, a boy of 10 years will be treated differently from a grown up man of 30 years, for committing the same offence, because of the difference in the mental capacity of the two, to distinguish between right and wrong. Likewise, a man of unsound mind (*section 84, IPC, 1860*) would be treated differently from a man of sound mind who commits murder intentionally.

The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment always ought to fit the crime; yet in practice sentences are determined largely by other considerations. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times on account of misplaced sympathies to the perpetrator of crime leaving the victim or his family into oblivion. Undue sympathy to impose inadequate sentence would do more harm to the justice system. (Para 14, 8, 9 and 7)

The law regulates social interest and arbitrates conflicting claims and demands. Security of person and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-culture conflict, where the living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be object of law which must be achieved by imposing appropriate sentence. Therefore, law as corner stone of the edifice of "order" should meet the challenges confronting the society.[3] (Para 6)

1 Haughton, *Institutes of Hindu Law,* 1825, p 189.

2 See PK Sen, *Penology Old and New,* TLL, 1929, pp 90-91, for the concept of punishment in the Hindu period; Law Commission of India's 42nd Report, on The *Indian Penal Code, 1860*, 1971, pp 44-81.

3 *State of Karnataka v Puttaraja*, *AIR 2004 SC 433* : *(2004) 1 SCC 475* : 2004 SCC (Cr) 300 : *2004 Cr LJ 579*. Doraiswamy Raju and Arjit Pasayat, JJ, delivered the judgment.

7.2 Theories of Punishment

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7.2 Theories of Punishment

Punishment is primarily used as a method of protecting society by reducing the occurrence of criminal behaviour. A crime may generate three types of reactions against a criminal, viz:

(i) **Punitive approach**: It considers the criminal as a notoriously dangerous person who deserves severe punishment to protect the society from his criminal conduct;

(ii) **Therapeutic approach**: It aims at curing the criminal tendencies which were the product of diseased psychology; and

(iii) **Preventive approach:** It seeks to eliminate those conditions from the society, which were responsible for crime causation.

The object of protecting society is sought to be achieved by deterrence, prevention, retribution and reformation. Of these, deterrence is usually regarded as the main function of punishment, others being merely secondary.

7.2.1 Deterrent Theory

According to this theory, the object of punishment is not only to prevent the wrongdoer from doing a wrong for the second time, but also to make him an example for other persons who have criminal tendencies. Salmond considers deterrent aspects of criminal justice to be the most important for control of crime.[4]

The chief aim of the law of crimes is to make the evil doer an example and to give a warning to all that are like-minded. In other words, the commission of every offence should be made a bad bargain. Among those who advocate deterrent punishment because of its social utility, some claim that the infliction of pain upon those convicted of crime serves to deter others from crime, and that it has great value for that reason, even if some individuals are not deterred. The notion that punishment reduces crime is based on the hedonistic assumption that people regulate their behaviour by calculation of pleasure and pain.[5]

The deterrent theory was the basis of punishment in England in the medieval period, and consequently, severe and inhuman punishments were inflicted even for minor offences. For instance, for an ordinary crime such as stealing, the culprits were subjected to punishment of death by stoning and whipping. In India, sentences of death or mutilation of limbs were imposed even for petty offences of forgery and stealing, etc, during the Mogul period. Even today, in most of the Islamic countries such as Pakistan, Iran, Iraq and Saudi Arabia, the deterrent theory is the basis of penal jurisprudence.

However, this theory has been criticised on the grounds that it has proved ineffective in checking crimes, and also that excessive harshness of punishment tends to defeat its own purpose by arousing the sympathy of the public towards those who are given cruel and inhuman punishment. Deterrent punishment is likely to harden the criminal instead of creating in his mind the fear of the law. Hardened criminals are not afraid of imprisonment.

7.2.2 Preventive Theory

Another object of punishment is to prevent or disable. The offenders are disabled from repeating the crime by punishment like death, exile or forfeiture of an office. By putting the criminal in jail, he is prevented from committing another crime. According to Paton:

> The preventive theory concentrates on the prisoner but seeks to prevent him from offending again in the future. Death penalty and exile serve the same purpose of disabling the offender. Critics point out that preventive punishment has the undesirable effect of hardening the first-time offenders or juvenile offenders by putting them in the association of hardened criminals.

7.2.3 Retributive Theory

In primitive society, punishment was mainly retributive. The victim was allowed to take revenge against a wrongdoer. The principle of “an eye for an eye, a tooth for a tooth, a nail for a nail” was the basis of criminal administration. According to Justice Holmes, “It is commonly known that the early forms of legal procedure were grounded in vengeance”.

The advocates of this theory urge that a criminal deserves to suffer punishment. The suffering imposed by the State, in its corporate capacity, is considered the political counterpart of individual revenge. It is said that unless the criminal gets the punishment he deserves, one or both of the following effects will be produced. The victim will seek individual revenge, which may mean lynching the accused (to murder an accused by mob action and without lawful trial as by hanging) if his friends co-operate with him, or, the victim will refuse to make a complaint or offer testimony, and the State will, therefore, be handicapped in dealing with criminals.

Retributive punishment gratifies the instinct of revenge or retaliation, which exists not merely in the individual wronged, but also in the society at large. In modern times, the idea of private revenge has been discarded, and the State has come forward to have the revenge in place of the private individual. However, the critics of the retributive theory point out that punishment in itself is not a remedy for the wrong. It merely aggravates the mischief. Punishment in itself is an evil and can be justified only on the ground that it is going to yield better results.

7.2.4 Reformative Theory

According to the reformative theory, the object of punishment is to reform criminals and that it accomplishes this by classifying or ingraining that crime does not pay or by breaking habits that criminals have formed. Even if an offender commits a crime under certain circumstances, he does not cease to be a human being. The circumstances under which he committed a crime may not occur again. The object of the punishment should be to bring about a moral reform of the offender. The criminal must be given some vocational training in art, craft or industry in jail so that he may be able to lead a good life and become a respectable citizen of society after his release.

While awarding punishment, the judge should study the character, antecedents and age of the offender, his family background, education and environment, the circumstances under which he committed the crime, the motive which prompted him to indulge in criminal activities etc. The object of doing so is to acquaint the judge with the circumstances under which the offence is committed, so that the punishment may be awarded to meet the ends of justice.

Critics of this theory state that if criminals are sent to prison to be transformed into good citizens, the prison will no more remain a prison, but will become a dwelling house. However, the deterrent motive should not be abandoned altogether in favour of the reformative approach. In fact, a perfect system of criminal justice cannot be based on any single theory of punishment. It has to be a combination of all. Every theory has its own merits and every effort should be made to take the good points of all. For instance, the reformative aspect must be given its proper place. The offender is not only a criminal to be punished but also a patient to be treated. Punishment should be in proportion to the gravity of crime. First time offenders should be treated leniently. Special treatment should be given to juvenile delinquents. Special courts should be set up for the trial of children and those in charge of them must try to find out ways and means of reforming them and not punishing them. A criminal should be able to secure his release by showing improvement in his conduct. The object of the concession, given to an offender, is to convince him that a life free of crime is better than the life in jail. Establishment of hospitals in prison on a large scale and improvement of living conditions in jails would serve a better purpose.

However, the courts should not confuse between correctional approach to prison treatment and nominal

punishment verging on decriminalization of serious social offences.[6] Courts which ignore the grave injury done to society, implicit in economic crimes committed by the white collar criminals, ill-serve social justice. Passing a soft sentence, when the need of the hour is different, could lead to a situation where innocents could become victims.

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4 Fitzgerald, *Salmond on Jurisprudence,* 12th Edn, pp 91-100.

5 NM Tripathi, *Bentham's Theory of Legislation*, 1979, pp 199-219.

6 *Hoskat v State of Maharashtra, AIR 1978 SC 1548* : *[1979] 1 SCR 192*. The accused, a reader in the Saurashtra University holding a MSc and a PhD degree from Karnataka University, was convicted for the offence of attempting to issue counterfeit university degrees. The Supreme Court held that the award of sentence till the rising of the courts by the sessions court was too lenient. The sentence awarded by the High Court for three years was just and reasonable. See also *Giasuddin v State of AP, AIR 1977 SC 1926* : (1977) 1 SCC 287 : 1978 SCR (1) 153.

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7.3 Causes of Crime

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7.3 Causes of Crime

The new outlook on punishment and the change in the social attitude towards the criminal has emerged due to the realisation that the criminal is also a part of society and needs sympathetic treatment. This change is largely due to the humanitarian approach, and the emergence of the concept of human rights and human dignity on national and international forums. Accordingly, a view has gained ground that the law should look at the criminal and not merely the crime, in fixing the punishment, and so, varied types of sanctions are applied, with a view to adopt the punishment to suit each particular category of criminals. Different sanctions are applied to children and juvenile delinquents, as opposed to adults; to mentally abnormal persons as against other individuals; to first time offenders as against the recidivist. The quantum of punishment also varies from a mere admonition to capital punishment depending on the nature and gravity of the offence.

In this connection, an important question that has puzzled the minds of jurists, criminologists, sociologists and psychologists is that why a man would prefer to deviate from the accepted norms of society as embodied in the law governing the particular community and representing the social code of behaviour. Hundreds of scholars, moralists, reformers, jurists and legislators have given their own explanation for crime and the ideas for its prevention. A good amount of literature is available on the subject. But what causes a specific individual to break a social sanction, or a law, or a custom has never been an enigma to the society.[7] Perhaps it would be of interest to examine some of the important theories of causation propounded by eminent jurists.

7.3.1 Pre-scientific Theories: Diabolical Criminal Conduct

The oldest theory advanced to explain criminal conduct is that the crime is the result of a person succumbing to the blandishments (allurements) of evil spirits. This view flourished in primitive, oriental, and medieval societies. Since it was thought that evil spirits infested the person and had to be driven out, the conventional notion of primitive punishment was either to exercise the evil spirits or to get rid of the possessed person by death or exile, i.e. “social death”. In part, this doctrine was based on the concept of protecting the community or family group against further outrage by the offending individuals, but far more important was the belief in the necessity and desirability of placating the Gods.

An excellent example of demonisation as a theory was the prosecution of witches in Massachusetts, USA, in 1962. These harmless women were thought to be possessed by the devil, and so it was thought that they had to be eliminated.[8] The belief in demonism still persists in many cultures and to a great degree in our traditions. The belief in charms to ward off evil spirits is still concurrent among people and among tribals in more isolated parts of Orissa, Madhya Pradesh, Bihar and Nagaland, and in countries like China and Myanmar.

7.3.2 The Classical Theory

The classical theory developed in England during the last half of the nineteenth century and spread to other European countries. The theory is based on hedonistic psychology. According to this philosophy, a man’s behaviour is governed by consideration of pain and pleasure. The pleasure contemplated from a particular act, namely,

violation of a legal rule, may be balanced against the pain anticipated from the same act. According to the proponents of this view, the penalty should be severe, so that the pain should exceed the pleasure derived from the violation of the law. The principle of equality in punishment was the order of the day, and no distinction was made between age, sanity, wealth, position or circumstances. However, later, the extreme idea of equality was modified and a concession was shown in respect of children and lunatics, and they were exempted from punishment.

7.3.3 Moral Insanity and Moral Imbecility

This was the most popular theory in the nineteenth century. The term “moral insanity” was used by James Cowles Prichard in 1835. Rush (1812) defined “moral derangement” as a State when the will becomes the involuntary vehicle of vicious actions through the instrumentality of passion. Ray (1833), an authority on medical jurisprudence, pointed out that crimes were committed under the influence of a blind instructive impulse, which was irresistible. He laid special emphasis on the propensity to destroy, and attempted a differentiation between homicidal mania and criminal homicide.

7.3.4 Anthropological Theories[9]

To explain deviant behaviour, it was thought that there must be anatomical or physiological differences between persons, in the organism as a whole, or in the nervous system. The criminal reacted differently because he was originally different from others.

Lombroso (1911) is the founder of this school and is universally credited with the initiations of the concept of “criminal man” as a distinct type. He insisted that the criminal was essentially altruistic, a savage. The inclination to assault or kill was explained as a persistence of animal or sub-human ancestral traits. According to this point of view, attention was paid to the “stigmata of degeneration”, namely, facial asymmetry, lower skull, deformed pate (usually high or pointed arch), receding lower jaw, scanty beard, low growing head hair and low forehead, meeting eyebrows, deformities of dental arches and teeth, coarse features, etc.

The theory of degeneration brought crime, insanity, mental deficiency and pauperism into a sequence of cause and effect. These behaviour patterns were no longer looked upon as mere accidents or results of “satanic interference”.

However, the criminal anthropology theory is no longer considered valid and good. It is said that crime is not an organic entity but a social phenomenon. Anthropometry and physical examination cannot aid in the recognition of the potential criminal.

7.3.5 Psychological Theories

There has been a shift to a psychological orientation in the effort to search for the causation of criminal behaviour. One has to deal with motives and driving forces of human conduct in order to explain criminality on the part of the individual.

Psychological theories center on instincts and desires. The former represent inherent fundamental needs, and as such are the major sources of energy in the organism. The latter are directed at goals. Man thrives to satisfy needs and attain goals. So there are the psychological beacons which materially aid in chartering the life course.

7.3.6 Sociological Theories

The influence of social environment on the conduct of man has been recognised since the birth of human society. Viewing society in the light of an organisation, the man is an integral part thereof, almost all thinkers starting from Plato have looked upon crime as indicative of disease or degeneracy of the former and aimed at the reformation of the same as indispensable from the normal health of the latter.

Perhaps the first sociologist to develop a theory of causation, beside the ecologists, was Edwin H Sutherland, a well-known criminologist of his time. His thesis, known as the “differential association” theory, envisages that individuals become criminals because they apparently have more contact in daily life with criminals or quasi-criminals than with non-criminals; that their milieu is heavily weighted by individuals who are crime motivated.

Another distinguished sociologist, Donald R Taft's thesis holds that in any culture which is highly competitive and materialistic, the strive for prestige and status is so highly impelled by social forces, crime rate would be high. His thesis is that a dynamic, complex and highly materialistic culture with inconsistencies between precept and practice, with a high degree of differential treatment between members of deviant groups and members of underprivileged and minority groups, with success measured more by "what you sow" than "what you have", or in conspicuous consumption rather than in integrity, is bound to have much crime.

7.3.7 Multiple Cause Approach: Multiple Fiction Theory

In contrast with the preceding school of criminology, which attempts to formulate a theoretical explanation of criminal behaviour, many scholars have insisted that crime is a product of a large number and great variety of factors and that these factors cannot be organised into general propositions which have no exception, ie, they insist that no scientific theory of criminal behaviour is possible. The multiple factor approach, which is not a theory, is used primarily in discussion of individual cases of crime. Thus, one crime may be caused by one combination of circumstances or "factors"; while another crime may be caused by another combination of circumstances or "factors".

As stated by Enrice Ferri, a distinguished criminologist, crime is the result of manifold causes, which, although found always linked into an intricate network, can be detected by means of careful study. The factors of crime can be divided into individual or anthropological, physical or natural and social factor. The anthropological factors comprise the age, sex, civil status, profession, domicile, social rank, instruction, education and the organic and psychic *constitution*. The physical factors are race, climate, the fertility and disposition of the soil, the relative length of the day and night, the season, the meteoric conditions, temperature. The social functions comprise the density of population, immigration, public opinion, customs and religion, public order, economic and industrial conditions, agriculture and industrial production, public administration of public safety, public instruction and education, public beneficence, and in general, civil and penal legislations.

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7 Barnes and Teeters, *New Horizons in Criminology,* 3rd Edn, 1966, pp 116-117.

8 Sutherland and Cressy, *Principles of Criminology,* 6th Edn, p 52.

9 Anthropological theories relate to the study of human beings in respect to the distribution, origin, classification and relationship of races.

7.4 Punishments under the Indian Penal Code, 1860

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7.4 Punishments under the Indian Penal Code, 1860

Chapter III of *Indian Penal Code, 1860* (sections 53 to 75) has laid down the general provisions relating to the punishments. The code has provided for a graded system of punishment to suit different categories of crime. Section 53 provides for five types of punishments[10] that can be awarded to a man convicted under *IPC, 1860*, namely:

(a) Death sentence;[11]

(b) Imprisonment for life;

(c) Imprisonment with or without hard labour;

(d) Forfeiture of property; and

(e) Fine.

The Code does not, in general, provide for a minimum penalty except in a few cases, such as murder, sexual offences etc.[12] A wide discretion has been given to the courts to award any punishment within the maximum limits of punishment prescribed for an offence in each case on its individual merit. The court must take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation, the age, sex, character and antecedent of the criminal, and whether the accused is a first-time offender, or a habitual or a professional criminal.[13] A provision has also been made for the imposition of the sentence of imprisonment for nonpayment of fine.[14]

7.4.1 New Forms of Punishment Suggested

It is suggested to add seven new forms of punishment to existing ones in *section 53, IPC, 1860* with a view to deter particular types of criminals.[15] Such punishments will have more psychological, social and moral impact on the criminals and will go a long way in curbing crimes. The proposed punishments are:

(i) Compensation to victims of crime;

(ii) Externment;

(iii) Public censure;

(iv) Community service; and

(v) Disqualification from holding public office.

However, except compensation to victims of crime, other forms of punishment have not been implemented. Even provisions relating to compensation is very inadequate and hardly serves any purpose.

10 *Indian Penal Code* (Amendment) Bill 1972, recommended for the addition of three more types of punishments under the code namely, externment (section 74A), compensation to victims of crime (section 74B) and public censure (section 74C). However, it was not accepted.

11 In case of a person below 18 years of age, at the time of the commission of offence, life imprisonment is substituted for death sentence. *Raisul v State of UP,* AIR 1977 SC 1822 : (1976) 4 SCC 301; *Alembic Glass Industries Ltd v Workmen, AIR 1976 SC 2091* : *(1976) 3 SCC 522*.

12 The *Indian Penal Code, 1860*, has prescribed a minimum sentence of imprisonment for life under sections 302 and 121; seven years under sections 397 and 398; seven and 10 years under section 376.

13 See *Jagmohan Singh v State of UP, AIR 1973 SC 947*, p 956 : *(1973) 1 SCC 20* : 1973 SCR (2) 541; The Supreme Court of India suggested the norms of death penalty. *Bachan Singh v State of Punjab,* AIR 1980 SC 898 : *(1980) 2 SCC 684* : *1980 Cr LJ 636*; *Edigga Annamma v State of AP, AIR 1974 SC 799* : (1974) 4 SCC 4433; *Machhi Singh v State of Punjab, AIR 1983 SC 957* : *(1983) 3 SCC 470*. See *Chawla v State of Haryana, AIR 1974 SC 1039* : *(1974) 4 SCC 579* : 1974 SCR (3) 340; *Modi Ram v State of MP,* (1972) Cr LJ 69, p 70 : AIR 1972 SC 2438 : (1972) 2 SCC 630; see also *Rajendra Prasad v State of UP, AIR 1979 SC 916* : *(1979) 3 SCC 646*.

14 In *section 64 of Indian Penal Code, 1860*, fine has been provided as the only punishment for minor offences as an alternative to imprisonment; in addition to imprisonment; the maximum limit is fixed, the actual fine to be imposed is left at the discretion of the court.

15 See KD Gaur, *Text book on Indian Penal Code,* 4th Edn (2009), pp 100-103, for detail discussion on the subject.

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7.5 Compensation to Victims of Crime

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7 PUNISHMENT

7.5 Compensation to Victims of Crime

Criminal law, which reflects the social ambitions and norms of the society, is designed to punish, as well as to reform criminals, but it hardly takes any notice of the victims.

The victims of crime are entirely overlooked in misplaced sympathy for the criminal. The guilty man is lodged, fed, clothed, warmed, lighted, and entertained in a model prison at the expense of the State, from the taxes that the victim pays to the treasury. And the victim, instead of being looked after, is contributing towards the care of prisoners during his stay in the prison, infact, it is a weakness of our criminal jurisprudence that the victims of crime do not attract due attention.[16]

7.5.1 Compensation under the Criminal Procedure Code 1973

In pursuance of the recommendations of the Law Commission of India in its 41st Report, 1969, a comprehensive provision for compensation to the victims of crime has been provided in *section 357 of the CrPC, 1973*. Under sub-section (1) to *section 357 of CrPC*, the trial courts and the appellate courts are competent to award compensation to the victims of crime, only after trial and conviction of the accused, in the following four cases:

(i) Meeting proper expenses of prosecution;

(ii) Compensation to a person (or his heirs) for the loss or injury caused by the offence when he can recover compensation in a civil court;

(iii) Compensation to persons entitled to damages under *Fatal Accidents Act 1855*; and

(iv) Compensation to a bona fide purchaser of property, which being the subject of theft, criminal misappropriation, cheating, etc, and is ordered to be restored to the person entitled to it.

Compensation under sub-section (1) can be ordered only where the court imposes a fine and the amount of compensation is limited to the amount of fine. No expenses or compensation can be ordered, if no fine has been imposed or when a person under *section 360 of CrPC, 1973* is released on probation of good conduct or after admonition and fine is imposed.[17]

According to sub-section (3) to *section 357, CrPC, 1973*, the court is empowered to award compensation for loss or injury suffered by a person, even in cases where fine does not form a part of a sentence.

Sub-section (3) to section 357 reads:

…

(1) When a Court imposes sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

…

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

…

7.5.2 Victim Compensation Scheme:

Of late, the *Code of Criminal Procedure* (Amendment) Act 2008 (Act 5 of 2009) has provided for a comprehensive Victim Compensation Scheme under a new section 375A added in the *Code of Criminal Procedure 1973*. Clause (1) of the section envisages that:

> Every State Government in coordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

Clauses 2 to 6 of *section 357A, CrPC, 1973* provide that the District and State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded on the recommendation of the court to the victim or his dependents who have suffered loss or injury as a result of the crime. The District and State Legal Authority in order to alleviate the suffering to the victim may provide immediate first-aid facility or medical benefits and award adequate compensation.

However, it is found that the trial courts seldom resort to exercising their powers liberally. Perhaps, taking note of the indifferent attitude of the subordinate courts, the apex court in *Hari Kishan*,[18] directed the attention of all courts to exercise the provisions under *section 357 of CrPC, 1973*, liberally and award adequate compensation to the victim, particularly when an accused is released on admonition, probation or when the parties enter into a compromise. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal judicial system. To set an example, the apex court in *Sarup Singh,*[19] awarded Rs 20,000 compensation to the widow of the deceased and reduced the sentence of seven years imprisonment to one year.

In the 2014 case of *Suresh v State of Haryana,* AIR 2015 SC 518 : 2014 (4) Crimes 363 : 2015 Cr LJ 661*,* in which Devender Chopra and his deceased son Abhishek Chopra, who had left their factory for their house in DLF Gurgaon on 18 December 2000 but did not reach their house. On investigation it was found that both were kidnapped for huge lump sum and were killed and murdered on not getting lump sum amount for which the accused was prosecuted and convicted under *sections 364A*, *300* and *201* of *IPC, 1860* and sentenced to life imprisonment which was upheld by the Apex Court.

In the present case, *de facto* complainant PW2 Raman Anand filed petition for compensation to family members of deceased and his son who were abducted and killed by accused persons and the same has been dismissed by the High Court without any reason. In fact even without such petition, the High Court ought to have awarded compensation. There is no reason as to why the victim's family should not be awarded compensation under section 357A by the State. Thus, the State Government is liable to pay compensation to the family of the deceased. Further, the Supreme Court determined the interim compensation payable for the two deaths to be rupees ten lacs, without prejudice to any other rights or remedies of the victim family in any other proceedings and accordingly directed the State Government of Haryana to pay interim compensation of Rs 10 lacs. This is a welcome judgment. It is hoped that the courts below will follow the example set by apex court and award compensation to the victims of crime.

Tekan: Practice of giving different amount of compensation to rape victim ranging from Rs 20,000 to Rs 10,00,000 (rupees twenty thousand to ten lakhs) as compensation needs to be introspected by all States and Union Territories taking into consideration scheme framed by State of Goa. Scheme made by National Commission of Women (NCW), revised by NCW on 15 April 2010 shall apply in addition to any application that may be made under *sections 357*, *357A* of *Code of Criminal Procedure 1973*. Supreme Court - 2016

Tekan alias *Tekan v State of MP now Chhattisgarh*[20]

The accused developed intimacy with the victim and assured her that he is in love with her and on the pretext of marriage committed sexual intercourse for almost a year knowing fully well that she was blind. In course of time

when the prosecutrix aged 18 years became pregnant, the prosecutrix told the accused to marry her. At that point of time, the accused stopped visiting the house of the prosecutrix. Subsequent to it, the incident was disclosed to the father of the prosecutrix who called the meeting of the Panchayat in the village. In the Panchayat, the accused was also called. It is the case of the prosecution that in the Panchayat, the accused admitted the fact that he had committed sexual intercourse with the prosecutrix but refused to marry her and left the Panchayat. It was the specific case of prosecution that though the prosecutrix was blind, she could recognize the accused person by his voice and by touch.

The trial court convicted the accused under *section 376 IPC* for rape and sentenced to seven years rigorous imprisonment, which was confirmed by the High Court and upheld by Apex Court in appeal.

Coming to the question as to whether the prosecutrix is entitled to victim compensation and, if so, to what extent? Apex Court *suo motu* came to the conclusion that the victim, being in a vulnerable position and who is not being taken care of by anyone and having no family to support her either emotionally or economically, we are not ordering the respondent-State to give her any lump sum amount as compensation for rehabilitation as she is not in a position to keep and manage the lump sum amount. From the records, it is evident that no one is taking care of her and she is living alone in her village. Accordingly, we in the special facts of this case are directing the respondent-State to pay Rs 8,000 per month till her life time, treating the same to be an interest fetched on a fixed deposit of Rs 10,00,000. By this, the State will not be required to pay any lump sum amount to the victim and this will also be in the interest of the victim.

The Apex Court has provided in tabular form the scheme of compensation and rehabilitation to be provided to the victims of sexual assault in different States and Union Territories as stated below:

SCHEDULE

S. No.		**Details of Lost or Injury**	**Maximum Limit of Compensation**
1.		Rape of Minor	50,000
2.		Rape	25,000
3.		Rehabilitation	2,00,000
4.	Assam	Rape	75,000
		Rape of Minor/Gang Rape	1,00,000
5.	Bihar	Rape	50,000
6.	Delhi	Rape	3,00,000
		Rehabilitation	20,000
8.	Goa	In case of injury causing, severe mental agony to women and child (e.g. Rape cases, etc.)	10,00,000 (Ten Lakh)
9.	Gujarat	Rape	1,00,000
		Rehabilitation	50,000
11.	Haryana	Rape	3,00,000
		Medical expenses on account of injury	15,000
13.	Himachal Pradesh	Rape	50,000
14.	Jammu & Kashmir	Rape of minor or rape in	1,00,000

7.5 Compensation to Victims of Crime

S. No.		Details of Lost or Injury	Maximum Limit of Compensation
		police custody	
		Rape	50,000
16.	Karnataka	Rape of minor	3,00,000
		Rape other than minor	1,50,000
18.	Kerala (50% extra if the victim is 14 years or less)	Rape	3,00,000
		Rehabilitation	1,00,000
20.	Maharashtra	No amount for the offence of rape	Nil
21.	Manipur	Rape of Minor	30,000
		Rape	20,000
		Rehabilitation	20,000
24.	Nagaland	Rape of Minor	1,00,000
		Rape	50,000
		Rehabilitation	50,000
27.	Odisha	Loss or injury causing severe mental agony to women and child victims in case like Human Trafficking	10,000
28.	Rajasthan	Rape of Minor	3,00,000
		Rape	2,00,000
		Rehabilitation	1,00,000
31.	Sikkim	Rape	50,000
		Rehabilitation	30,000
33.	Tripura	Rape	50,000 of which Rs. 5,000 shall be paid after preliminary verification of the complaint and the balance amount shall be sanctioned on the filling of charge sheet.
34.	Uttar Pradesh	Rape	2,00,000
35.	Uttarakhand	Rape of Minor	2,50,000
		Rape	2,00,000
		Rehabilitation in case of rape victim	1,00,000
38.	West Bengal	Rape of Minor	30,000
		Rape	20,000

S. No.		Details of Lost or Injury	Maximum Limit of Compensation
		Rehabilitation	20,000
41.	UT of Chandigarh	Rape	3,00,000
		Rehabilitation	20,000
43.	UT of Dadar and	Rape	3,00,000
	Nagar Haveli	Rehabilitation	20,000
45.	UT of Daman	Rape	3,00,000
		Rehabilitation	20,000
47.	UT of Puducherry	Rape	3,00,000
		Rehabilitation	20,000

While going through different schemes for relief and rehabilitation of victims of rape, Apex Court came across one Scheme made by the National Commission of Women (NCW) revised on 15 April, 2010. The application under this scheme will be in addition to any application that may be made under *sections 357*, *357A* of *Code of Criminal Procedure, 1973* as provided in para 22 of the Scheme. Under this Scheme maximum of Rs 3,00,000 (three lakhs) can be given to the victim of the rape for relief and rehabilitation in special cases like the present case where the offence is against an handicapped women who required specialized treatment and care.

While dismissing the appeal, the Court said undisputably, no amount of money can restore the dignity and confidence that the accused took away from the victim. No amount of money can erase the trauma and grief the victim suffers. This aid can be crucial with aftermath of crime. The Court directed that all the States and Union Territories shall make every endeavour to formulate a uniform scheme for providing victim compensation in respect of rape/sexual exploitation with the physically handicapped women as required under the law taking into consideration the Scheme framed by the State of Goa for rape victim compensation.

After *section 357A of Code of Criminal Procedure, 1973* the following sections have been inserted *vide Criminal Law (Amendment) Act* 13 of 2013, namely:—

> **357B. Compensation to be in addition to fine under section 326A[21] or section 376D[22]** of *Indian Penal Code*. —The compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim under *section 326A* or *section 376D* of *Indian Penal Code (45 of 1860)*.

> **357C. Treatment of victims.**—All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under sections 326A, 376, 376A, 376B, 376C, 376D or *section 376E of Indian Penal Code (45 of 1860)*, and shall immediately inform the police of such incident.

7.5.3 Death Sentence under Indian Penal Code, 1860

Sentence of death is the most extreme punishment provided under *Indian Penal Code, 1860*. Regarding “death” as a punishment, the framers of *IPC, 1860* have categorically stated that it ought to be very sparingly inflicted and only in those cases where either murder or the highest offence against the State has been committed. This apart, *IPC* prescribed “death” as an alternative punishment to which the offenders may be sentenced for the following offences:

(i) Waging or attempting to wage war or abetting waging of war against the Government of India (section 121);

(ii) Abetting mutiny, if committed in consequence thereof (section 132);

(iii) Giving or fabricating false evidence upon which an innocent person suffers death (section 194);

(iv) *Section 195A, IPC, 1860*: The second Part of *section 195A IPC* provides that if an innocent person is convicted and sentenced in consequence of false evidence, given by a person under threat or inducement with death or imprisonment or more than seven years, the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced.

(v) Murder (section 302);

(vi) Murder by life convict [section 303—struck down by the Supreme Court in *Mithu's case,* (1983), however, still remains on the statute book);

(vii) Abetment of suicide of a minor or insane or intoxicated person who commits suicide in consequence thereof (section 305);

(viii) Attempt to murder by a life convict if hurt is caused (section 307),

(ix) Kidnapping for ransom (section 364A)[23]

In addition to the above stated cases, *IPC* provides for death sentence in the following conditions, viz:

(i) Criminal conspiracy to commit any offence punishable with death, if committed in consequence thereof for which no punishment is prescribed (section 120B);

(ii) Joint liability extending the principle of constructive liability on all the persons who conjointly commit an offence punishable with death, if committed in furtherance of common intention or common object of all (sections 34 and 149); and

(iii) Abetment of offences punishable with death (section 109).

Mandatory death sentences continued to be imposed in Brunei Darussalam, Ghana, Iran, Malaysia, Maldives, Myanmar, Nigeria, Pakistan, Saudi Arabia, Singapore, and Trinidad and Tobago. Mandatory death sentences are inconsistent with human rights protections because they do not allow "any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence".[24]

Death Sentence: A Critical Appraisal: Demand for retribution is not new. Death penalty is the ultimate assertion for heinous crimes. This explains the popular demand of death for rape in the wake of high incidence of rapes in the country, as in the case of section 364A providing for death penalty for kidnapping for ransom in 1993.[25]

In the distant past, the Rajasthan High Court in 1986 had ordered for public hanging of *Lachma Devi,*[26] who was found guilty of causing a dowry death. However, the death sentence was commuted by the Supreme Court. Surprisingly, a study made by the Law Commission of India[27] showed that 51% respondents opted for public hanging as against 49% for hanging in jail; and in The Times of India SMS survey 67% respondents suggested for public hanging.

Two passages from the earlier decisions of the Supreme Court, often quoted by later Benches, also reflect this popular trend of thinking in *Dhananjay Chatterjee v State of WB*,[28] wherein the court said:

> In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenseless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the court respond to the society's cry for justice against the criminal's for demands justice. The courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal, but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

Similarly, in *Mahesh v State of MP,*[29] which was a case of multiple murders committed in a brutal manner, the court said:

> It will be a mockery of justice if these appellants are permitted to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give a lesser punishment for the appellants would be rendering the justice system of this country suspect. The common man will lose faith in courts. In such cases he understands and appreciates the language of

deterrence more than the reformative jargon.

The execution of *Dhananjay Chatterjee* on 14 August 2004 for rape and murder of a teenage girl after a de facto moratorium on executions since 1990s has once again started a debate amongst scholars, jurists, judges and has aroused the public attention as to whether death sentence should be abolished since it does not serve any purpose in view of the world wide trend towards its abolition.[30]

The opinion, however, is divided on this complex question of life and death. The pragmatic reasons put forward against capital punishment are:

(i) Capital punishment reinforces the idea of retributive justice, a medieval concept that must have no place in the civilised society. It is argued that a person who has committed a heinous crime, such as murder must be likewise deprived of life.

Does this mean that a rapist should be raped or that a torturer should be tortured?

(ii) Capital punishment has no deterrent value; its use has not been shown to bring about a significant decrease in crime. It is perhaps the certainty of punishment that has the effect of deterring crime, not the quantum of punishment.

(iii) Capital punishment is irrevocable; once carried out it cannot be undone. This is crucial in view of certain developments, such as the use of DNA testing in some cases has proved previously convicted persons as being innocent.

(iv) There is a possibility that the retention of death punishment may possibly lead to a failure of justice in some cases and to the acquittal of guilty persons. No doubt, judges are men of the highest integrity and endowed with impartial attitude. They are most anxious to administer justice. But they are, after all, human beings, and they might sometimes commit an error of judgment and award death to one and life imprisonment to another in similar situations, despite their responsibility in a case of murder. There might be cases of miscalculation which at times is unavoidable. There might be situations when miscarriage of justice could take place in some cases under similar circumstances as stated by the apex court on 20 November 2012 while commuting the death sentence to life imprisonment in a Haryana case observing that the “rarest of rare” criteria is judge centric.

(v) Thousands of murders are committed each year and to check murders, national interest demands that the guilty persons should not escape justice. The best deterrent sentence would be one of life imprisonment,[31] and that should mean imprisonment practically for the whole life and not just 14 or 20 years as at present.[32] Perhaps the knowledge that a murder would make one spend their whole life in prison would act as a sufficient deterrent.

(vi) It appears that death sentence is not a deterrent to the commission of offences of murder and loss of life, but is a deterrent to convictions. Extraneous considerations based on the anxiety to save a human being from the gallows come into play, and hardly any one is executed.

Those who favour death penalty put forward the following contentions in their support:

(i) Death penalty is the ultimate assertion of society’s highest form of disgust for humanity’s worst crime. Death penalty, after a civilised, legally scrutinised and successively tested judicial proceeding, is intrinsic and instinctive to society’s right to exist.

(ii) The enormous limitations and safeguards surrounding it provide the best of both worlds for its retention in extreme situations he awards death, otherwise life imprisonment when the judge feels that he has no option except death in a particular case.

(iii) The Supreme Court has reduced imposition of death penalty to the “rarest of rare” cases. Guidelines have confined and limited it to the exclusive domain of the truly despicable and shockingly heinous cases.

(iv) The process of ascertaining guilt and awarding sentence are separated by distinct hearings, under *section 235 (2) of CrPC, 1973* that confer sufficient safeguards against the possible error of judgment in awarding a sentence.

(v) The death sentence awarded by the session's court is subject to automatic confirmation by the High Court to ensure complete accuracy and to avoid the possibility of any error of judgment.

(vi) Murder cases in general go to the Supreme Court for final verdict in one way or another. This ensures sufficient safeguards against possible injustice, and error of judgment.[33]

(vii) Mandatory death sentence having been struck down by the Supreme Court (*section 303, IPC, 1860*), the possibility of the innocent being sent to gallows has been reduced to zero.

(viii) Even after the pronouncement of a death sentence by the Supreme Court, the cases are subjected to clemency by way of appeals, reprieves and pardons by the Governor and the President of India.

Hence, the chance of an innocent person being sent to the gallows is statistically infinitesimal.

Taking into account the potent arguments by the protagonists of an "eye for an eye" philosophy who demand "death for death" and the humanists, who on the other hand, press for the other extreme, namely "death in no case", perhaps a middle approach may be adopted on experimental basis, which can be summarised as below:

The current state of affairs requires a thorough review of the entire provisions of both substantive and procedural law on capital punishment. To begin with, death sentence may be suspended on an experimental basis for a period of five years as in the case of England in 1965. On completion of five years, after making a proper and scientific study and comparing the data of murders committed before and after the suspension of death sentence, a final decision as to its abolition or retention be taken after a national debate, both inside and outside the Parliament on this important question of life and death. This will set at rest the controversial issue to the satisfaction of all.

7.5.3.1 *Application of the "Rarest of Rare" Test May Lead to Error of Judgment*

The Supreme Court in *Machhi Singh,*[34] referring to the "rarest of rare" theory formulated in *Bachan Singh*,[35] has categorically laid down that the trying court is required to draw up a balance sheet of aggravating and mitigating circumstances and opt for maximum penalty only if, even after giving the maximum weightage to the mitigating circumstances, there is no alternative but to impose the death sentence. For instance, certain kinds of crime have invariably been looked upon with severity and have unfailingly invited the maximum sentence. These include rape and murder of minor girls;[36] kidnapping and murder of a child[37] or the merciless killing of a sister-in-law and her children.[38]

However, on an analysis of some of the decisions handed down by the Supreme Court since *Bachan Singh,*[39] it appears that at times the exercise of balancing the aggravating and mitigating circumstances is not adequately performed.[40] The reason afforded by the court for either confirming or commuting the death sentence appears, to invariably turn on the nature of the crime, role of the offender in the crime and the judges notion about crime and the law. The background of the offender and the possibility of his reformation or rehabilitation are seldom taken into consideration.

For instance, in *Dhananjoy Chatterjee v State of WB; Laxman Naik v State of Orissa* and *Kamla Tiwari v State of MP,*[41] the accused charged for raping and murdering the victims were sentenced to death. On the other hand, in a similar case in *State of UP v Kumudi,* AIR 1999 SC 1699 : (1999) 4 SCC 108 where the appellant was convicted for raping and murdering a 14 year old girl who had gone to the fields to ease herself was given the benefit of commutation of death sentence to life imprisonment on the ground that since the circumstances indicated that she willingly allowed the appellant to have some liberty with, this was not a "rarest of rare" case. There appears to be no valid justification for making such a distinction between life and death between similar set of cases.

Similarly, in *Om Prakash v State of Haryana,* AIR 1999 SC 1332 : (1999) 3 SCC 19 where seven persons were murdered by the accused, working in the Border Security Force, without any provocation, to wreak vengeance over a dispute over a plot of land, the accused was sentenced to life imprisonment.

In the above mentioned case, the accused was liable to receive the death sentence, but the court would have been accepting the argument that the accused was compelled to resort to the crime because the authorities had paid no heed to the complaints made by him against the deceased in regard to encroachment on the property; and taking into consideration the fact that the appellant was working as a disciplined member of the armed forces having no criminal antecedents and that he was 23 years old at the time of commission of the offence, the accused was not awarded the extreme punishment of death. Relying on the reformative theory, the court held:

> There is no reason to believe that he cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute continuing threat to the society.

On the other hand, in *Shiv Ram v State of UP,* AIR 1998 SC 49 : (1998) 1 SCC 149, death sentence was awarded for the murder of five persons, including a 10 year old boy. The victims heads were dismembered in a brutal manner and they were carried in a procession and their bodies were roasted in fire. Whereas in *State of UP v Bhoora, AIR 1998 SC 254* : *(1998) 1 SCC 128*, which involved the murder of four persons, the death sentence awarded was commuted to life imprisonment.

In *Nirmal Singh v State of Haryana, AIR 1999 SC 1221* : *(1999) 3 SCC 670* the murder by the appellant (who was on parole) of five persons of the family of the rape victim, whose evidence at the trial had resulted in his conviction, invited the maximum punishment. Going by the individual role of the accused, the appellant's brother was given a commuted sentence.

Thus, one can visualise, that there may be situations when miscarriage of justice might take place in some cases under similar circumstances.

7.5.4 Visualizing the possibility of error of Judgment

7.5.4.1 *Supreme Court calls for a relook at norms on death penalty—rarest of rare criteria judge-centric*

More than 32 years after it devised the "rarest of rare" criterion to restrict the imposition of the death penalty to exceptionally heinous and cold-blooded murders, the Supreme Court on 20 November 2010 said the standard was being applied differently by different judges and needed to be looked at afresh.[42]

Referring to the landmark case of *Bachan Singh,*[43] decided in 1980, when the "rarest of rare" category was devised, and the subsequent important decision on death sentence, a bench of Justices KS Radhkrishnan and Madan B Lokur said there was "little or no uniformity in the application" of this principle. In fact, the bench seemed to even concede that categorizing crimes—the basis for ranking them and assessing which meet the "rarest of rare" standard—might be difficult: In short, the apex court suggested that the present system was not working. The court said in a sentencing process

> it is important to give the crime and criminal equal importance. We have, unfortunately, not taken the sentencing process as seriously as it should be, with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing",

Justice Lokur, who authored the judgment for the bench, said.

Importantly, the bench barred the governments from granting mass remission of sentences to convicts for their release on Independence Day, Republic Day or birth anniversary of Mahatma Gandhi—a discretionary power which governments have often used in controversial ways.

The court had in 1980 classified the nature of cases to carve out the "rarest of rare" category, while identifying mitigating circumstances which it held should enable a judge to consider awarding life sentence even in convictions warranting imposition of the death penalty. Justices Radhakrishan and Lokur on 20 November 2012 said the mitigating circumstances enumerated in the Bachan Singh judgment, which gave discretion to a judge to commute the death sentence to life term, had not been uniformly applied through the years. The bench made the observation while commuting to life imprisonment the death sentence awarded by a trial court and the High Court to two people for wiping out an entire family in Haryana.

The bench moved on to explore the application of the "rarest of rare" criterion. Justice Lokur said, "It does appear that in view of the inherent multitude of possibilities, the aggravating and mitigating circumstances approach has not been effectively implemented. Therefore, this needs a fresh look in the light of conclusions in Bachan Singh."

16 *Ratan Singh v State of Punjab,* (1979) 4 SCC 719 : AIR 1980 SC 84. See KD Gaur *Textbook on Indian Penal Code,* 4th Edn, (2009) Annexure II for "Justice to Victims of Crime", pp 869-882.

17 Section 5 of Probation of Offences Act 1958, empowers the court to require released offenders to pay compensation and costs to the victims.

18 *Hari Kishan & State of Haryana v Sukhbir Singh,* AIR 1988 SC 2127 : (1988) 4 SCC 551.

19 *Sarup Singh v State of Haryana,* AIR 1995 SC 2452 : 1995 Cr LJ 4168.

20 AIR 2016 SC 817 : 2016 Cr LJ 1440 : JT 2016 (2) SC 147, per MY Eqbal and Arun Mishra, JJ.

21 *Section 326A, IPC* provides punishment for causing grievous hurt by use of acid to the victim.

22 *Section 376D, IPC* provides punishment for gang rape.

23 Inserted with effect from 22 May 1993 by *Criminal Law (Amendment) Act 1993*.

24 Amnesty International-Death Sentence and Executions 2017, p 8.

25 See KD Gaur, A *Textbook of Indian Penal Code,* 6th Edn, Universal Law Book Co, 2016, pp 861-864. Inserted in *Indian Penal Code, 1860*, with effect from 22 May 1993 by *Criminal Law (Amendment) Act 1993*; *section 364A, Indian Penal Code, 1860*, was inserted by Act 42 of 1993, section 2, w.e.f. 22 May 1993.

26 In *Attorney General of India v Lachma Devi,* AIR 1986 SC 467 : 1989 Supp (1) SCC 264, the Supreme Court stated "...A barbaric crime does not have to be visited with a barbaric penalty with such a public hanging', ...the decision to award death sentence is more out of anger than on reasons. The judicial discretion should not be allowed to be swayed by emotions and indignation."

27 Law Commission of India's 187th Report, 3 October 2003, p 187.

28 (1994) 2 SCC 220 : (1994) 1 JT 33. The accused, a liftman, in an apartment raped and murdered a 14 year old girl Hetal Parekh. According to the post mortem report, her nose was broken and her windpipe crushed before being raped.

29 (1987) 3 SCC 80, p 82 : AIR 1987 SC 1346, followed in *Mahendra Nath Das v State of Assam,* AIR 1999 SC 1926 : (1999) 5 SCC 102 : (1999) 3 Scale 700.

30 *"The Death Penalty World Wide Development in 2004"*, Amnesty *International,* April 2005, p 6. Chiradeep S Begga, *"Death Penalty Debate Alive and Kicking".* The Times of *India,* 2 July 2004. Dhananjay Chaterjee was finally hung to death on 14 August 2004.

31 *State of MP v Ratan Singh,* AIR 1976 SC 1552 : (1976) 3 SCC 470 : 1976 SCR 552.

32 KN Katju, *"Life Imprisonment Should Replace Death Penalty"*, Northern India *Patrika,* 10 February 1963.

33 Abhishek Manu Singhvi, *"Should Capital Punishment be Abolished?"*, Sunday Times of *India,* 27 June 2004, p 11.

34 *Machhi Singh v State of Punjab,* AIR 1983 SC 957 : (1983) 3 SCC 470.

35 *Bachan Singh v State of Punjab,* AIR 1980 SC 898 : (1980) 2 SCC 684 : 1980 Cr LJ 636, per Bhagwati, J.

36 *Dhananjoy Chatterjee v State of WB,* (1994) 2 SCC 220 : (1994) 1 JT 33; *Laxman Naik v Orissa,* (1994) 3 SCC 381 : AIR 1995 SC 1387. However, in *State of UP v Kumudi,* (1999) 4 SCC 108 : AIR 1999 SC 1699 : 1999 Cr LJ 2523, the sentence was commuted to life imprisonment.

37 *Henry Westmuller Roberts v State of Assam,* AIR 1985 SC 823 : (1985) 3 SCC 291; *Mohan v State of TN,* (1998) 5 SCC 336 : AIR 1995 SC 2396 where the death sentences awarded to the principal accused and his younger brother were confirmed while those awarded to the two accomplices were commuted.

38 *Javed Ahmed Pawala v State of Maharashtra,* AIR 1983 SC 594 : (1983) 3 SCC 39 : 1983 (1) Scale 410; *Jai Kumar v State of MP,* (1999) 5 SCC 1 : AIR 1999 SC 1860. See *State of TN v Suresh,* (1998) 2 SCC 372 : AIR 1998 SC 1044 where the passage of time helped to commute the sentence.

39 *Bachan Singh v State of Punjab,* AIR 1980 SC 898 : (1980) 2 SCC 684 : 1980 Cr LJ 636.

40 A notable exception is the decision in *Anshad v State of Karnataka,* (1994) 4 SCC 381 : [1994] 3 SCR 642, where the Supreme Court commuted the death sentence awarded to three people by the High Court on a reversal of acquittal. The Supreme Court held that the reasons given by the High Court without balancing the aggravating and mitigating circumstances were not "special reasons" contemplated by law.

41 *Dhananjoy Chatterjee v State of WB*, (1994) 2 SCC 220 : (1994) 1 JT 33; *Laxman Naik v State of Orissa,* AIR 1995 SC 1387 : (1994) 3 SCC 381; *Kamla Tiwari v State of MP,* AIR 1996 SC 2800 : (1996) 6 SCC 250.

42 The Times of India, (Pune Edition) November 21, 2012, p 1.

43 *Bachan Singh v State of Punjab,* AIR 1980 SC 898 : (1980) 2 SCC 684 : 1980 Cr LJ 636.

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7.6 Movements towards Worldwide Abolition of Death Sentence

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part I General Principles

7 PUNISHMENT

7.6 Movements towards Worldwide Abolition of Death Sentence

The worldwide trend with respect to capital punishment reveals a mixed reaction. The international community is divided over the death penalty. There is a growing consensus among western countries that the death penalty has no place in the twenty-first century. It is outdated, if not barbaric. Several international organisations including the United Nations have pressed for its abolition, worldwide, from time to time. The UN Commission of Human Rights has called for a moratorium on all executions and urged all member States that still maintain the death penalty to restrict the number of offences for which the death penalty may be imposed and not to impose death penalty on a person below 18 years of age and on a person suffering from any form of mental disorder.

With the untiring efforts of Amnesty International, a total of 106 countries have now abolished the death penalty in law or in practice. And the total number of countries that have abolished death penalty for all crimes have gone up from 10 to 106 within 40 years from 1977 to 2017. The countries may be divided into following four categories, 25 of 31 December, 2017, viz:

(i) Abolitionist for all crimes—106 (see Table 1);

(ii) Abolitionist for ordinary crimes only—7 (see Table 2);

(iii) Abolitionist in law or practice—29[44] (see Table 3);

(iv) Retentionist (countries which have retained death punishment)—56 (see Table 4).

TABLE 1

ABOLITIONIST COUNTRIES FOR ALL CRIMES

Countries Whose Laws do not provide for the Death Penalty for Any Crime - 106 Countries

7.6 Movements towards Worldwide Abolition of Death Sentence

Country	Date (A)	Date (AO)	Date (late ex.)	Country	Date (A)	Date (AO)	Date (late ex.)
Albania	2007	2000		Finland	1972	1949	1944
Andorra	1990		1943	France	1981		1977
Angola	1992			Georgia	1997		1994K
Argentina	2008	1984		Germany	1987		
Armenia	2003			Greece	2004	1993	1972
Australia	1985	1984	1967	Haiti	1987		1972K
Austria	1968	1950	1950	Honduras	1956		1940
Azerbaijan	1998		1993	Hungary	1990		1988
Belgium	1996		1950	Iceland	1928		1830
Bhutan	2004		1964K	Ireland	1990		1954
Bosnia Herzegovina	2001	1997	Italy	1994	1947	1947	
Bulgaria	1998		1989	Kyrgyzstan	2007		
Burundi	2009			Kiribati			Ind.
Cambodia	1989			Liechtenstein	1987	1785	
Canada	1998	1976	1962	Lithuania	1998		1995
Cabo Verde	1981		1835	Luxembourg	1979		1949
Colombia	1910		1909	Macedonia	1991		
Cook Islands	2007			Malta	2000	1971	1943
Costa Rica	1877			Marshall Islands		Ind.	
Cote D'ivoire	2000			Mauritius	1995		1987
Croatia	1990		1987	Mexico	2005		19661
Cyprus	2002	1983	1962	Micronesia			Ind.

7.6 Movements towards Worldwide Abolition of Death Sentence

Country	Date (A)	Date (AO)	Date (late ex.)	Country	Date (A)	Date (AO)	Date (late ex.)
Czech Republic	1990			Moldova	1995		
Denmark	1978	1933	1950	Monaco	1962		1847
Djibouti	1995		Ind.	Montenegro	2002		
Dominican	1966			Mozambique	1990		1986
Republic							
Denmark	1978	1933	1950	Namibia	1990		1988K
Djibouti	1995		Ind.	Nepal	1197	1990	1979
Dominican	1966			Netherlands	1982	1870	1952
Republic							
Ecuador	1906			New Zealand	1989	1961	1957
Estonia	1998	1991	Nicaragua	1979	1930		
Country	Date (A)	Date (AO)	Date (late ex.)	Country	Date (A)	Date (AO)	Date (late ex.)
Niue				Solomon Islands		1966	Ind.
Norway	1979	1905	1948	South Africa	1997	1995	1991
Palau				Spain	1995	1978	1975
Panama	1922		1903K	Sweden	1972	1921	1910
Paraguay	1992		1928	Switzerland	1992	1942	1944
Philippines	2006 (1987)		2000	Togo	2009		1978
Poland	1997		1988	Timor-Leste	1999		
Portugal	1976	1867	1849K	Turkey	2004	2002	1984
Romania	1989		1989	Turkmenistan	1999		
Rwanda	2007		1998	Tuvalu			Ind.
Samoa	2004		Ind.	Ukraine	1999		

7.6 Movements towards Worldwide Abolition of Death Sentence

Country	Date (A)	Date (AO)	Date (late ex.)	Country	Date (A)	Date (AO)	Date (late ex.)
San Marino	1865	1848	1468K	United Kingdom	1998	1973	1964
Soã Tomé and Príncipe	1990		Ind.	Uruguay	1907		
Senegal	2004		1967	Uzbekistan	2008		2005
Serbia (Incl. Kosovo)	2002		1902	Vanuatu			Ind.
Seychelles	1993		Ind.	Holy See	1969		
Slovakia	1990			Venezuela		1863	
Marin	2017			Costa Rica			
Bolvic	2017			Bolivia	2017		
Slovenia	1989						

Amnesty International last updated: 31 March 2010. Abbreviations: Date (A) = date of abolition for all crimes; Date (AO) = date of abolition for ordinary crimes; Date (late ex) = date of last execution; K = date of last known execution, Ind = no executions since independence.

TABLE 2

Abolitionist Countries for Ordinary Crimes Only (7)

Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances, such as wartime crimes.

Country	Date (AO)	Date (late ex.)
Bolivia	1997	1974
Brazil	1979	1855
Chile	2001	1985
El Salvador	1983	1973K
Guinea		
Israel	1954	1962
Kazakhstan	2007	-
Peru	1979	1976

Last updated: 31 December 2017, Abbreviations: Date (AO) = date of abolition for ordinary crimes; Date (late ex) = date of last execution; K = date of last known execution, Ind = no executions since independence.

TABLE 3

Abolitionist Countries in Law and Practice (29)

Countries that retain the death penalty for ordinary crimes such as murder can be considered abolitionist in practice, if they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions in future. The list also includes countries which have made an international commitment not to use the death penalty.

Abbreviations: Date (late ex) = date of last execution; K = date of last known execution, Ind = no executions since independence.

Country	Date (late ex.)	Country	Date (late ex.)	Country	Date (late ex.)
Algeria	1993	Eritrea	1989	Kenya	1987
Brunei	1957K	Ghana	1993	Laos	1989
Burkina Faso	1988	Grenada	1978	Liberia	2000
Cameroon	1997	Russian Federation	1999	Maldives	1992
Central African Republic	1981	South Korea (Republic)	1997	Malawi	
Mauritania	1987	Sri Lanka	1976	Mali	1980
Morocco	1993	Siero Leone		Tanzania	1995

Country	Date (late ex.)	Country	Date (late ex.)	Country	Date (late ex.)
Myanmar	1980s	Swaziland	1983	Tunisia	1991
Niger	1976k	Tajikistan	2004	Zambia	1997
Papua New Guinea	1950				

Amnesty International last updated: 31st December, 2017 Abbreviations: Date (late ex) = date of last execution; K = date of last known execution, Ind = no executions since independence.

TABLE 4

Retentionist: Countries and Territories which Retain the Death Penalty for Ordinary Crimes (57)

Afghanistan	Egypt	Lebanon	Singapore
Antigua And Barbuda	Equatorial Guinea	Lesotho	Somalia
Bahamas	Ethiopia	Libya	Sudan
Bahrain	Guatemala	Malaysia	Syria
Bangladesh	Guinea	Mongolia	Taiwan
Barbados	Guyana	Nigeria	Thailand
Belarus	India	Oman	Trinidad and Tobago
Belize	Indonesia	Pakistan	Uganda
Botswana	Iran	Palestinian Authority	United Arab Emirates
Chad	Iraq	Qatar	Unites States of America
China	Jamaica	Saint Christopher & Nevis	Vietnam
Comoros	Japan	Saint Lucia	Yemen
Congo (Democratic Republic)	Jordan	Saint Vincent and the Grenadines	Zimbabwe
Cuba	Korea (North)	Saudi Arabia	
Dominica	Kuwait, Laos	Sierra Leone	

Amnesty International 31 December, 2017

The Russian Federation introduced a moratorium on executions in August 1996. However, executions were carried out between 1996 and 1999 in the Chechen Republic.

States with and without the death penalty as of 18 August, 2016 United State of America States with the death penalty (30)

Albama	Louisiana	Pennsylvania
Arizona	Mississippi	South Carolina
Arkansas	Missouri	South Dakota
California	Montana	Tennessee

Colorado	Nevada	Texas
Florida	New Hampshire	Utah
Georgia	North Carolina	Virginia
Idaho	Ohio	Washington
Indiana	Oklahoma	Wyoming
Kansas	Oregon	Kentucky
	ALSO	
	- US Government	- US Military

States without the death penalty (20) (YEAR ABOLISHED OR OVERTURNED IN PARENTHESES)

Alaska (1957)	**Michigan (1846)**	**Vermont (1964)**
Connecticut (2012)**	Minnesota (1911)	West Virginia (1965)
Delaware (2016)#	Nebraska (2015)***	Wisconsin (1853)
Hawaii (1957)	New Jersey (2007)	
Illinois (2011)	New Mexico (2009)*	**ALSO**
Iowa (1965)	New York (2007)^^	Dist. of Columbia (1981)
Maine (1887)	North Dakota (1973)	
Maryland (2013)	Rhode Island (1984)^	
Massachusetts (1984)		

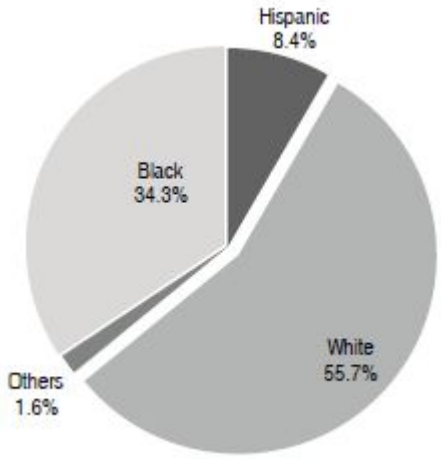
DEATH PENALTY STATES WITH GUBERNATORIAL MORATORIA (4)*

Colorado (2013)	Pennsylvania (2015)
Washington (2014)	Oregon (2011)

Note: 1. Out of 50 States in the United States 20 States do not subscribe to Capital Punishment whereas 30 provides for Capital Punishment.

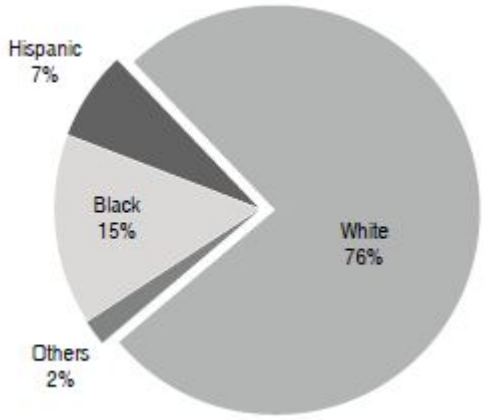
NATIONAL STATISTICS OF THE DEATH PENALTY AND RACE IN UNITED STATE

RACE OF DEFENDANTS EXECUTED



- White: 822
- Black: 507
- Hispanic: 124
- Others: 24

Race of Victims in Death Penalty Cases



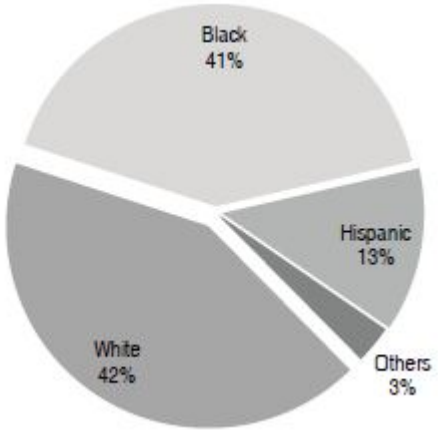
Over 75% of the murder victims in cases resulting in an execution were white, even though nationally only 50% of murder victims generally are white.

Persons executed applying following five methods since 1976:

1313	Lethal Injection
160	Electrocution
11	Gas Chamber
3	Hanging
3	Firing Squad

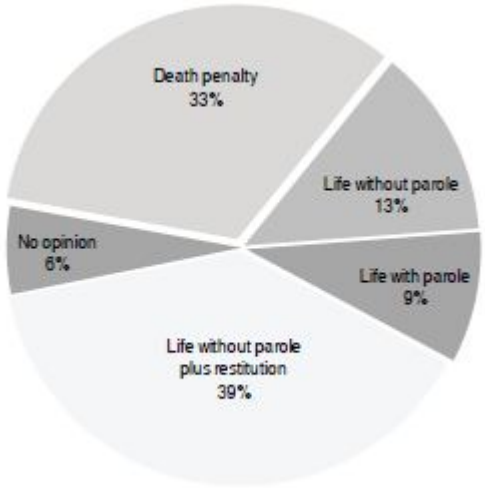
32 states plus the US government use lethal injection as their primary method

DEATH ROW INMAT ES BY RACE



Support for Alternatives to the Death Penalty

A 2010 poll by Lake Research Partners found that **a clear majority of voters (61%) would choose a punishment other than the death for murder.**



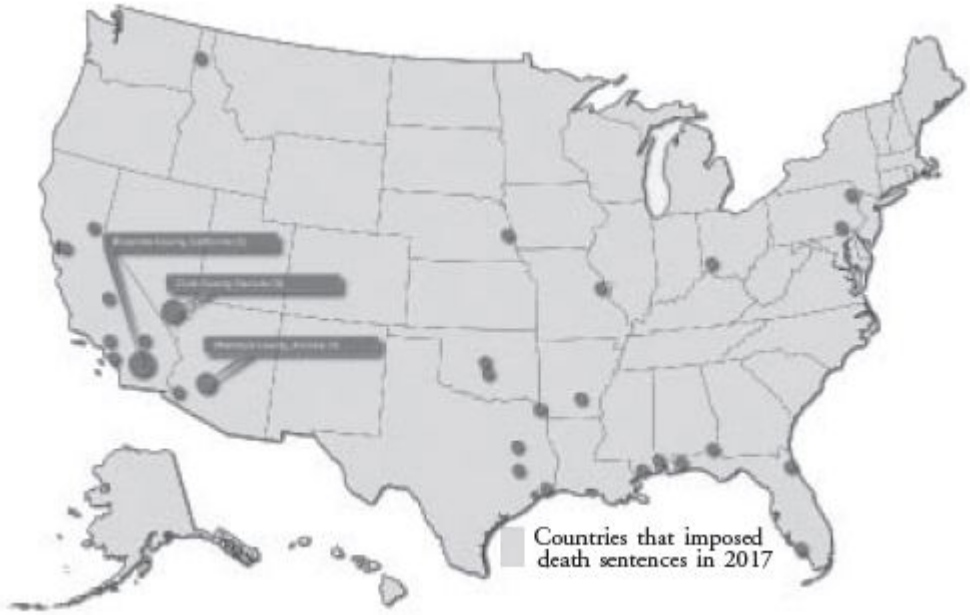
The death penalty in 2017: year end report Death sentences, executions second lowest in a quarter century

Public support for death penalty reaches 45-year low

The years 2016 and 2017 produced the two[45] lowest annual totals of new death sentences since States began re-enacting new death-penalty statues in response to the US Supreme Court's 1972 *Furman v Georgia,* 408 US 238 (1972) : 1972 US Lexis 169 decision striking down existing death-penalty laws. The 3, 5, and 10 years periods ending in 2017 had the lowest numbers of death sentences of any corresponding periods since 1976, continuing the nation's long-term decline in the use of the death penalty. The 39 new death sentences imposed in 2017 trailed only 2016's record-low 31 new death sentences. For the third consecutive year, fewer death sentences were imposed over the last decade than in the decade preceding the *Furman* decision.

Executions also remained near historic lows, with the totals in 2016 and 2017 the lowest in more than a quarter century. As with new death sentences, the 23 executions in 2017 trailed only the 20 carried out in 2016 as the fewest since 1991. Seventy-four percent of 2017 executions took place in just four states – Texas (7), Arkansas (4), Florida (3), and Alabama (3). The seven executions conducted in Texas matched 2016's total as the fewest executions in the State since 1996. For the first time since 1985, Harris Country carried out no executions.

Just Three States Accounted for 31% of the 39 Death Sentences in the US in 2017



7.6.1 Death-Penalty Use Remains Low in US in 2017[46]

Executions and new death sentences remained near historic lows in 2017, as the annual Gallup Poll on the death penalty measured support for capital punishment at its lowest level in 45 years. Both the 23 executions and 39 new death sentences in 2017 were the second lowest totals in more than a quarter-century. For the 17th consecutive year, the number of prisoners on the nation's death rows fell, as the combination of exonerations, non-capital resentencings, and deaths by natural causes again outpaced new death sentences imposed.

Florida and Alabama adopted reforms abolishing outlier practices that had contributed disproportionately to the nation's death sentences. Florida abolished non-unanimous jury recommendations for death, requiring jury unanimity before a judge can impose the death penalty. Alabama abolished the practice of judicial override, which had allowed judges to impose death sentences despite a jury recommendation for life.

Use of the death penalty remained geographically concentrated, with executions carried out in just eight States and new death sentences imposed by 14 states and the federal government. Two States — Texas and Arkansas — accounted for nearly half (48%) of all executions in 2017, with Alabama and Florida, despite the reforms, accounting for an additional quarter. More than 30% of the new death sentences nationwide came from just three countries—Riverside, California; Clark, Nevada; and Maricopa, Arizona. Harris County, Texas is symbolic of the change in capital punishment in the United States. Harris has executed more prisoners than any other State, but for the first time since 1974, it neither executed any prisoner nor sentenced any defendant to death.

Public support for the death penalty fell five percentage points last year, and ten percentage points among Republicans, according to the October 2017 Gallup Poll. The 55% of Americans telling Gallup they support the death penalty for a person convicted of murder declined to its lowest level since March 1972.

Five more people were exonerated from death row in 2017, bringing the total of exonerations since 1973 to 161. Those five cases highlighted systemic problems of racial bias, flawed forensic testimony, inadequate access to quality representation, and police and prosecutorial misconduct. But at the same time, four prisoners were executed despite substantial concerns about their guilt and more than 90% of those executed had significant evidence of mental illness, intellectual disability, severe trauma, and/or innocence.

Executions by State	**2017**	**2016**
Texas	7	7
Arkansas	4	0
Alabama	3	2

Executions by State	2017	2016
Florida	3	1
Ohio	2	0
Virginia	2	0
Georgia	1	9
Missouri	1	1
Totals	23	20

7.6.2 Death Sentences and Executions 2017

Amnesty International recorded a reduction in the number of executions and death sentences imposed around the world in 2017, with fewer than 1,000 executions and fewer than 2,600 new death sentences – a decline of 4% and 17% respectively compared to 2016. This was mainly due to decreases in three of the countries that reported the highest numbers of executions in 2016: Iran, Saudi Arabia and Pakistan. China was once again the world's lead executioner, but figures, remained classified as a state secret.

Two countries – Guinea and Mongolia – abolished the death penalty for all crimes, while Guatemala became abolitionist for ordinary crimes, such as murder.

In the Middle East and North Africa region, Iran, Saudi Arabia and Iraq remained among the world's top executions. Bahrain, Jordan, Kuwait and the United Arab Emirates resumed executions.

Progress was made in the Sub-Saharan Africa region. Executions were recorded in Somalia and South Sudan – three fewer countries than in 2016 – and death sentences were imposed in 15 countries, compared to 17 in 2016.

In many countries in the Asia-Pacific region, the use of the death penalty continued to violate International law, with death sentences often imposed as mandatory punishment and for non-lethal offences such as drug trafficking.

The USA remained the only country to carry out executions in the Americas region, for the 9th consecutive year. Only three countries – Guyana, Trinidad and Tobago and the USA – imposed death sentences.

In the Europe and Central Asia region, Belarus was the only country to impose death sentences and carry out executions.

7.6.3 Capital Punishment—An Overview[47]

Amnesty International recorded a 37% decrease in the number of executions carried out globally in 2016 as against the previous year. At least 1,032 people were executed – 602 fewer than in 2015 when the organization recorded the highest number of executions in a single year since 1989. Despite the significant decrease, the overall number of executions in 2016 remained higher than the average recorded for the previous decade. These numbers do not include the thousands of executions carried out in China, where data on the use of the death penalty remained classified as a state secret.

Iran alone accounted for 55% of all recorded executions. Together with Saudi Arabia, Iraq and Pakistan it carried out 87% of the global total. Iraq more than tripled its executions and Egypt and Bangladesh doubled theirs.

Amnesty International recorded executions in 23 countries, two fewer than in 2015. Belarus and authorities within the State of Palestine resumed executions in 2016 after a year's hiatus, while Botswana and Nigeria carried out their first executions since 2013. In 2016, Amnesty International did not record executions in six countries – Chad, India, Jordan, Oman, United Arab Emirates and Yemen – that carried out executions in 2015.

7.6.4 Executions Recorded Globally in 2016

Afghanistan (6), Bangladesh (10), Belarus (4+), Botswana (1), China (+), Egypt (44+), Indonesia (4), Iran (567+), Iraq (88+), Japan (3), Malaysia (9), Nigeria (3), North Korea (+), Pakistan (87+), Palestine (State of) (3), Saudi

Arabia (154+), Singapore (4), Somalia (14: Puntland 1, Somaliland 6, Federal Government of Somalia 7), South Sudan (+), Sudan (2), Taiwan (1), USA (20), Vietnam (+).

Amnesty report only covers the judicial use of the death penalty and does not include figures for extrajudicial executions. Amnesty International only reports figures for which it can find reasonable confirmation, although the true figures for some countries are significantly higher. Some states intentionally concern death penalty proceedings; others do not keep or make available data on the numbers of death sentences and executions.

Where "+" appears after a figure next to the name of a country – for example, Indonesia (47+) – it means that Amnesty International confirmed 47 executions or death sentences in Indonesia but believes there were more than 47. Where "+" appears after a country name without a figure – for instance, Iran (+) – it means that Amnesty International has corroborated executions or death sentences (more than one) in that country but had insufficient information to provide a credible minimum figure. When calculating global and regional totals, "+" has been counted as two, including for China.

7.6.5 Recorded Execution in 2017

China 1,000s

Iran 507+

Saudi Arabia 146

Iraq 125+

Pakistan 60+

Egypt 35+

Somalia 24 (Puntland 12; Federal Government of Somalia 12)

USA 23

Jordan 15

Singapore 8

Kuwait 7

Bangladesh 6

Palestine (State of) 6, Hamas authorities, Gaza

Afghanistan 5

Malaysia 4+

Japan 4

South Sudan 4

Bahrain 3

Belarus 2+

Yemen 2+

United Arab Emirates 1

North Korea +

Vietnam +

7.6.6 Recorded Death Sentences Globally in 2017[48]

China 1,000s

Nigeria 621

Egypt 402+

Bangladesh 273+

Sri Lanka 218

Pakistan 200+

India 109

Zambia 94

Thailand 75

Iraq 65+

Indonesia 47+

Singapore 15

Lebanon 12+

Afghanistan 11+

Zimbabwe 11

Jordan 10+

Mali 10

Trinidad and Tobago 9

Ghana 7

Tanzania 5+

Yemen 5+

United Arab Emirates 5

China 1,000s	**Singapore 15**
USA 41	Belarus 4+
Malaysia 38+	Botswana 4
Viet Nam 35+	Libya 3+
Algeria 27+	Gambia 3
Tunisia 25+	Guyana 3
Somalia 24+ (Puntland 16;	
Federal Government of Somalia 8)	Japan 3
Democratic Republic of the Congo 22+	Taiwan 3
Kenya 21+	Myanmar 2+
Sierra Leone 21	Equatorial Guinea 2
Sudan 17+	Laos 1+
South Sudan 16+	Saudi Arabia 1+
Palestine (State of) 16, Hamas authorities, Gaza	Brunei Darussalam 1
Morocco/Western Sahara 15+	Qatar 1
Kuwait 15+	Iran +
Bahrain 15	North Korea +

Europe and Central Asia are now virtually death penalty free zones following the abolition of the death penalty in Uzbekistan for all crimes. There is just one country Belarus that still carries out executions. Even the USA has moved away from the death penalty.

The countries that carried out executions since beginning of enactment of criminal law till 2017 in their respective states are: China (1718), Iran (51,4), Saudi Arabia (250)+, USA (157), Pakistan (123)+, Iraq (227), Viet Nam (19)+, Afghanistan (93), North Korea (15)+, Japan (18), Yemen (13)+, Indonesia (14), Libya (8), Bangladesh (15), Belarus (8)+, Egypt (46)+, Malaysia (10)+, Mongolia (1), Sudan (3), Syria (1), United Arab Emirates (1), Bahrain (1), Botswana (2), Singapore (5), and St Kitts and Nevis (11), Nigeria 3, Palestine (State of) 3, Sudan 2, Taiwan 1, *****

7.6.7 Recorded Death Sentences in 2016 and 2017[49]

China 1,000s/+	Kuwait 49/7	Afghanistan 4+/5
Nigeria 527	Tunisia 44	Bela

		rus 4
Pakistan 360+/60+	Saudi Arabia 40+/146	Qatar 4
Bangladesh 345+/6	Malaysia 36+/4+	Barbados 3
Egypt 237+	USA 32	Laos 3+
Thailand 216	Mali 30	Myanmar 3+/0
Cameroon 160+	United Arab Emirates 26	Japan ¾
Iraq 145+	Kenya 24+	Ethiopia 2
India 136	Palestine (State of) 21, Hamas authorities, Gaza	Maldives

2/0

Lebanon 126

Sudan 21+

Taiwan 2/0

Zambia 101

Tanzania 19

Trinidad and Tobago 2

Democratic Republic of the Congo 93+

Ghana 17

Libya 1+

Sri Lanka 79+/0

Jordan 13

Guyana 1

Vietnam 63+

Niger 11

Kazakhstan 1

Indonesia 60+

Zimbabwe 8

Malawi 1

7.6 Movements towards Worldwide Abolition of Death Sentence

Somalia 60 (Puntland 45; Somaliland 8; and Federal Government of Somalia 7)

Singapore 7+/8

Papua New Guinea 1/0

Algeria 50

Morocco/Western Sahara 6

Iran +

Mangolia - 0

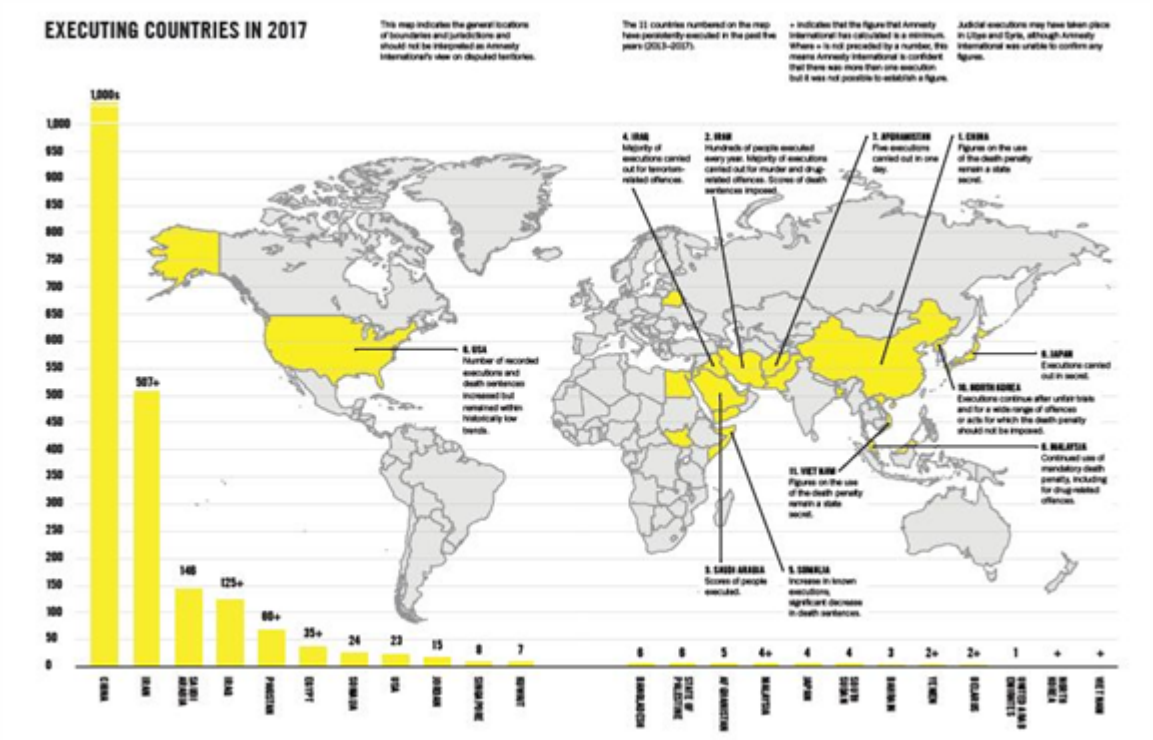
Liberia 5+

North Korea +/+

Thailand/0 South Korea 0

Sierra Leone 5

South Sudan +



7.6.8 Commutation of Death Sentence

Section 54, and 55 of *Indian Penal Code,1860* empower the appropriate government,[50] i.e. the Central Government in case of offences committed in the Union Territories, and State governments in case of offences committed in the States, *vide* sections 432 to 434[51] of *Criminal Procedure Code 1973* to commute, (suspend or substitute) the sentence of death to any other punishment. The government may exercise the powers on its own initiative without any prayer to that effect by the accused. The framers of the *Penal Code of India* explained the object of such a provision in the following words:

> It is evidently fit that the government should be empowered to commute the sentence of death for any other punishment provided by the code. Many circumstances, of which the executive authorities ought to be accurately informed, but which more often be unknown to the ablest judge, may, at particular times, render it highly inconvenient to carry a sentence into effect; ...and which the government only is competent to decide.[52]

The matter of commutation falls beyond the jurisdiction of courts, since it is the prerogative of the executive to alter the sentence once it is accorded by the courts of law. However, as an exception to the general rule, the High Court, in case of a pregnant woman, may commute the sentence of death to imprisonment for life or postpone its execution till such time as it deems fit;[53] and a sessions court may tender pardon to an accomplice in a case where a grave offence is alleged to have been committed by several persons, so that, with the aid of the person pardoned, the offence could be proved.[54]

7.6.9 Power of Pardon: Constitutional Provisions

The *Constitution of India* has invested the President and the governors of States under *Articles 72* and *161* respectively, with the power to grant pardon (absolute or conditional), reprieve (temporary suspension of punishment), respite (postponement to a future date the execution of death sentence), remission (to reduce the amount of punishment without changing the character of punishment), or to suspend, remit or commute the sentence of any person convicted of any offence.[55] Such powers exercised by the President and the governors are purely executive in nature.

The President has the exclusive power to grant pardon, reprieve and respite in all cases where the sentence is a sentence of death, and both the President and the governors have concurrent powers in respect of suspension, remission and commutation of a sentence of death.

7.6.9.1 *Pardon: Extent and Scope*

The term “pardon” means remission of punishment. It may be defined as an act of grace by which the accused is excused from the penalty. It cannot be demanded as a matter of right. Pardon wipes out the guilt of the accused, and brings him to the original position of innocence, as if he had never committed the offence.[56] The prerogative of mercy is, in essence, an executive function to be exercised by the head of the State after taking into consideration a number of factors which may not be germane (relevant) for consideration by a court of law.[57]

The prerogative of mercy or pardon is an indispensable component of a well-balanced system of criminal jurisprudence, and mitigation of severity is considered humanitarian. Accordingly, the power to grant pardon is exercised when the prescribed penalties are harsh in a particular case (s). In other words, pardon is nothing more than an exercise of discretion on the part of the crown head of the State, to dispense with or to modify punishment, which common law or statute would require to be undergone.[58] Pardon may be either absolute, or conditional, and may be granted either before or after conviction. A pardon is conditional when it becomes operative after the grantee has performed the conditions laid down in the grant, or where it becomes void, when such specified conditions take place. The power of pardon is purely discretionary, and there is no obligation on the part of the President or governor to hear the parties concerned before rejecting or granting a mercy petition.[59]

The power of pardon has been the subject of criticism all over the world, since the granting of pardon is nothing but capricious exercise of executive superiority without taking into consideration any humanitarian aspect; and it has nothing to do with the underlying philosophy behind the exercise of such power of pardon. This has been reflected in the execution of Zulfikar Ali Bhuto, former Prime Minister of Pakistan; and four others in the Nawab Mohammad Ahmad murder case, in spite of appeals for amnesty from the world community. Similarly, Nigeria’s military regime ignored the plea of the Commonwealth leaders for clemency, and executed human rights activist Ken Saro-Wiwa and eight others on 10 November 1995.[60]

Though the power of pardon is purely discretionary, and is subject to abuse, its retention in the penal system is essential. It may substantially help in saving an innocent person from being punished due to erroneous justice or in cases of doubtful conviction. The greatest advantage of the pardoning power lies in the fact that it is always preferable to grant liberty to a guilty offender rather than sentence a person who is otherwise innocent. If pardons are administered with care and solely to correct injustices, they certainly do not diminish respect for law, rather, they inculcate confidence in the machinery of justice.

Perhaps a pardon preconditioned by a system of parole would be an ideal policy, best suited to all those concerned in the administration of criminal law. It would further be appropriate to relieve the executive of this arduous task of administering pardon, which is very technical. Such a function may be entrusted to a parole board or any such high-powered committee constituted for the purpose. Such boards are already in operation in many States of USA with good results.

7.6.10 Imprisonment for Life

Imprisonment for life technically means a sentence of imprisonment running throughout the remaining period of a convict’s natural life.[61] As regards the nature of imprisonment is concerned, the Supreme Court of India, in the case of *KM Nanavati*,[62] has held that sentence of imprisonment in case of charge of murder, means rigorous imprisonment for life, and not simple imprisonment. An accused, convicted with imprisonment for life, may be granted remission for good conduct. As per *section 57, IPC, 1860* for the purpose of calculating remission, a life sentence is treated as a sentence of 20 years.

Section 55, which is a supplement to *section 54 of IPC, 1860* empowers the appropriate government to commute the sentence of imprisonment for life to imprisonment of either description for a term not exceeding 14 years. The power under the section is executive in nature, and is exercised without the consent of the accused as in the case of *section 54, IPC, 1860*.

7.6.10.1 *Commutation and Remission Distinguished*

In case of commutation, punishment is altered to one of a different sort than that originally proposed;[63] while in case of remission, the amount of punishment is reduced without changing the character of punishment.[64] For instance, an accused, on his release from jail, after the expiry of the period of punishment of 14 years which was commuted to the sentence of life imprisonment under *section 55, IPC*, will not be regarded as being under the sentence of imprisonment.

On the other hand, where the sentence of life imprisonment is remitted under *section 432 of Code of Criminal Procedure, 1973*, the accused must be regarded as still being under sentence of imprisonment for life. *Section 73, Indian Penal Code, 1860* empowers the court to award solitary confinement in exceptional case of brutality and atrocity.[65] *Section 74, IPC, 1860* prescribes the limits of solitary confinement.[66]

7.6.11 Ex-post facto laws:

Ex-Post Facto law that calls for a greater punishment than the punishment in effect when the crime was committed, violates Sixth Amendment to US *Constitution* - US Supreme Court - 2013.

Peugh v US,

133 S Ct 2072 (2013) : 186 L Ed 2d 84 (2013) : 2013 US Lexis 4359

Petitioner Peugh was convicted of five counts of bank fraud for conduct that occurred in 1999 and 2000. At sentencing, he argued that the Ex Post Facto Clause required that he be sentenced under the 1998 version of the Federal Sentencing Guidelines in effect at the time of his offenses rather than under the 2009 version in effect at the time of sentencing. Under the 1998 Guidelines, Peugh's sentencing range was 30 to 37 months, but the 2009 Guidelines assigned more severe consequences to his acts, yielding a range of 70 to 87 months. The District Court rejected Peugh's ex post facto claim and sentenced him to 70 months' imprisonment. The Seventh Circuit affirmed.

While allowing the appeal and reversing the sentence and remanding the case by a majority of 5 to 4 the US Supreme Court held that a retrospective increase created a sufficient risk of a higher sentence to constitute an ex post facto violation. When defendant committed his crime, the recommended sentence was 30 to 37 months. When he was sentenced, it was 70 to 87 months. Such a retrospective increase in the measure of punishment raised clear ex post facto concerns. The presence of discretion applying amended sentencing guidelines that increases a defendant's recommended sentence notwithstanding that sentencing courts possess discretion to deviate from the recommended sentencing range did not displace the Ex Post Facto Clause's protections. Nothing is a rule that retrospective application of a higher Guidelines range violated the ex post facto clause undid the holdings of Sixth Amendment cases, including Booker. The amended Guidelines' enhancement of the measure of punishment by altering the substantive "formula" used to calculate defendant's sentencing range created a "significant risk" of a higher sentence, and offended fundamental justice, one of the principal interests the Ex Post Facto Clause was designed to serve.

7.6.11.1 *Limit to Punishment*

Sections 71 and *72* of the *Indian Penal Code, 1860* provide rules for awarding punishment in cases where an offence is made up of several minor offences, and where it is doubtful as to which offence was committed by the accused.

Section 75 imposes liability to enhance punishment where a person is guilty of repeatedly committing offences on the ground that the punishment undergone has had no effect in preventing a repetition of the crime.[67]

Delay in execution of death sentence does not by itself entitle commutation to life imprisonment, section 54,—IPC, 1860—Supreme Court—1983

Sher Singh v State of Punjab,

AIR 1983 SC 465 : (1983) 2 SCC 344 : 1983 SCR (2) 582

The apex court did not agree in Sher Singh with the decision in *TV Vatheeswaran v State of TN,* AIR 1983 SC 361 : [1983] 2 SCR 348 that since more than two years had passed from the time the petitioners had been sentenced to death by the trial court, they are entitled to demand that the said sentence should be quashed, and substituted by the sentence of life imprisonment.

Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed. But, no hard and fast rule can be laid down to the effect that "delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke *Article 21* and demand the quashing of the sentence of death." This period of two years purports to have been fixed in *Vatheeswaran* after making "all reasonable allowance" for the

time necessary for appeal and consideration of reprieve. One has only to turn to the statistics of the disposal of cases in the High Court and the Supreme Court to appreciate that a period far exceeding two years is generally taken by these courts together for the disposal of matters involving even the death sentence. Very often, four or five years elapse between the imposition of death sentence by the sessions court and the disposal of the special leave petition or an appeal by the Supreme Court in the matter.

This is apart from the time, which the President or the governor takes to consider a petition filed under *Article 72* or *Article 161 of the Constitution*, or the time which the government takes to dispose of, applications filed under *sections 432* and *433 CrPC, 1973*.

Therefore, the fixation of the time limit of two years does not seem to accord with the common experience of the time normally consumed by the litigative process and the proceedings before the executive. Hence, the substitution of the death sentence by life imprisonment cannot follow by the application of the two-year formula, as a matter of *quod erat demonstradum.*

Death sentence passed was not vacated.

Prolonged delay in execution will not make death sentence inoperative— Supreme Court—1989

Triveniben v State of Gujarat,

AIR 1989 SC 142 : (1988) 4 SCC 574 : 1988 (2) Scale 907

A five judge[68] constitutional Bench of the apex court set at rest the conflicting decisions in five cases[69] by holding that the prolonged delay in execution of death sentence does not automatically entitle the accused to a lesser sentence of life imprisonment. The court was unanimous in its verdict.

Justice GL Oza held:

> Undue long delay in execution of the sentence of death will entitle the condemned person to approach this court under *Article 32* but this court will only examine the nature of delay caused and circumstances enduring after sentence is finally confirmed by the Judicial process and will have no jurisdiction to re-open the conclusions reached by the court while finally maintaining the sentence of death. This court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable.[70]

Section 57, Indian Penal Code 1860—imprisonment for life to be reckoned as equivalent to 20 years

The “appropriate government” *vide section 432 of CrPC, 1973*, has been conferred with the power to remit sentence for life as defined under *section 57 of IPC, 1860*. It is only the government concerned that can remit, suspend or commute the sentence. A sentence of life imprisonment cannot automatically come to an end by virtue of a lapse of 20 years *vide section 57, IPC, 1860*. It cannot be treated as one for a definite period. It has to be decided by the government concerned, and not the court.

Imprisonment for life not limited to 20 years—Supreme Court—1976

State of MP v Ratan Singh,

AIR 1976 SC 1552 : (1976) 3 SCC 470 : 1976 SCR 552

Facts: This appeal was directed against the judgment of the Punjab and Haryana High Court by which the High Court allowed the writ petition filed by the respondent, a life convict, for release from jail on the ground that the accused, having served the sentence for more than 20 years, was entitled to be released as a matter of course under the provisions of the Punjab Jail Manual and the Rules framed under Prison Act.

Justice Fazalali held:

As regards the point raised by the respondent, that the prisoner could be released automatically on the expiry of 20 years under the Punjab Manual or the Rules framed under *Prisons Act 1894* (9 of 1894), the matter is no longer *res integra* and stands concluded by the decision of this court in *Gopal Vinayak Godse v State of Maharashtra,* AIR

1961 SC 600 : *[1961] 3 SCR 440*, where the court following a decision of the Privy Council in *Pandit Kishori Lal v King Emperor,* AIR 1945 PC 64 : (1945) 47 Bom LR 625, observed: that

> Under *section 57, IPC, 1860* a person transported for life or any other term before the enactment of the said section would be treated as a person sentenced to rigorous imprisonment for life or for the said term. And sentence for life imprisonment, without any formal remission by appropriate government, can not be automatically treated as one for a definite period. No such provision is found in the *IPC*, *CrPC, 1973*, or the *Prisons Act 1894*.

A sentence for imprisonment for life, therefore, must, prima facie, be treated as imprisonment for the whole of the remaining period of the convicted person's natural life.

The court further observed that:

From a review of the authorities and the statutory provisions of *CrPC, 1973*, the following propositions emerge:

(a) That a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various Jail Manuals or under *Prisons Act* cannot supersede the statutory provisions of *Indian Penal Code, 1860*. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate government chooses to exercise its discretion to remit either the whole or a part of the sentence (*section 432 of CrPC, 1973*).

(b) That the appropriate government has the undoubted discretion to remit or refuse to remit the sentence and where it refuses to remit the sentence, no writ can be issued directing the State government to release the prisoner.

(c) That the appropriate government which is empowered to grant remission under *section 432, CrPC, 1973* is the government of the State where the prisoner has been convicted and sentenced, i.e. the transferor State and not the transferee State where the prisoner may have been transferred at his instance under *Transfer of Prisoners Act*.

(d) That where the transferee State feels that the accused has completed a period of 20 years, it has merely to forward the request of the prisoner to the concerned State government, i.e. the government of the State where the prisoner was convicted and sentenced and even if this request is rejected by the State government, the order of the government cannot be interfered with by a High Court in its writ jurisdiction.

The appeal is allowed and order of High Court is set aside.

7.6.12 Proportionality of Sentence

The principle of proportionality of sentence between the time served for attempted murder and the minimum term which would have been served had the attempt been successful could be maintained by reducing a sentence of 18 years' imprisonment to 15 years where the attack resulted in serious damage but there were mitigating factors.

R v Sandhu (Manjit),

2008 WL 5044248 : (2008) (2009) 2 Cr App R (5) 10 : (2008) EW CA 2687

The applicant (s) applied for leave to appeal against a sentence of 18 years imprisonment, imposed following his conviction for attempted murder.

S and the victim (V) had been married but had separated. V had returned to the matrimonial home to collect some belongings and to enable S to see their children. S ran towards V with a knife, slashed the knife around her head, neck and chest area, and tried to strangle her. V grabbed the knife and suffered lacerations to her head, neck and hands. She required an operation to repair nerve damage in both hands. The attack resulted in permanent scarring and in emotional and psychological damage. The attack took place in the presence of their children. The judge stated that the minimum term of imprisonment would have been 15 years had V died. Having regard to S's mitigation and the fact that the attack was not premeditated, the judge concluded that the appropriate sentence was one of 18 years.

The appellant S argued that the sentence was manifestly excessive as the judge had failed to make sufficient

allowance for the background of the offence and S's personal mitigation. S also argued that the judge wrongly applied the principle of having regard to the minimum term to be served in the event of the victim having died.

Application granted, appeal allowed. The starting point for consideration was the principle that, with regard to a sentence for attempted murder, there had to be a proportionate relationship between the time served and the minimum term which would have been served had the attempt been successful The matter could not be approached by means of a mathematical formula. The attack was a terrible one which was aggravated by the adverse effect it had on the children, but there were mitigating factors including the fact that the attack was not premeditated. The principle of proportionality could be maintained by granting leave, allowing the appeal and substituting a sentence of 15 years imprisonment for the 18 years that the sentencing judge had imposed.

Life imprisonment means convict's whole life—Allahabad High Court—1999

Mahak Singh v State of UP,

AIR 1999 All 274 : (1999) 3 AWC 1838 : 1999 (3) All WC 1838

Justice OP Garg held:

There is no provision in law that life imprisonment expires on serving out the sentence for 14 years or 20 years. It was earlier a myth that although no formal order of commutation or remission, either under *section 55, IPC, 1860* or section 433 (b), *CrPC, 1973*,[71] has been passed, the convict having been subject to rigorous imprisonment for a period of more than 14 years, should be deemed to have served life imprisonment and, therefore, entitled to be released forthwith.

The controversy came to be considered by the apex court in the case of *Naib Singh v State of Punjab,* AIR 1983 SC 855 : (1983) 2 SCC 454 : 1983 SCR (2) 770, where it was held that there will be no question of releasing the convict simply because he has served 14 years rigorous imprisonment in the absence of order of commutation passed by the State government either under *section 55, IPC, 1860* or *section 433 (b) of CrPC, 1973*.

Solitary confinement to be restored in extreme cases only—Supreme Court—1981

Kishore Singh Raminder Dev v State of Rajasthan,

AIR 1981 SC 625 : (1981) 1 SCC 503 : 1981 SCR (1) 995

Justice VR Krishna Iyer held:

Flimsy grounds like "loitering in the prison", "behaving insolently and in an uncivilised manner", "tearing off his history ticket" cannot be the foundation for the torture treatment of solitary confinement and crossbar fetters. Keeping prisoners in separate solitary rooms for long periods from eight months to 11 months spells are long enough to be regarded as barbarous and would amount to breach of fundamental law laid down by the Supreme Court in the *Sunil Batra's* case.[72] Solitary confinement disguised as "keeping in separate cell" and "imposition of fetters" are not to be resorted to, save in the rarest of rare cases and with strict adherence to the procedural safeguards contained in the decisions of the Supreme Court relating to the punishment of prisoners.

Prisoners are not persons to be dealt with at the mercy of the prison echelons authority. *Articles 14*, *19* and *21* operate within the prisons in the manner explained in *Sunil Batra's* case.

If special restrictions of a punitive or harsh character like solitary confinement or putting fetters have to be imposed for convincing security reasons, it is necessary to comply with natural justice. Moreover, there must be an appeal from a prison authority to a judicial organ when such treatment is meted out. Human dignity is a dear value of our *Constitution* not to be bartered away for mere apprehensions entertained by jail officials.

Gift of land as compensation in lieu of acquittal of charge of murder— illegal—Supreme Court of India—1984

Ramesh Kumar v Ram Kumar,

AIR 1984 SC 1029 : (1984) 3 SCC 90

Acquittal of the accused under *section 302* read with *section 34*, *IPC, 1860*, by the High Court on the ground that a gift of three acres of land was made to the deceased's widow is illegal.

Setting aside the judgment of the High Court, the Supreme Court held that if the judgment of the High Court is upheld, a person who can afford to make gifts of land or money to the heirs of the victim may get away even with a charge of murder. Courts are to dispense justice, not to dispense with justice. The judgment cannot stand a second scrutiny.

Compromise to commute death sentence is allowed in Pakistan—(not in India)—Supreme Court of Pakistan—1982

Mohammad Hanif v State[73]

Muhammad Hanif and Muhammad Shafiq sons of Umar Din were convicted and sentenced to death for the murder of their step-mother Zenab Bibi under section 302 read with section 34,[74] Pakistan *Penal Code*.

The deceased, was the step-mother of the appellants. The complainant Muhammad Afzal, was her real son and the half-brother of the appellants. Since the judgment was delivered by the High Court, the parties have entered into a compromise in pursuance thereof, Muhammad Afazal has filed an affidavit before the court to the effect that in view of the close relationship between the parties and on account of the intervention of the elders of the family and with a view to maintaining peace and amity between its members, the children of deceased have forgiven their two half-brothers, for the murder of their mother and they request that they may be acquitted.

Approving the compromise as a good gesture between the brothers, the Supreme Court of Pakistan commuted the sentence of death to life imprisonment.

Following reformative approach towards the accused, the court directed the accused-husband to pay Rs 40,000 to wife as compensation in lieu of two years—imprisonment and the offence of bigamy under section 494 was compounded—Supreme Court—1978

Narotam Singh v State of Punjab[75]

Justice VR Krishna Iyer held:

The complainant, Amrit Kaur, was married to the accused. A dowry issue soured the relationship. The wife was sent back to her brother and restoration of conjugal rights never occurred. Meanwhile, the first accused developed intimacy with another woman, Dananjeet Kaur which led to a sort of wedlock.

The husband, the appellant, was found guilty and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs 500.... Even though husband is guilty what should be the sentence in the present case?

The appellant is a businessman and one consequence of his two years imprisonment is that he wrecks his business, which, whatever else happens, will land his family, including one or both the wives, in financial misfortune.

Secondly, punitive incarceration may not restore the harmony between the complainant and the appellant, if at all, it may estrange them into worse hostility and never restore them back to consortium.

Thirdly, the reality of the situation is that the man has married a second woman. The complainant derives poor comfort if left in the cold after a draconian sentence inflicted upon her husband. True, the penal law registers the public denunciation of the community on criminal misconduct and the wife certainly will derive satisfaction if the husband who betrays the conjugal fidelity and ill-treats one to whom requires he is obliged to be kindly is punished. She has to live, which means financial resources. She has to have a future, which certainly cannot rest with a betrayer.

Taking the totality of these circumstances into consideration,... the best course would be to have the offence compounded for which the parties were readily willing, appreciating the pragmatism of life.

Offence compounded. Conviction quashed.

Prisoner has right of confidentiality in legal correspondent—House of Lords—2001

R v Secretary of State for Home Department, ex parte Daly,

[2001] 3 All ER 433 (HL) : [2001] UKHL 26

Lord Bingham of Cornhill held:

On 31 May 1995, the Secretary of State introduced a new policy governing the searching of cells occupied by convicted and remand prisoners in closed prisons in England and Wales. Under that policy, no prisoners were allowed to be present during a search of living accommodation, and cell. Search staff was required, in the absence of the prisoner, to examine legal correspondence to ensure that it was bona fide correspondence between the prisoner and a legal adviser.

The lawfulness of that policy was challenged by Daly, a long-term prisoner, who contended that such a policy was not authorised by section 47 (1)[76] of Prison Act 1952, which empowered the secretary of State to make rules for the regulation of prisons and for their discipline and control of prisoners.

The Court of Appeal rejected the contention and held that the policy represented the minimum intrusion into the rights to prisoners consistent with the need to maintain security, order and discipline in prisons.

Daly appealed to the House of Lords, contending that the blanket policy of requiring prisoners to be absent during the examination of legally privileged correspondence infringed, to an unnecessary and impermissible extent, a basic right recognised both at common law and under *Article 8* (1)[77] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Schedule I to Human Rights Act 1998), and that the general terms of section 47 authorised no such infringement, either expressly or impliedly.

Allowing the appeals the House of Lords said that the secretary of State's policy was unlawful and void insofar as it provided that prisoners always had to be absent when privileged legal correspondence, held by them in their cells, was examined by prison officers. Although any prisoner who attempted to intimidate or disrupt a search of his cell, or whose past conduct showed that he was likely to do so, could properly be excluded even while his privileged correspondence was examined, no justification had been shown for routinely excluding all prisoners, whether intimidating or disruptive or not, while that part of the search was conducted.

Condemned prisoner's have right to be interviewed—Andhra Pradesh High Court—1998

M Hasan v State of AP,

AIR 1998 AP 35 : (1997) 6 ALT 209

Facts: Two petitioners, one was an experienced documentary film maker and the other freelance journalist, filed the writ petition. Their request to interview two condemned prisoners sentenced to death in 1996[78] was turned down by the jail authorities.

The jail authorities advanced following reasons for refusal to grant permission for interview, viz

(a) If the petitioner is granted permission, it would result in complaining by a large number of public for reducing the sentence of the condemned prisoners;

(b) Such exhibition of videography may result in lowering the position of the courts;

(c) The prisoners had not expressed their desire to be interviewed earlier. On the other hand, their consent was obtained subsequently;

(d) Reporting in the press or video graphing the views or feelings of the condemned prisoners cannot be allowed for reasons of safety and security.

Allowing the writ petition, the High Court of Andhra Pradesh held that refusal by the jail authorities to grant permission to be interviewed amounts to deprivation of citizen's fundamental rights to freedom of speech and expression. It is not just and proper for the jail authorities to prevent the petitioners from interviewing the condemned prisoners. The court further said that the condemned prisoners (sentenced to death like any other citizen) have right to freedom of speech and expression guaranteed under *Article 19 (1)(a) of the Constitution* and right to propagate his or her ideas and views on any aspect through available media, without any fear or favour as long as they stand the test of reasonable restrictions.

44 Countries can be considered abolitionist in practice. They retain the death penalty in law but have not carried out any executions for the past 16 years or more. Amnesty International April 2017, pp 40-41.

****** In April 2012, the Connecticut legislature voted to abolish the death penalty for future crimes. By its terms, the repeal law did not affect the status of the 11 prisoners then on the State's death now. The Connecticut Supreme Court subsequently ruled in August 2015 that the death penalty violated the state *constitution*. The Court reaffirmed that holding in May 2016 and reiterated that the State's remaining death row prisoners must be resentenced to life without possibility of parole.

On 2 August, 2016, the Delaware Supreme Court held that the State's capital sentencing procedures were unconstitutional and struck down Delaware's death penalty statute. On 15 August, the Delaware Attorney General's office announced that it will not appeal the Supreme Court's ruling. Whether the Supreme Court's decision applies to the 13 people facing active death sentences is still unknown.

******* In May 2015, the Nebraska legislature voted to abolish the death penalty and overrode a gubernatorial veto to the repeal bill. Death penalty proponents subsequently submitted sufficient signatures to suspend the repeal pending the outcome of a voter referendum in November 2016. The status of the 10 prisoners on the State's death row should be repeal survive the voter referendum is uncertain.

***** In March 2009, New Mexico voted to abolish the death penalty. However, the repeal was not retroactive, leaving two people on the State's death row.

^^ In 2004, the New York Court of Appeals held that a portion of the State's death penalty law was unconstitutional. In 2007, the court ruled that its prior holding applied to the last remaining person on the State's death row. The legislature has voted down attempts to restore the statute.

^ In 1979, the Supreme Court of Rhode Island held that the State's statute imposing a mandatory death sentence for an inmate who killed a fellow prisoner was unconstitutional. The legislature repealed the law and removed it from the State criminal code in 1984.

***** http://www.deathpenaltyinfo.org/states-and-without-death-penalty (Last accessed in February 2019).

45 The Death Penalty in 2017: Year End Report, Death Penalty Information Centre.

46 After the release of the original report on 14 December 2017, there has been another exoneration and another grant of clemency. This version of the report, released 3 January 2018, is updated to include those developments.

47 Amnesty International, April 2017, p 4.

48 *Death Sentences and Executions 2017*, Amnesty International Report, p 7.

49 *Death Sentences and Executions 2017*, Amnesty International.

50 *Indian Penal Code, 1860, section 55A*, defines "appropriate government", See *Sambha Ji Krishan Ji v State of Maharashtra, AIR 1974 SC 147* : *(1974) 1 SCC 196* : 1974 Cr LJ 302.

51 *Code of Criminal Procedure 1973, section 433*:

The appropriate government may, without the consent of the person sentenced, commute—

(a) a sentence of death, for any other punishment provided by the *Indian Penal Code* (45 of 1860;

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding 14 years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine.

52 Law Commission of India's Second Report, note A, p 95.

53 *Code of Criminal Procedure 1973, section 416*.

54 *Code of Criminal Procedure 1973, section 306*, gives to a judicial magistrate or a metropolitan magistrate power to tender pardon to an accomplice. The power is to be exercised only in the case of grave offences to solicit information when it is not possible otherwise. See *Bipin Behari Sarkar v State of WB,* 1959 AIR 13 : *1959 SCR 1324*; *PV Narasimha Rao v State,* (1998) 4 Supreme 1. For details of case see chapter dealing with Offences Against Public Servant under *IPC, 1860*.

55 VN Shukla, *The Constitution of India,* 6th Edn, 1975, p 303. The power of pardon in India can be traced back to Regulating Act 1773, which vested the power with the Governor-General.

56 Sutherland and Cressy, *Principles of Criminology*, p 544.

57 In the case of *Grossman, ex p,* 267 US 87 : 69 L Ed 527 : 1925 US Lexis 359, Taft CJ has explained the object of investing the power of pardon in the head of the States in the following words: "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or endorsement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances, which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority, than the courts, power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it. Our *Constitution* confers this discretion on the highest officer in the nation, in confidence that he will not abuse it."

58 See Anson, *The Law and Custom of the Constitution,* vol II, 4th Edn, Pt II, p 27.

59 *Kehar Singh v UOI,* AIR 1989 SC 653 : (1989) 1 SCC 204. It was held that the President's power is beyond the purview of the court.

60 The Times of *India,* 12 November 1995, p 1. Saro Wiwa, 54, and his fellow activists in the movement for the survival of the Ogoni people (minority group) were convicted in October 1995 by a secret tribunal for the murder of four Ogoni men at a political rally held in May 1994.

61 *State of MP v Ratan Singh,* AIR 1976 SC 1552 : (1976) 3 SCC 470 : 1976 SCR 552.

62 *KM Nanavati v State of Maharashtra,* AIR 1962 SC 605 : (1962) Supp (1) SCR 567. See *sections 433* and *433A* of *Code of Criminal Procedure 1973*, for power to commute sentence and restrictions on such power in certain cases.

63 *Indian Penal Code, 1860, section 433*.

64 *Indian Penal Code, 1860*, *sections 432*, *434*, *435*.

65 *Sunil Batra v Delhi Administration,* AIR 1980 SC 1579 : (1980) 3 SCC 488; *Charles Sobhraj v Supdt Central Jail,* AIR 1978 SC 1514 : (1978) 4 SCC 104 : 1979 SCR (1) 512. See KD Gaur, *A Text Book of Indian Penal Code*, 3rd Edn, 2004, pp 89-92.

66 *Kishore Singh v State of Rajasthan,* AIR 1981 SC 625 : (1981) 1 SCC 503 : 1981 SCR (1) 995.

67 Ratanlal & Dhirajlal, *Law of Crimes*, 23rd Edn, 1991, pp 182-85.

68 The Bench consisted of GL Oza, Murari Mohan Dutt, KN Singh, K Jaganath Shetty and LM Sharma, JJ.

69 *TV Vatheeswaran v State of TN,* AIR 1983 SC 361 : [1983] 2 SCR 348; *Sher Singh v State of Punjab,* AIR 1982 SC 465 : [1983] 2 SCR 582; *Javed Ahmed Abdul Hamid Pawala v State of Maharashtra,* AIR 1985 SC 231 : [1985] 2 SCR 8.

70 *Triveniben v State of Gujarat,* AIR 1989 SC 142, p 143, para 9 : (1988) 4 SCC 574.

71 *Code of Criminal Procedure 1973, section 433* reads:

> **Power to commute sentence**—The appropriate government may, without the consent of the person sentenced commute—(a) ...
>
> (b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine.

72 *Sunil Batra v Delhi Administration,* AIR 1978 SC 1675 : (1980) 3 SCC 488 : 1979 SCR (1) 392. In *Charles Sobhraj v Supdt Central Jail, Delhi,* AIR 1978 SC 1514 : (1978) 4 SCC 104 : 1979 SCR (1) 512, it was held that *Article 21* guarantees right against fetters.

73 Supreme Court Monthly Review (SCMR), Pakistan. Per Muhammed Afzal Zullah, Nasim Hasan Shah, Abdul Kadir Sheikh and Main Burhanuddin Khan, JJ; *Iftikhar Ahmad v State,* (1982) 42 PLS 277 (SC).

74 Similar to *section 302* and *section 34* of *Indian Penal Code, 1860*.

75 AIR 1978 SC 1542 : (1979) 4 SCC 505 : 1978 Cr LJ 1612, per VR Krishna Iyer and Jaswant Singh JJ.

76 The Prison Act 1952, section 47, so far as material provides: "(1) The secretary of State shall make rules for the regulation and management of prisons, remand centres—and for the classification, treatment discipline and control of persons required to be detained therein..."

77 *Article 8* of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, so far as material provides: "1. Everyone has the right to respect for—his correspondence."

78 *Gentela Vijayvardhan Rao v State of AP,* AIR 1996 SC 2791 : (1996) 6 SCC 241. The accused sneaked into a passenger bus with an inflammable liquid (petrol) and set it ablaze, causing severe burn injuries to innocent passengers and killing 23 of them, including children.

8.1 Offences Affecting Life

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.1 Offences Affecting Life

Culpable homicide and murder are the gravest of offences against a human being. The word homicide has been derived from the Latin word *"homo"*, which means a man, and *"caedere"* which means to cut or kill. Thus, homicide means the killing of a human being, by a human being.[1] However, in every case of killing, one is not culpable. There may be cases where the law will not punish a man for committing homicide. For instance, killing in self-defence, or in pursuance of a lawful authority or by reason of a mistake of fact, is not culpable. Likewise, if death is caused by accident or misfortune, or while doing an act in good faith and without any criminal intention for the benefit of the person killed, the man is excused from criminal responsibility for homicide.[2] On the other hand, if the killing is not legally justified, the man will be liable for it in law. For instance, even if an alien is killed, save in the actual course of an operation of war, the killing is as much punishable as the killing of any other man.[3]

A homicide may, therefore, be either lawful or unlawful. In the former case, law will set the culprit free, whereas in the latter case, the accused will be held criminally responsible for his act. Unlawful homicide may be classified into different categories depending on its nature in order to fix a suitable punishment. These are:

(i) Culpable (blameworthy/homicide) (sections 299, 304);

(ii) Murder (sections 300, 302);

(iii) Causing death by negligence (section 304A), and

(iv) Dowry death (section 304B).

The distinguishing features of these different categories of unlawful homicides are the degree of intention, knowledge, or recklessness with which a particular homicide is committed. If the probability of death resulting from a bodily injury is of a high degree (i.e. where death is a certainty), it is murder, and if the probability is not of that order, it is culpable homicide.[4] For instance, if *A* attacks *B,* with a sharp-edged knife in his heart resulting in *B's* death, *A* would be guilty of murder.[5] On the other hand, if *A* causes injury to *B* with a stick, fracturing his skull and causing his death, *A* would be liable for culpable homicide.[6] In the first case, it is certain from the nature of the injury and the instrument used for the purpose, that the injury would cause death of the victim, whereas it is not so in the second case.

There may be situations where death of a man is caused as a result of a rash and negligent act of the accused. For instance, where *A* drove a motor car while he was feeling sleepy and as a consequence, he lost control over the vehicle and collided with a tree, causing death of one of the persons sitting in the car, the death was caused neither intentionally nor with the knowledge that the act was likely to cause death, yet *A* is liable for the death of the passenger. *A* is responsible for causing death by negligence and is liable for punishment under *section 304A of the IPC, 1860*.[7]

If the act of killing does not fall in any one of the sections mentioned above, the accused would neither be liable for culpable homicide, nor for murder, nor for culpable homicide not amounting to murder, nor for causing homicide by negligence. *A*, strikes his servant *B*, with a small stick in order to punish him for being careless in his job. The blow ruptured *B's* enlarged spleen, of which *A* was not aware, resulting in *B's* death. Since *A* neither had any intention to

kill *B*, nor was the injury such as was likely to cause *B's* death, *A* would be liable neither for murder nor for culpable homicide. *A's* intention was merely to inflict mild bodily injury, and so, he might be liable to cause simple hurt only (*section 319, IPC, 1860*).

8.1.1 Causal Connection between the Act and the Death

To fix criminal liability, the causal connection between the act and the death must be direct and distinct, and though not necessarily immediate, it must not be too remote. These conditions are not fulfilled:

(i) If the connection between the act and the death is obscure (hidden) or,

(ii) If there are concurrent contributory causes which make it impossible to say that the act in question was a substantial cause, or,

(iii) If the connection is broken by the intervention of subsequent causes.

Whether in a particular case these conditions are fulfilled or not is always a question of degree, dependent upon circumstances.[8]

8.1.1.1 *Connection between the Act and the Death is Obscure*

In cases, for instance, where a mother commits suicide because her son is dissolute, or because she has been seduced and desecrated, it would be impossible to prove a definite and direct connection between the death and the act of the son or husband.

It is also doubtful whether homicide is committed when death results from an act, which does not usually produce such results. A very slight nervous shock might in many cases kill a person suffering from a heart disease, as effectively as a shot or a stab injury. Similarly, disarrangement of a pillow, sudden awakening from a deep sleep, or sudden communication of bad news, might cause the death of a sick person, just as a man hanging over a steep precipice might be killed by loosening of a stone or a root. In all such cases, the connection between cause and effect is not only definite but obvious. However, there are cases in which death is a remote and improbable consequence of the act that the law withholds criminal responsibility except where death was intended [section 300 (2), *IPC*].

8.1.1.2 *Difficulty in Ascertaining Immediate Cause of Death Due to Inconspicuous Concurrent Cause of Death*

In some cases, the difficulty lies in ascertaining the facts, and not in applying the law. For instance:

(a) A man received an injury for which he undergoes a surgical operation, as a result of which he dies;

(b) The man refuses to undergo a surgical operation which would probably have cured him, and in consequence of his refusal he dies;

(c) The surgeon who attends on him is incompetent and pursues a wrong course of treatment, either from ignorance or from bad faith and this causes his death;

(d) The surgeon's treatment is proper but the patient does not observe his directions and dies.

> In all these cases, the deceased is regarded as having been killed by the injury, except in the case of the incompetence of the surgeon.

(e) The connection between the act and the death by it is direct and distinct, though it cannot in any of them be called immediate. In each of them, the man would not have died as he did if he had not been wounded; but also in each case, something different from his wound caused his death and was a more immediate cause of it than the wound.

8.1.1.3 *Intervention of Subsequent Causes*

Though the connection between the death and the injury is direct and distinct, other causes which are distinct from and independent of the injury may intervene to prevent the death from being treated in law as homicide.

A, hoping that *B* will catch small-pox induces him to walk down a street in which many people are down with small pox. *B* catches small-pox and dies. *A* no doubt has caused *B's* death, but in a manner, so remote, and dependent on so many contingencies, that it could hardly be said that *A* had killed *B*.

Thus, despite that the result of a man's act is the death of a human being, it can be excused and justified in a certain circumstance by reason of the absence of criminal intention, knowledge or recklessness on the part of the accused or there being no direct and distinct causal connection between the act and the death.

The *Indian Penal Code, 1860*, besides providing punishment for unlawful homicides has also provided punishment for abetment of suicide (sections 305, 306), attempt to murder (section 307), attempt to culpable homicide (section 308), and an attempt to commit suicide (section 309).

Refusal of medical treatment does not break chain of causation—Court of Appeal—1975

R v Blaue, *[1975] 3 All ER 446* : [1975] Cr LR 648 : *[1975] 1 WLR 1411*

Facts: A refusal by the victim to have medical treatment, which might have saved her life, does not break the chain of causation. Blaue attacked a girl with a knife, causing a serious wound, which pierced her lung, necessitating surgery. The girl was a Jehovah's Witness and steadfastly refused to have a blood transfusion, which was necessary before the operation could take place, on the ground that it was contrary to her religious beliefs, despite being told that she would die otherwise. She died the next day.

Blaue was convicted of manslaughter on the ground of diminished responsibility after the judge had directed the jury that the question of causation was whether at the time of the girl's death, the stab was still an operating or substantial cause of death. Blaue (defendant) appealed to the Court of Appeal.

Per Lawton, LJ: Lord Parker, CJ in *R v Smith, [1959] 2 All ER 193*, commented as follows:

> If at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating...only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.
>
> The physical cause of death in this case was the bleeding into the pleural cavity arising from the penetration of the lung. This had not been brought about by any decision made by the deceased girl but by the stab wound. It has long been the policy of the law that those who use violence on other people must take their victims as they find them. It does not lie in the mouth of the assailant to say that his victim's religious beliefs which inhibited her from accepting certain kinds of treatment were unreasonable.

The question for decision is what caused her death. The answer is the stab wound, the fact that the victim refused to stop this end coming about did not break the causal connection between the act and death.

> The appeal is dismissed.

Discontinuance of life-support system does not break chain of causation— Court of Criminal Appeal—1981

R v Malcherek; R v Steel,

[1981] 2 All ER 422 (CA) : *[1981] 1 WLR 690* : (1981) 73 Cr App R 173

The discontinuance of treatment to save a victim's life does not break the chain of causation between the initial injury and death. In both the cases, the victims of assaults were placed on life-support systems. The doctor's diagnosed brain death, discontinued treatment and disconnected the life-support systems. In each case, on a charge of murder, the trial judge withdrew the issue of causation from the jury.

On appeal it was held, dismissing both the appeals that in neither case was there any evidence that the original injury was other than the continuing operating cause of death. The discontinuance of treatment did not break the chain of causation between initial injury and death. The accused was held liable.

8.1.2 Offences Affecting the Human Body

(i) A total of 8,97,171 cases of offences affecting the human body were reported which accounted for 30.1% of total *IPC* crimes during 2016, out of which causing simple & grievous injuries due to rash driving (3,48,914 cases) accounted for maximum cases *i.e.* 38.9% followed by cases of causing death by negligence (1,40,215 cases) and grievous hurt (89,039 cases) accounting for 15.6% and 9.9% respectively.

(ii) Maximum number of cases under offences affecting the human body were reported in Uttar Pradesh (11.2%) followed by Madhya Pradesh (9.2%) and Maharashtra (8.9%) during 2016.

Violent Crime:*

A bird's eye view of violent crimes affecting body, property, public safety and women for the last eight years, i.e. from 2009 to 2016 can be seen from the following table:

Table 1

Violent Crimes reported during 2009-2016

8.1 Offences Affecting Life

Sl. No.	Crimes	Years							
		2009	2010	2011	2012	2013	2014	2015	2016
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1.	Total Violent Crimes	2,41,986 [10.9]	24,19,86 [10.9]	2,56,329 [11.0]	2,75,165 [11.5]	3,00,357 [11.3]	3,30,754 [11.6]	3,35,901 [11.4]	4,219,299
1.1	Affecting body	1,07,580 (46.6)	11,33,69 (46.8)	12,26,79 (47.9)	1,29,017 (46.9)	1,45,542 (48.5)	1,69,154 (51.1)	1,78,525 (53.1)	8,97,171
1.2	Affecting Property	28,845 (12.9)	30,366 (12.5)	31,880 (12.4)	34,756 (12.6)	39,625 (13.2)	45,300 (13.7)	43,323 (12.9)	
1.3	Affecting Public Safety	71,678 (31.1)	76,079 (31.4)	77,564 (30.3)	86,469 (31.4)	81,483 (27.1)	75,331 (22.5)	74,965 (22.3)	
1.4	Affecting Women	21,397 (9.3)	22,172 (9.2)	24,206 (9.4)	24,206 (9.4)	33,707 (11.2)	40,969 (12.4)	39,088 (11.6)	

Note: 1. [ ], () Bracketed figures represent the percentage share of crimes to total *IPC* crimes.

2. (), [ ] Bracketed figures represent the percentage share of crimes to total Violent Crimes

8.1.3 Incidences of Violent Crimes during 2015 (3,35,901 Rate 26.7)

A total of 3,35,901 cases of violent crimes were registered in the country during the year 2015 compared to 3,30,754 cases in 2014, showing an increase of 1.6% during 2015 over 2014. The share of violent crimes to the total *IPC* crimes during the year 2015 is 11.4%.

State and UT-wise crime during the year 2015, Uttar Pradesh, Maharashtra and Bihar have reported maximum number of 40,613 cases, 37,290 cases are 35,754 cases respectively contributing 12.1%, 11.1% and 10.6% of the total violent crimes reported in the country respectively.

As against 2015 a total of 4,29,299 violent crimes were reported in 2016.

Number of cases regarding murder committed during 2014, 2015 and 2016 are as stated below:

8.1 Offences Affecting Life

Crime Head	Crime Incidence			Crime Rate			Percentage Variation	
2014	2015	2016	2014	2015	2016	2014-2015	2015-2016	
Murder	33,981	32,127	30,450	2.7	2.6	2.4	-5.5%	-5.2%

(i) A total of 30,450 cases of murder were reported during 2016, showing a decline of 5.2% over 2015 (32,127 cases). Uttar Pradesh (4,889 cases) reported the highest number of cases of murder accounting for 16.1% followed by Bihar with 8.5% (2,581 cases) and Maharashtra with 7.6% (2,299 cases) during 2016.

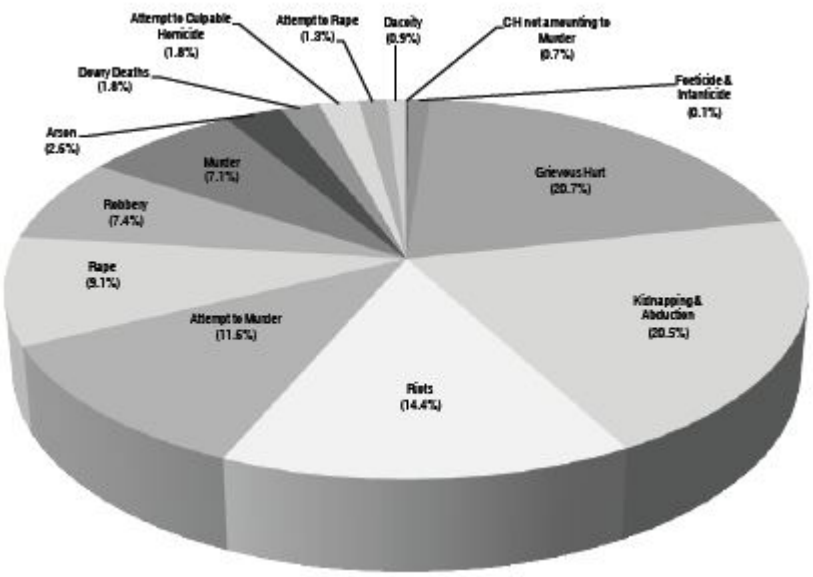
(ii) Personal vendetta or enmity (5,179 cases) was the motive in highest number of murder cases followed by property dispute (3,424 cases) and gain (2,270 cases).

RATE OF VIOLENT CRIMES DURING 2015 (All India 26.7)



Crime in India-2015, p 58

Violent Crimes in States/uTs (2016)



1 Stephen, *A History of the Criminal Law of England,* vol III, 1883, p 1; JWC Turner, *Russell on Crime,* 12th Edn, 1964, pp 399-464; Moreland Roy, *The Law of Homicides,* pp 1-8.

2 See Chapter 3 dealing with "General Exceptions". "Lawful homicides" may be classified into (i) Excusable homicides (*Indian Penal Code, 1860*, *sections 80*, *82-88*, *92*) and (ii) Justifiable homicides (*Indian Penal Code, 1860*, *sections 76-79*, *81*, *100*, *103*).

3 1 Hale PC 433.

4 See *Essays on the Indian Penal Code*, Indian Law Institute, 1962, pp 144-64; *Virsa Singh v State of Punjab,* AIR 1958 SC 465 : [1958] 1 SCR 1495; *Rajwant Singh v State of Kerala,* AIR 1966 SC 1874 : 1966 Cr LJ 1509; *Anda v State of Rajasthan,* AIR 1966 SC 148 : 1966 Cr LJ 171.

5 *Narayanan Nair v State of Travancore-Cochin,* AIR 1956 SC 99 : 1956 Cr LJ 278 : 1956 (0) Ker LT 92 SC.

6 *Inder Singh Bagga Singh v State of Pepsu,* AIR 1955 SC 439.

7 The Law Commission of India's 42nd Report, 1971, pp 236-237.

8 Stephen, *A History of Criminal Law of England*, vol III, 1883, p 1.

* National Crime Record Bureau 2015 pp 55-56/National Crime Record Bureau 2016, p xviii.

8.2 Culpable Homi

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.2 Culpable Homi

299. Culpable homicide.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Illustrations

(a) *A* lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. *Z*, believing the ground to be firm, treads on it, falls in and is killed. *A* has committed the offence of culpable homicide.

(b) *A* knows *Z* to be behind a bush. *B* does not know it. *A* intending to cause, or knowing it to be likely to cause *Z's* death induces *B* to fire at the bush. *B* fires and kills *Z*. Here *B* may be guilty of no offence; but *A* has committed the offence of culpable homicide.

(c) *A*, by shooting at a fowl with intent to kill and steal it, kills *B*, who is behind a bush; *A* not knowing that he was there. Here, although *A* was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill *B*, or to cause death by doing an act that he knew was likely to cause death.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed, or been completely born.

304. Punishment for culpable homicide not amounting to murder.— Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with a fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

8.3 Murder

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.3 Murder

300. **murder.—**Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

Secondly.—If it is done with intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

Thirdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

Fourthly.—If the person committing the act knows that it is so imminently dangerous that it must in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations

(a) *A* shoots *Z* with the intention of killing him. *Z* dies in consequence. *A* commits murder.

(b) *A*, knowing that *Z* is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. *Z* dies in consequence of the blow. *A* is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if *A*, not knowing that *Z* is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here *A*, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) *A* intentionally gives *Z* a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. *Z* dies in consequence. Here *A* is guilty of murder, although he may not have intended to cause *Z's* death.

(d) *A* without any excuse fires a loaded cannon into a crowd of persons and kills one of them. *A* is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Distinction between section 299 and section 300 of the IPC, 1860— Explained—Bombay High Court—1876

Reg v Govinda[9]

Facts: The prisoner, a young man of 18, kicked his wife (a girl of 15) and struck her several times with his fist on the back. These blows seemed to have caused her no serious injury. She, however, fell on the ground and then the accused put one knee on her chest, and struck her two or three times on the face. One or two of these blows were violent and took effect on the girl's left eye, producing a contusion (injury without breaking skin) and discolouration. The skull was not fractured, but the blow caused an extravasation of blood in the brain and the girl died in consequence.

The session's judge found the prisoner guilty of murder and sentenced him to death. The case was sent up for confirmation by the High Court.

There being a difference of opinion between the judges as to what offence the prisoner had committed, the case was referred to the third judge, Melville J for his opinion.

Justice melville held:

For the convenience of comparison, the provision, of *sections 299* and *300* of the *IPC, 1860* may be stated thus:

Section 299	**Section 300**
A person commits culpable homicide, if the act by which the death is caused is done:	Subject to certain exceptions, culpable homicide is murder, if the act by which death is caused is done:
(a) With the intention of causing death;	(1) With the intention of causing death [section 300 Illustration (a)]; (2) With the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused [section 300 Illustration (b)];
(b) With the intention of causing such bodily injury as is likely to cause death [section 299 Illustration (a)];	(3) With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death [section 300 Illustration (c)];
(c) With the knowledge that... the act is likely to cause death [section 299 Illustration (b)].	(4) With the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death [section 300 Illustration (d)].

Further, Melville, J stated:

> ...Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder.
>
> ...The offence is murder, if the offender knows that the particular person injured is likely, either from peculiarity of *constitution*, or immature age, or other special circumstance, to be killed by an injury which would not ordinarily cause death. See illustration (b), section 300.

It is on the comparison of clause (b) of 299 and section 300 "thirdly" that the decision of doubtful cases like the present must generally depend. The offence is culpable homicide, if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. The distinction is fine, but appreciable ...It is a question of degree of probability. Practically, it will generally resolve itself into a consideration of the nature of the weapon used. A blow from the fist or a stick on a vital part may be likely to cause death; a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death. The offence is culpable homicide, and not murder. Neither was there an intention to cause death, nor was the bodily injury sufficient in the ordinary course of nature to cause death. Ordinarily, it would not cause death.

But a violent blow in the eye from a man's fist, while the person struck is lying with his or her head on the ground, is certainly likely to cause death, either by producing a contusion or extravasation of blood on the surface or in the substance of the brain.

Convicted of culpable homicide and sentenced to seven years imprisonment.

Indian Penal Code, 1860, sections 302, 304, Part II—Murder or culpable homicide in absence of intention to cause death offence is culpable homicide.

Madanayya v State of Maharashtra[10]

The fact reads that the accused throughout night gave beating to deceased living as his wife. Cumulative effect of injuries was that that the deceased died. Fact that deceased woke up in morning, and narrated the incident to her sister and she survived till evening. Post-mortem report showing that she died within couple of hours after partaking a heavy meal. Held the accused had no intention to cause death of the deceased. Conviction of accused for murder under section 302 altered to one under section 304, Part II. For culpable homicide not amounting to murder.

This appeal before the Apex Court was directed against the judgment and order of the High Court of Bombay, Nagpur Bench whereby it upheld the judgment passed by the Additional Sessions Judge, Gadchiroli convicting the appellant under *section 302 of Indian Penal Code, 1860* and sentencing him to suffer rigorous imprisonment for life and to pay fine of Rs 200. Allowing the appeal the Supreme Court said:

> We have gone through the post-mortem report and there is no doubt that there were number of injuries on the body of the deceased. None of the injuries by itself was sufficient for causing death. The cumulative effect of the injuries is that the deceased died. The issue that arises is whether the accused had the intention of causing death of the deceased. We cannot ignore the fact that the deceased woke up in the morning and narrated the incident to her sister PW-3, and she survived till 5.00 pm in the evening. The post-mortem report also shows that she died within a couple of hours after partaking a heavy meal. In this view of the matter, it is difficult to impute the intention to kill to the deceased. Therefore, we convert the conviction of the accused from one under section 302 to section 304 Part II. As the appellant has been behind bars for sixteen years, in our view, this is sufficient punishment for his crime and therefore, we reduce the sentence after altering the sentence as aforesaid to the period of incarceration already undergone by the appellant-accused. He shall be released forthwith.
>
> Appeal Allowed – Offence Reduced from murder to culpable homicide not amounting to murder.

Indian Penal Code, 1860, sections 302 and 304, Part II—Culpable homicide not amounting to murder. Single fatal blow on the head of deceased, not conclusive of intention to commit murder. No other injuries found on vital parts of the body. Accused had no preconceived intention to commit murder. Accused committing crime of culpable homicide not amounting to murder. Conviction of accused altered from section 302 to section 304, Part II. Accused sentenced for rigorous imprisonment of seven years. (Paras 18 and 19)—Supreme Court—2017

Vijay Pandurang Thakre v State of Maharashtra[11]

Per AK Sikri, J:

In all these appeals, there were 21 appellants who were all convicted for the offences punishable under sections 302, 307, 324, 336, 427, 506-II, 148 read with *section 149 of the Indian Penal Code, 1860*, by the Additional Sessions Judge, Nagpur upheld by the High Court, that were however, allowed in part thereby altering the charge under *section 307 IPC* to *section 324 of IPC*. Rest of the conviction recorded by the trial Court has been maintained.

As per the prosecution, members of the group of accused persons hatched a conspiracy to eliminate leading members of Deshmukh family for taking revenge of their defeat in Gram Panchayat election and in furtherance of their common object, committed the murder of Ashok Deshmukh and attempted to commit murder of Vilas Deshmukh, Vivek Deshmukh (PW-9 an PW-8 respectively), assaulted Dinesh Deshmukh, Arun Deshmukh, Prafulla Deshmukh, Sau Kalpana Deshmukh and Smt. Kausabai Choudhary (PW-6, PW-7, PW-13, PW-10 and PW-11 respectively), pelted stones on the houses of Deorao Nakhale and Bhimrao Nakhale (PW-12 and PW-16 respectively) and damaged the scooter of PW-4 Sushil Deshmukh.

Apex Court while allowing the appeal partly and altering the conviction from section 302 to section 304 Part II culpable homicide said:

> No doubt, in the scuffle that took place, one blow came to be inflicted on the head of Ashok which injury proved fatal. However, this by itself cannot be the reason to conclude that there was any intention to commit his murder. If 30 persons had attacked the members of Deshmukh Group, there are no injuries on the vital parts of other persons who got injured in

> the said episode. Ashok also suffered only one injury on his head and no other injury on vital part of his body. Had there been any common objective to cause murder of the members of Deshmukh Group, there would have been many injuries on deceased Ashok as well as other injured persons on the vital parts of their bodies (Para 18)

The Court accordingly held—that there was no preconceived common object of eliminating the members of Deshmukh family and group and the assembly was not acquired with any deadly weapons either. Even the High Court has not pointed out any such evidence. These findings are hereby set aside. The conviction of the appellants under *section 302 IPC, 1860* was converted into section 304-II IPC, 1860 for which the appellants were sentenced for rigorous imprisonment of seven years each.

Appeal partly allowed conviction altered from murder to culpable homicide under section 304 Part II *IPC, 1860* and sentenced to seven years which appellants had already served. Hence released from jail henceforth.

Indian Penal Code (45 of 1860) sections 302, 328—Murder and causing hurt by means of poison. Appeal against acquittal. Sale of spurious liquor 44 persons died and 36 others lost eyesight permanently by consuming poisonous liquor. Testimonies of injured and relatives of deceased that spurious liquor was purchased from shops of respondents. The fact that after such tragedy respondents even tried to destroy remaining bottles. Establishes that respondents had full knowledge that bottles contained substance methyl and also had full knowledge about disastrous consequences thereof. Case falls within four corners of section 300 fourthly. Acquittal of respondents, erroneous and set aside. (Para 24 Supreme Court 2017)

State of Haryana v Krishan[12]

Per AK Sikri, J:

In December, 1980, a very brazen, bizarre and outlandish incident took place, commonly known as “hooch tragedy”. The deleterious consequence was that 36 persons who had purchased liquor from a licensed vend in Village Kalanwali, District Sirsa, Haryana lost their lives after consuming the same. Another 44 persons who too had purchased the liquor from the same shop and consumed that liquor lost their eyesight permanently. Numbers of FIRs were registered in which the investigation was carried out by the police. All these cases were clubbed together for the purpose of trial. Orders of consolidation of trials of these FIRs were passed by the Sessions Judge resulting into a joint trial in which 48 persons were arrayed as accused. This joint trial culminated into passing of judgment by the Sessions Judge. It resulted into conviction of only two accused persons, namely, Krishan and Som Nath, for the offences under *section 302 of the Indian Penal Code, 1860* read with section 120B who were directed to undergo imprisonment for life and also to pay fine of Rs 10,000 each. They were also convicted for offence under *section 328 IPC, 1860* (causing hurt by means of poison) read with *section 120B IPC* for which they were to suffer imprisonment for a term of five years with fine of Rs 5,000 each. Conviction against these two persons were also recorded under section 61 (1)(a) of Punjab *Excise Act* 1914 for which sentence of six months rigorous imprisonment and fine of Rs 1,000 was imposed on the two convicts. Apart from these accused persons, all other accused persons were acquitted.

The two convicts (respondents herein) challenged the order of their conviction by filing appeal in the High Court. State preferred appeal to Apex Court. Allowing the State appeal and restoring the conviction against the respondents – accused the Apex Court said;—

The High Court committed manifest error in observing that evidence was not produced to connect the respondents with the tragedy. No doubt, there have been some lapses on the part of the police authorities in not investigating the case with the vigour that was necessitated. The High Court may also be right in finding fault with the State administration for not conducting an inquiry into the circumstances which led to the tragedy for pin-pointing the shortcomings in the system which permitted sale of spurious liquor from licenced liquor vend. At the same time, insofar as culpability of the respondents is concerned, the same was proved beyond doubt by producing plethora of evidence. Apex Court is of the opinion that trial Court had rightly come to the conclusion holding respondents to be the guilty of crime.

It would be suffice to observe that adequate evidence is produced showing the culpability of the respondents, individually. Once it is shown that the spurious liquor was sold from the local vends belonging to the respondents coupled with the fact that after this tragedy struck, the respondents even tried to destroy remaining bottles clearly establishes that the respondents had full knowledge of the fact that the bottles contain substance methyl and also had full knowledge about the disastrous consequences thereof which would bring their case within the four corners

of section 300. The respondents cannot be treated as mere cat's paw and naive. They have exploited the resilience nature of bucolic and rustic villagers.

Accordingly, this appeal is allowed and judgment of the High Court acquitting the respondents is set aside and that of the trial Court convicting the respondents is restored. The respondents shall undergo the sentence inflicted by the trial Court.

Appeal allowed.

Indian Penal Code, 1860, sections 300, 301, 498A—Murder, causing disappearance of evidence and cruelty. Appeal against conviction. Accused husband alleged to have killed his wife by strangulation. Relationship between appellant and deceased was not cordial because of illicit relationship between accused and another. Death of deceased was homicidal in nature caused due to asphyxia. Evidence of witnesses that on date of incident accused asked deceased to come to field where he would pay money to her. Sometime later deceased was found dead under a tree. Evidence found credible on all material aspects of prosecution case. Conviction of accused under section 302 and section 201, proper—Supreme Court—2015.

Eshwarappa v State of Karnataka[13]

Per TS Thakur, J:

This appeal arose out of a judgment and order passed by the High Court of Karnataka at Bangalore, whereby the High Court had dismissed an appeal by the appellant affirming his conviction for offences punishable under *sections 302*, *498A* and *201* of *Indian Penal Code, 1860*.

The deceased-Latha and the appellant got married to each other. The marital relationship, soured when the appellant developed illicit relations with one Sarpina. Appellant was neglecting the deceased and was residing with Sarpina, accused No 2. The appellant to get rid of the deceased strangulated her and the body was lying dead under a tamarind tree near the land of appellant in his village.

The death of the deceased was homicidal in nature caused due to asphyxia. The ligature marks found around the neck of the deceased proved that there was constriction of the neck of the deceased because of exertion of force.

The appellant had piled a heap of stones and tied a rope to the branch of the tamarind tree, only to support a false plea in defence that the deceased had committed suicide.

The High Court dismissed the appeal *in toto* although on the finding recorded by it the High Court could and indeed should have set aside the conviction of the appellant under *section 498A, IPC, 1860*.

Apex Court dismissing the appeal held:

> In the totality of the circumstances and having regard to the nature of the evidence which the Courts below have found credible on all material aspects of the prosecution case, we do not see any compelling reason to interfere with the view taken by the Trial Court as affirmed by the High Court.

Appeal dismissed. Conviction confirmed under *section 302* and *section 201*, *IPC, 1860*. Cruelty under *section 498A, IPC* not maintainable.

Indian Penal Code, 1860, sections 302, 34, 120B—Murder mens rea. Common intention or conspiracy Accused, husband along with other co-accused committing murder of wife by strangulating her neck with rope. Prosecution proving common intention of accused beyond doubt Accused persons cannot be acquitted of charges of murder in absence of proof of criminal conspiracy. Conviction, proper. (Para 9)

Shantanu Sitaram alias Anil Divekar v State of Maharashtra

with

Deepak alias Ganesh S Patil v State of Maharashtra[14]

Per Ashok Bhushan, J:

8.3 Murder

These two appeals have been filed against the judgment of the Bombay High Court dismissing three appeals filed by three accused questioning their conviction and sentence imposed by the Additional District Judge, Satara by which they were sentenced to suffer rigorous imprisonment for life and to pay fine for the offence punishable under *section 302* read with *34*, *IPC, 1860* and further to RI for three years and fine for offence under *section 201* read with *34*, *IPC* and for three years and fine for offence under *section 120B, IPC*, which was confirmed by the High Court.

Accused No 1, Shantanu married deceased Supriya on 28 April 1999. Their daughter, Mrunal was born on 22 March 2000 parents' house. On 23 December 2000, Shantanu came to Supriya's parents' house and took Supriya for a ride in a car in the evening at about 8.30 pm Shantanu took Supriya hurriedly without even permitting her to change her nightgown which she wore at that time. Supriya along with her daughter aged about nine months sat in the Fiat Car of Shantanu driven by him. When till 10 pm Shantanu did not return.

On the information of Shambhaji Mane, crime case under *sections 394* and *302*, *IPC* was registered. Shantanu was admitted to the hospital and after he was released from the hospital, he was interrogated by the IO, PW-30, PSI. On the basis of the interrogation, on 30 December 2000, the police arrested Shantanu and two other persons A2, Rafik and A3, Deepak alias Ganesh S Patil. At the instance of A2, on 30 December 2000 itself, recovery of an amount of Rs 1,000 from his house and recovery of gold jewellery which Supriya was wearing at the time of occurrence was made from his neighbourer, Damodar Gade. At the instance of A2, recovery of further stick, piece of rope, knife and other articles was found. All the articles were photographed by PW-22, Shantaram Shinde. Certain recoveries were also made at the instance of A3. Accused were charge-sheeted. Prosecution produced 30 witnesses to prove guilt.

Dismissing the appeal apex Court held, the mere fact that evidence under section 120B had not been proved does not in any manner affect the charge under *sections 302* read with *34*, *IPC*. A1 to A3 with common intention committed the crime which has been proved by the prosecution and the conviction of A1 to A3 under *sections 302* read with *34*, *IPC* cannot be faulted.

Appeals dismissed.

Indian Penal Code, 1860 sections 302, 324—Murder, section 320-grievous hurt section 506-criminal intimidation. Evidence Act section 3 murder injured witness accused persons allegedly committing assault with hammer, billhook and iron rod on head of deceased and injuring another. Accused persons coming in car on the field of deceased, identified by eye-witnesses. Evidence of eye-witnesses and injured witness revealing repeated assaults by accused persons on head of deceased due to enmity between parties. Medical report of deceased disclosing multiple cerebral injuries sufficient to cause death and injuries on injured person found to be grievous. Repeated assaults on head of deceased establishing intention of accused persons to cause death liable under section 302, IPC. Conviction of accused persons, proper. (Para 13, Para 14 and Para 16)—Supreme Court—2017

Chandrasekar v State

With

Balasubramanian v State of TN[15]

Per Navin Sinha, J:

The appellants stand convicted under *section 302, IPC, 1860* to life imprisonment and under *section 324, IPC, 1860* to six months rigorous imprisonment.

The statement of the injured, PW-1 Lalbahadur Sastri, brother-in-law of the deceased Gnanasekaran, was recorded by the Sub-Inspector of Police at the Udumalpet Government Hospital on 17 July 2007 at 10:00 AM with regard to the assault made by the appellants on the deceased and the witness, the same morning at 7:30 AM. The motive was ascribed to the acquittal of the deceased the previous day, in a criminal prosecution at the behest of appellant Govindaraj. The deceased was assaulted by the appellants repeatedly on the head with a hammer, sickle and iron rod respectively. The witness was also assaulted by the appellants causing injuries. FIR was registered the same day under sections 506 (ii) and 307, *IPC*. The deceased expired at the hospital on the same day at 11:30 AM after which *section 302, IPC* was also added.

Dismissing the appeal and upholding the conviction apex Court said:

The appellants came together armed with a hammer, sickle and iron rod respectively. They assaulted the deceased indiscriminately on the head repeatedly, a very sensitive part of the human body reflecting the individual intention of each of them to ensure the death of the deceased. The number of injuries caused on the head speaks for itself regarding the intention of the appellants. There is no need for us to consider and examine issues of common intention, in the facts of the case. (Para 14)

In view of the clear ocular evidence available, issues with regard to the confession statement and recovery of the weapons of assault need not be considered for correlation. Held, in the facts and circumstances of the case, the Court does not find any reason to interfere with the conviction of the appellants. Their bail bonds are cancelled and they are directed to surrender forthwith for serving act the remaining period of sentence.

Appeal dismissed.

Ranbir Penal Code sections 302, 341 Jammu and Kashmir Evidence Act section 3—Murder circumstantial evidence. Accused allegedly hurling abuses and later attacked deceased on his head with iron rod resulting in death. Assault on account of tussle same day of incident. Independent witness providing scuffle between parties in which accused threatened deceased that he will see him anytime. Iron rod recovered from instance of accused, proved, post-mortem report revealing injuries on head of deceased sufficient to cause death. Evidence of eye-witness, father of deceased supporting chain of events and found to be reliable. Guilt of accused established. Conviction, proper. (Para 18, Para 19, Para 20, Para 23, Para 27, Para 28, Para 33)

Khurshid Ahmed v State of J&K[16]

Per NV Ramana, J:

This appeal is directed against the judgment passed by the High Court of Jammu and Kashmir at Jammu reversing the order of acquittal passed by the Principal Sessions Judge, Bhaderwah against the appellant, and convicted him for the offences punishable under sections 302/341 of Ranbir *Penal Code* and sentenced him to suffer imprisonment for life and to pay a fine of Rs 1,000 for the offence punishable under section 302, RPC and to pay a fine of Rs 500 for the offence under *section 341, IPC, 1860* wrongful restraint with the direction to realize the fine amount from his estate. While dismissing the appeal preferred by the accused appellant apex Court held, that the direct oral evidence available on record coupled with the medical evidence, points at the guilt of the accused and not proving the motive for commission of the offence lost its significance in the facts of the case.

The power of the appellant Court in an appeal against acquittal is the same as that of an appeal against conviction. But, in an appeal against acquittal, the Court has to bear in mind that the presumption of innocence is in favour of the accused and it is strengthened by the order of acquittal. At the same time, appellate Court will not interfere with the order of acquittal mainly because two views are possible, but only when the High Court feels that the appreciation of evidence is based on erroneous considerations and when there is manifest illegality in the conclusion arrived at by the trial Court. In the present case, there was manifest irregularity in the appreciation of evidence by the trial Court. The High Court based on sound principles of criminal jurisprudence, has interfered with the judgment of acquittal passed by the trial Court and convicted the accused as the prosecution was successful in proving the guild of the accused beyond reasonable doubt. (Para 32)

In view of the foregoing discussion and a conspectus of all the material would pave way to conclude that the prosecution has proved the case beyond reasonable doubt and the appeal preferred by the accused is bereft of any substance and accordingly dismissed. (Para 33)

Appeal dismissed conviction upheld (Supreme Court 2018).

Appreciation of evidence – Sections 302, 304 Part I and 307 of Indian Penal Code, 1860 facts did not commend to conclude that the Appellant had the intention of eliminating any one of those fired at, though he had the knowledge of the likely fatal consequences thereof. The conviction of the Appellant ought to be moderated to one under section 304 Part 1 and 307 of Code, 1860 as against under section 302, IPC, 1860. Further, the sentence for the offences was reduced from life imprisonment to the period already undergone. —Supreme Court—2016

Gurpal Singh v State of Punjab[17]

Per Amitava Roy J:

It is alleged by the prosecution that on the exhortation of Harpartap, the Appellant opened fire, which hit the informant on the side of his head. Meanwhile drawn by the commotion, Paramjit Kaur, the wife of the informant, Jatinder Singh and Lakhwinder Singh, friends of Jugraj rushed to the terrace. On seeing them, the Appellant fired from his gun towards them, which hit Paramjit and Jatinder on their abdomen and Lakhwinder on his mouth and head. On hue and cry being raised, the Appellant and the accused fled the scene.

The injured were rushed to the Guru Nanak Dev Hospital, Amritsar where they were treated. However, Jatinder succumbed to the injuries sustained.

High Court concurred with verdict of Trial Court in convicting appellant for offence under sections 302 and 307 of Code, 1860 for murder and attempt to murder, while acquitting co-accused. Hence, present appeal before apex Court the question is – Whether conviction was sustainable. Facts: The High Court concurred with the verdict of the Trial Court in convicting the Appellant for the offence under *sections 302* and *307* of *Indian Penal Code, 1860* while acquitting the co-accused, his son. Following his conviction, the appellant had been awarded sentence of life imprisonment and fine with default sentence under section 302 of Code, 1860 and five years rigorous imprisonment and fine with default sentence under *section 307 of IPC, 1860*. Hence, the present appeal by the appellant.

Held, while allowing the appeal partly;

(i) The eye-witnesses including the informant offered a consistent coherent and convincing narration thereof which did not admit of any doubt of their trustworthiness. The plea of their family relationship to discredit them did not commend for acceptance. The medical evidence revealed injuries on the deceased and the injured compatible with the weapon used. The charges levelled against the appellant thus were proved beyond doubt.

(ii) Incidentally, twelve years had elapsed since the occurrence. The appellant was overpowered by an uncontrollable fit of anger so much so that he was deprived of his power of self-control and being drawn in a web of action reflexes, fired at the deceased and the injured, who were within his sight.

In view of the facts and circumstances of the case, the conviction of the appellant is converted to one under section 304 P*art 1* and *307 IPC* from *section 302 of the Indian Penal Code* and the sentence of life imprisonment is reduced to the period already undergone (12 years of imprisonment). In this view of the matter, as a corollary, the appellant is hereby ordered to be set at liberty forthwith, if he is not required to be detained in connection with any other case.

Sections 302 read with section 34, IPC, 1860 conviction upheld under section 304 Part I. Having regard to the fact that deceased survived for 62 days and that his condition was stable when he was discharged from the hospital, the Court cannot draw an inference that the intended injury caused was sufficient in the ordinary course of nature to cause death so as to attract clause (3) of section 300 Indian Penal Code. [13] Hence, conviction altered under section 304 Part I.—Supreme Court—2016

Sanjay v State of UP[18]

High Court upheld conviction of appellants under *sections 302* read with *section 34* of *Indian Penal Code, 1860* – These criminal appeals have been filed assailing the impugned judgment passed by the High Court dismissing the criminal appeals and upholding the conviction of the appellants for offences under *sections 302*, *307* read with *section 34 Indian Penal Code* and *section 452 Indian Penal Code, 1860*. Allowing the appeals in Part A.

The appellants used firearms country-made pistol and fired at Roop Singh at his head as the accused had the intention of causing such bodily injured as is likely to cause death. As the bullet injury was on the head, vital organ, second appellant intended of causing such bodily injury and therefore conviction of the appellant is altered from *section 302 Indian Penal Code* to section 304 Part I *Indian Penal Code*. [15] C. Both the appellants indiscriminately fired from their country-made pistols at Roop Singh-deceased and Sheela (PW-2) respectively. The conduct of the appellants and the manner in which the crime has been committed is sufficient to attract *section 34 Indian Penal Code* as both the appellants acted in furtherance of common intention. [14] D. Conviction of the appellants-was modified to section 304 Part I read with *section 34 Indian Penal Code* respectively. [16] Conviction modified and upheld under section 304 Part I.

Injury sufficient in the ordinary course to cause death falls under section 300, clause "thirdly" of Indian Penal Code, 1860—Supreme Court—1958

Virsa Singh v State of Punjab,

AIR 1958 SC 465 : *[1958] 1 SCR 1495*

Justice Bose held:

The appellant Virsa Singh has been sentenced to imprisonment for life under *section 302 of IPC, 1860* for the murder of one Khem Singh.

There was only one injury on Khem Singh as the result of a spear thrust and the doctor who examined Khem Singh while he was still alive said that it was ...sufficient to cause death in the ordinary course of nature.

It was argued that the facts set out above do not disclose an offence of murder because the prosecution has not proved that there was an intention to inflict a bodily injury that was sufficient to cause death in the ordinary course of nature. Section 300 "Thirdly" was quoted:

> If it is done with the intention of causing injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

It was said that the intention, which the section requires, must be related, not only to the bodily injury inflicted, but also to the clause,

> and the bodily injury, intended to be inflicted is sufficient in the ordinary course of nature to cause death.

This argument is fallacious. If there is an intention to inflict an injury that is sufficient to cause death in the ordinary course of nature, then the intention is to kill and in that event, the clause "thirdly" would be unnecessary because the act would fall under the first part of the section, namely:

> If the act by which the death is caused is done with the intention of causing death.

The two clauses are disjunctive and separate. The first is subjective, and the other— "If it is done with the intention of causing bodily injury to any person"—is objective.

...To put it shortly, the prosecution must prove the following facts before it can bring a case under section 300:

> First, it must establish quite objectively, that a bodily injury is present;
>
> Second, the nature of the injury must be proved; these are purely objective investigations;
>
> Third, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved, to be present, the inquiry proceeds further; and,
>
> Fourth, it must be proved that the injury set out above is sufficient to cause death in the ordinary course of nature. This part of the inquiry is purely objective and inferential and has nothing to do with the intention of the offender.

Once these four elements are established by the prosecution, the offence is murder under section 300.

The question is ...whether he intended to inflict the injury in question; and once the existence of the injury is proved, the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion.

If the totality of the circumstances justifies an inference that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury to be as serious as it turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury.

The difference is not one of law but one of fact; and whether the conclusion should be one way or the other is a matter of proof.

It is held, in the absence of any circumstances to show that the injury was caused accidentally or unintentionally, the presumption would be that the accused had intended to cause the inflicted injury.

The conviction is upheld. The appeal is dismissed.

Indian Penal Code, 1860 sections 300, 34 and 141 – Murder - Deceased tried to run away but was chased by accused - While one accused exhorted others, all the others effectively participated in inflicting injuries on the body of deceased - Common intention thus, coming into existence at spur of moment. All accused continuing to assault deceased causing fatal injuries even after he fell on ground, showing their common intention or object to cause death. Prosecution witness explained occurrence by attributing specific role to each accused - 30 injuries inflicted on the body of one deceased and 33 on the other deceased - Injuries inflicted on spine, which is vital part of body, establishes that acts were going to result in death of deceased - Hence, it is not a case where offence under section 302 IPC can be converted to offence under section 304 IPC Part I or Part II - For culpable homicide not amounting to murder - Merely because another view is possible, it is no reason for Supreme Court to interfere in acquittal of an accused

State of Haryana v Shakuntala[19]

Per Swatanter Kumar J:

The case relates to conviction of all the nine accused. For commission of the offence punishable under *section 148 of IPC, 1860* as well as under *sections 325*/*302 IPC* read with *section 149 IPC*, for inflicting injuries by a deadly blow, hitting Manohar Lal as well as Sushila, who ultimately died on way to hospital. They were sentenced to life imprisonment under *section 309 IPC, 1860* and sentenced under *section 300*, *304*, *34*, *141* and *149 IPC* and sentenced to life imprisonment and fine and various other sentences to run concurrently.

The High Court of Haryana upheld the conviction of the accused nos 1 to 4 and 7 and 9, which resultantly acquitted accused nos 5, 6 and 8. The state went in appeal against the acquittal of the accused nos 5, 6 and 8.

While dismissing the state appeal, the Apex Court held that:

> …merely because another view is possible, it would be no reason for Supreme Court to interfere with order of acquittal. Since the accused nos 1 to 4, 7 and did not go in appeal their sentences remain intact.
>
> First, Lakshmi opened assault by giving an iron blow hitting Sushila on her leg. The accused gave a deadly blow on Manohar Lal's head, who fell down and all started beating him and Sushila. Both died on their way to the hospital. All accused persons were convicted.

Appellant liable to be convicted for murder under section 302 IPC, 1860 read with section 34 IPC for hitting the head of the deceased with a piece of wood lying at the place of occurrence when the blow given by the appellant was sufficient to cause death as per post mortem evidence—Supreme Court—2012

Lokesh Shivakumar v State of Karnataka,

AIR 2012 SC 956 : *(2012) 3 SCC 196*

Per Aftab Alam and R Dave, JJ:

While dismissing the appeal against conviction for committing murder under *section 302, IPC, 1860* read with *section 34, IPC* for rigorous imprisonment for life and a fine of Rs 500/- for hitting Dharmraj's (deceased) head with a wooden piece on the right side of his head resulting in severe bleeding injures on head, face and nose, that resulted in Dharmraj's death, the apex court said that injury was sufficient to cause death as per the post mortem evidence.

Bodily injury likely to cause death–culpable homicide falls under clause (b) to section 299, IPC—Supreme Court—1976

Jayaraj v State of TN,

AIR 1976 SC 1519 : 1976 CR LJ 1186 : (1976) 2 SCC 788

Facts: Jayaraj, appellant (A-1), and six others were tried by the session's judge, for causing the death of one Pattu Nadar. All were acquitted. There was political rivalry between the deceased and the appellant and election fever was raging at the time.

On appeal by the State, the High Court set aside the acquittal of A-1 and convicted him under *section 302, IPC, 1860* for the murder of Pattu Nadar and sentenced him to imprisonment for life. Hence, this appeal by A-1.

Justice RS Sarkaria stated:

...the prosecution must prove the following before it can bring a case under *section 300, IPC*, Thirdly clause.

(1) It must establish, quite objectively, that a bodily injury is present.

(2) The nature of the injury must be proved, these are purely objective investigations.

(3) It must be proved that there was an intention to inflict mat particular injury, that is to say, it was not accidental or unintentional, or that some other kind of injury was not intended.

(4) It must be proved that the injury of the type just described made up of the three elements set out above, was sufficient to cause death in the ordinary course of nature. This part of the inquiry is purely objective and inferential and has nothing to do with the intention of the offender.

In case the fourth element has not been objectively and clearly established, there is no escape from the conclusion that the prosecution had failed to prove beyond reasonable doubt that this injury on the abdomen of the deceased was sufficient to cause death in the ordinary course of nature. The act of the appellant did not amount to murder, the nature of the offence committed would be culpable homicide not amounting to murder. The guilty intention in the first two conditions under *section 299, IPC, 1860* contemplates the intended death of the person harmed or the intentional causing of an injury likely to cause his death.

The knowledge in the third condition contemplates knowledge of the likelihood of the death of the person.

The first clause of section 300 reproduces the first part of section 299. Therefore, ordinarily, if the case comes within clause (a) of section 299 it would amount to murder. If the act of the accused falls under clause (b) of section 299, ie, if the intended bodily injury is likely to cause death as distinguished from one which is sufficient to cause death in the ordinary course of nature, clause 3 of section 300 would not apply.

This is exactly the situation in the present case. The offence committed by the appellant would, therefore; fall under clause (b) of section 299 punishable under the first part of *section 304, IPC, 1860*.

The appeal is partly allowed.

Section 302, IPC—Murder and culpable homicide: Distinction between clause Thirdly of section 300 and clause Secondly of section 299 depends on the nature of injury, intention of the accused—Appeal Dismissed, Conviction upheld—Supreme Court—2008

Bavisetti Kameshwara Rao @ Babai v State of AP[20]

Per VS Sirpurkar, J:

The apex court in Kameshwara Rao held that, when injury is caused on a vital part of the body with savage force resulting in instantaneous death, injury is sufficient to cause death within section 300 clause Thirdly and amounts to murder punishable under *section 302 IPC* murder irrespective of a solitary injury.

Accused appellant, a motor mechanic, on verbal altercation between an unarmed deceased plugged screw driver in the abdomen with such savage force so as to cause 12 cm deep injury damaging liver and spleen resulting in his death almost instantaneously.

The doctor who conducted the post-mortem opined that[21] the deceased had died of hemorrhagic shock due to injuries to liver and spleen. A glance at these injuries would suggest that it was injury No 3 (see footnote) which was fatal and it was in the region of the, abdomen which was a vital part of the body of the deceased.

The trial court on the basis of the medical report that the injury was sufficient in the ordinary course of nature to cause death under section 300 clause Thirdly sentenced the accused under *section 302 IPC,1860* for murder, which was confirmed by the High Court. Hence, appeal to the Supreme Court.

An important question raised before the apex court was that:

> Whether a solitary injury (single injury) could be considered sufficient to cause death of the accused.

The accused appellant pleaded that since this was the case of a single injury that too, the weapon used was a screw driver which was in the regular use of the accused as a tool, the accused being a motor mechanic: it could not be said that his intention was to cause death and also to cause such bodily injury as would be sufficient to cause death of the deceased within clause Thirdly of *section 300 IPC, 1860*.

It was further pleaded that since it was only a single injury and, even if in the knowledge of the accused that such injury was likely to cause the death of the deceased, the offence at the most would be culpable homicide under clause (ii) to section 299 punishable under section 304 Part II of *IPC*.

Dismissing the appeal and upholding the conviction the apex court held that a careful perusal of the facts of the case and medical report would reveal that when the screw driver was plucked with savage force into the vital part of the body with it, it cut his liver and spleen, which clearly demonstrates that this was a case, “where the act was done with the intention of causing bodily injury and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause the death” covered by “Thirdly” of *section 300 of Penal Code*, 1860.”

And even if there was a single injury caused, it was with such a force and on such a vital part of the body that it caused almost instantaneous death. The deceased, after he was injured he went to the police station and before he could reach to the hospital, he breathed his last.

Appeal Dismissed.

Single blow on the neck in a sudden quarrel causing death—culpable homicide —within clause (ii) to section 299 IPC, 1860—Supreme Court—1992

Patel Rasiklal Becharbhai v State of Gujarat,

AIR 1992 SC 1150 : 1992 Cr LJ 2334 : *1993 Supp (1) SCC 217*

Facts: The appellant, A-3, along with five others were tried for offences punishable under sections 147, 148, 302, 324, 326 and 447, read with *section 149 of the IPC, 1860*. Though the trial court acquitted all of them, the High Court convicted A-3 under *section 302, IPC*. The Supreme Court set aside the conviction under section 302 and instead convicted him under section 304 Part II of *IPC*.

It was held that facts of this case would show that there is a reasonable doubt whether the accused intended to cause that particular injury in which case the offence is one punishable under section 304 Part II of *IPC*. For culpable homicide, since the accused must have had knowledge that he was likely to cause the death.

Only injury caused to the child by throwing on the ground causing congestion in the brain does not necessarily result in death—culpable homicide—and not murder—Supreme Court—1982

Sarabjeet Singh v State of UP,

AIR 1983 SC 529 : (1984) 1 SCC 673 : 1983 Cr LJ 961 : 1982 (2) Scale 1354

Facts: Transaction of sale of land led to a quarrel in which, one of the 17 men lifted the four year old child of *G* and threw the child on the ground. The child died. The autopsy surgeon stated that the only injury caused to the child in the brain was congestion and that congesting of the brain does not necessarily result in death. The court held:

(1) Part I of *section 300 of the Indian Penal Code, 1860* will not be attracted because it could not be said that the act which caused death was done with the intention to cause death.

(2) If you deal with a young child in harsh manner that is likely to cause injury, you are presumed to know that such a young infant with under-developed bones and muscles may suffer death.

It was held that the accused in this case was guilty of culpable homicide not amounting to murder *vide* clause (ii) to *section 299 IPC* and, therefore; punishable under Part II of *section 304 of IPC*.

Appellant liable to be convicted for murder under section 302, IPC, 1860 read with section 34, IPC for striking a blow on the head of the deceased with wood lying at the place of occurrence when the blow given by the appellant was sufficient to cause death in the ordinary course of nature, as per post-mortem evidence - Supreme Court.

Lokesh Shivakumar v State of Karnataka,

AIR 2012 SC 956 : (2012) 3 SCC 196 : 2012 (2) Scale 430 : 2012 (2) JT 357

Per Aftab Alam, J (Anil R Dave, J):

While dismissing the appeal against the conviction for committing murder under *section 302, IPC* read with *section 34, IPC* for rigouros imprisonment for life and a fine of Rs 500 for hitting Dharanmraj (deceased) with a wooden piece and a large stung (wound by) brick on the right side of his head resulting in severe bleeding injuries on head, face and nose, that resulted in Dharmaraj's death, the Apex Court said that the injury was sufficient to cause death in the ordinary course of nature *vide* section 300 clause Thirdly, *IPC*, as per the post-mortem evidence.

Indian Penal Code, 1860, section 300—Evidence Act, section 3—Murder taking place when deceased, alongwith wife were returning home - Evidence of wife that deceased was assaulted by accused by weapons used for cutting, corroborated by evidence of two other chance witnesses of being assaulted, cannot be disbelieved on ground that she was an interested witness - Other two witnesses had gone to house of deceased to get loan from LIC, as deceased was an LIC agent - While returning to their house, they witnessed assault - Witnesses cannot be branded as chance witness and sympathizers of party to which deceased belong as partisan witness

Myladimmal Surendran v State of Kerala,

AIR 2010 SC 3281 : 2010 (9) Scale 10 : JT 2010 (9) SC 282

with

Arayakkamdy Sukumaran v State of Kerala, 2006 Cri LJ 976

Per Surinder Singh Nijar, J:

These appeals have been filed against the common judgment passed by the High Court of Kerala, at Ernakulum in a criminal appeal, filed by the accused/appellants No 1 and No 3 and No 5 respectively, whereby, the High Court confirmed the conviction of the accused/appellants under sections 143, 147, 148, 341, 302 read with *section 149, IPC*, but partly allowed their appeals to the extent that the sentence of death was converted to imprisonment for life.

> Dismissing the appeal, the Apex Court, while disapproving the attitude of the court to regard casually material witnesses to crimes of violence, as chance witnesses as observed in the case of *Sachchey Lal Tiwari v State of UP*,[22] said that:
>
> Murders are not committed with previous notice to witnesses, soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passerby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have and explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter of explaining their presence.

Upon due consideration of the entire facts and circumstances of the case, the court was of the considered opinion that the judgment of the High Court did not call for any interference. The appeals were dismissed.

Indian Penal Code, 1860 sections 302, 304, Part I Honour killing accused found guilty of murdering his pregnant daughter for marrying into lower caste. Deceased in public toilet found lying in pool of blood with cut to her neck. Testimony of witness that she saw accused coming out from public toilet with blood stained sickle found truthful, reliable and corroborated by proved circumstances and evidence of other prosecution witnesses. Accused not only had strong motive to kill his daughter but also responsible for her death. No interference with finding of guilt recorded against accused. (Paras 24, 25, 27) Sentence of 10 years imprisonment for offence under section 304, Part I enhanced to life imprisonment. (Paras 29, 30, 31)—Supreme Court—2017

Gandi Doddabasappa alias Gandhi Basavaraj v State of Karnataka[23]

Am Khanwilkar, J:

This criminal appeal arises from the judgment and final order passed by the High Court of Karnataka. The High Court has set aside the order of acquittal passed by the Sessions Court and instead convicted the appellant (accused) for an offence punishable under section 304, Part I of *Indian Penal Code, 1860* ("*IPC*") and sentenced him to undergo 10 (ten) years of rigorous imprisonment for killing his daughter, Shilpa.

The couple returned to their village Taranagar to stay with the parents of Ravi Kumar (PW-16), PW-17 and PW-18. When this marriage came to the knowledge of Shilpa's father, the accused, he bitterly opposed the same and reportedly berated PW-16 and his family on several occasions, stating that they had brought down the honour of his family and that he would "finish" his daughter for marrying into a lower caste, and finally killed her.

After hearing Shilpa's cry coming from a public toilet near her residence which she often used, her mother-in-law rushed towards the toilet and saw the appellant emerging from the toilet with a blood-stained sickle. Upon seeing PW-18, the appellant (accused) threw the sickle into a manure dung pit nearby and ran away. The Sessions Court, acquitted the accused *inter alia* on the ground that mere intent on the part of the accused to commit the crime was not sufficient to record a finding of guilt.

In appeal by the State, the High Court recorded a finding of guilt against the appellant but went on to convict the appellant for offence under section 304, Part I of *IPC* and sentenced him to 10 years of imprisonment. This order of conviction and sentence has been challenged by the appellant.

Dismissing the appeal and enhancing the sentence by recording conviction of the appellant under *section 302 of IPC, 1860* and imposing sentence of imprisonment for life, said:

> Suffice it to observe that none of the five exceptions[24] in *section 300 of IPC* is attracted in the present case. It would necessarily follow that the accused (appellant) committed murder of his daughter Shilpa who was in the advanced stage of pregnancy and for which he was liable to be punished with either imprisonment for life or death under *section 302 of IPC* alone. In the peculiar factual background of this case, we do not find it a fit case to impose death penalty.

Appeal dismissed.

Section 302 read with section 34 of IPC, 1860—Honour killing and section 313 and 161 CrPC, 1973 - Evidence of a child (the youngest member of the family) cannot be believed on the ground that he could not recapitulate the ghastly incident of murder of six members of the family that took place years ago in his tender age - Minor discrepancies not touching the core of the case cannot be a ground for rejection of evidence—Supreme Court—2010

State of UP v Krishna Master,

AIR 2010 SC 3071 : (2010) 12 SCC 324 : JT 2010 (8) SC 240 : 2010 (7) Scale 597

Per AK Pattnaik, J:

The State of Uttar Prasdesh preferred appeal to Apex Court against the judgment of the Allahabad High Court acquitting all the 18 accused persons convicted by the trial court for eliminating seven persons of Harijan family. The respondents belonging to Thakur caste literally butchered seven totally innocent persons belonging to the Harijan caste, and to wipe out the entire evidence of their atrocities. After shooting, they were thrown in river Ganges where currents were very strong. Out of seven, even the bodies of five persons could not be recovered.

On the intervening night of 9-10 September 1979, in the village Lohari, Police Station Hussainganj of Fatehpur District in Uttar Pradesh, 20-22 accused persons committed dacoities in the Harijan locality by breaking open the doors of the main gate of the house of Jasodiya and Kallu (PW 14). They looted the house. Thereafter, Kallu, Jasodiya, Din Dayal, Sukhlal, Tulsi, Ganga Ram, Deo Nath alias Madan were tied with rope and were taken to the bank of the river Ganges, pushed in the boats and brutally murdered, thereafter, all of them were thrown into the river Ganges, at a point where there were strong currents. Out of seven, five dead bodies could not even be retrieved. Kallu (PW 14) jumped into the stream of the river Ganges and saved his life. Jasodiya, wife of Kallu was recovered from the river Ganges in an injured and unconscious state and after she regained consciousness, she got a written report lodged at the police station.

Jasodiya succumbed to the injuries next day on 11 September 1979. However, before her death, a dying declaration was recorded by the Medical Officer at midnight of 10 September 1979, in which she narrated the entire incident elaborately.

The sessions Judge, Fatehpur, in an elaborate, exhaustive and well considered judgment, sentenced the 18 accused persons under *section 302* read with *section 149 IPC, 1860* for life imprisonment for committing the murder of Jasodiya, Ganga, Tulsi, Deo Nath alias Madan, Din Dayal, Sukhla and Shripal; and also sentenced to undergo four years, with rigourous imprisonment under *section 201 IPC, 1860* for eliminating of evidence of murder by throwing the dead bodies of the seven persons in the river Ganga.

The Apex Court on a careful examination of the case said that the High Court had failed to appropriate the circumstances in which Kallu had survived by jumping into the river, and hiding at certain places. In a genocide and massacre which was witnessed by him, wherein all of his seven close relatives, including his wife were killed one after the other, in his presence and were thrown in the river Ganga, his escaping the death was a miracle. Hiding and saving his life from a mighty cruel upper caste group was a normal human instinct. Any reasonable or prudent person would have behaved in the same manner.

While reversing the judgment of acquittal of the High Court, the Apex court summarised the entire legal position and observed that the court would be justified in interfering in the judgment of the High Court in the following circumstances, which are illustrative, and not exhaustive:

(i) The High Court's decision is based on totally erroneous view of the law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) The apex court must always give proper weight and consideration to the findings of the courts below;

(vi) The court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.

The following principles emerge from the aforementioned cases:

(i) The appellant court may review the evidence in appeal against acquittal under sections 378[25] and 386[26] of *Criminal Procedure Code 1973*. Its power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial Court's conclusion with respect to both facts and law.

(ii) The accused is presumed to be innocent until proved guilty. The accused possessed this presumption when he was before the trial court. The High Court's acquittal supports the presumption that he is innocent.

(iii) There must be also substantial and compelling reasons for reversing an order of acquittal.

After going through a catena of cases, and critically examining the law, the Apex Court came to the conclusion that the court would be justified in interfering substantially and with compelling reasons to discard the High Court decision.

The Apex Court accordingly allowed the appeal filed by the State and the acquittal of six accused (namely (1) Mathura Singh @ Vijay Bahadur Singh R/o Village Lohari, District Fatehpur, (2) Udai Bhan Singh @ Lallan Singh R/o Kasraon District Patehpur, (3) Dhirendra Singh R/o Mawaiya, District Fatehpur, (4) Munruz son of Ram Lrzl R/o District Banda, (5) Ram Niwas Singh alias Challa Singh R/o Siyari, District Patehpur, and (6) Vijay Karan Singh R/o Bhainsahi, District Fatehpur) recorded by the High Court was set aside, and their conviction as recorded by the trial court was restored.

While concluding the case the court said:

> It is absolutely imperative to abolish the caste system as expeditiously as possible for the smooth functioning of Rule of Law and Democracy in our country.

However, on the contrary, the caste system instead of withering away, has taken an ugly form which is evident from the spate of "honour killings" taking place all over the country, in which young couples defying the verdict of *khap* (caste) panchayats, marrying outside the caste or within the same *gotras* are brutally murdered by persons no less than their own kith and kin;[27] brothers shooting sisters, grandmother killing granddaughter, mother strangling to kill by squeezing the throat with hands of daughter father arranging son's death, etc.

In a bizarre story, unfolding in northwest Delhi's Ashok Vihar, a misplaced sense of caste loyalty, a twisted, medieval idea of honour and blinding rage seem to have turned some youngsters virtually into serial killers. Honour killings', which seemed to be a grotesque and macabre dance of death being enacted in Haryana and Uttar Pradesh, are now taking place within a metropolitan city like Delhi, close enough to send a chill down the spines of the capital's residents.

In just 48 hours, between the 20 to the 22 June 2010 three bodies were found of two young women and a man, with bullet wounds in the head. Monica Gurjar Singh (24) and her husband, Kuldeep Singh (26), were found to have been killed on the night of 20th June, 2010. On 2 June 2010, the body of Monica's cousin, Shubha Nagar (20), was found with a hole in the head, left to rot in a Santro car in Ashok Vihar's H Block, barely a kilometre away from the Ashok Vihar police station,[28] in Delhi.

It is horrifying to note that nineteen honor killings took place just in 80 days between April to 30 June 2010, which comes to one murder every four days.

It is high time that a serious thought should be given as suggested by apex Court followed by concerted efforts taken in the direction of abolishing caste system and caste based politics before it is too late.

Section 302, IPC, 1860 - Cold blooded murder of Jessica Lal calls for conviction of Manu Sharma under section 302, IPC for the rest of the his life - Supreme Court -2010

Sidhartha Vashisht @ Manu Sharma v State (NCT of Delhi),

(2010) 6 SCC 1 : *AIR 2010 SC 2352* : *2010 (4) SCR 103* : *2010 (4) Scale 1*

Per Sathasivam, J:

In a sharp 239 page judgment, a Bench comprising Justices P Sathasivam and Swatanter Kumar of the Supreme Court on the 19 April 2010 sealed Manu Sharma's fate by upholding his conviction under *section 302, IPC* awarded by the Delhi High Court, and sentenced the convict to jail for the rest of his life for the cold blooded murder of model Jessica Lal in 1999, saying his guilt was proven beyond reasonable doubt.

On the night of 20-30 April 1999, Jessica, a 34 year-old bartender, was shot dead by Manu Sharma (33) at a restaurant called the "Tamarind Cafi", owned by socialite Bina Ramani at Qutub Colonade, South Delhi. The court said there was little doubt that Manu fired from his Italian make .22 P Beretta pistol, first at the roof and then at the right temple of Jessica Lal after her refusal to serve him liquor. She and Malini Ramani tried to make him understand that, "the party at Tamarind Court restaurant was over and there was no liquor available"

On 21 February 2006, a trial court acquitted all the accused, including Vikas Yadav, son of Uttar Pradesh politician DP Yadav, and former MNC executive.

This led to a public outrage, and a "Justice for Jessica" campaign. And on 18 December 2006, the Delhi High Court reversed the order and sentenced Sharma to life imprisonment under *section 302 IPC, 1860* for murder of Jessica Lal *vide* clause (1) to *section 300, IPC*. Yadav and Gill got four years jail term for destruction of evidence.

While dismissing the appeals of the three against the High Court verdict, terming them "devoid of merit", the apex court said the evidence regarding the actual incident, the testimonies of witnesses, the evidence connecting the vehicles and cartridges to the accused — Manu Sharma as well as his conduct after the incident absconding for a while and false answers to 11 material questions posed to him by the trial court judge, prove his guilt beyond reasonable doubt. The Court observed:

(i) The presence of the accused (Manu Sharma) at the scene of the crime is proved through the ocular testimonies of prosecution witnesses, which were corroborated by the three calls made to the police control room after the incident.

(ii) He did not even have an explanation for his licensed pistol, used in the commission of the offence. Thus, an adverse interference has to be drawn against him for non—explanation of the whereabouts of the pistol... the burden thus shifts on him.

(iii) As regards reporting of sensitive cases, the court cautioned all modes of media to extend their cooperation to ensure fair investigation, trial, and defence of the accused, and non-interference in the administration of justice in matters *sub judice.*

(iv) The distinction between trial by media and informative media should be maintained, trial by media should be avoided, particularly at a stage when the suspect is entitled to the constitutional protections. Invasion of his rights is bound to be held impermissible.

Taking a serious view of "media trial" in high-profile and sensitive cases, the Supreme Court cautioned the print and electronic media to ensure that there was no interference in the pending investigation/trial of the case while reporting it. While writing the judgment, Justice Sathasivam said:

> The freedom of speech protected under *Article 19 (1)(a) of the Constitution* has to be carefully and cautiously used, so as to avoid interference in the administration of justice and leading to undesirable results in matters sub judice.

The Bench said:

> Presumption of innocence of an accused is a legal presumption and should not be destroyed at the very threshold through the process of media trial and that too when the investigation is pending. In that event, it will be opposed to the very basic rule of law and would impinge upon the protection granted to an accused under *Article 21*.

The Bench further said:

> It is essential for the maintenance of the dignity of courts and is one of the cardinal principles of rule of law in a free democratic country that criticism or even reporting, particularly in sub judice matters, must be subjected to checks and

> balances so as not to interfere with the administration of justice.

Referring to the High Court's criticism of the trial court, which acquitted the prime accused, Manu Sharma, the Bench said:

> The respect of the judiciary and for the judiciary is of paramount consideration. Every possible effort should be made and precaution taken which will help in preservation of the public faith and individual dignity.
>
> A judicial consensus would require that the judgment should be set aside or affirmed as the case may be, but preferably without offering any undesirable comments, disparaging remarks or indications which would impinge upon the dignity and respect of judicial system, actus curiae nemi nem gravabit.

This is a welcome judgment, and will go a long way in giving a lesson to like minded persons as Manu Sharma, who prefer to take law in their own hands as a result of vanity, greed and their lust for power.

In this context it is important to point out, as highlighted by the apex court that, legislation is needed for a robust witness protection system, that would protect witnesses from being intimidated by the powerful and the mafia in the society.

Sections 364, 376, 377, 302 and 201 of IPC, 1860 - Life sentence till death - Death sentence of a young person aged 28 years converted to life imprisonment for murder and rape of child, considering the possibility of reform in the absence of record of any previous crime of kidnapping, rape or murder on any earlier occasion - Supreme Court - 2012

Amit v State of UP,

AIR 2012 SC 1433 : 2012 AIR SCW 1628 : *2012 (4) SCC 107* : 2012 Cr LJ 1791 : *2012 (2) Scale 675*

Per Justice AK Pattnaik (Swatantar Kumar J):

While upholding the conviction, the apex court partly allowed the appeal and converted the death sentence to life imprisonment, with a direction that the life sentence will extend to full life, subject to any remission or commutation at the instance of the government for good and sufficient reason.

The appellant accused, Amit, took away Monika, aged 3 years from the house of her parents on the pretext that he would give biscuits to her, but never returned. It was found that the appellant raped Monica and murdered her. After investigation, charge-sheet was framed against the appellant under *sections 364*, *376*, *377*, *302* and *201*, *IPC* and trial court found the accused guilty under the said sections of the Code.

The trial court took the view that this is one of those rarest of the rare cases in which the appellant was not eligible for any sympathy of the court and imposed the sentence of death which was confirmed by the High Court.

Section 302 IPC, 1860—When circumstantial evidence fully establishes the guilt of the accused conviction under section 302 IPC for murder is proper— Supreme Court—2010

G Parshwanath v State of Karnataka[29]

Per Jm Panchal, J:

Circumstantial evidence.—The wife and son of the accused burnt to death in the house of the accused. The deceased had informed her parents a few hours before incident about the cruelty meted out to her over the telephone. The accused left the place of the incident just after the incident took place and locked the door of the house from the outside. Thus, the possibility of any other person visiting the deceased was excluded. Medical evidence showing the presence of kerosene on the dead bodies and the fact that the deceased was found lying on floor of the room rule out the possibility of suicide. Accused suspected the character of the deceased and wanted to marry another girl. This constitutes sufficient motive and the circumstances lead to the conclusion of guilt of the accused-husband.

The marriage of the deceased Chethana took place with the appellant in 1987 and in 1988 the deceased gave birth to a male child. Initially the relations between the appellant and the deceased were cordial, but, after sometime bickering started taking place between the two of them. As the days passed by, this bickering grew into discordiality resulting in the harassment and cruelty to the deceased by the appellant.

The deceased used to complain about the harassment and cruelty meted out to her, to her father, mother and sister when she had the occasion to meet them.

On 13 May 1993 around 1.45 pm the neighbours of the appellant noticed smoke and fumes emitting from the house of the appellant, which was situated at Ganesh Temple Street, Bellary.

Fire brigade officials rushed to the house on information, opened the front door and noticed two completely burnt and charred bodies of a woman and a child in one of the rooms. The appellant was not present in the house, and came back only after the information about the fire having taken place in his house was conveyed to him.

The appellant was found guilty for commission of offences punishable under *sections 302* and *201 IPC* and sentenced to life imprisonment. Feeling aggrieved the appellant preferred appeal, which was dismissed by the High Court, which gave rise to the appeal before the Supreme Court.

Dismissing the appeal, the Apex Court held that, in a case based on circumstantial evidence where proved circumstances complete the chain of evidence, it cannot be said that in the absence of motive, the other proved circumstances are of no consequence.

The effect of the absence of motive would depend on the facts of each case. The prosecution alleged that the appellant disliked his deceased wife as he suspected that he had not fathered her child and he was contemplating to marry another girl. Some of the letters produced by the prosecution would indicate that the deceased was suffering a lot because of the unnatural conduct of the appellant towards her. The evidence of the mother of the deceased would also show that the deceased was subjected to harassment. The finding recorded by the High Court that from a letter relied upon by the defence i.e. Exhibit D-2 it transpires that the appellant was harassing the deceased and treating her with cruelty because he was desirous of marrying some other girl cannot be ignored.

This constitutes sufficient motive on the part of the appellant to kill his wife and child. The court also mentioned that the appellant had initiated divorce proceedings against the deceased. Those proceedings were dismissed for default.

If all the circumstances mentioned above are taken together, coupled with the absence of any material to indicate that Chethana had committed suicide with the child, they lead to only one inference that in all human probability the murders of the deceased were committed by the appellant alone and none else.

The Supreme Court held that the evidence on record has been rightly appreciated by the trial court and the High Court. On appreciation of evidence, the appellant is found guilty. Neither the reasons given by the trial court nor the High Court can be termed as perverse so as to call for interference of this court in the instant appeal.

Appeal is dismissed.

Indian Penal Code, 1860, section 302 Murder Circumstantial evidence testimony of eye-witnesses having seen deceased going on bicycle with accused previous evening. Deceased not returning at night. Corpse of deceased recovered next morning hidden in heap of fodder in fields. Post-mortem report- opinion death of deceased due to strangulation. Time elapsed since death of deceased estimated in post-mortem report as 24 to 36 hours coinciding with when deceased was last seen with accused FIR lodged promptly.

No evidence led by accused regarding his not being in company of deceased or that they had parted their ways. Recovery of bicycle as also milk-can on confession of accused, identified by witness belonging to him and abscondence of accused after incident are additional factors completing links in chain of circumstances. Conviction of accused, proper. (2018)

Satpal v State of Haryana[30]

Per Navin Sinha, J:

8.3 Murder

The appellant assails his conviction under *section 302* read with *section 201*, *IPC, 1860* by the Additional Sessions Judge, Hissar affirmed by the High Court, based on the last seen theory.

Dismissing the appeal Apex Court held, an FIR is not to be read as an encyclopedia requiring every minute detail of the occurrence to be mentioned therein. The absence of any mention in it with regard to the previous altercation, or the presence of the milk-can, cannot affect its veracity so as to doubt the entire case of the prosecution. The altercation suffices to establish motive. The appellant has not led any evidence regarding his not being in the company of the deceased or that they had subsequently parted ways.

The deceased Kapil Kumar was 13 years old hardly in a position to resist the appellant. We see no reason why the two witnesses being related to the deceased would depose falsely and shield the real offender, especially when the appellant has not given any reason or led any evidence for his false implication.

The recovery of the atlas cycle on the confession of the appellant, identified by PW-7 (uncle of deceased) as belonging to him, as also the recovery of the milk-can on the same basis with the name of PW-7 inscribed on it with nail polish and the fact that the appellant was absconding after the occurrence till his arrest on 16 September 2007 are additional incriminating factors which complete the links in the chain of circumstances. The recovery having been proved by PW-7, the failure to examine the other seizure witness, Kheda, is of no consequence.

In the entirety of the fact and circumstances of the case, the Court found no reason to interfere with the conviction of the appellant.

Appeal dismissed.

Indian Penal Code, 1860, section 302—Evidence Act section 3 Murder Circumstantial evidence. Guilt of accused must be established by prosecution beyond reasonable doubt and circumstances must be consistent only with guilt of accused. (Para 9) Accused allegedly causing death or deceased while taking her to her sister's place. Accused informing that she had stayed back at her sister's place followed by his ascendance after incident sufficient to hold accused guilty. However, strong suspicion in itself, not sufficient to establish guilt of accused beyond reasonable doubt—Material contradiction and failure in establishing complete chain of circumstances and to exclude every hypothesis other than guilt of accused. Conviction unsustainable. (Para 13)—Supreme Court—2017. Appeal allowed.

Ganpat Singh v State of MP[31]

Per Dr DY Chandrachud, J:

This appeal arises from a judgment of a Division Bench of the Madhya Pradesh High Court in its bench at Indore. The High Court affirmed the conviction of the appellant under *section 302 of the Indian Penal Code, 1860*.

Shantabai was a widow. Her husband Mangilal had died about a decade earlier. She resided together with her son Rakesh, who was a minor. The prosecution alleges that the appellant would visit her frequently.

The Additional Sessions Judge found the Appellant guilty of an offence under *section 302 of the IPC, 1860* and sentenced him to imprisonment for life. The case rested entirely on circumstantial evidence. The circumstances which weighed with the trial court were that; (i) the deceased was last seen accompanying the appellant; (ii) the deceased had taken with her the jewellery of PW-1 and PW-2 which was recovered from the appellant; and (iii) the appellant had no explanation of how the articles were found in his possession.

The High Court did not rely upon the alleged recovery of the silver ornaments which were material circumstances which the Additional Sessions Judge had found to link the appellant with the murder of Shantabai. Nonetheless, three circumstances weighed with the High Court in affirming the conviction of the appellant. These are summarized in the following extracts of the judgment of the High Court:

Thus, to summarize the facts:—

(i) The deceased was last seen in the company of the accused.

(ii) The accused made false statement to the son of the deceased Rakesh (PW-4) that her mother had gone to the maternal aunt.

(iii) That the body of the deceased was recovered at the instance of the accused.

Allowing the appeal Apex Court said in a case which rests on circumstantial evidence, the law postulates a two-fold requirement. *First*, every link in the chain of circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt. *Second*, all the circumstances must be consistent only with the guilt of the accused. The principle has been consistently formulated thus:

> The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence.[32]

The mere circumstance that the appellant was last seen with the deceased is an unsafe hypothesis to base a conviction on a charge of murder in this case. The lapse of time between the point when the appellant was last seen with the deceased and the time of death is not minimal. The time of death was estimated to be between two to four weeks prior to the recovery of the body.

Appellant is entitled to the benefit of doubt. The prosecution failed to establish a complete chain of circumstances and to exclude every hypothesis other than the guilt of the Appellant. (Para 3)

Appeal allowed the conviction of the Appellant under *section 302 of the IPC, 1860* was set aside.

Appeal allowed.

Indian Penal Code, 1860, section 302—Evidence Act section 106. Murder. Circumstantial evidence Theory of last seen. Accused asking deceased to accompany him for cleaning safety tank. Family members of deceased deposing about last seeing deceased leaving with accused. Burden on accused, to explain what happened to deceased. Accused not discharging his obligation, by providing any explanation regarding whereabouts of deceased. Accused misleading family member of deceased, to approach police for searching her husband. Dead body of deceased found thereafter. Irrespective of unreliable recovery of weapon and severed head by accused, strong circumstances against accused, inconsistent with his innocence. Conviction, proper. (Para 8)—Supreme Court—2017

Dilip Mallick v State of WB[33]

Per L Nageswara Rao, J:

This appeal is filed against the judgment of the High Court of Calcutta by which the conviction of the appellant under *section 302 Indian Penal Code, 1860* and sentence of life imprisonment by the Additional Sessions Judge, Fast Track 2nd Court, Siliguri was confirmed.

A decapitated body and the cut head of the deceased was found lying in the Chandmuni Tea Estate near Himachal Behar Abasan Project at 1.30 pm hours on 3 February 2004. On the basis of a written complaint made by Bhupendra Nath Singh (PW-12), the investigation commenced and the appellant along with Hira Routh and Khogesh Bansfore were arrested.

The Trial Court held that the chain of circumstances was clearly established by clinching evidence which proved that the accused persons had committed the offence.

The High Court re-appreciated the evidence on record and upheld the conviction and sentence of the appellant qua *section 302 IPC, 1860*.

The three circumstances relied upon by the High Court are that the accused and the deceased were last seen together, that the accused attempted to mislead regarding the whereabouts of the deceased and that the accused did not offer any explanation about the events of accused.

Dismissing the appeal and upholding conviction apex Court said:

PW-3, PW-4 and PW-5 who are the family members of the deceased were consistent in their testimonies that the deceased and accused were last seen together at around 2:00 pm on 2 February 2004. There is a burden on the accused to give an explanation about what happened after they left the house of the deceased. No explanation was given about the events of 2 February 2004 after they left from the house of the deceased.

We are in agreement with the conclusion of the High Court that though the recovery was not proved, the other circumstantial evidence is sufficient to prove the guilt of the accused. Accused is directed to surrender before the jail authorities immediately to undergo the remaining part of the sentence.

Indian Penal Code (45 of 1860), sections 300, 309— section 3 - Evidence Act (1 of 1872)—Suicide or homicide

In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances shall be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.—Supreme Court—Appeal allowed, conviction quashed.

Satish Nirankari v State of Rajasthan[34]

Per AK Sikri, J:

Pooja, daughter of Pramod Bhatnagar (Informant) went missing on 1 November 1995. On that day, she had left her home at 5.30 pm to attend her MBA classes. However, she did not return. Accused was charged and convicted under *section 300 IPC, 1860* for murder of the deceased Pooja. The conviction was confirmed by High Court. Allowing the appeal apex Court said:

The deceased and appellant had gone to the place of incident together.

Since the parties are in love with each other and families are against it, they decided to get married. It is established that deceased was wearing bindi, make-up, sindoor (vermillion) and 12 red bangles. From the place of incident following articles were removed – bindi, vermillion, bangles, rose garland, make up material, metal glass, one tumbler containing copper sulphate water, fruit juice that Pooja could arrange the poison from a house belonging to a stranger. Second reason was that after consuming poison, a lonely girl could not fathom strength to hang herself. These are mere conjectures. There had to be a positive evidence that the appellant had administered poison to the deceased, which is missing. Moreover, following circumstances are assumed by the High Court, which are again unwarranted.

The appellant made sure that deceased was taken to hospital to save her.

If appellant's intention was to commit murder of the deceased and escape, he could have just left the deceased at the spot and deceased would have died of poisoning. It was pointless and futile for appellants to additionally hang deceased. Moreover, if such was the intention of the appellant, he would not have called for help or raised alarm with neighbours. The appellant also would not have committed the murder in the place where he worked and operated from. (Para 36)

If appellant's intention was to commit murder, he could have run away from the spot of incident. (Para 37)

If appellant's intention was to commit murder, he would not have directed his brother – Ashok to call for deceased's parents, which he admittedly did. (Para 38)

Admittedly appellant also consumed poison and was in hospital for 50 days. Appellant is also convicted for *section 309 IPC, 1860* for attempting to commit suicide.

We have pointed out above that the High Court had made two observations as reasons in support of the conclusion that it is the, appellant who committed murder. First reason was that it was highly unbelievable.

"(i) Deceased might have fallen in love with appellant while she was a teenager, but at the age of 23 years having ambition to become IAS officer, it cannot be believed that she wanted to marry appellant.

(ii) Possibility cannot be ruled out that appellant was desperately wanting to marry deceased and took her to a lonely place. When deceased did not agree, appellant first offered poison with thumbs-up and later ties cable wire to the neck of the deceased and pushed her head on the wall. The appellant later put vermillion and bangles on the body of the deceased." (Para 40)

Coming to the cause of death, learned counsel for the appellant had argued before us, as well as in the High Court, that as per Modi's Medical Jurisprudence & Toxicology there are 16 main distinctions in death caused by hanging or strangulation. According to medical evidence second ligature mark was ending towards back of the neck and it was oblique going upwards and ligature mark was shining. The hyoid bone was intact there was no fracture of larynx and trachea. There were no scratches, abrasions and bruises on face, mouth and ears. There were no abrasions and ecchymosed around about the edges of ligature mark. Subcutaneous tissues under ligature mark were white, hard and glistering. There were no injuries to muscles of neck. The saliva was dribbling. If the death would have been strangulation then fracture of larynx and trachea and hyoid bone was a must there should have scratches abrasions and fingernail marks and bruises on the face neck and other parts of the body. Saliva would not have dribbling, ligature mark would have been horizontal and not oblique it would have lower down in the neck and not upwards to the chin. There should have been abrasions and ecchymosed round about the edges of the ligature marks. Subcutaneous tissues should have ecchymosed there should have been some injuries to muscles of neck carotid arterier, internal coat should have been ruptured, whereas there was no such rupture. The prosecution failed to prove that the cause of death was homicidal. Dr SK Pathak (PW-3) did not say that death was homicidal in nature. Post-mortem Report (Ex. P-4) also does not say that it was homicidal. (Para 41)

This aspect is not even dealt with by the High Court. Further, the alleged weapon, *i.e.,* cable wire was not sent to CFSL and to any scientific laboratory to confirm fingerprints of the appellant. All the aforesaid factors amply demonstrate that the prosecution has not been able to bring out and prove the guilt of the appellant beyond reasonable doubt. There are lurking doubts in the story of the prosecution and many missing links which are pointed out above.

The court said therefore, it is of the opinion that prosecution has not been able to prove the guilt of the appellant beyond reasonable doubt. As a consequence, this appeal is allowed setting aside the conviction of the appellant under *section 302 of the IPC*.

Appeal allowed.

Section 300 IPC, 1860—Conviction on the basis of circumstantial evidence: In case of Evidence of "Last seen together" theory being not trustworthy to establish chain of circumstances that could link the accused with crime, accused is entitled to be acquitted—Appeal Allowed—Supreme Court—2008

Sattatiya @ Satish Rajanna Kartalla v State of Maharashtra[35]

Per GS Singhvi, J:

The appellant—accused was convicted under *section 302 IPC, 1860* for murder of one Satish who was found lying on the right side of the stairs of "Pratap building" 173, Dadiseth Agyari Lane, Mumbai in a pool of blood on 1 October 1994 and sentenced to life imprisonment.[36]

The accused-appellant and one Devabhuma Badapatti were arrested on 3 October 1994. On questioning by the police about the murder the accused took the police to room No. 45 of the third floor of Ganesh Bhawan and got recovered his paint and shirt with blood stains and one half portion of the blade alleged to have been used for the commission of the offence. A handkerchief was found near the body of the deceased which was said to have been purchased by the appellant from one Mohammed Farid Abdul Gani's shop. It was stated by one Raju Chandur Pujari that he saw the accused with the deceased on the night of the incident, on 30 September 1994 at 10.45 pm.

The trial court relying on the prosecutions' contention of circumstantial evidence of "last seen together theory," recovery of blood stained paint and shirt and blood stained half blade and handkerchief found near the body of the deceased convicted both the accused under *section 302* read with *section 34 IPC, 1860* and sentenced them to life imprisonment.

On appeal the High Court upheld the conviction of the appellant but acquitted Devabhuma Badpatti on the premises that there was no evidence trustworthy that he was party to the crime.

Allowing the appeal the apex court said that on a careful scrutiny of the facts of the case it is evident that the

prosecution has failed to establish the chain of circumstances leading to an inescapable conclusion that the appellant had committed the crime. The very fact that the prosecution did not produce any document containing the recording of the statement allegedly made by the appellant expressing his desire to facilitate recovery of the cloth and half blade and purchase of handkerchief is highly suspect and not trust worthy. The credibility of the evidence relating to recovery is substantially dented by the fact that even though as per the chemical Examiners Report the blood stains found on the shirt, paint and half blade were those of human blood, the same could not be linked with the blood of the deceased. The court refereed to a number of cases in support of its contention that has been listed in the footnote.[37]

Appeal allowed.

Section 302 of IPC, 1860—Conviction of appellant for murder under section 302 IPC merely on the basis of extrajudicial confession coupled with recovery of weapon of crime at his instance—Not proper—Supreme Court—2010

Podyami Sukada v State of MP (New Chhattisgarh)[38]

Per CK Prasad, J:

The appellant confessed that on the night of 8 December 1999, his mother (deceased) Madvi Mase scolded him alleging that he wanders after consuming liquor which enraged him and he picked up a burning wooden plank assaulted her which caused her death. On the basis of what has been disclosed in the meeting with PW 1 Madvi Rama, the accused was convicted and sentenced to life imprisonment under *section 302 IPC, 1860* on the basis of an extra-judicial confession. The High Court while concurring with the decision of the lower court said:

> In view of the above, we are of the considered opinion that extrajudicial confession regarding causing death of his mother attacking her with the teak wood plank was made by the accused before the panchayat, this evidence of extrajudicial confession by accused before these witnesses inspire confidence of the court as the same stands corroborated by FIR Recovery of weapon of offence as well as medical evidence also corroborates the confession. Therefore, the finding of the trial court convicting the accused for the offence under section 302 is based on the legal evidence and we do not find any circumstance to differ from the view taken by the trial court.

While allowing the appeal and setting aside the conviction, the apex court said that the evidence of both the prosecution witnesses is slippery and it is difficult to hold with certainty from their evidence that any extra judicial confession in fact was made by the appellant. The court said that this state of evidence leaves the court in doubt. The court opined that the witness of the extrajudicial confession did not inspire confidence and merely on the ground of recovery of weapon of crime at the instance of the appellant, it shall be unsafe to sustain the conviction of the appellant. Accordingly, the court granted the appellant the benefit of doubt.

Appeal was allowed.

Conviction under sections 302, 323 read with section 34 of Indian Penal Code, 1860. A valid dying declaration may be made without obtaining a certificate of fitness of the declarant by a medical officer. No reason to question the reliability of the dying declaration of the deceased for the reason that at the time of recording his statement by Head Constable, Manphool Singh, he was found to be mentally fit to give his statement regarding the occurrence. Further, evidence of Head Constable Manphool Singh was shown to be trustworthy and has been accepted by the Courts below. The view taken by the High Court does not suffer from any infirmity and the same is in order. Conviction upheld.

Gulzari Lal v State of Haryana[39]

Per V Gopala Gowda, J:

The present appeal arises out of the impugned judgment passed in by the High Court of Punjab & Haryana at Chandigarh, whereby the High Court dismissed the appeal filed by the appellant upholding the judgment and order of the learned District & Sessions Judge, Fast Track Court, Hisar whereby the learned Sessions Judge had convicted the appellant under sections 302, 323 read with 34 of the *Indian Penal Code, 1860* and sentenced him to undergo imprisonment for life, along with a fine of Rs 200. While dismissing the appeal. The Apex Court said that the question raised by the appellant on the issue that no blood stained earth was recovered from the place of crime

is not relevant. On this count, the High Court had also noted the laxity on the part of the police and rightfully concluded that the conviction was valid in light of the statements made by the deceased and the witnesses.

Dismissing the appeal Apex Court held it did not find any infirmities with the statements made by the deceased and recorded by the head constable Manphool Singh.

Appeal dismissed. (Supreme Court 2016)

Accused and co-accused jointly stabling deceased causing death leading to recovery of blood-stained knives. FSL (Forensic Science Laboratory report) report establishing blood of deceased on one knife seized clothes of accused showing blood of deceased. Reliable testimony of eye-witnesses about both accused going to house of deceased and assaulting him with knives after taking him away. Failure of prosecution to establish motive, inconsequential. Both accused liable to be convicted under sections 302/34 IPC.

Kara Bhai v State of Gujarat,

AIR 2017 SC 5413

Dismissing the appeal held Accused 1 (Bhima) and accused 2 (Kara Bhai), who had jointly gone to the house of the deceased and had called him out and had taken him away. Immediately thereafter the incident had taken place in course of which both accused Nos 1 and 2 had attacked the deceased with knives. In view of the said evidence on record, the prosecution would not be required to establish that it is any one particular accused who is responsible for causing the fatal injury inasmuch as the ingredients of *sections 302* and *section 34 IPC, 1860* would be squarely (fairly attracted) attracted in the present case.

Dying declaration (Ex PF/1) was properly recorded and was rightly relied on by the Courts below for resting the appellant's conviction. We also hold that it was corroborated by the testimony of Pyarelal (PW-3), who proved the motive behind the incident and also proved the incident in question by identifying the accused.—Supreme Court—2016. Appeal dismissed, conviction restored.

Shama v State of Haryana[40]

Per Abhay Manohar Sapre, J:

This appeal is filed against the judgment passed by the High Court of Punjab and Haryana at Chandigarh whereby the High Court dismissed the appeal filed by the appellant and upheld the judgment/order of conviction and sentence rendered under *section 302* read with *section 34 IPC, 1860* by the Trial Court.

Naurang-the deceased was an inhabitant of Malia Mandi, Hansi. About 8-9 months prior to the occurrence, his daughter Suman was married to son of Sube Singh (accused No 3). However, the relations between the two families had become strained due to this marriage.

On 9 October 1997, at about 9.15 pm, Naurang-the deceased was going on his bicycle to attend his duty at Hafed Spinning Mill, Hansi. When he reached near the nursery, Sube Singh, his brother-Shama (appellant herein) and one fat man-Jai Singh came on a scooter, Jai Singh asked Naurang about his name and when he told his name, he fired a shot from his pistol on Naurang's abdomen, which hit a little above his navel. Some passers-by took Naurang to the General Hospital, Hansi. Dr SK Gupta (PW-1) Medical Officer of the hospital, informed the police about the admission of injured Naurang in hospital. After receiving information, Mam Chand, Inspector came to the hospital and made an application seeking opinion of the doctor about the fitness of Naurang so as to enable him to record his statement. After getting the opinion of the Doctor that Naurang was fit to make statement, Mam Chand, Inspector recorded the statement of Naurang (Ex. PF/1), the subsequently expired.

The Additional Sessions Judge, Hisar convicted all the three accused for the offence punishable under *section 302*/*34 Indian Penal Code, 1860*. Accused Jai Singh was held guilty under *section 25 of the Arms Act* also were sentenced to undergo imprisonment for life and to pay a fine of Rs 10,000 each under *section 302*/*34 Indian Penal Code, 1860*.

In view of the foregoing discussion, Apex Court said the appeal fails and is accordingly dismissed. Conviction restored.

Dying declaration—Section 302 of Indian Penal Code, 1860 implicating husband of the deceased. The evidence available on record and the sole evidence of the father of the deceased implicating husband of the deceased as compared to the dying declaration of the deceased exonerating husband did not inspire confidence to make it the basis for the conviction of the respondent. Hence, the appeal failed and was accordingly dismissed.—Supreme Court—2016

State of Gujarat v Jayrajbhai Punjabhai Vari[41]

Per RK Agrawal, J:

Rekhaben (since deceased) was married to Jayrajbhai Punjabhai Varu, the respondent, was residing along with her in-laws. The deceased was admitted to the Government Hospital with 90% burn injuries. She stated that in the morning, when all other family members were sleeping in the house, an unknown person came near her and told her that he had come to take her. By saying so, he took her into the kitchen, poured kerosene on her and by lighting the matchstick set her on fire and went away from the place and, consequently, she started burning in flames. She further gave a statement that the unknown person was an outsider who was wearing white clothes. On hearing her cries, other family members also woke up and admitted her in the hospital. The said FIR was registered on the basis of the statement given by the deceased herself in the hospital to the police official which was treated as a complaint. In the said statement, the thumb impression of the deceased was identified by the father of the deceased. On the very same day, she made a statement before the Executive Magistrate and narrated the whole incident. In the afternoon, the deceased succumbed to her injuries. On the basis of the statement given by the deceased, the Sessions Judge convicted the respondent under section 302 Division Bench of the High Court allowed the appeal.

Aggrieved by the order acquitting the respondent of all the charges, the State filed present appeal by way of special leave before present Court.

Held, apex Court while dismissing the appeal;

(i) The dying declaration of the deceased was recorded by the Executive Magistrate after following the due process of law. In both the statements, the deceased had not named her husband/the respondent or his family members. Both the statements were consistent and there was no contradiction as to the role of the respondent. There was no involvement of the respondent in the commission of offence.

(ii) The Courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. There were two sets of evidence, one was the statement made before the police officer and the Executive Magistrate and the other was the oral dying declaration made by the deceased before her father. It could not be said that there were contradictions in the statements made before the police officer and the Executive Magistrate as to the role of the respondent in the commission of the offence and in such circumstances, one set of evidence which was more consistent and reliable, which in the present case being one in favour of the respondent, required to be accepted and conviction could not be placed on the sole testimony of father of deceased.

(iii) The conviction basing reliance upon the oral dying declaration made to the father of the deceased is not reliable and such a declaration can be a result of afterthought. This was the reason the Court also insisted that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. It cannot be laid down as an absolute Rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The Rule requiring corroboration is merely a Rule of prudence.

(iv) The prosecution has to prove the guilt of the accused beyond all reasonable doubt and it is also the Rule of justice in criminal law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other towards his innocence, the view which is favourable to the accused should be adopted.

Appeal dismissed.

Section 302 IPC, 1860 and section 3 of Evidence Act—Murder of wife by Husband: The very fact that the husband was absconding for a month from the date of murder of the wife by pouring kerosene on her body in the room in which they were living confirms that husband must have caused death when the plea of alibi

could not be substantiated. Conviction can be based on dying declaration alone, subject to the satisfaction of the court—Accused Liable—Supreme Court—2008

Amarsingh Munnasingh Suyawanshi v State of Maharashtra[42]

Per B Sinha, J:

The appellant was unemployed and was addicted to liquor. His wife, Kamlabai, the deceased used to work as labourer and was being ill treated by her husband.[43] On the fateful day of 7 June 1990 when she was serving food to the appellant at 9.00 pm he took out kerosene from the lamp, poured it on her body and set her ablaze and thereafter, fled away from the place. On hearing her cries, the neighbours came and extinguished the fire, and was taken to hospital next day where she succumbed to the injuries. In the hospital she made two dying declarations—one before the constable and the other before the Special Judicial Magistrate in which she charged "her husband of setting fire". Husband r emained absconding for a almost a month and finally surrendered only on 5 July 1990.

In the absence of any explanation whatsoever as to why for about a month the accused was absconding in a situation of this nature where admittedly the husband, wife and children were residing in one room at the time of the occurrence it was he and the deceased alone were residing, it was for the appellant-accused to prove that how the deceased had met her death. Since the accused was unable to explain cause of the homicidal death of his wife, it was obvious that it was none other than the accused himself who caused the death of his wife. The guilt of the accused is further supported by the dying declaration of the deceased that affirms the role of the accused in pouring kerosence on her and setting her ablaze.

Relying on the dying declaration, the trial court sentenced the appellant to Life imprisonment under *section 302 IPC, 1860*, which was confirmed by the High Court. Accused appealed to the apex court.

While dismissing the appeal, the Supreme Court held that:

> It is now a well settled principle of law that a judgment of conviction can be recorded on the basis of the dying declaration alone subject of course to the satisfaction of the court that the same was true and voluntary.[44]

Conviction upheld.

Section 302 IPC, 1860—Accused strangulated his fiance (with whom he was engaged) on her refusal to marry-Absconding and Attempting to hide his identity—Guilty of Murder—Supreme Court—2008

Kuchibotla Saran Kumar v State of AP[45]

Harjit Singh Bedi, J:

Accused and the deceased P Sesha Sudha, an ad hoc (temporary) lecturer in a college in Vishakapatnam, were in love with each other. The marriage was fixed on 23 March 2000 at Vishakhapatnam. However, the difference surfaced between the two and the marriage was called off. The accused became upset and annoyed with the cancellation so much so that he threatened in case the deceased would not marry him she would be killed as he would not tolerate her marriage to any one else.

Since the accused did not succeed in his efforts, he planned to get rid of the deceased. He telephoned the deceased to meet her in the College in the Electrical Engineering Laboratory on 8 February 2000. Since it was a sports day no one was in the lab on that day. He took her there wrapped her chunni (Dupatta) around her and strangulated her to death. He left the body into corner beyond sight of the persons and left the place. The lab was locked at 4.00 pm. When the lab was opened next morning, i.e., 9 February 2000 the body of the deceased was found lying on the floor.[46]

The accused was prosecuted under 302 *IPC, 1860* for murder and sentenced to life imprisonment, which was confirmed by the High Court. The apex court dismissed the appeal as having no merit.

Conviction confirmed.

Rape with murder—Death penalty commuted to life imprisonment: Chain of circumstantial evidence complete to prove the offence beyond reasonable doubt— Supreme Court—2010

Aftab Ahmad Anasari v State of Uttaranchal,[47]

AIR 2010 SC 773 : (2010) 2 SCC 583 : 2010 (1) Scale 408 : JT 2010 (1) SC 424

The deceased went missing in the evening of 5 February 1998 when she was playing near her house. Her naked dead body was found at about 6 am on 8 February 1998 lying on a public way in front of her neighbor's house. She was found to be subjected to rape and died a homicidal death. The appellant, who is the accused, was seen fleeing away from near the place where the dead body of the deceased was lying at about 4.30 am on 8 February 1998. Blood stained frock and blood stained underwear of the deceased concealed in the house of sister of the appellant were recovered pursuant to voluntary disclosure statement made by the appellant while in police custody. Underwear of the appellant seized during the course of investigation was found to be stained with blood and semen. The appellant's evidence relating to extra judicial confession made by accused to ex-pradhan of village found to be reliable.[48]

The appellant and one Mumtaz were prosecuted for rape and murder of Yasmeen aged five years daughter of Nayeem Ahmad and for causing the disappearance of evidence of those offences. The Sessions Judge, Nainital, convicted the appellant and Mumtaz under *sections 302*, *376* and *201* of the *Indian penal Code* and imposed death sentence under *section 302 IPC* as well as for life imprisonment under *section 376 IPC, 1860* for rape. However, the High Court in appeal though confirmed the conviction but modified the sentence to life imprisonment under *section 302 IPC*.[49]

Upholding the conviction and dismissing the appeal the apex court held that the cumulative effect of the above mentioned facts taken together is conclusive proof beyond reasonable doubt in establishing the guilt of the appellant. The chain of circumstances is such as to show that within all human probability the rape and murder of the deceased were committed by the appellant and none else and he had also caused disappearance of evidence of those offences.

8.3.1 Exceptions to Murder Treated as Culpable Homicide not Amounting to murder Punishable under section 304, Indian Penal Code, 1860

Section 300 of IPC, 1860 speaks of five exceptions in which, if a murder is committed, it is treated as "culpable homicide not amounting to murder". The exceptions are justified on the ground that in such cases the deceased is equally responsible for his death. Accordingly, the criminal liability of the accused is reduced from murder to culpable homicide not amounting to murder punishable under *section 304, IPC*.

(i) Whilst the accused was deprived of the power of self-control by grave and sudden provocation; Exception 1 to *section 300, IPC*; or

(ii) In the exercise of the right of private defence; Exception 2 to *section 300, IPC*; or

(iii) In the exercise of legal powers; Exception 3 to *section 300, IPC*; or

(iv) In a sudden fight; Exception 4 to *section 300, IPC*; or

(v) With the consent of the deceased; Exception 5 to *section 300, IPC*.

8.3.1.1 *Grave and Sudden Provocation*

Exception 1.—**When culpable homicide is not murder.—**Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:—

First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the power of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 1 not applicable in case of lapse of sufficient time between act and incident after provocation—Appeal Dismissed—Supreme Court—1962

KM Nanavati v State of Maharashtra,

AIR 1962 SC 605 : *1962 Supp (1) SCR 567*

The appellant KM Nanavati, second in command of the Indian Naval Ship “Mysore” was sentenced to life imprisonment under section 302 by the Bombay High Court for the murder of Prem Ahuja, a businessman of Bombay, for having illicit relationship with his wife Sylvia, who confessed to Nanavati of her illicit intimacy with Ahuja. Enraged at the conduct of Ahuja, Nanavati went to his ship, took from the stores of the ship a semiautomatic revolver and six cartridges on a false pretext, loaded the same, went to Ahuja’s apartment, entered his bedroom and shot him dead. Thereafter, the accused, surrendered himself to the police.

His defence was that when he shot the deceased he was deprived of the power of self-control caused by sudden and grave provocation.

The question before the court was whether a reasonable person placed in the same position as the accused, would have reacted to the confession by his wife in the manner as the accused did.

Justice Subba Rao held:

Under this exception culpable homicide is not murder if the following conditions are complied with:

(1) The deceased must have provoked the accused.

(2) The provocation must be grave.

(3) The provocation must be sudden.

(4) The offender, by reason of the said provocation, shall, have been deprived of his power of self-control.

(5) He should have killed the deceased during the continuance of the deprivation of the power of self-control.

(6) The offender must have caused the death of the person who gave the provocation or that of any other person by mistake or accident.

Chief Justice Goddard in *R v Duffy, [1948] 1 All ER 932,* said:

> Provocation is some act, or series of acts, done by the deceased to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.

The Indian Law on the subject may be considered from two aspects, namely,

(1) whether words or gestures unaccompanied by acts can amount to provocation, and

(2) what is the effect of the time lag between the act of provocation and the commission of the offence.

The Madras High Court in *Boya Munigadu v The Queen,* (1881) ILR 3 Mad 33, upheld the plea of grave and sudden provocation, in the following circumstances. The accused saw deceased when she had cohabitation with his bitter enemy; that night he had nothing to eat; next morning he went to the ryots for his wages when he saw his wife eating along with her paramour. He killed the paramour with a bill hook. Held, the accused had sufficient provocation to bring the case within the first exception to section 300.

Where a woman was leading a notoriously immoral life, and on the previous night mysteriously disappeared from the bed side of her husband and the husband protested against her conduct, she vulgarly abused him, whereupon the husband lost his self-control, picked up a rough stick, and assaulted her ...the Lahore High Court, in *Jan Muhammad v Emperor*,[50] held:

> In judging the conduct of the accused, one must not confine himself to the actual moment when the blow, which ultimately proved to be fatal, was struck, that is to say, one must take into consideration not only the event which took place immediately before the fatal below was struck. ...but also the whole unfortunate affair should be looked at as one prolonged agony on the part of the husband which must have been preying upon his mind and led to the assault upon the woman, resulting in her death.

...Is there any standard of a reasonable man for the application of the doctrine of "grave and sudden" provocation?

No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc; in short, the cultural, social and emotional background of the society to which an accused belongs. It is neither possible nor desirable to lay down any standard with precision, it is for the court to decide in each case depending upon the facts and circumstances. However, following guidelines may be stated as follows:

(1) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control.

(2) Words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first exception to section 300.

(3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence.

(4) The fatal blow should be traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving scope for premeditation and calculation.

Bearing these principles in mind, let us look at the facts of this case. When Sylvia confessed to her husband that she had illicit intimacy with Ahuja, the latter was not present. We will assume that he had momentarily lost his self-control. But, if his version is true—it shows that he was only thinking of the future of his wife and children and also of asking for an explanation from Ahuja for his conduct. This attitude of the accused clearly indicates that he had not only regained his self-control, but, on the other hand, was planning for the future. Then he drove his wife and children to a cinema, left them there, went to his ship, took a revolver on a false pretext, loaded it with six rounds, did some official business there, and drove his car to the office of Ahuja and then to his flat, went straight to the bedroom of Ahuja and shot him dead. Between 1.30 pm when he left his house and 4.20 pm when the murder took place, three hours had elapsed, and, therefore, there was sufficient time for him to regain his self-control, even if he had not regained it earlier.

On the other hand, his conduct clearly shows that the murder was a deliberate and calculated one. The mere fact that before the shooting, the accused abused the deceased and the abuse provoked an equally abusive reply could not conceivably be a provocation for the murder.

Held, the facts of the case do not attract Exception 1 to section 300.

The appeal is dismissed.

Act of sodomy on the son of the accused by deceased was sufficient provocation under exception I to section 300, IPC, 1860—Accused entitled to right of private defence—Supreme Court—1977

Hansa Singh v State of Punjab[51]

The accused on seeing one Gurbachan Singh (the deceased) committing sodomy on his son, assaulted him resulting in death. The court held that the accused (appellant) had done so under sudden and grave provocation which led him to commit murderous assault. The appeal of the accused was allowed. Conviction of the accused was reduced from life imprisonment under section 302 to imprisonment for seven years under section 304, Part II of *IPC, 1860 vide* Exception I to *section 300, IPC*.

Constant harassment by throwing garbage and rubbish into one's shop/home may lead to grave and sudden provocation resulting in deprivation of power of self control, exception 1 to section 300, IPC applicable—Supreme Court—2007

Muthu v State of TN[52]

The Supreme Court in *Muthu v State of TN,* on 2 November 2007 held that constant harassment may lead to deprivation of the power of self control amounting to grave and sudden provocation. The accused Muthu angered by a ragpicker-Siva's daily habit of throwing waste into his shop, took out a knife and stabbed him to death. Differentiating between a pre-planned crime and a crime resulting from a fit of rage, the court said this was not a murder but culpable homicide not amounting to murder punishable under *section 304 IPC, 1860*. In so doing, the apex court placed littering several notches higher on the scale of offence.

Justice Katju, writing the judgment for the bench said:

> In the heat of the moment and in a fit of anger people some times do acts which may not have been done after premeditation. Hence, the law provides that while those who commit acts in a fit or anger should also be punished, their punishment should be lesser than that of premeditated offences… We are satisfied that Muthu was deprived of the power of self-control by grave and sudden provocation which led him to commit the offence. If rubbish is thrown into one's house or shop, one would naturally get very upset. It is evident that the accused had no motive or intention to cause death since he was not carrying the knife from before, and only picked it up during the scuffle with Siva (deceased).

Appeal was partly allowed and the life term reduced to five years giving the accused the benefit of Exception I to *section 300 of the Indian Penal Code, 1860*.

Effect of provocation on a reasonable man is the determining factor to justify verdict of manslaughter—House of Lords—1941

Mancini v Director of Public Prosecutions,

(1941) 3 All ER 272 (HL) : *[1942] AC 1*

Facts: Fletcher, an enemy of the appellant and Distleman, entered a club, whereupon the appellant attacked Fletcher. Distleman came to Fletcher's aid seized the appellant and aimed a blow at him. The appellant whipped out a dagger, mortally wounded Distleman and cut Fletcher's hand severely. The appellant pleaded that his action had been taken in private defence, when Distleman attacked him with the open penknife.

The test to determine whether provocation will reduce the crime of murder to manslaughter is that of the effect of the provocation upon a reasonable man, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance—

(i) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and

(ii) to take into account the instrument with which the homicide was effected, for to retort in the heat of passing induced by provocation by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger.

In short, the mode of resentment must bear a reasonable relationship to the provocation, if the offence is to be reduced to manslaughter.

The jury found the appellant guilty of murder and his appeal to the Court of Appeal and the House of Lords was dismissed.

A reasonable man is one having power of self control of an ordinary man of that age and sex as that of the accused—House of Lords—1978

Director of Public Prosecutions v Camplin,

(1978) 2 All ER 168 (HL) : [1978] UKHL 2 : *[1978] AC 705*

Facts: The respondent Camplin, who was 15 years of age, killed Mohammed Lal Khan, by splitting his skull with a

chapati pan. At the time of the incident, the two of them were alone in Khan's flat. Camplin's defence was that Khan had buggered him despite of his resistance and had then laughed at him whereupon Camplin had lost his self-control and attacked Khan fatally with a *chapati* pan.

The jury found Camplin guilty of murder. The Court of Appeal, Criminal Division, allowed the appeal and substituted a conviction for manslaughter on the ground that the provocation was enough to have made a reasonable person of the same age as the appellant in the same circumstances do as he did.

The point of law of general public importance involved in the case is:

Whether, on the prosecution for murder by a boy of 15 years, where the issue of provocation arises, the jury should be directed to consider the question, under section 3 of Homicide Act 1957[53] whether the provocation, was enough to make a reasonable man do as he did by reference to a reasonable adult or by reference to a reasonable boy of 15.

It was held that section 3 of Homicide Act 1957 was intended to mitigate in some degree the hardness of the common law of provocation as it had been developed by various decisions. It recognises and retains the dual test. The provocation must not only have caused the accused to lose his self-control, but also be such as might cause a reasonable man to react to it as the accused did. Age of the accused, i.e. 15 years was held to be relevant at the time of killing.

The appeal was dismissed.

Grave and Sudden Provocation: To invoke the defence of provocation, and accused (defendant) is to be judged by the standard of a reasonable person having ordinary powers of control. The standard is a constant objective, standard in all cases—Privy Council—2005

Attorney General for Jersey v Holley,[54]

(2005) 3 All ER 371 (PC)

While allowing the appeal the court (Privy Council) by a majority of 6:3 held that the defence of provocation was to be judged by the objective standard of a reasonable man having ordinary powers of control. After having assessed the gravity of the provocation to the defendant, the standard of self control by which his conduct was to be evaluated for the purpose of the defence of provocation was the external standard of a person having and exercising ordinary powers of "self control".

The defendant, a chronic alcoholic, was charged with the murder of his long standing girlfriend. He admitted killing her with an axe while under the influence of alcohol and the sole issue at his trial was provocation. In the instant case, evidence that the defendant was suffering from chronic alcoholism had not been a matter to be taken into account by the jury, when considering whether in their opinion, having regard to the actual provocation and their view of its gravity, a person having ordinary powers of self control would have done what the defendant did. Accordingly, the appeal was allowed.

Distinction between section 300 Exception 1 and 4 IPC, 1860: In case of Exception 1 there is total deprivation of self-control, whereas in case of Exception 4 there is heat of passion that clouds men to do things which they would not otherwise do—Supreme Court—2008

Thankachan v State of Kerala[55]

Dr Arijit Pasayat held:

Exception 4 to *section 300 of Indian Penal Code, 1860* deals with a case of prosecution not covered by Exception 1. Both the Exceptions are founded upon the same principle, namely, absence of premeditation. However, in case of Exception 1 there is total deprivation of self control, whereas in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deed which they would not otherwise do. Of course, there is provocation in Exception 4 as in case of Exception 1; but injury done is not the direct consequence of that provocation.[56]

On 7 February 1997 at or about 6.45 pm in a village in the district of Kotayam in the State of Kerala a scuffle took place between the accused (1, 2, 3 and 4) and the deceased, who was sitting in the varanda of his house. Accused

2 caught hold of the deceased by the tuck (fold) of his dhoti and dragged him on to the road. The deceased picked up a soda bottle from the parapet of his house.

Seeing this A2 went and picked a soda bottle from the adjacent grocery shop and struck the deceased on the head with soda bottle. Thereupon the deceased also hit A2 on the head with soda bottle in his hand and inflicted an injury. Seeing this A2 sprinkled chilly power on the eyes of the deceased, who stood there with both hands held against his face and rubbing his eyes. A1 then exhorted A2 and A3 to cut the deceased to death. Thereupon, A2 drew a chopper from inside his shirt and cut the deceased on his head inflicting injuries and A3 stabbed the deceased on his right arm with a knife inflicting injury. The deceased fell on the road and succumbed to the injuries at about 2.10 pm on 8 February 1997.

All the four accused were charged and convicted under *section 302, IPC, 1860* read with section 34 for murder by the trial court. However, the High Court upheld the conviction of the accused 2 and 3, but acquitted accused 1 and 4 for want of sufficient evidence for killing the deceased.

Allowing the appeal partially holding the accused liable under section 304 Part I instead of *section 302 IPC, 1860* giving the benefit of Exception 4 to *section 300 IPC*, the apex court held that since the deceased first assaulted one of the accused with broken bottle causing injury, the accused had given the knife blow to the deceased in sudden quarrel in the heat of passion, the accused is entitled to the benefit of the Exception 4 *IPC*.

8.3.1.2 *Private Defence*

Exception 2.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration

Z attempts to horsewhip *A*, not in such a manner as to cause grievous hurt to *A. A* draws out a pistol. *Z* persists in the assault. *A* believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots *Z* dead. *A* has not committed murder, but only culpable homicide.

The framers of the Code commented as follows:[57]

> It will always be expedient to make a separation between murder and what we have designated as voluntary culpable homicide in defence. A man, who deliberately kills another in order to prevent him from pulling his nose if allowed to go absolutely unpunished, would be most dangerous. The law punishes and ought to punish such killing, but we cannot think that the law ought to punish such killing as murder, for the law itself has encouraged the slayer to inflict on the assailant any harm short of death which may be necessary for the purpose of repelling the outrage; to give the assailant a cut with a knife across the finger which may render his right hand useless to him for life, or to hurl him downstairs with such force as to break his legs; and it seems difficult to conceive that circumstances which would be a full justification for any violence short of homicide, should not be a mitigation of the guilt of homicide. That a man should be merely exercising a right by fracturing the skull and knocking out the eye of an assailant, and should be guilty of the highest crime in the code if he kills the same assailant, that there should be only a single step between perfect innocence and murder, between perfect impunity and liability to capital punishment, seems unreasonable. In a case in which the law itself empowers an individual to inflict any harm short of death, it ought to hardly, we think, to visit him with the highest punishment if he inflicts death.

Exception 2 to section 300, IPC, 1860 does not apply when injury caused more harm than necessary—Patna High Court—1960

Lachmi Koeri v State of Bihar,

AIR 1960 Pat 62 : 1960 Cr LJ 271

Justice Sahai held:

The sessions judge of Patna convicted appellant Lachmi Koeri under section 302, and sentenced him to imprisonment for life. The appellant was suspected of having committed theft in a dwelling house punishable under *sections 380* and *457* of the *Indian Penal Code, 1860*. Havildar, hereinafter *H* and constable *S* were deputed to

arrest him. While they were proceeding they saw the appellant coming out of a toddy shop. They chased him and he ran. However, *H* managed to catch him at a short distance. There was a scuffle between *H* and the appellant. The appellant then took out a *chhoora* from his waist and gave a blow with it on *H's* arm. He fell down in a *nala.* The appellant then gave several blows to *H,* got out of the *nala* and fled. *H* was brought to the hospital where he died at 9.15 am.

The question is whether the appellant had a right of private defence against *H* who was a public servant.

There was nothing to show that the appellant knew that the man who had caught him was a havildar of police and a public servant. *H* was not in uniform. There is no doubt that the appellant initially had the right of private defence, but, it is clear from the evidence, that the appellant could not entertain any fear of grievous hurt or death from *H.*

The question was whether he can be held to have merely exceeded the right of private defence in committing the murder.

The evidence showed that the first blow given with the *chhoora* by the appellant to *H,* fell on the forearm, and *H* fell in the nala. The appellant also fell on him in the *nala* and thereafter the appellant gave him incessant blows with his *chhoora*. As a result, no less than nine incised injuries were caused to *H,* most of them, including the fatal one, were caused when *H* was lying helpless under him.

On a consideration of the facts and circumstances mentioned above, initially the appellant had the right of private defence, he does not come under Exception 2 to section 300 and it cannot be held that his right of private defence extended up to the causing of *H's* death. He was held guilty under *section 302 of IPC, 1860* and the appeal was dismissed.

8.3.1.3 *Exercise of Legal Powers*

Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes the death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception applicable—public servant acting in good faith for advancement of justice if exceeds power—Allahabad High Court—1955

Dakhi Singh v State,

AIR 1955 All 379 : *1955 Cr LJ 905*

The appellant, a constable of Railway Protection Police (RPF) was convicted under *section 302, IPC, 1860* and sentenced to death. He shot a thief suspected to be tampering with sugar bags from goods wagon on order by the *Havildar* and pleaded that he did so in discharge of his duty and that it was just an accident that he hit the fireman instead. *Section 46 of CrPC*[58] lays down that when a police officer arrests a person and such person forcibly resists the endeavour to arrest him or attempts to evade the arrest, such police officer may use all means necessary to effect the arrest, but this does not give a right to cause the death of the person unless he is accused of an offence punishable with death or imprisonment for life.

It was held that the case would be covered by Exception 3 to *section 300 of IPC, 1860*. The said exception provides that culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith thinks to be lawful and necessary for the due discharge of his duty as a public servant without ill-will towards the person whose death he has caused. In the present case, there was no ill-will between the appellant and the deceased. The appellant was a public servant and his object was the advancement of public justice. He caused the death of the fireman by doing an act which he, in good faith, believed to be lawful and necessary for the due discharge of his duty. In such circumstances, it was held that the offence committed was culpable homicide not amounting to murder punishable under Pt II of section 304, of *IPC* and not murder. The conviction under section 302 was set aside.

Indian Penal Code, 1860, sections 300 Exception 3, 304, Part II [Public Servant when exceeds the Power]. Culpable homicide not amounting to murder. Custodial death, appreciation of evidence. Plea of alibi, Accused, police personnel causing death of deceased in police custody. Deceased, hale and hearty at time

of arrest. Deceased found in cabin of accused during investigation. Accused persons putting deceased in female lockup when only four persons present in male lockup. Post-mortem report showing 14 ante-mortem injuries. Failure of accused persons to offer any explanation as to how deceased died in their custody. Accused putting up false plea of alibi by fudging station diary, lockup register and arrest register to cover up death in police custody. Facts and circumstances showing that only accused persons responsible for death of deceased causing death of deceased in police custody. Rigorous imprisonment of 10 years under section 304, Part II, proper. (Para 13)—Supreme Court—2017

State through CBI Spl Crime Branch, Mumbai v Sanvlo Naik[59]

Seven accused were charged for the offence under *section 302* read with *section 34* of *Indian Penal Code, 1860*. All of them have been acquitted of the said charge. accused No 2 (SV Caeiro) and accused No 5 (Sanvlo Naik), who are respondents in the present appeals, were, however, convicted for the offence punishable under section 304 Part II read with *section 34 IPC, 1860* and sentenced to suffer simple imprisonment of three years and two years respectively along with fine. Aggrieved, the convicted accused respondents filed separate appeals before the High Court of Bombay. Which allowed their appeal and acquitted.

Aggrieved, the State through Central Bureau of Investigation went in appeal before the Apex Court.

Allowing the appeal apex Court said, the circumstances culled out above would be sufficient to enable the Court to come to the conclusion that it is the accused respondents and nobody else who are responsible for the injuries on the deceased. Having regard to the circumstances and the absence of any cogent explanation on the part of the accused respondents and taking into account the fact that the deceased was in police custody and death had occurred in such custody, we are of the view that it is the accused respondents (accused Nos 2 and 5) who, to the exclusion of any other persons, were responsible for the injuries that caused the death of the deceased Abdul Gaffar Khan.

We, therefore, take the view that the acquittal of the accused respondents of the offence under section 304, Part II read with *section 34 IPC, 1860* cannot be legally sustained.

This will bring the Court to a consideration of the adequacy of the sentence imposed on the accused respondents. The maximum punishment that is awardable in case of offence under section 304, Part II *IPC* is ten years. The accused respondents are police personnel whose duty was to act in accordance with law. Death had occurred when the deceased was in police custody. The accused had fudged the General Diary Register of the police station to put up their defence and had put up a false plea of *alibi*. In view of the evidence of PW-5 that the memo sending the deceased to the hospital was recorded by him after the deceased was already declared to be dead would indicate that accused No 2 had prepared a false memo sending the deceased to the hospital when he was already dead. Taking into account all the above, it is our considered view that the accused respondent having been found guilty of commission of the offence under section 304, Part II read with *section 34 IPC, 1860* should suffer the maximum sentence awardable under the said section. We, therefore, set aside the order of the High Court; convict the accused respondents of the offence under section 304, Part II read with *section 34 IPC* and sentence them to suffer rigorous imprisonment for a period of ten years.

8.3.1.4 *Sudden Fight*

Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heart of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

8.3.1.5 *Assault not premeditated taking place in sudden fight*

Indian Penal Code, 1860, sections 302, 300, Exception 4, 304, Part II. Evidence Act, section 3. Murder or culpable homicide not amounting to murder—Appreciation of evidence. Accused persons allegedly causing death of deceased by inflicting injuries with knife on neck of deceased. Evidence of eye-witnesses revealing one accused person inflicting injuries with knife, another giving fist blows and other two accused persons holding deceased. Homicidal death proved by medical report of deceased. Death and occurring due to altercation taking place during discussion and in sudden fight, accused persons assaulted deceased. Conviction of accused persons modified from section 302 to section 304, Part II and sentence reduced to period already undergone. (Para 7)

8.3 Murder

Shahajan Ali v State of Maharashtra

with

Sikandar Ali v State of Maharashtra,[60]

AIR 2017 SC 2614 : 2017 (2) Crimes 423

Per L Nageswara Rao, J:

The appellant was convicted for an offence under *section 302 of the Indian Penal Code, 1860*, and sentenced to life imprisonment. The appeal preferred by him was dismissed by the High Court. The appellants who were tried along with the appellant were acquitted by the Trial Court. The High Court reversed the acquittal and convicted them under section 302 and sentenced them to life imprisonment.

Aggrieved by the judgment of the High Court, the appellants have filed the above appeals before the Apex Court.

Apex Court while holding the accused liable for death of the deceased modified the sentence from *section 302 IPC, 1860* and section 304 Part II. Apex Court said:

We have no doubt about the complicity of all the accused in the homicide of Sarfraj. A-1 attacked the deceased with the knife and caused injury on his neck which resulted in his death. The other accused assisted him in committing the crime by holding the hands of the deceased. However, the only question that falls for consideration is whether the accused are liable to be punished for an offence *section 302 IPC, 1860*. After scrutinizing the material on record, we are of the opinion that the accused are not liable to be convicted under *section 302 IPC*. We are convinced that there was neither prior concert nor common intention to commit a murder. During the course of their business activity the accused reached the *dhaba* where the deceased was present. An altercation took place during the discussion they were having behind the *dhaba*. That led to a sudden fight during which A-1 attacked the deceased with a knife. Exception 4 to *section 300 IPC, 1860* is applicable to the facts of this case. As we are convinced that the accused are responsible for the death of Sarfraj, we are of the opinion that they are liable for conviction under section 304 Part II of *IPC, 1860*. We are informed that A-1 has undergone a sentence of seven years and that A-2 to A-4 have undergone four years of imprisonment. We modify the judgment of the High Court converting the conviction of the accused from section 302 to section 304 Part II of *IPC, 1860* sentencing them to the period already undergone. They shall be released forthwith.

Order accordingly.

Exception 4 to section 300, IPC, 1860 does not apply in case of an unarmed person who makes no threatening gesture—Supreme Court—1956

Narayanan Nair Raghavan Nair v State of Travancore-Cochin,

AIR 1956 SC 99 : 1956 Cr LJ 278 : 1956 (0) Ker LT 92 SC

The appellant was convicted under *section 302, IPC, 1860* and sentenced to death for murdering *A*, with whom there was a litigation regarding partition of property. It was argued that this was a case of sudden fight.

The court held that it was not a case in which death sentence was called for, and reduced the sentence to life sentence.

The court observed:

> The exception requires that no undue advantage be taken of the other side. It is impossible to say that there is no undue advantage when a man stabs an unarmed person who makes no threatening gestures and merely asks the accused's opponent to stop fighting.
>
> Then also, the fight must be with the person who is killed. Here, the fight was between Velayudhan (PW 1), son-in-law of the deceased and the appellant. The deceased had no hand in it. He did not even try to separate the assailants. All he did

was to ask his son-in-law, Velayudhan, to stop fighting and said that he would settle their dispute.

There was no premeditation and the death sentence was reduced to one of transportation for life. The appeal succeeds, on the question of sentence only.

The appeal is partly allowed.

Exception 4 applicable—injury inflicted in sudden fight with the knife— Supreme Court—1976

Amrithalinga Nadar v State of TN,

AIR 1976 SC 1133 : (1976) 2 SCC 194 : 1976 Cr LJ 848

In one village, non-payment of Rs 5 to an artist resulted in the death of one of the villagers. The High Court convicted appellant (accused) under *section 302, IPC, 1860*. On examining the circumstances, the Supreme Court held that the fatal injury was caused by the appellant to the deceased without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and that Exception 4 to section 300 applies to this case. The appeal was partly allowed.

Benefit of Exception 4 to section 300, IPC, 1860 is available only if offender has not taken "undue advantage" or acted in a cruel manner—or not taken unfair advantage—Supreme Court—2007

Naveen Chandra v State of Uttaranchal[61]

Justice Arijit Pasayat held:

The fourth exception of *section 300, IPC, 1860* covers acts done in a sudden fight. The said exception deals with case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self control. In case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do.

There is provocation in Exception 1; but the injury done is not the direct consequence of that provocation.

In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing.

A sudden fight implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, not in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be exception 1. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel of unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

Altercation between two families in morning of fateful day—deceased receiving injury on his head—conciliation arranged through Panchayat—in course of conciliation deceased who had sustained head injury in morning got in fury and started abusing accused—in altercation that ensued accused causing injuries to two persons who were unarmed and also chasing other members of their family— Accused in circumstances not entitled to plead right of self defence.

Appellant was convicted for offence punishable under *section 302* read with *section 34* of the *Indian Penal Code, 1860*.. While the appellant was awarded death sentence, the other two were sentenced to undergo imprisonment for life. All the three accused persons were convicted for offence punishable under *section 302* read with *section 34*, *IPC, 1860*.

Sections 102 and *105* of *IPC, 1860* deal with commencement and continuance of the right of private defence of body and property respectively. The right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, to commit the offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of the danger to the body continues. In *Jai Dev v State of Punjab,* AIR 1963 SC 612 : [1963] 3 SCR 489, it was observed that as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to route, there can be no occasion to exercise the right of private defence.

The right of private defence is essentially a defensive right circumscribed by the governing statute i.e. *IPC* is available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of retribution, expected to repel unlawful aggression and not as retaliatory measure.

Though the accused was exercising right of private defence, but had exceeded the same by continuing the attacks even after the threat to life had ceased.

Appeal dismissed.

Exception 4 to section 300 of IPC, 1860 is applicable when the offender has not taken undue advantage or acted in cruel or unusual manner—Supreme Court—2006

Pappu v State of MP[62]

Justice Arijit Pasayat held:

For application of Exception 4 to *section 300 IPC, 1860* it is not sufficient to show that there was sudden quarrel and there was no premeditation. It must further be shown that offender has not taken undue advantage or acted in cruel or unusual manner. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression “undue advantage” as used in the provision means “unfair advantage”.

It cannot be laid down as a rule of universal application that whenever one blow is given *section 302, IPC* is ruled out. It would depend upon the weapon used, size of the weapon in some cases, force with which the blow was given, part of the body where it was given and several such relevant factors.

Considering the factual background in the case at hand it will be appropriate to convict the appellant under section 304, Part II *IPC*, instead of *section 302, IPC* as has been done by the trial court and affirmed by the High Court. Custodial sentence of eight years would meet the ends of justice.

The appeal is allowed to the aforesaid extent.

Appeal partially allowed.

Exception applicable—death caused in sudden quarrel does not indicate cruel act by taking undue advantage—Supreme Court—1989

Surinder Kumar v Union Territory of Chandigarh,

AIR 1989 SC 1094 : (1989) 2 SCC 217

The appellant had an argument with the deceased and PW 2. In the course of this heated exchange, PW 2 is alleged to have showered filthy abuses and also threatened to throw out the utensils and lock the kitchen. Since PW 2 was uttering filthy abuses in the presence of the appellant’s sister and the deceased brother, Nitya Nand did not restrain him, the appellant got enraged, went into the kitchen and returned with a knife with which he inflicted one blow on the neck of PW 2 causing a bleeding injury. In the mean time, the appellant inflicted three knife blows to Nitya Nand—one on the shoulder, the other on the elbow and the third on the chest, as a result whereof Nitya Nand collapsed to the floor and later died while on the way to the hospital.

Considering the fact that there was no ill will between the parties, the court held that the appellant was entitled to the benefit of Exception 4 to *section 300 of IPC*. Thus, the accused was convicted under section 304, instead of *section 302, IPC, 1860*.

Exception applicable—death caused in sudden fight without premeditation and not taking undue advantage—Supreme Court—1992

Suraj Mal v State of Punjab,

AIR 1992 SC 559 : 1993 Supp (1) SCC 639 : 1992 Cr LJ 520 : 1991 (2) Scale 1177

The dying declaration of the deceased stated that it was only during the quarrel that ensued between the deceased and the appellant, that the appellant stabbed the deceased once with a knife. As the appellant acted without premeditation in the heat of passion upon a sudden quarrel, the court allowing the appeal, held that since exception 4 is attracted to the facts of this case, the offence is punishable under section 304, but not under *section 302, IPC, 1860*.

Exception IV to section 300 IPC, 1860—A fight on the spur of the moment between the two male groups on the issue of taking possession of cattle shed with no intention to kill anyone – And, in absence of any overt act attributed to any of the appellants towards 'S', the deceased lady, for inflicting any injury to her - Appellants could not be convicted for murder of 'S' so as to attract rigour of section 302 IPC, 1860 - Held, this is a case where the appellants should be convicted for the offence punishable under section 304 instead of 302 IPC - Supreme Court - 2015

Balu s/o Onkar Pund v State of Maharashtra,

2015 (2) SCC (Cr) 252 : 2015 (1) Crimes 181 : *2015 (2) Scale 147* : JT 2015 (1) SC 36

Abhay Manohar Sapre, J:

A (A-1) and M (PW-3), both resident of same village were good friends S, the deceased. Was the wife of M. Around 25-30 years back, M had purchased land from A for his cattle shed in the same village and he was also placed in its possession. However, no sale deed was executed between them yet M continued to remain in passion of cattle shed all through. Due to election for the post of Sarpanch, relations between them were not noyt as cordial as they used to be in the past. Thereafter, A started pressurising M to vacate the land and hand over the possession of cattle shed. On 15 January 2008, the appellants armed with weapons barged in the cattle shed and started removing iron sheets fixed to the roof. M requested the appellants not to remove the sheets. Since the appellants did not listen to M and continued their operation in moving the sheets, M resisted and made an attempt to stop them. At that time, S and M's son U (PW 5), who were present on the spot, intervened and resisted appellants from removing the sheets. This led to scuffle between both parties. Accused 1, 3 and 4 beat M and threw him out of the cattle shed. A (A-1) poured kerosene on the cattle shed and SH (A-4) set the cattle shed on fire. S, who was resisting the appellants, caught in contact of fire and received severe burn injuries. On notifying this, M tried to enter in cattle shed to save his wife SG (A-2) then inflicted an axe-blow on M's head due to which he sustained bleeding injury. S was taken to the civil hospital where she succumbed to her injuries.

The session judge convicted the appellant-accused. The High Court dismissed their appeals and confirmed the conviction and sentenced awarded by the trial court. The appellants argued that it was not a case of murder, but 'it was a case falling under section 304 Part I of *Indian Penal Code, 1860*. There was neither any intention on the part of any the appellants to commit the murder of S nor had the appellants visited the spot with any such intention. The only intention of the appellants was to take passion of cattle shed caught fire causing burning injuries to S, which unfortunately resulted in her death.

Allowing the appeals partly, the Supreme Court held: It is for the reason that *firstly*, neither there was any motive nor any intention on he part of any of the appellants to eliminate S. *Secondly*, there was no enmity of any kind with S in person with any of the appellants. *Thirdly*, the appellants had gone there to take possession of the cattle shed and not with an intention to kill any member of the family of M. *Fourthly*, if at all, there was some kind of animosity or jealousy then it was towards A-1 who had won the election. S had nothing to do with the election because she never contested the election. *Fifthly*, despite the appellants being armed with weapons, none of them inflicted any injury or gave blow to S but single bow was inflicted only on M, who fortunately survived. *Sixthly* S died due to sustaining of burn injuries, which she suffered because on it. In other words, if the appellants had not set the cattle shed ablaze by pouring kerosene on it, then, the incident of death of S would not have occurred. *Seventhly*, it was a fight on the spur of moment between the two male groups on the issue of taking passion of cattle shed with no intention to kill anyone and lastly, in the absence of the overt act attributed to any of the appellants towards S for inflicting any injury to her, the appellants could not have been convicted for inflicting any injury to her, the appellants

could not have been convicted for act of committing murder of S so as to attract the rigour of *section 302 IPC, 1860* and instead they should have been convicted for an offence of culpable homicide not amounting to murder under section 304 Part I *IPC*.

8.3.1.6 *Consent*

Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Illustration

A, by instigation, voluntarily causes *Z*, a person under eighteen years of age, to commit suicide. Here, on account of *Z's* youth, he was incapable of giving consent to his own death; *A* has therefore abetted murder.

Consent of the deceased to suffer death reduces the crime from murder to culpable homicide not amounting to murder—Patna HC—1992

Dasrath Paswan v State of Bihar[63]

Justice Chaudhury stated:

The appellant was convicted under *section 302, IPC, 1860* for the murder of his wife and sentenced to transportation for life. He was a student of class tenth. He had failed in the annual examination for three years in succession and was very much upset at these failures. He took his last failure so much to heart that he decided to end his life and informed his wife, who was a literate woman, of about 19 years of age, of his decision. His wife asked him to first kill her and then kill himself. In accordance with the pact, the accused killed his wife but was arrested before he could kill himself. He appealed.

The question is whether Exception 5 to *section 300, IPC, 1860* is applicable in this case since the deceased was above the age of 18 years and that she had suffered death with her own consent?

It was contended on behalf of the prosecution that the consent in the present case was obtained by putting pressure upon her, the pressure being communication by the appellant to his wife that he had decided to end his own life, and so the prospect of widowhood prompted the unfortunate women to agree to suffer death at the hands of her husband.

Rejecting the contention, the court said it cannot be accepted that the deceased gave consent under fear or injury or under misconception of fact that will be invalid under *section 90, IPC, 1860*. The conviction of the appellant was accordingly altered from murder under *section 302, IPC* to culpable homicide not amounting to murder under the first part of *section 304, IPC*.

Having regard to the extraordinary nature of this case, the court held that a moderate sentence is proper. The appellant, an immature young man, was suffering from an inferiority complex. The loss of a devoted wife has already been a great punishment to him appellant was sentenced to five years of rigorous imprisonment. Subject to this modification the appeal was dismissed.

Murder Suicide Pact—Defence of abandonment of plan to kill the children is not applicable when the accused did not do more than mere promise not to take part in the suicide pact. In the absence of reasonable steps taken either to neutralize the effect of participation or prevent commission of the offence accused is liable for offence.

R v Gauthier,

[2013] 2 SCR 403 : 2013 SCC 32 (CanLII) : 360 DLR (4th) 1

Defense of Abandonment: Air of Reality Test the accused and her husband settled in Chibougamau in Canada in 2000, where they had two children. Throughout the following years, misfortune seemed to plague the family, as the accused and her husband both fell into psychological distress. Unable to find stable jobs, despite having moved to another area of Quebec, the couple was forced to go bankrupt. On 31 December 2008, accused was told by her husband that they should commit suicide and take their children with them. At one point during evening, the husband prepared drinks for all family members, causing them to fall asleep.

When she woke up the next morning, the accused found her husband and their children dead. She called 911 and told the operator that “it was a pact” and that “we told ourselves we wouldn’t start in 2009.” When the police arrived they found several documents, some in the accused’s hand, revealing that the couple had decided together to end their and their children’s lives. The accused was arrested and charged under section 21[64] of Criminal Code of Canada with first degree murder of her three children. At trial, the accused claimed that she was in dissociative state at the relevant time.

The accused was convicted, and she appealed on the basis that defense of abandonment should have been put to injury. The Court of Appeal pointed out that if accused was in dissociative state, as she claimed, she could not also assert that she had abandoned pact. The Court of Appeal concluded that trial judge had not erred in refusing to put defense of abandonment to jury. Accused appealed to the Supreme Court of Canada.

The accused claimed that she had told her husband that she had changed her mind and no longer intended to participate in the common purpose. However, the Court was of the view that this claim was not sufficient to meet the air of reality test, even if it were assumed that this claim would be sufficient for jury to reasonably conclude that accused had communicated her intention to withdraw from the plan, that communication would not on its own have sufficed, in circumstances of this case, for judge to put defence of abandonment to jury. Since evidence showed that accused did more than merely promise to take part in the murder-suicide pact, she had to do more to either neutralise the effects of her participation or to prevent commission of offence. Therefore, trial judge did not err in deciding not to put defence of abandonment to jury.

There are two main issues in this appeal. First, was it appropriate to exclude the defence of abandonment from the defences put to the jury on the basis that it was incompatible with the defence’s principal theory, the absence of mens rea? If not, did the defence of abandonment meet the air of reality test? The court answered both questions in the affirmative.

While dismissing the appeal by a majority 5 to 1[65] the Supreme Court of Canada held that since the evidence showed that the accused did not do more than merely promise to take part in the murder-suicide pact she had to do more either to neutralize the effects of her participation or to prevent the commission of the offence. Therefore, the trial judge did not err in deciding not to put the defence of abandonment of the jury.

Per Fish J (dissenting):

The trial judge was bound to put abandonment to the jury if there was evidence that the accused had changed or abandoned her earlier intention to aid or abet the murder of her children, and had adequately communicated to her husband that she had withdrawn from their pact. Here, there was evidence upon which a properly instructed jury might well have found that the accused had abandoned the suicide pact in respect of which she was charged and convicted of murder, or at least have been left with a reasonable doubt on this issue, which would of course have sufficed to warrant an acquittal. It would be fundamentally unfair at this stage to fault the accused for failing to demonstrate anything more than a change of intention to aid or abet the murder of her children.

8.3.2 Sudden Infant Death Syndrome

The petition for a writ of *certiorari* challenging petitioner’s conviction for death of her 7-week-old grand-child by sudden infant death syndrome (SIDS) 1 US Supreme Court, 2011.

Cavazos v Smith [Skhank Baby Case]

132 S Ct 2 (2011) : 181 L Ed 2d 311 : 2011 US Lexis 7603

This case concerns the death of seven-week-old Etzel Glass. On 29 November 1996, Etzel’s mother, Tomoka, put Etzel to sleep on a sofa before going to sleep herself in another room. Respondent Shirley Ree Smith- Tomekas’s mother slept on the floor next to Etzel. Several hours later, Smith ran into Tomeka’s room, holding Etzel, who was limp, and told her that “[s] omething [was] wrong with Etzel.” By the time emergency officials arrived, Etzel was not breathing and had no heart beat. Inmate’s seven-week old grandchild died. The prosecution’s three experts attested that the child’s death was sudden infant death syndrome (SIDS) and not Shaken Baby Syndrome (SBS) as claimed by the defence.

In an interview with the police a few days later, Smith said that she had shaken Etzel, but then she corrected herself and said that she had twisted him to try to elicit a reaction.

Smith was arrested and charged with assault on a child resulting in death under California *Penal Code section 273ab* which states:

> Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment... .

The defence expert, pediatric neurologist Dr William Goldie, testified that Etzel's death *was* due to SIDS (Sudden Infant Death Syndrome). He noted that Etzel was born with jaundice, a heart murmur, and low birth weight-making him more susceptible to SIDS. Dr Goldie testified that pathologists had not been able to determine the cause of Etzel's death and that the bleeding could be attributed to the resuscitation efforts.

The jury found Smith guilty. Concluding that the jury "carefully weighed" the "tremendous amount of evidence" supporting the verdict the trial judge denied Smith's motion for a new trial and sentenced her to an indeterminate term of 15 years to life in prison.

On direct review, Smith contended that the evidence was not sufficient to establish that Etzel died from Shaken Baby Syndrome (SBS). Respondent inmate petitioned for a writ of *habeas corpus* [pursuant to 28 USCS section 2254] asserting a claim of in sufficient evidence regarding her conviction under *California Penal Code section 273ab*. The district court denied the petition. The United States Court of Appeals for the Ninth Circuit reversed with instructions to grant the writ. Petitioner warden sought review.

The Supreme Court of the United States granted the inmate's petition for a writ of certiorari and motion to proceed in *forma pauperis*. The Court reversed the appellate court's judgment, and remanded the case for further proceedings. 6-3 *per curiam* decision.

Certiorari Granted.

8.3.2.1 *Mercy Killing—An Exception to Murder under section 300 of Indian Penal Code, 1860*

There is a growing body of opinion that a new exception to *section 300, IPC* be enacted under the caption "mercy killing or compassionate killing"[66] subject to two years imprisonment. This provision should be invoked to cover cases where a person, out of compassion, kills another in order to relieve a person from incurable suffering. In such a case the person deserves different treatment than an ordinary case of murder. For instance, where a person kills a man believing on reasonable grounds that the victim was:

(i) permanently subject to great bodily pain or suffering; or

(ii) permanently helpless from bodily or mental incapacity; or

(iii) subject to rapid and incurable bodily or mental degeneration.

In such a case, the killing (whether spontaneous or premeditated) is generally prompted by the knowledge of the victim's severe handicap, imminent death or severe pain and a compassionate decision that the victim would be better off dead. However in India, the judiciary has no statutory provision to decide such cases.

In England, the courts have invoked section 2 of Homicide Act 1957, which allows "diminished responsibility" as an exception to murder to cover such cases of mercy killing.

For instance in *R v Taylor,* (1980) CLY 540, a father had killed his child who was autistic (abnormal) by battering him on his head with an axe and cutting his throat, was not held liable for murder, though he was a very loving father.

Sentencing the father to 12 months probation, Heilborn J of the Court of Appeal outlined the factors contributing to his abnormality of mind and impairment of responsibility which included his emotional reaction to the child's handicap and depression and at the prospect of the child being removed to an institution. The judge, considering that the accused would suffer enduring punishment in the knowledge of what he had done, concluded that, it was her public duty not to add to that hell by sentencing him to imprisonment.

Jones: In *R Jone*,[67] the accused a 29 year old man, suffocated his mother who was at an advanced stage of the

terminal cancer.[68] The accused, who had watched his father suffer a painful and lingering death by the same disease, was in a condition of severe anxiety and despair. Watkins J, while stating that he could not condone killing, held that the appropriate sentence in these circumstances was a conditional discharge.

The above cases are not unusual and reflect a well established practice of accepting the plea of diminished responsibility on charges of murder by involving section 2 (1) of Homicide Act 1957 discussed below, dealing with diminished responsibility in cases of mercy killing.

8.3.2.2 *Diminished Responsibility, Exception to Murder Under English Law—Section 2 of Homicide Act—1957*

In England, 114 years after the promulgation of the Mc'Naughten Rules, the law of murder was amended by Homicide Act 1957. The rules were retained, but the Scottish "defence" of diminished responsibility was introduced. The Homicide Act was essentially a compromise solution to the controversy over capital punishment. It appeased the retentionists by retaining as capital offences certain categories of murder, including murder by shooting and murder in the course or furtherance of theft; but the remainder, numerically more significant, carried a mandatory sentence of life imprisonment.

The Murder (Abolition of Death Penalty) Act 1965 made all murders punishable by life imprisonment alone. Section 2[69] of Homicide Act 1957 introduced the "defence" of diminished responsibility. Strictly speaking, it is not a defence but operates to alter the category of the crime. The effect was to give the court the widest discretion in passing the sentence. Instead of a mandatory penalty of death or life imprisonment, the court could impose imprisonment for life or any lesser period, a fine, or a conditional or unconditional discharge under Criminal Justice Act 1948.

Jury Trial: Murder or manslaughter (culpable homicide) Failure of Trial Judge to give proper direction to the Jury amounts to material irregularity and may lead to miscarriage of justice in case of the accused having killed the deceased by strangulation depriving her of oxygen-Conviction quashed; House of Lords—2006

R v Coutts,[70]

(2006) 4 All ER 353 : [2006] UKHL 39 : *[2006] 1 WLR 2154*

Lord Bingham of Cornhill

The appellant, Graham James Coutts was charged with the murder of his girl friend Jane Longhurst on 14 March 2003. The trial judge on the basis of the facts of the case directed the jury[71] that they have to choose between convicting the appellant of murder or acquit him on the ground of accident. Considering the facts and nature of the case the jury decided to convict the appellant of murder he was therefore sentenced to life imprisonment. His appeal to the Court of Appeal on the ground that the trial judge has misdirected the jury resulting in miscarriage of justice was rejected. The Judge should have also given an option to the jury either to convict the appellant for (i) murder, or (ii) manslaughter (=culpable homicide), or (iii) acquit the accused taking into consideration the fact of the case. Thereupon the appellant moved the House of Lords.

It is alleged that the appellant murdered the deceased in his flat on 14 March 2003 in order to obtain sexual stimulation and that having strangulated her with a pair of tights around the neck with a knot on the right hand side. He did her with a pair of tight around the neck with a knot on the right hand side. He did have some sexual contact with her body. He stored her body first in his car, then in his shed, then in a commercial storage facility. On 19 April 2003 he took her body to an area of woodland some distance away and set her fire on it. When found, the body was burning and unclothed.

The expert pathologist told that the cause of the deceased's death was compression of her neck by the ligature (something which binds), causing her to be asphyxiated (suffocation). The appellant testified that he and the deceased had consensual asphyxial sex, and that her death had been a tragic accident. He testified that with her consent, when they were face to face on the bed, he had put a ligature, in the form of a pair of tights around the deceased's neck. The sight of the ligature was intended to stimulate him sexually, and the restriction to the body of the deceased's brain was intended to heighten the sexual pleasure. According to the appellant, when he was on his back and she was above him, he held the end of the tights behind her neck with his left hand, while masturbating (rubbing) with his right hand. At some time before he ejaculated, he must have closed his eyes. When he opened them again, he was aware of the deceased lying over him and not moving. In fact, she was dead.

Allowing the appeal the House of Lords held that the judge's failure to leave a manslaughter verdict to the jury was a material irregularity and hence the conviction is quashed.

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9 (1876) ILR 1 Bom 342. *Gurdev Raj v State of Punjab,* 2007 (11) Scale 729 : (2007) 13 SCC 380 : [2007] 10 SCR 835; appellant picked up a quarrel with his wife and mother-in-law and with an iron *mungli,* administered two blows on the head of the his mother-in-law as a result where of she died. Modifying his sentence from murder under section 302 to culpable homicide under section 304, Pt II, the apex court held fatal injury could have been caused by single blow and was not sufficient in an ordinary course of nature to cause death.

10 AIR 2017 SC 3064 : 2017 (2) Crimes 333 : 2017 (7) Scale 1. Ashok Bhushan and Deepak Gupta, JJ delivered the judgment.

11 AIR 2017 SC 897 : (2017) 4 SCC 377 : 2017 (2) Scale 236, AK Sikri and RK Agrawal, JJ, delivered the judgment.

12 AIR 2017 SC 3125 : (2017) 8 SCC 204 : 2017 (7) Scale 141, AK Sikri and Ashok Bhushan, JJ, delivered the judgment.

13 AIR 2015 SC 3037 : 2015 Cr LJ 4034 : 2015 (6) JT 462 : 2015 (8) Scale 159, TS Thakur and Adarsh Kumar Goel, JJ, delivered the judgment.

14 AIR 2017 SC 4970 : 2017 (4) Crimes 280, AK Sikri and Ashok Bhushan, JJ.

15 AIR 2017 SC 2600 : 2017 (3) Crimes 397, L Nageswar Rao and Navin Sinha, JJ, delivered the judgment.

16 AIR 2018 SC 2457 : 2018 Cr LJ 4442 : 2016 (2) JKJ 91 : JT 2018 (5) SC 145, NV Ramana and S Abdul Nazeer, JJ.

17 AIR 2017 SC 471 : (2017) 2 SCC 365 : 2016 All MR (Cr) 5373 : 2016 (12) Scale 410 : JT 2016 (11) SC 425, Dipak Misra and Amitava Roy, JJ delivered the judgment.

18 AIR 2016 SC 1, TS Thakur, CJI and R Banumathi, J, delivered the judgment.

19 AIR 2012 SC 2123 : 2012 (4) JT 287 : 2012 Cr LJ 2850 : 2012 (4) Scale 526, AK Patanaik and Swatanter Kumar, JJ.

20 AIR 2008 SC 1854 : (2008) 15 SCC 725 : 2008 Cr LJ 2987 : JT 2008 (5) SC 350, VS Sirpurkar, J (SB Sinha,J).

21 The Doctor found the following injuries: 1. An incised wound on lateral aspect of left pam 2 cm+1\2 2 cm, black in colour; 2. An incised wound above wound No 1 on lateral aspect of left palm. 2cm+1\2cm +2cm, black in colour; 3. An incised wound on epigastria region of abdomen just below xiphi sternum 2 cm+1 cm+ 12 cm (length, breadth, depth respectively); 4. An abrasion from right upper arm above elbow joint 5+4 cm, black in colour; 5. An abrasion on medical aspect of left leg, 2cm+1\2 cm, black in colour; 6. Another abrasion in front of left leg 1 cm +1\2 cm, black in colour. The driver plunged the screw into the vital part of the body of the deceased. It cut his liver and spleen. Hence, the offence at the most would be culpable homicide not amounting to murder punishable under section 304 Part II of the *IPC*.

22 AIR 2004 SC 5039 : (2004) 11 SCC 410.

23 AIR 2017 SC 1208 : 2017 (1) Crimes 350 : 2017 Cr LJ 2028 : 2017 (3) Scale 236, Kurian Joseph and AM Khanwilkar, JJ.

24 Five Exceptions under *section 300 IPC* are: (1) Grave and Sudden Provocation, (2) Exceeding Right of Private Defence, (3) Public Servant Exceeding his Power, (4) Sudden Fight, (5) Consent.

25 *CrPC, 1973 section 378* provides provisions for appeal in case of acquittal.

26 *CrPC, 1973 section 386* describes the powers of the appellate court, at length.

27 Dwalapayan Ghosh, Times of India dated 14 June 2010.

28 Ankita Ghosh, Times of India, July 2010.

29 AIR 2010 SC 2914 : (2010) 8 SCC 593 : JT 2010 (8) SC 633 : 2010 (8) Scale 315, Harjit Singh Bedi and JM Panchal, JJ delivered the judgment.

30 AIR 2018 SC 2142 : (2018) 6 SCC 610 : JT 2018 (4) SC 622, Kurian Joseph, Mohan M Shantanagoudar and Navin Sinha, JJ.

31 AIR 2017 SC 4839 : 2017 AIR (SCW) 4839 : 2017 (4) Crimes 55, NV Ramana and Dr DY Chandrachud, JJ, delivered the judgment.

32 See *Sharad Birdhichand Sarda v State of Maharashtra,* AIR 1984 SC 1622 : (1984) 4 SCC 116 : 1985 SCR (1) 88; *Ramreddy Rajeshkhanna Reddy v State of AP,* AIR 2006 SC 1656 : (2006) 10 SCC 172 : 2006 (3) SCR 348 : JT 2006 (4) SC 16; *Trimukh Maroti Kirkan v State of Maharashtra,* 2006 AIR SCW 5300 : (2006) 10 SCC 681 : JT 2006 (9) SC 50 : 2007 Cr LJ 20; *Venkatesan v State of TN,* AIR 2008 SC 2369 : (2008) 8 SCC 456 : 2008 Cr LJ 3052 : JT 2008 (6) SC 640; *Sanjay Kumar Jain v State of Delhi,* (2011) 11 SCC 733 : AIR 2011 SC 363; *Madhu v State of Kerala,* (2012) 2

SCC 399 : AIR 2012 SC 664 : 2012 Cr LJ 1230; *Munna Kumar Upadhyaya alias Munna Upadhyaya v State of AP,* (2012) 6 SCC 174 : AIR 2012 SC 2470 : 2012 Cr LJ 3068; *Vivek Kalra v State of Rajasthan,* 2013 AIR (SCW) 1155 : 2013 Cr LJ 1524 : 2013 (2) Scale 515 : JT 2013 (3) SC 209.

33 AIR 2017 SC 1133 : 2017 (1) Crimes 328 : JT 2017 (2) SC 415, SA Bobde and L Nageswara Rao, JJ, delivered the judgment.

34 AIR 2017 SC 3051 : 2017 Cr LJ 4055 : JT 2017 (7) SC 54, AK Sikri and Ashok Bhushan, JJ, delivered the judgment.

35 AIR 2008 SC 1184 : (2008) 3 SCC 210 : 2008 Cr LJ 1816 : 2008 (1) Crimes 191, GS Singhvi and GP Mathur, JJ.

36 On 1 October 1994 one Dr Dhoni resident of Pratap building, 173 Dadiseth Agyari lane, Mumbai telephonically informed the police that a man who was later identified as Satish, was lying on the right side of the stairs of the building in a pool of blood. API Gaekwad reached the spot and removed the person to the GT Hospital where he was declared brought dead.

37 See *Hanumant Govind Nargundkar v State of MP,* AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cr LJ 129; *Padala Veera Reddy v State of AP,* (1989) Supp (2) SCC 706 : AIR 1990 SC 79; *Sharad Birdhichand Sarda v State of Maharashtra,* 1984 AIR 1622 : 1985 SCR (1) 88; *State of UP v Ashok Kumar Srivastava,* (1992) 2 SCC 86 : AIR 1992 SC 840; *Bodhraj Altas Bodha v State of J&K,* (2002) 8 SCC 45 : AIR 2002 SC 3164; *Bharat v State of MP,* (2003) 3 SCC 106 : AIR 2003 SC 1433.

38 AIR 2010 SC 2977 : (2010) 12 SCC 142 : 2010 Cr LJ 161 : 2010 (7) Scale 168, Harjit Singh Bedi and Chandramauli Kumar Prasad, JJ.

39 AIR 2016 SC 795 : 2016 (95) All CC 478 : 2016 (93) All CC 475 : 2016 All MR (Cr) 880 : 2016 Cr LJ 1349 : 2016 (1) Crimes 80 (SC) : 2016 (1) JCC 731 : 2016 (2) RLW 1364 (SC) : 2016 (2) Scale 118 : (2016) 4 SCC 583 : 2016 (3) SCJ 62 : 2016 (1) UC 378, TS Thakur, CJI and V. Gopala Gowda, J, delivered the judgment.

40 2016 (4) Crimes 390 : 2017 (2) JT 224 : (2017) 11 SCC 535, AK Sikri and Abhay Manohar Sapre, JJ, delivered the judgment.

41 AIR 2016 SC 3218 : 2016 (14) SCC 151 : 2016 (6) Scale 708 : 2016 (4) Crimes 347 : 2016 (2) UC 1513 : 2016 All MR (Cr) 3567, Kurian Joseph and RK Agrawal, JJ, delivered the judgment.

42 AIR 2008 SC 479 : (2007) 15 SCC 455 : 2007 (12) Scale 587. SB Sinha, and HS Bedi JJ; *Rameshwar Dass v State of Punjab,* AIR 2008 SC 890 : (2007) 14 SCC 696 : 2007 (14) Scale 378. Accused husband held liable for dowry death. Held, A pregnant woman ordinarily would not commit suicide unless relationship with her husband comes to such a pass that she would not be compelled to do so. The very fact that the accused-appellant remained absconding for six days after the incident of suicide of his wife without any justification goes to prove accused's involvement in the suicide.

43 Kamlabai, the deceased was married to the appellant 15 years prior to the incident which took place at about 9.00 pm on 7 June 1990. The couple had five children-two daughters and three sons-all being minor at the material time.

44 *State of Rajasthan v Parthu*, (2007) 11 Scale 460 : AIR 2008 SC 10 : (2007) 12 SCC 754; *Mehhiboobsab Abbasabi Nadaf v State of Karnataka,* (2007) 9 Scale 473 : AIR 2007 SC 2666 : (2007) 13 SCC 112. Relied on.

45 AIR 2008 SC 1877 : (2008) 11 SCC 478 : 2008 Cr LJ 2610 : JT 2008 (5) SC 364, Harjit Singh Bedi and SB Sinha, JJ.

46 The matter was reported by the Principal of the College. The appellant was named as the prime accused in the FIR. After hectic search the police arrested the accused on 13 February 2000 at about 3.30 pm.

47 JM Panchal and TS Thakur, JJ.

48 *State of UP v MK Anthony,* AIR 1985 SC 48 : (1985) 1 SCC 505 : 1985 Cr LJ 493 : 1984 (2) Scale 728.

49 *Pulukuri Kottaya v Emperor,* AIR 1947 PC 67; *State of UP v MK Anthony,* AIR 1985 SC 48 : (1985) 1 SCC 505 : 1985 Cr LJ 493 : 1984 (2) Scale 728; *Vasa Chandrasekhar Rao v Ponna Satyanarayana,* (2000) 6 SCC 286 : AIR 2000 SCC 2138 : 2000 Cr LJ 3175; and *Geetha v State of Karnataka,* (2000) 10 SCC 72 : AIR 2000 SC 3475.

50 AIR 1934 All 833 : AIR 1929 Lah 861.

51 AIR 1977 SC 1801 : (1976) 4 SCC 255 : 1977 Cr LJ 1448. See also *Yeshwant Rao v State of MP*, AIR 1992 SC 1683 : 1993 Supp (1) SCC 520 : 1992 Cr LJ 2779.

52 AIR 2008 SC 1 : 2007 (4) Crimes 240 : 2007 (12) Scale 795. The Times of India November 6, pp 1, 7, Justice AK Mathur and K Markandey Katju. The offence took place at a town in Tamil Nadu, where a tea stall and a waste paper shop did business next to each other. Muthu worked with the waste paper merchant and used to arrange the articles inside the shop.

53 Homicide Act 1957 (of United Kingdom), section 3 reads:

Provocation.—Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did, shall be left to be determined by the jury and in

determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

54 The Bench consisted of Lord Bingham, Nicholls, Hoffmann, Hope, Scott, Rodger, Walker, Baroness Hole and Lord Carswell.

55 *AIR 2008 SC 406* : *(2007) 14 SCC 501* : 2007 (4) Crimes 263 : *2007 (13) Scale 69*, Dr Arijit Pasayat and P Sathasivam, JJ.

56 2006 AIR SCW 1678 Relied on.

57 *Draft Penal Code,* note M, pp 146, 147.

58 *Code of Criminal Procedure 1973, section 46*, reads:

> **Arrest how made.—**(1) In making an arrest the police officer shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by words or action.
>
> Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest.
>
> (2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.
>
> (3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or imprisonment for life.
>
> …

59 AIR 2017 SC 4976 : 2017 AIR (SCW) 4976 : 2017 (4) Crimes 275, Ranjan Gogoi and Navin Sinha, JJ, delivered the judgment.

60 L Nageswara Rao and Navin Sinha, JJ, delivered the judgment.

61 *AIR 2007 SC 363* : 2006 Supp (9) SCR 668 : *2006 (12) Scale 456* : *2007 Cr LJ 874*, Per Arijit Pasayat and Lokeshwar Singh Panta, JJ; see *Pappu v State of MP, AIR 2006 SC 2659* : *(2006) 7 SCC 391*.

62 *AIR 2006 SC 2659* : *(2006) 7 SCC 391* : 2006 Cr LJ 2640 : JT 2006 (6) SC 308, per Arijit Pasayat and SH Kapadia, JJ.

63 AIR 1958 Pat 190 : (1958) 6 BLJR 60 : 1958 Cr LJ 548, per Sahai and HK Chaudhury, JJ.

64 Section 21 of Criminal Code of Canada read as follows:

21. (1) [Parties to offence] Every one is a party to an offence who

(a) actually commits it:

(b) does or omits to do anything for the purpose of aiding any person to commit it: or

(c) abets any person in committing it.

(2) [Common intention] where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein an any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of offence would be probable consequence of carrying out the common purpose is a party to that offence.

65 Per Wagner, J. (LeBel, Abella, Rothstein, Moldaver, Karakatsanis, JJ. Concurring).

66 Roger Leng, *"Mercy Killing and the CLRC",* New Law *Journal,* 1982, pp 76-79.

67 *"The Guardian"*, 4 December 1979.

68 See John A Robertson, *The Rights of the Critically Ill,* Bantam Books, New York, 1983, pp 80-96, 161.

69 Homicide Act 1957, section 2, reads: Persons suffering from diminished responsibility.—

(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

(2) On charge of murder, it shall be for the defence to prove that the person charged, is by virtue of this section, not liable to be convicted of murder.

(3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

(4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.

70 [Lord Bingham of Cornhil, Lord Nicholls of Birkenhead, Lord Hutton, Lord Rodgel of Earlserry and Lord Mance].

71 Jury Trial: In England, America and most of the common law countries jury assist the court in criminal cases to ascertain the guilt of the accused. A panel of Jury consisting of distinguished persons from different walks of life in the locality is selected to assist the judge (court) in criminal trial to decide the factual position in a case. The judge explains the jury legal issues involved in the case and seeks opinion of the jury on the basis of the facts of the case. Judge as per the advice of the jury decides the case according to law.

8.4 Constructive Culpable Homicide

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.4 Constructive Culpable Homicide

A man may be liable for culpable homicide, even if a person other than the one intended is killed. It is sufficient if the accused had an intention or knowledge that his act would cause the death of a human being; it is immaterial whether in consequence of that act some other man is killed instead of the one intended. In such cases, as exemplified by section 301, the accused is liable for causing the death of the other man in the same manner, and to the same extent, as he would have been, had he caused the death of the person, whose death he intended, or knew himself to be likely to cause. The accused is supposed to have the intention to kill, the very man killed, by virtue of the doctrine of transfer of malice. This is based on the common law principle of constructive malice. For instance, *A* intending to kill *B*, shoots at *B*, but the bullet strikes and kills *C*, who unknown to *A* was standing close-by. *A* would be guilty of murder, notwithstanding that he had not intended to kill *C*.

301. Culpable homicide by causing death of the person other than person whose death was intended.—If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

Intention of causing death sufficient, irrespective of who becomes the victim— Allahabad High Court—1955

Ballan v State of UP,

AIR 1955 All 626 : 1955 Cr LJ 448

Ballan was wanted in three dacoities, alleged to have been committed by him. On 15 June 1954, police received information that he was present at his house. The house was besieged. Ballan was hiding in a grain-bin. He was asked to come out. He did not come out. Instead, he fired at the sub-inspector Ram Murti Singh who ducked so as to avoid being hurt. Rajendra Singh, a constable who was standing behind the sub-inspector, was hit and died. Ballan was convicted under *section 302* read with *section 301*, *IPC, 1860* for murder.

Dismissing the appeal against conviction, the court held that the “intention of causing death” is not to be interpreted as the “intention of causing death of any particular person”.

Act done with the intention to cause death is sufficient to hold a man liable even if person other than one intended is killed—Madras High Court—1912

Public Prosecutor v MS Moorthy,

(1912) 13 Cr LJ 145 (Mad)

The appellant with the intention of killing *A,* gave him some sweets in which a poison containing arsenic and mercury in soluble form had been mixed. *A* ate a portion of the sweet and then threw the rest away. A girl, took it, ate a part of it and gave the rest to another child. The two children died from the effect of the poison. The appellant was acquitted of the charge of murdering the two children. The State appealed.

Holding the appellant liable for murder under *section 302* read with *section 301*, *IPC*, Justice Benson of Madras High Court observed:

> The rule makes it clear that culpable homicide may be committed by causing the death of a person whom the offender neither intended, nor knew himself to be likely to kill, a rule which though it does not lie on the surface of section 299 yet is, ...deducible from the generality of the words 'cause death' and from the illustration to the section, and the rule then goes on to State that the quality of the homicide, that is, whether it amounts to murder or not, will depend on the intention or knowledge which the offender had in regard to the person intended or known to be likely to be killed or injured and not with reference to his intention or knowledge with reference to the person actually killed, a rule deducible from the language of sections 299 and 300 of the Code though not, perhaps, lying on their very surface.

Doctrine of transfer of malice applied in a case in which a person interfering in a dispute was killed by a bullet aimed by one at another—Supreme Court—1972

Gyanendra Kumar v State of UP,

AIR 1972 SC 502 : (1972) 4 SCC 819 : 1972 CR LJ 308

In a school committee meeting, *B*, made remarks that the father and the uncle of the accused were monopolising all seats of authority and that they were dishonest. The accused, on hearing this, went to his house and brought the gun. By that time the meeting had ended. The accused asked those who were near *B* to move away because he wanted to shoot *B.* Then he fired a shot and he missed his aim. *B* then started running to save himself. In the meantime, the deceased who was the maternal uncle of the accused, rushed towards the accused in order to prevent him from using the gun. The accused, however, pushed him back and fired at *B*. But the deceased came between the gun and *B,* and was shot in the back and died.

Held, the offence committed was murder under section 302 read with section 301 and not culpable homicide not amounting to murder under Part I of *section 304 of IPC, 1860*, as the offence could not be attributed to any grave and sudden provocation. The appeal was dismissed.

Killing by gross negligence is constructive manslaughter (culpable homicide) under English law—Court of Appeal—1886

Queen v Latimer,

[1886] 17 QBD 359

There was a quarrel in a public house kept by Ellen Rolston, between Latimer and one Thomas Evan Chappel. Latimer was knocked down by Chappel. He went out into a yard, came back after five minutes and aimed a blow with his belt at Chappel and struck him slightly. The belt, however, bounded off and struck, Ellen Rolston, who was standing there, in the face, cutting her face open and wounding her severely. Latimer was convicted. It was purely an accidental act so far as Ellen was concerned.

Upholding the conviction, Lord Coleridge said:

> This conviction must be sustained. It is common knowledge that a man who has an unlawful and malicious intent against another, and in attempting to carry it out, injures a third person, is guilty of what the law J deems malice against the person injured, because the offender is doing an unlawful act, and has that which the judges call general malice.

A man engaged in performing an unlawful and dangerous act causing death is guilty of manslaughter—House of Lords—1976

Director of Public Prosecutions v Newbury and Jones,

[1976] 2 All ER 365 (HL) : [1976] UKHL 3

Per Lord Salmon, J:

...the train ...was approaching a bridge over the track. Just as the train approached the parapet of the bridge the appellants, two boys aged 15 years, pushed the paving stone off, of the parapet towards the incoming train. It came through the glass window of the cabin, in which the driver and the guard were sitting, struck the guard and killed him.

They were jointly charged with manslaughter and each was found guilty. Both of them unsuccessfully appealed against their conviction and sentence to the Court of Appeal and to the House of Lords.

The point of law certified to be of general public importance is:

> Can a defendant properly be convicted of manslaughter, when his mind is not affected by drink or drugs, if he did riot foresee that his act might cause harm to another?

In *Larkin*,[72] Humphreys, J said:

> Where the act which a person is engaged in performing is unlawful, and if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently he causes the death of that other person by that act, then he is guilty of manslaughter. It makes it plain (a) that an accused is guilty of manslaughter if it is proved that he intentionally did an act which was unlawful and dangerous and that, the act inadvertently caused death and (b) that it is unnecessary to prove that the accused knew that the acts were unlawful or dangerous. This is one of the reasons why cases of manslaughter vary so infinitely in their gravity. They may amount to little more than pure inadvertence and sometimes to little less than murder.

Appeal dismissed.

A person will be criminally responsible for involuntary manslaughter, if the act results in death, even if the victim has consented to take such a risk and engaged in some joint unlawful activity—Court of Appeal—2003

R v Wacker[73]

The defendant, a truck driver, drove a lorry from Rotterdam (Netherlands) to Zeebrugge (United Kingdom). The lorry had been loaded with a refrigerated container, which had been partitioned by a wooden framework into two distinct areas. The immigrants 60 Chinese people had been asked to go behind the partition and the other part of the container near the door was loaded with tomatoes to conceal the illegal human cargo behind. The container was sealed apart from a small air vent which was closed for about five hours prior to the ferry crossing to Dover to preserve secrecy.

On disembarkation at Dover the customs officers discovered the bodies of 58 immigrants, who had suffocated. Applying the doctrine of negligence and *ex turpi causa non oritur action* for causing death of the victims by suffocation and conspiracy to facilitate the entry of illegal entrants into the United Kingdom, the trial court convicted and sentenced the respondent to six years imprisonment on each of the manslaughter charges to run concurrently and eight years of imprisonment for the conspiracy to be consecutive with a total of 14 years of imprisonment.

Dismissing the appeal, the court held that:

> The defendant by continuing with the unlawful enterprise in the way that he did, he would have been voluntarily shouldering the duty to take care for the safety of Chinese in this regards. In this case death arose from the failure to take care to see that there was an adequate supply of air for those 60 Chinese during their journey. He was aware that no one's action other than his own could realistically prevent the Chinese from suffocating to death and if he failed to act reasonably in fulfilling this duty to an extent that could be characterised as criminal, he was guilty of manslaughter.

Lord Justic Kay, speaking on behalf of the court, said:

> ...Criminal law would not decline to hold a person as criminally responsible for the death of another simply because the two were engaged in some joint unlawful activity at the time or because there might have been an element of acceptance of the degree of risk by the victim in order to further the joint unlawful enterprises... Moreover the criminal law will not hesitate to act to prevent serious injury or death even where the persons subjected to such injury or death may have consented to or willingly accepted the risk of actual injury or death.[74]

> The court held that by causing so many deaths by gross negligence arising from a desire to avoid detection of illegal immigrants, the defendant has committed a serious offence, which puts the case into a category of its own. The court, accordingly, enhanced each of the sentences of six years' to fourteen years' for manslaughter, to run concurrently with eight years' imprisonment for conspiracy without altering the total period of sentence of 14 years' of imprisonment.

Appeal dismissed.

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72 [1943] 1 All ER 365 (HL).

73 *(2003) 4 All ER 295* (CA), per Kay LJ.

74 *R v Brown (Anthony), [1993] 2 All ER 75*.

8.5 Death Sentence

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.5 Death Sentence

302. **Punishment for murder.—**Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

COMMENTARY

Section 302 of the Indian Penal Code, 1860 prescribes an alternative punishment of either death or imprisonment for life for murder. Originally *Code of Criminal Procedure* 1898 under section 367 (5)[75] provided that when an offence was punishable with death, and the court sentences the accused to any punishment other than death, the court was required to state the reasons for imposing the lesser penalty in its judgment.

After independence of the country, in 1955, *section 367 (5) of Code of Criminal Procedure* 1898 was deleted to soften the rigorous of capital punishment. The court was given an option either to award death sentence or life imprisonment as one of the alternative punishments for murder.

In response to the move against capital punishment, *Code of Criminal Procedure 1973*, in section 354 sub-section (3)[76] has made death sentence an exception and life imprisonment a normal punishment for murder, reversing the pre-1955 position.

Thus, where an offence is punishable with death or imprisonment for life, the court has to give special reasons in writing for awarding the death sentence coming under rarest of rare category and if no reasons are recorded, the appellate court will commute the sentence of death to a sentence of life imprisonment.[77]

8.5.1 Constitutionality of Death Sentence

The constitutional validity of death sentence under *section 302, IPC, 1860* was canvassed before the Supreme Court in 1973 in *Jagmohan Singh v State of UP,*AIR 1973 SC 947 : (1973) 1 SCC 20 : 1973 SCR (2) 541, as being contrary to *Articles 14*, *19* and *21* of *Constitution of India*.

Upholding the sentence of death, the court held that even assuming that “the right to life” was basic to the freedom mentioned in *Article 19 of the Constitution* and that no law could deprive the life of a citizen unless it was reasonable and in public interest, it would be difficult to hold that capital punishment as such, was unreasonable or not required in public interest.

The subject of capital punishment is a difficult and controversial issue. It has evoked strong divergent views. In that State of affairs, if the legislature decided to retain capital punishment for murder, the court said, in the absence of objective evidence regarding its unreasonableness, it cannot, therefore, be said that capital punishment as such, is either unreasonable, or not in the public interest, offending *Article 19 of the Constitution*.

Equally untenable is the contention that *section 302, IPC, 1860* confers uncontrolled and unguided discretion to judges and that therefore, is hit by *Article 14 of the Constitution*. If the law has given to a judge a wide discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of

the crime, it will be impossible to say that there would be any discrimination since the facts and circumstances of one case can hardly be the same as the facts and circumstances of another. *Article 14* can hardly be invoked in matters of judicial discretion.

The court, further held that section 302 did not contravene *Article 21 of the Constitution* in so far as the trial and punishment of the accused is determined by the judges as per provisions of *Indian Evidence Act 1872* and *Code of Criminal Procedure 1973*, which are undoubtedly part of the procedure established by law.

Again in 1980, in *Bachan Singh v State of Punjab*,[78] the Supreme Court, by a majority of four to one, reaffirmed its earlier decision and held that the provision of death penalty as an alternative punishment for murder in *section 302, IPC, 1860* is neither unreasonable nor it is against the public interest. It violates neither the letter nor the ethos of *Article 19 of the Constitution*.

The question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong and divergent views. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others for rejecting the petitioner's argument that retention of the death penalty in the impugned provision is totally devoid of reason and purpose. A very large segment of people, all over the world, including sociologists, legislators, jurists, judges and administrators still firmly believe to the contrary in the worth and necessity of capital punishment for the protection of society. The court, further held that the provision of death penalty as an alternative punishment for murder is not violative of *Article 21*. *Article 21* expanded and read for interpretation purposes, clearly brings out the implication that the founding fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law. There are several other indications also in the *Constitution*, which show that the *Constitution*-makers were fully cognizant of the existence of death penalty for murder and certain other offences in the Code. Entries 1 and 2 in List III (Concurrent List) of the Seventh Schedule specifically refer to the *IPC* and the *Code of Criminal Procedure* as in force at the commencement of the *Constitution*.

Under the successive Criminal Procedure Codes, it is evident that a sentence of death is to be carried out by hanging. In view of the aforesaid constitutional postulates, by no stretch of imagination can it be said that death penalty under section 302, either per se or because of its execution by hanging, constitutes an unreasonable, cruel or unusual punishment.[79] On parity of reasoning, it cannot be said that death penalty for the offence of murder violates the basic structure of the *Constitution*.

Justice PN Bhagawati, however, did not agree with the majority in *Bachan Singh* case and gave a dissenting judgment holding that section 302 in so far as it provides for the invocation of death penalty as an alternative to life sentence is ultra vires and void as being violative of *Articles 14* and *21* of the *Constitution*, since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by the imposition of death sentence.

Death sentence is not per se unreasonable and not against public interest— Supreme Court—1973

Jagmohan Singh v State of UP,

AIR 1973 SC 947 : *(1973) 1 SCC 20* : 1973 SCR (2) 541

Facts: The appellant, who is convicted under *section 302, IPC, 1860* for murder and sentenced to death, contended before the Supreme Court that:

(i) Death sentence puts an end to all fundamental rights and therefore is not in the interest of the general public.

(ii) The discretion vested in the judges to impose capital punishment is not based on any standards or policy required by the legislature for imposing capital punishment in preference to imprisonment for life.

(iii) The uncontrolled and unguided discretion in the judges to impose capital punishment or imprisonment for life is hit by *Article 14 of the Constitution*.

(iv) In the absence of any procedure established by law in the matter of sentence, the protection given by *Article 14 of the Constitution* was violated and hence for that reason also, the sentence of death is unconstitutional.

Justice Palekar held:

The first submission is based on the provisions of *Article 19 of the Constitution*. That article does not directly deal with the freedom to live. It deals with seven freedoms [now six] like the freedom of speech and expression, freedom to assemble peaceably and without arms etc, but not directly with the freedom to live. It is, however, contended that freedom to live is basic to all the seven freedoms and since the enjoyment of those seven freedoms is impossible without conceding the freedom to live, the latter cannot be denied by any law unless such law is reasonable and is required in general public interest. It was, therefore, contended that unless it was shown that the sentence of death for murder passed the test of reasonableness and general public interest, it would not be a valid law.

...the *Constitution* makers had recognised the death sentence as a permissible punishment and had made constitutional provisions for appeal, reprieve and the like. But more important than these provisions in the *Constitution* is *Article 21*, which provides that, “no person shall be deprived of his life except according to procedure established by law”. The implication is very clear. Deprivation of life is constitutionally permissible, if that is done according to the procedure established by law. ...the Law Commission in its thirty-fifth Report 1967 has come to its conclusion as follows at page 354 of the report:

> The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind.
>
> It is difficult to rule out the validity of, or the strength behind, many of the arguments for abolition. Nor does the commission treat lightly the argument based on the irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values.
>
> Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment.

The next contention is that by providing in *section 302 of IPC*, that one found guilty there under is liable to be punished either with death sentence or imprisonment for life, the legislature has abdicated its essential function in not providing by legislative standards in what cases the judge should sentence the accused to death and in what cases life imprisonment.

...prior to the *Amending Act* 26 of 1955, *section 367 (5) of Code of Criminal Procedure* 1898 read as follows:

> If the accused is convicted of an offence punishable with death and the court sentences him to any punishment other than death the court shall in its judgment state the reason why sentence of death was not passed.

By the amendment, this provision is deleted and as the Code at present stands, punishment for murder is one of the two, namely, death or imprisonment for life. Neither *section 302 of IPC, 1860* nor any other provision in *CrPC 1973* says in what cases the capital punishment is to be imposed and in what others the lesser punishment.

In India, the difficulty encountered by the Commission had been overcome long ago and it is accepted by the public that only the judges shall decide the sentence. Where an error is committed in the matter of sentence the same is liable to be corrected by appeals and revisions to higher courts for which appropriate provision was made in *CrPC*. The structure of our criminal law which is principally contained in *IPC* and *CrPC*, underlines the policy that when the legislature has denned an offence with sufficient clarity and prescribed the maximum punishment, a wide discretion in the matter of fixing the degree of punishment should be allowed to the judge.

These considerations naturally include a number of particulars, as of time, place, persons and things, varying according to the nature of the case. Circumstances which are to be considered in alleviation of punishment are (1)

the minority of the offender; (2) the old age of the offender; (3) the condition of the offender's wife, apprentice; (4) the order of a superior military officer; (5) provocation; (6) when offence was committed under a combination of circumstances and influence of motives which are not likely to recur either with respect to the offender or any other; (7) the state of health and the sex of the delinquent.

Bentham mentions the following circumstances in mitigation of punishment which should be inflicted: (1) absence of bad intention; (2) provocation; (3) self-preservation; (4) preservation of some near friends; (5) transgression of the limit of self defence; (6) submission to the menaces; (7) submission to authority; (8) drunkenness; (9) childhood.

In India, this onerous duty is cast upon judges and for more than a century and half the judges are carrying out this duty under the Code. The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguards for the accused.

It was next contended that uncontrolled and unguided discretion in the judges to impose capital punishment or imprisonment for life was hit by *Article 14 of the Constitution*.

If the law has given to the judge a wide discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of the crime, it will be impossible to say that there would be at all any discrimination, since facts and circumstances of one case can hardly be the same as the facts and circumstances of another. It has been pointed out by this court in *Budhan Choudhry v State of Bihar,* AIR 1955 SC 191 : *[1955] 1 SCR 1045*, that *Article 14* can hardly be invoked in matters of judicial discretion.

The appeal is dismissed.

Death sentence to be imposed in rarest of rare cases—Supreme Court—1980

Bachan Singh v State of Punjab,

AIR 1980 SC 898 : *(1980) 2 SCC 684* : *1980 Cr LJ 636*

Facts: The first contention of the appellant is that the provision of death penalty in *section 302 of IPC* offends *Article 19 of the Constitution*. It is argued that the decision in *Maneka Gandhi v UOI, AIR 1978 SC 597* : (1979) 4 SCC 16, has given a new interpretative dimension to *Articles 14*, *19* and *21* of the *Constitution* and accordingly, every law of punitive detention both in procedural and substantive aspects must pass the test of all the three articles. Further, by virtue of India acceding in 1979 to the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations, India is committed to a policy for abolition of the death penalty.

Justice Sarkaria (for himself and on behalf of Chandrachud, CJ, AC Gupta and NL Untwalia, JJ) stated:

(1) The extreme penalty can be inflicted only in the gravest cases of extreme culpability;

(2) In making a choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also.

For making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case....

A court may, however, in the following cases impose the penalty of death, which may be designated as "rarest of rare cases":

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the union or of a member of any police force or of any public servant and was committed:

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under section 43[80] of *CrPC, 1973*, or who had rendered assistance to a magistrate or a police officer demanding his aid requiring his assistance under section 37[81] and section 129[82] of the said Code.

There can be no objection to the acceptance of these indicators but...we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.

For all the foregoing reasons, we reject the challenge to the constitutionality of the impugned provisions contained in *sections 302, IPC* and 354 (3) of *CrPC, 1973*.

Guidelines to determine rarest of rare cases laid down—Supreme Court—1983

Machhi Singh v State of Punjab,[83]

AIR 1983 SC 957 : *(1983) 3 SCC 470* : 1983 SCR (3) 413

Justice Thakkar held:

Machhi Singh and his 11 companions, close relatives and associates were prosecuted under *section 302, IPC, 1860* in five sessions cases. Four of them were awarded death sentence, whereas the sentence of imprisonment for life was imposed on nine of them. The present group of appeals is directed against the aforesaid judgment rendered by the High Court.

The reasons why the community as a whole does not endorse the humanistic approach reflected in “death sentence in no case” doctrine are when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty as exemplified in rarest of rare cases evolved in *Bachan Singh.*

The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. Manner of commission of murder:

When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance:

(i) When the house of the victim is set aflame with the end in view to roast him alive in the house;

(ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death; and

(iii) When the body of the victim is cut into pieces or his body is dismembered in fiendish manner.

II. Motive for commission of murder

When the murder is committed for a motive which evinces total depravity and meanness. For instance:

(a) When a hired assassin commits murder for the sake of money or reward;

(b) When a cold blooded murder is committed with deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murdered or when the murdered is in a dominating position or in a position of trust; and

(c) When murder is committed in the course of betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

(a) When murder of a member of a scheduled caste or minority community is committed not for personal reasons but in circumstances which arouse social wrath. For instance, when such a crime is committed in order to terrorise such persons and frighten them into fleeing from a place or in order to deprive them of or make them surrender lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance;

(b) In cases of bride burning and what are known as dowry-deaths or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

When the crime is enormous in proportion. For instance, when multiple murders, say, of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality are committed.

V. Personality of victim of murder

When the victim of murder is:

(a) An innocent child who could not have or have not provided even an excuse, much less a provocation for murder;

(b) A helpless woman or a person rendered helpless by old age or infirmity;

(c) When the victim is a person *vis-à-vis* whom the murdered is in a position of domination or trust; and

(d) When the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

In this background the guidelines indicated in the *Bachan Singh* case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from the *Bachan Singh* case:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) Before opting for the death penalty the circumstances of the “offender” also require to be taken into consideration along with the circumstances of the “crime”.

(iii) Life imprisonment is the rule, and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the related circumstances.

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In order to apply these guidelines inter alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

The death sentence imposed on the appellants... having been confirmed, the sentence shall be executed in accordance with law.

The appeal is dismissed.

Section 302 IPC, 1860—Wide Discretion in sentencing under section 302 IPC, 1860 to be judiciously exercised. Dastardly act of acid attack causing death of the victim calls for 30 years of life imprisonment without remission. Not a rarest of rare case—Supreme Court—2012

Sandeep v State of UP,

2012 (2) Crimes 254 : *2012 (5) Scale 444* : *(2012) 6 SCC 107*

In sentencing under *section 302 IPC, 1860* the judges have a wide discretion either to award death sentence specifying the special reasons, or life imprisonment that works out to be 14 years. In the instant case, a police patrolling party heard screams and saw two young men trying to pull out a girl in injured conditions by opening the main door of the car. They nabbed the two men and found that the girl had injuries on her head and right cheek. The girl supposedly had an affair with one of the assailants and was pregnant at that time. On the pretext of marrying her, he had called her on that fateful evening. He had another plan and that was to convince her to abort the foetus and on her refusal she was beaten up with the aid of a jack and pana (spanner) cut with a blade and also acid was poured on her head resulting in her death as a result of the injuries. The accused were held guilty under *section 302* read with *section 34 IPC*. The question was of sentencing–whether life imprisonment should be awarded or death penalty?

As far as death penalty was concerned it was held not to fall into the “rarest of rare” category though it was a dastardly act. The court held:

> [T] aking into account the facts and circumstance of the case on hand, while holding that the imposition of death sentence to the accused Sandeep was not warranted and while awarding life imprisonment we hold that accused Sandeep must serve a minimum of 30 years in jail without remission before consideration of his case for premature release.

Section 302 IPC, 1860—Extreme penalty of death sentence under section 302 IPC is uncalled for murder of three children in the absence of pre-planning or pre determination to eliminate family of his brother—Supreme Court—2012

Sham alias Kishore Bhaskarrao Matkari v State of Maharashtra,

[2011] 11 SCR 744 : *(2011) 10 SCC 389* : *2011 (11) Scale 206* : *AIR 2012 SC 301*

Per P Sathasivam, J:

While partly allowing the appeal and setting aside the extreme penalty of death under *section 302, IPC, 1860* awarded by the High Court of Maharashtra and restoring the sentence of life imprisonment as directed by the trial court, the apex court said that since the murder was neither pre planned nor pre-medidated nor any dangerous weapon was used in commission of the offence and murder took place only on account of property dispute, there is no reason to disbelieve that the appellant cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a constant threat to the society.

“Special Category of Cases short of Rarest of Rare Cases”: Death Sentence is substituted by “imprisonment for Life” with a direction that the accused not to be released till rest of his life. ‘“Life Sentence” must be meant to be life sentence in real terms—Supreme Court—2008

Swamy Shraddananda @ Murali Manohar Mishra v State of Karnataka,[84]

2008 (5) Supreme 482 : *AIR 2008 SC 3040* : *(2008) 13 SCC 767* : 2008 (11) SCR 93 : *2008 (10) Scale 669*

Per Altab Alam, J:

When an appellant[85] comes to Supreme Court carrying a death sentence awarded by trial court and confirmed by the High Court, Supreme Court may find, as instantly that the case just falls short of “rarest of rare category” and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to nature of crime, court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate.

In such cases a just, reasonable and proper course would be to expand the options and to take over what, as a mater of fact, lawfully belongs to the court, i.e., the vast hiatus (gap) between 14 years imprisonment and death. Court would take recourse to the expanded option primarily because in facts of case, sentence of 14 years imprisonment would amount to no punishment at all. Hence there was a good and strong basis for court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that convict must not be released from prison for the rest of his life or for the actual term as specified in the order, as the case may be, death sentence given to appellant by trial court and confirmed by High Court substituted by imprisonment for life beyond the application of remission with a direction that he shall not be released from prison till rest of his life.

Sections 364, 376, 377, 302 and 201 of IPC—Life sentence till death—Death sentence of a young person aged 28 years converted to life imprisonment for murder and rape of a child considering the possibility of reform in the absence of record of any previous crime of kidnapping, rape or murder on any earlier occasion—Supreme Court—2012

Amit v State of UP,

AIR 2012 SC 1433 : *(2012) 4 SCC 107* : 2012 Cr LJ 1791 : 2012 (2) JT 553

Per Justice AK Pattnaik and Swatantar Kumar, JJ:

While upholding the conviction, the apex court partly allowed the appeal, converted the death sentence to life imprisonment with a direction that the life sentence will be subject to any remission or commutation at the instance of the Government for good and sufficient reasons.

The appellant accused Amit took away Monika, aged 3 years from the house of her parent on the pretext that he would give biscuits to her but never returned. It was found that the appellant raped Monika and murdered her. After investigation, charge sheet was framed against the appellant under *sections 364*, *376*, *377*, *302* and *201 IPC* and trial court found the accused guilty under the said sections of the Code.

The trial court took the view that this is one of those rarest of rare cases in which the appellant was not eligible for any sympathy of the court and imposed the sentence of death which was confirmed by the High Court.

Assassination of Mahatma Gandhi—30 January 1948. Accused liable under section 302, Indian Penal Code, 1860 read with section 120B, IPC—East Punjab High Court—1949

Nathuram Godse v The Crown,[86]

AIR 1949 East Punjab 321 : 1949 Cr LJ 834

With the assassination of messenger of peace and non-violence Mohandas Karam Chand Gandhi “Father of Nation” by Nathuram Godse on 30 January 1948 in a prayer meeting in the evening at Birla Mandir in Delhi an era of dedication and sacrifice came to an end. The independence of India in 1947 was the beginning of the end of colonial rule from the world map and emergence of independent nations world over.

Nathuram assassinated a defenseless old man and sowed the seeds of politics of terror, bomb blasts, murder, exploitation of religion, race, caste, creed and region etc., based on hatred and mistrust. That poisonous tree has borne many fruits in the last 60 years. The atmosphere in the country is so polluted today that murderers are honoured as noble people and a truly noble-minded man is censured and called evil-minded.

At least six months before the assassination of Gandhiji Nathuram had been expressing his desire to assassinate Gandhi, in public meetings as well as in private discussions.[87] Nathuram and his associates were of the view that Mahatma Gandhi spent his entire political life protecting fundamentalist Muslims at the cost of the welfare of Hindus. Even today his disciples and admirers stick to this line. At that time itself, there was criticism that Gandhiji started his fast on 13 January 1948 to save the lives of Muslims in Delhi. In one of the Marathi’s play, an account of the reasons advanced by Nathuram for assassination of Gandhiji has been given in the following words:

> There’s a deep wound in my heart, my mind, blow after blow on the same wound. The pieces of the country due to partition, the slaughter of refugees, the rape of my mothers and sisters. The grant of 55 crores that was given to Pakistan to help it

> against our soldiers fighting in Kashmir and the obstinate, headstrong manner in which Gandhi fought for it were all unpardonable. It was definitely a wrong decision made by Gandhi. We had to give 55 crores to Pakistan to satisfy Gandhi's childish obstinacy and my Sindhu (Indus) river which was separated from united Hindustan and presented to Pakistan.[88]

A conspiracy was hatched between Nathuram Godse, Narayan Apte, Karkare, Madanlal, Gopal Godse (brother of Nathuram) and Digamber Badge and his servant Shankar Kistayya who turned approver (prosecution witness) to execute the plan of murder of Gandhiji. They had gone to Delhi before 20 January 1948, some of them had traveled and stayed in hotels under assumed names, the all but one of them admitted their presence at Birla House at the time of the explosion, the fact that a number of hand-grenades were taken by Badge to Bombay and were carried to Delhi, and the manner of the hasty dispersal from Delhi of all the conspirators, left very little doubt that all of them had gone to Delhi with a common object, and that their simultaneous presence in Delhi was not a mere coincidence. There was ample evidence that after the explosion brought about by Madanlal Pahwa using a Guncotton slab during Gandhiji's prayer meeting of 20 January 1948. Karkare who was in Bombay sent a telegram to Apte in Poona on 25 January 1948. The telegram simply said: *"Both Come Immediately".*[89]

After the unsuccessful bomb explosion at Gandhiji's prayer meeting on 20 January 1948, they finally succeeded in executing the plan on 30 January 1948, when Nathuram in the evening appeared before Gandhi in the prayer meeting at Birla mandir in Delhi touched his feet with folded hands and shot him dead with the pistol. Gandhiji remained unmoved despite seeing the very messenger of death standing in front of him. The possibility of the words *"Hey Ram"* coming out of the lips of such a courageous believer in God is stronger than Nathuram's contention.

Gandhiji could very well visualise that his end had come when on 29 January 1948; he suffered a bout of coughing which just would not cease. He then said that his cough would not get better with penicillin tablets but only by taking the name of the God Ram and praying to him. He told the attendant:

> If someone were to end my life by putting a bullet through me—as someone tried to do with a bomb the other day and I met his bullet without a groan (a disapproval or worry), and breathed my last taking God's name, then alone would I have made good my claim.[90]

One could say that after Gandhi began his fast on 13 January 1948 at five minutes to noon over the problem of giving Rs 55 crores to Pakistan, Nathuram found a convenient reason to kill him. But actually this sum of Rs 55 crore was the money that was Pakistan's share, from the cash of Rs 375 crore in the vaults of the Reserve Bank of India before partition.[91] On the third day of the fast, 15 January 1948, the Government of India declared its decision of handing over to Pakistan its share of Rs 55 crore from the cash balances immediately. Yet Gandhiji did not withdraw his fast since its second objective was to establish peace between Hindus and Muslims in Delhi. On 18 January 1948, after the All-Party Peace Committee had given an assurance in writing and all the representatives, including those of the Hindu Sabha in Delhi and the Rashtriya Swayamsevak Sangh (RSS) had signed the assurance, Gandhi ji accepted a glass of orange juice from Maulana Azad and terminated his fast at 12.45 pm.[92]

The decision taken by Patel and Nehru on behalf of the Government of India was in keeping with the law. Gandhiji was treating this matter of giving Rs 55 crore to Pakistan as a moral one. He felt that if this fast could calm down, the atmosphere in India, especially in Delhi, then the atmosphere in Pakistan would automatically cool down too.

At night on 13 January 1948, some Sikh refugees from Pakistan held demonstrations opposite Birla House. Nehru had just sat down in his car after meeting Gandhiji when he heard their slogans "Blood for Blood" and "Let Gandhi Die". Enraged, he got out of the car and screamed, "The person who said let Gandhi die should repeat it in front of me. He will have to kill me first." The demonstrators dispersed. Today, the nature of Indian politics has changed so much that the fact that political leaders like Gandhiji, Nehru and Sardar Patel had the courage to confront an angry mob unarmed seems unimaginable.

On that day, morning newspapers carried news of the slaughter of Hindu and Sikh refugees from the North-West Frontier Provinces who were returning to India at Gujarat, a railway station in West Punjab that had become part of Pakistan. Condemning this slaughter in his prayer meeting, Gandhiji said:

> Then and not till then shall I repent that I ever called it a sin, as I am afraid I must hold today, it is. I want to live to see the Pakistan not on paper, not in the orations of Pakistan orators, but in the daily life of every Pakistani Muslim... The fast is a

bid for nothing less.[93]

In one of his speeches at a prayer meeting, Gandhiji said that the Muslim league should be held primarily responsible for the happenings in both parts of Hindustan (India and Pakistan).

Immediately after Nathuram fired at Gandhiji and killed him on 30 January 1948, he was handcuffed and brought to the police station on Delhi's Parliament Street and produced before the magistrate and was sent in jail. After, the other accused Narayn Apte, Karkare, Madanlal, Gopal Godse Digamber Badge and his servant Shankar Kistayya, in the Gandhi assassination conspiracy were arrested.

The trial started in Red Fort on 27 May 1948 before the Special Judge Atmacharan of all the accused along with Nathuram. After a prolonged trial the court came to the conclusion of the involvement of all the accused in the conspiracy to assassinate Gandhiji as planned.

The court rejected Nathuram's statement that the decision to assassinate Gandhiji was his alone, that he did not conspire with anyone; that there was no "conspiracy", that he was not at all connected with the bomb explosion on 20 January 1948 to assassinate Gandhiji, and that he had not mentioned it to anybody.

Being convinced by the gravity of the most heinous crime of assassination of the father of the nation—Mahatma Gandhi, the judges awarded death sentence to the main accused, Nathuram Godse and Apte; and life imprisonment to Karkare, Mandanalal and Gopal Godse for the assassination and entering into conspiracy to kill Gandhiji under section 302 read with *sections 34* and *120B*, *IPC*. Digamber Badge and Shankar Kistayya, having turned approvers were acquitted. The Punjab High Court,[94] while dismissing the appeal of the accused unanimously confirmed the sentence awarded by the trial court.[95]

Nathuram Godse and Apte were hanged to death[96] in the morning of 15 November 1949.[97] And in October 1964, Karkare, Madanlal and Gopal Godse finished their term in prison and were released.[98]

Unfortunately, in independent India, politics has lately become so rapidly criminalised that a murderer becomes a martyr and the Mahatma who led the people's movement to free the country is termed a traitor. There are people who even today believe that Nathuram was not a murderer but a martyr. According to them, his assassination of Gandhi was not a wrong action but absolutely right and carried out in order to protect the religion and the nation. Today, the number of people who believe this is increasing.

Note: The total period of investigation, trial and final judgment including appeal and execution of death sentence in less than two years is an eye opener.

It reveals that justice can be delivered in a reasonable time if all the parties are sincere and committed to their job as is evident from Gandhiji's Assassination case. It is surprising that nowadays delivery system of justice both criminal and civil in our country has become a misnomer. One cannot dream of justice in a reasonable possible time. It takes years before one can hope for the final outcome of a case.

1. Assassination of Gandhiji took place on 30 January 1948.
2. Investigation was completed in less than six months and trial started on 27 May 1948.
3. Trial and appeal was finally disposed off in less than a year, and finally the accused were hanged to death on 15 November 1949.

Assassination of Indira Gandhi—conspirators can be charged and convicted for murder though they have not actually committed murder—Indira Gandhi Murder: Rarest of Rare Case—Supreme Court—1988

Kehar Singh v Delhi Administration[99]

The three appellants, Kehar Singh, Balbir Singh and Satwant Singh were convicted and sentenced to death for entering into a conspiracy and committing the murder of Indira Gandhi on 31 October 1984 under sections 302, 120B, 34, 107, and 109 of *IPC*. Another accused, Beant Singh, died at the hands of the security guards. The conspiracy is a result of the injured feelings of the Sikhs because of Operation Bluestar, under which armed forces personnel entered the Golden Temple Complex at Amritsar to clear off terrorists, causing loss of some life and property. It is alleged that all the four accused, expressed their resentment and held Indira Gandhi responsible for

the action taken at Amritsar. They met at various places and at various times to discuss and to listen to inflammatory speeches and recordings calculated to provoke them to retaliatory action against the decision of the government. The resentment ultimately led them to become parties to a criminal conspiracy to commit an illegal act, namely, to commit the murder of Indira Gandhi.

Dismissing the appeal, the Supreme Court held:

> The act of the accused has not only taken away the life of the popular leader, but also undermines the democratic system. There is yet another serious consideration. The accused are persons who are posted on the security duty of the Prime Minister. They are posted there to protect her from the intruder or from any attack from outside and therefore there appears to be no reason or no mitigating circumstances for consideration of the question of sentence. Additionally, an unarmed lady was attacked by Beant Singh and Satwant Singh with a series of bullets and it has been found that a number of bullets entered her body. The manner in which mercilessly she was attacked by those two persons on whom the confidence was reposed to give her protection repels any consideration of reduction of sentence. In this view of the matter even the conspirator who inspired the persons who actually acted does not deserve any leniency in the matter of sentence. The sentence awarded by the trial court and maintained by the High Court appears to be just and proper.... It is one of the rarest of rare case in which extreme penalty of death is called for.

It was urged on behalf of the accused Kehar Singh and Balbir Singh that there was no charge against them under section 109[100] of *IPC, 1860* and without such a charge, they are liable to be sentenced only for the offence of abetment and not for the murder. Reliance was placed on of *section 120B of IPC* which provides inter alia that a party to a criminal conspiracy shall be punished in the same manner as if he had abetted such offence.

It was held that the contention was ill-founded. When an accused is a party to criminal conspiracy which led to the commission of the offence by the other co-accused Beant Singh and Satwant Singh, it cannot be said that the accused (conspirator) who did not himself participate in the commission of the offence could not be sentenced for the main offence, ie, murder and that he could be sentenced only for abetment of the offence, in absence of charge under section 109, against him. It overlooks the vital difference between:

(i) Abetment in any conspiracy; and

(ii) Criminal conspiracy.

The former is defined under the section 107 (2) and the latter under *section 120A of IPC, 1860*.[101] The gist of the offence of criminal conspiracy created under section 120A is a bare agreement to commit an offence. It has been made punishable under section 120B.

The offence of abetment created under section 107 (2) requires that there must be something more than a mere conspiracy, there must be some act or illegal omission in pursuance of that conspiracy.

The punishments for these two categories of crimes are also quite different. Section 109 is concerned only with the punishment of abetments for which no express provisions is made under the *Indian Penal Code, 1860*. A charge under section 109 should, therefore, be along with some other substantive offence committed in consequence of abetment.

The offence of criminal conspiracy under section 120A is on the other hand, an independent offence. It is made punishable under section 120B for which a charge under *section 109, IPC, 1860* is unnecessary and indeed inappropriate.

The offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts, sharing the unlawful design may be sufficient. The relative acts or conduct of the parties must be conscientious and clear to mark their concurrence as to what should be done.

The appeal was dismissed.

Assassination of General Vaidya—Requirement of hearing the accused on the question of sentence as

provided under section 235 (2) of Code of Criminal Procedure 1973[102] is satisfied when no injustice is done by pronouncement of conviction and sentence simultaneously—Supreme Court—1992

State of Maharashtra v Sukhdeo Singh[103]

General AS Vaidya, the then chief of the armed forces was, on the order of the then Prime Minister Indira Gandhi, assigned the difficult and delicate task of flushing out militants who had taken refuge in the Golden Temple at Amritsar. During this operation, known as the Bluestar Operation, some militants were killed and a part of the Golden Temple was damaged. Both the then Prime Minister Indira Gandhi and General Vaidya had, therefore, incurred the wrath of the Punjab militants.

On 10 August 1986, General AS Vaidya was shot dead in Pune. The designated court having come to the conclusion that it was a case falling within the description of the rarest of rare case awarded the extreme penalty of death to both the accused Sukhdeo Singh and Hajinder Singh under *section 302, IPC, 1860*.

Rejecting the defence plea, that since the conviction and sentence were pronounced on the same day, the capital punishment awarded to the accused should not be confirmed, the Supreme Court held that both the accused were mentally prepared for extreme penalty and that they would have, if they so desired, placed material in their written statements or would have requested the court for time when their statements under *section 313, CrPC, 1973* were recorded, if they desired to pray for a lesser sentence. Their resolve not to do so was reflected in the fact that they did not file any appeal against their convictions.

The court further held that the requirements of *section 235 (2) of CrPC* have been satisfied in letter and spirit and no prejudice is shown to have occurred to the accused.

The conviction was confirmed.

Murder of brother, brother's minor sons and aunt without any provocation while asleep committed in a cool and calculated manner, comes under "rarest of rare" category and calls for death sentence—Supreme Court—1997

Suraj Ram v State of Rajasthan[104]

The accused killed his real brother, two brother's minor sons and aunt while they were asleep and attempted to murder the brother's wife and daughter without any provocation. The murder was committed in a cool and calculated manner. Held, it is a rarest of rare case and death sentence is justified.

A cold-blooded brutal murder after rape of the accused's brother's daughter— falls within "rarest of rare cases"—Supreme Court—1995

Laxman Naik v State of Orissa,

AIR 1995 SC 1387 : (1994) 3 SCC 381

The appellant, Laxman Naik, was convicted under *sections 376* and *302* of *IPC, 1860* for committing rape and murder of his brother's daughter, aged seven years. The body of the deceased was found lying in a jungle. The torn apparel and underwear of the appellant was found near the dezad body of the victim and marks of violence over the dead body and bleeding injury in her private parts were found. A ribbon belonging to the deceased and some tamarind were also found lying near the dead body. The High Court confirmed the sentence.

It was held that the case revealed a sordid story in which the alleged sexual assault, followed by brutal and merciless murder, by the dastardly and monstrous act of an abhorrent nature is said to have been committed by the appellant, who was an agnate and paternal uncle of the deceased victim. This sends shock waves not only to the judicial conscience but to anyone having slightest sense of human values. A calculated, cold-blooded and brutal murder of a girl of a very tender age after, committing rape on her falls in the category of rarest of rare case attracting no other punishment other than the capital punishment under *section 302 IPC*. As reiterated by the Supreme Court in *Sushil Murmu v State of Jharkhand,* AIR 2004 SC 394 : (2004) 2 SCC 338.

> In rarest of rare case when the collective conscience of the community is so shocked that it will expect the holders of the judicial power to inflict death penalty irrespective of their personal opinion as regards disirability or otherwise of retaining

death sentence.

Assassination of Rajiv Gandhi by human bomb—rarest of rare case—Death Sentence confirmed—Supreme Court—1999

State CBI/SIT v Nalini,

1999 Cr LJ 3124 : *AIR 1999 SC 2640* : *(1999) 5 SCC 253*

Justices KT Thomas, DP Wadhwa and SS mohammed Quadri held:

On the night of 21 May 1991 a diabolical crime was committed. It stunned the whole nation. Rajiv Gandhi, former Prime Minister of India, was assassinated by a human bomb at Sriperumbudur in Tamil Nadu on 21 May 1991 when he arrived to address a public meeting at about 10.10 pm. Along with him 15 persons including 9 policemen perished and 43 suffered grievous or simple injuries. Assassin Dhanu, an LTTE (Liberation Tiger of Tamil Elam) activist, who detonated (exploded) the belt bomb concealed under her waist and Haribabu, a photographer engaged to take photographs of the horrific sight, also died in the blast. A camera was found intact on the body of Haribabu at the scene of the crime. The film in the camera when developed led to unfolding of the dastardly act committed by the accused and others. A charge of conspiracy for offences under Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA), *Indian Penal Code, 1860* (*IPC*); *Explosive Substances Act 1908*; *Arms Act 1959*; Passport Act 1967; *Foreigners Act 1946*; and *Indian Wireless Telegraphy Act 1933* was laid against 41 persons, 12 of whom were already dead having committed suicide and three absconded. Out of these, 26 faced the trial before the designated court. All were awarded death sentence on the charge of conspiracy to murder under *section 120B* read with *section 302 IPC, 1860* and also convicted for various other minor offences.

Charge of conspiracy states that 26 accused and those absconding, deceased and others, are charged with having entered into criminal conspiracy between July 1987 and May 1992 at various places in Sri Lanka and India to do or cause to be done illegal acts, namely:

(1) to infiltrate into India clandestinely (secretly);

(2) to carry and use unauthorised arms, ammunition and explosives;

(3) to set up and operate unauthorised wireless sets to communicate with LTTE leaders in Sri Lanka from time to time;

(4) to cause and carry out acts of terrorism and disruptive activities in Tamil Nadu and other places in India by use of bombs, explosives and lethal weapons so as to scare and create panic by such acts in the minds of the people and thereby to strike terror in the people;

(5) in the course of such acts to assassinate Rajiv Gandhi, former Prime Minister of India and others;

(6) to cause disappearance of evidence thereof and to escape;

(7) to screen themselves from being apprehended;

(8) to harbour the accused and escape from the clutches of law; and

(9) to do such other acts as may be necessary to carry out the object of the criminal conspiracy as per the needs of situation and in pursuance of the said criminal conspiracy and in furtherance of the same to carry out the object of the said criminal conspiracy.

Nalini (A-1) along-with the deceased accused Sivarasan, Dhanu and Subha met Haribabu at Parrys Corner, Broadway bus stand and proceeded to the venue of the public meeting at Sriperumbudur on the evening of 21 May 1991 where Nalini (A-l) provided cover to Dhanu and Subha and when Rajiv Gandhi arrived at the scene of occurrence to address the meeting at about 10.10 pm. Dhanu gained access nearer to Rajiv Gandhi and while in close proximity to Rajiv Gandhi, Dhanu detonated (exploded) the explosive device kept concealed in her waist belt at about 10.20 pm resulting in the blast and assassinated Rajiv Gandhi and 15 others and also by killing herself (Dhanu) and causing injuries to 43 persons.

Out of the 26 accused, the Supreme Court by a unanimous verdict, set at liberty 19 accused for charges under *section 120B* read with *section 302 IPC, 1860* and confirmed the death sentence awarded by the trial court in

respect of three, of the accused viz, Santhan (A-2), Murugan (A-3), and Arivu (A-18) and commuted the death sentence to life imprisonment in respect of Royert Payas (A-9), Jayakumar (A-10) and Ravichandran (A-18).

As regards the extreme penalty of death to Nalini was concerned it was confirmed by a majority of 2 to 1 (Wadhwa and Quadri JJ concurred). However, Thomas J disagreed with the majority and commuted sentence of death to life imprisonment.

Per Quadri, J (Justice Wadhwa concurred):

A crime committed on Indian soil against the popular national leader, a former Prime Minister of India, for a political decision taken by him in his capacity as the head of the executive and which met with the approval of the Parliament, by persons running political organisation in a foreign country and their agents in concert with some Indians, for the reason that it did not suit their political objectives and of their organisation, cannot but be the rarest of the rare case. In such a case the part played by A-1 (Nalini) is a candid participation in the crime of conspiracy to assassinate Rajiv Gandhi who was himself a young popular leader so much loved and respected by his fellow citizens and had been the Prime Minister of India. The conspirators including A-1 (Nalini) had nothing personal against him but he was targeted for the political decision taken by him as the Prime Minister of India. She in spite of being an Indian citizen joined the gang of conspirators and engaged herself in pursuit of common intention to commit the crime only because she was infatuated by the love and affection developed for A-3 (Murugan), and thus played her part in execution of the conspiracy which resulted in the assassination of Rajiv Gandhi and death of many police officers and innocent citizens including a small girl. For (Nalini), taking into consideration all the mitigating circumstances, there is no room for any leniency, kindness and beneficence.

Per Thomas, J (Minority):

Justice Thomas disagreeing with majority awarded life imprisonment to Nalini, considering the fact that she being wife and mother of the child of Murugan (A-3) was helpless, brain washed and compelled to become subservient and obedient to all the instructions of assailants. This fact alone was not sufficient justification, according to the learned Judge for putting the case under rarest and rare category.

By a majority, death sentence awarded to all four, viz, Nalini, Santhan, Murugan and Arivu confirmed.

However, the President of India commuted the death sentence in case of Nalini considering her to be mother of a child and belonging to weaker section.

Section 302 of the Indian Penal Code, 1860—Death by hanging is the just and appropriate punishment for killing by Surendra Koli of Nithari's serial rape-cum-murder of minor girls that falls within the rarest of rare category— Supreme Court—2011

Surendra Koli v State of UP[105]

Surendra Koli's voluntary confession before a magistrate of killing Rimpa Halder, aged 14 proved to be the unimpeachable evidence corroborated by two girls against him, graphically describing how he lured minor girls inside his employer Mohinder Singh's Noida house, strangulated them, sexually abused even the bodies of the girls, dismembered them and some times cooked a few parts and ate them.[106] The confessional statement was corroborated by the circumstantial evidence as the body parts of the victims were found in a drain near the house and weapons used in the crime were also recovered. DNA tests confirmed the identities of the victims.

Dismissing the appeal, the apex court said that there is no reasons to interfere with the finding of the trial court and the High Court that and the accused is guilty of murdering Rimpa Haldar who was the first victim in the Nithari serial cum rape-killing episode. The killings by Koli are horrifying and barbaric. He used a definite method in committing the crimes. It fitted the classification of the rare category of murder cases marked by violence, brutality and heinousness warranting imposition of death penalty.

Systematic kidnapping and killing of innocent children falls within the '"rarest and rare category" and calls for death sentence under section 302 IPC, 1860— Appeal dismissed—Supreme Court—2006

Renuka Bai @ Rinku@ Ratan v State of Maharashtra[107]

8.5 Death Sentence

The Supreme Court on 1 September 2006, in one of its historic judgments, upheld death penalty to two sisters, Renuka and Seema, who had horrified Maharashtra by describing them as a menace to society.[108]

The facts of the case were horrifying. Nine of 13 children in the age group between nine months and two and a half years in Sholapur and Nasik districts of Maharashtra, had been kidnapped from time to time either from school or market during 1990-96 and killed by the accused. The accused, with a perfect accomplice, their mother Anajanabai, and husband Kiran Shinde had made chain and purse snatching their profession. Anjanabai died before trial and Shinde got pardon on turning approver.

The trial court of Kolhapur found these two sisters Renuka and Seema, guilty of murdering six children and awarded death sentence to them and the Bombay High Court confirmed their sentence.

While upholding the Bombay High Court's verdict the Division Bench of the Supreme Court, describing the duo as a menace to society and unlikely to be reformed, approved the death sentence.

Justice Balakrishnan, writing the judgment for the Bench, said:

> We find no mitigating circumstance in favour of the appellant, except for the fact that they are women. Further, the nature of the crime and the systematic way in which each child was kidnapped and killed amply demonstrates the depravity of the mind of the appellants. These appellants indulged in criminal activities for a very long period and continued it till the police caught them. They very cleverly executed their plans of kidnapping the children and the moment they were no longer useful, they killed them and threw the dead body at some deserted place. The appellants had been a menace to the society, the people in the locality were completely horrified, and they could not send their children even to schools. The appellants had not been committing these crimes under any compulsion but they took it very casually and killed all these children, least bothering about their lives or agony of their parents.

Section 302 IPC, 1860—Professional murderers are a menace to social order and security: Deserve no sympathy even in terms of the evolving standard of decency of a maturing society—Death Sentence upheld—Supreme Court—1981

Kuljeet Singh alias Ranga v UOI[109]

Sanjay and Geeta Chopra Murder Case: The Supreme Court in *Kuljeet Singh alias Ranga* while dismissing the writ petition under *Article 32 of the Constitution* for reappraisal of the case upheld the death sentence awarded by the sessions court and confirmed by the Delhi High Court on Ranga and Billa for the brutal murder of two young children; brother and sister Sanjay and Geeta Chopra. The two innocent children were kidnapped and brutally murdered by the two notorious professional murderers and kidnappers of children for extortion.

Rejecting the petition for a lenient punishment the court said:

> The accused had made all the preparations for committing the murder of a person or persons whom they would apparently oblige by offering a lift. The plan which they hatched was that they would offer a lift to some young children, try to extort ransom from their parents by kidnapping them and to kill the children in the event of any impediments arising in the execution of their plan. The impediment here was the uncommon courage of the brave little children who did not make an abject surrender to their destiny and the stark fact which emerged during their molestation that their father was a mere Government servant whose salary was too small to permit the payment of the handsome ransom.

There was a planned motivation behind the crime though the accused did not have a personal motive to commit the murder of these two children. Any two children would have been good enough for them. The accused had loosened the handles of the doors of the car so that they should fall down when the children, after getting into the car, close the doors behind them. By this process it was ensured that the children would get into a trap like helpless mice. They got into the car but could not get out of it. In the boot of the car were kept formidable weapons which were ultimately used for committing the murder of the children. The injured children were taken to a park in order apparently to lull them into a false sense of security. The true purpose of doing so was to let the dusk fall so that the most dastardly act could be committed under the cover of darkness. So deep-laid was the strategy to which they adhered to the last without contrition of any kind. Their inhumanity defies all belief and description.

The court said that the survival of an orderly society demands the extinction of the life of persons like Ranga and Billa who were a menace to social order and security. They were professional murderers and deserved no sympathy even in terms of the evolving standards of decency of a maturing society.

Death sentence was upheld. Appeal dismissed.

Sections 302, 34 Indian Penal Code, 1860—Accused came to house of deceased and took him to hotel to resolve Union disputes. They consumed liquor. In midst of meeting one of accused taking away pistol of deceased and after asking waiter to serve more food shot deceased in head. Accused wiped fingerprints on pistol threw it near his body and tried to escape but captured. Act of wiping fingerprints and to escape indicate culpability of accused. Defence that deceased was schizophrenia patient believed by medical evidence. Not sustainable conviction under section 302 IPC upheld—Supreme Court—2010

Santokh Singh v State of Punjab,[110]

AIR 2010 SC 3274 : (2010) 8 SCC 784

Per Surinder Singh Nijjar, J:

The two appellants challenged the judgment of the Punjab and Haryana High Court upholding the conviction of the appellants for the offence under *section 302* read with *section 34 Indian Penal Code, 1860* sentencing them each to undergo imprisonment for life with a fine of Rs 1,000/-.

The deceased and the four accused persons were working in the same organization and were office bearers of the same Union. Two days before the incident, the deceased had left the Union to join another rival Union and became the president of the said rival union. The accused persons resented the action of the deceased. They formed a common intention to eliminate the deceased. They went to the house of the deceased and invited him to accompany them to resolve the Union disputes. They took him to Hotel Genesis where they consumed liquor. The pistol of the deceased was taken by one of the appellants and shot the deceased in the head with his own pistol.

They then wiped the fingerprints on the pistol and threw the pistol down next to the body of the deceased. They tried to escape. This would tend to indicate towards the guilt rather the innocence of the appellants. Two of them were captured just outside the hotel, the other two managed to escape. The injury on the deceased did not indicate that he had shot himself.

Dismissing the appeal, apex court held that all these circumstance taken together clearly form such a continuous and unbroken chain as to leave no shadow of doubt that the deceased was shot dead by one of the appellants. The cleaning of the pistol to remove the fingerprints is a circumstance which is a strong pointer to the guilt of the appellants. Conviction upheld.

Section 302 IPC, 1860—Brutal murder of three innocent young girls Kokilavani, Hemalatha and Gayathri and causing burn injuries to another twenty girls is an act of highest degree of depravity and extreme brutality— rarest of rare case calls for death sentence—Supreme Court—2010

C Muniappan and DK Rajendran v State of TN,

AIR 2010 SC 3718 : (2010) 9 SCC 567 : 2010 (8) Scale 637 : JT 2010 (9) SC 95

Per Dr BS Chauhan and GS Singhvi, JJ:

Dismissing the appeal against the judgment and order of the High Court of Tamil Nadu awarding death sentence to three assailants—Nedu, Madhu and C Muniapppan the apex court said that there is no cogent reason to interfere with the punishment of death sentence in case of extremely brutal, diabolic grotesque (strange and unnatural) and cruel murder of three innocent girls of the Horticulture college, Periakulam affiliated to Tamil Nadu Agriculture University, Coimbatore, while on tour had been the victims of a heinous crime at the tail end of the programme.

A demonstration by the appellants which had started peacefully, took an ugly turn when the appellants started damaging public transport vehicles. Damaging the public transport vehicles did not satisfy them and the appellants became the law unto themselves. There had been no provocation of any kind by any person whatsoever. Some of

the appellants had evil designs to cause damage to greater extent so that people may learn a “lesson”. In order to succeed in their mission, Nedu, Madhu, and Muniappan went to the extent of sprinkling petrol in a bus full of girl students and setting it on fire with the student still inside the bus. They were fully aware that the girls might not be able to escape, when they set the bus on fire. Some of the girls did not escape the burning bus. No provocation had been offered by any of the girls. Three girls stood to death and about 20 girls received burn injuries on several parts of their bodies. There can be absolutely no justification for the commission of such a brutal offence. Causing the death of three innocent young girls and causing burn injuries to another twenty is an act that shows the highest degree of depravity and brutality on the part of the accused.

Appeal Dismissed.

Shabnam and Samir v State of UP,

(2015) 6 SCC 632 : 2015 (5) JT 359 : 2015 (3) Crimes 298

The Supreme Court on Friday, 15 May 2015 imposed death sentence under *section 302 IPC, 1860* on a woman and her lover/Samir who wiped out her entire family- parents, two brothers, sister-in-law and two minors- after heavily sedating them to remove opposition to their love affair and also to grab the family property.

The apex court, which is generally reluctant in awarding death sentence to woman convicts and of late has been increasingly reluctant to impose capital punishment, was shocked by the brutality of the crime.

A bench of Chief Justice L Dattu and Justices SA Bobde and Arun Mishra while upholding the death penalty imposed on them by the trial court and confirmed by the Allahabad High Court.

Justice Dattu while writing the judgment; for the court said:

> Here is a case where the daughter Shabnam, who has been brought in an educated and independent family and was respectfully employed as a teacher, influenced by the love and lust of her paramour has committed this brutal paracide (murder) exterminating seven lives including that of a 10 months old innocent child.

Shabnam, who was pregnant at the time of crime, had conspired with her unemployed lover Samir and had served tea heavily laced with sedatives to her family members on 14 April 2008. Samir entered the house at Bahman Garhi in Amroha and the two slit the throats of the seven family members. She strangulated the 10 month old child as well.

Besides Shabnam, the other three women sentenced to death are Renuka Shinde and stepsister Seema Gavit convicted in 2001 of kidnapping 13 children, forcing them to join gang of thieves and murdering five of them in Maharashtra and Soniaand her husband in 2007 for murdering her father, mother, sister, stepbrother and his entire family, including 3 young children.

Renuka Shinde and her stepsister Seema Gavit were convicted in 2001 of kidnapping 13 children, forcing them to join a gang of thieves and murdering five of them. Shinde, 45, and Gavit, 39, were found guilty of kidnapping the 13 kids in Maharashtra. They were initially accused of murdering nine, but prosecutors were only able to prove that they killed five. The Supreme Court upheld their sentence in 2006. The President had rejected their mercy pleas last year.

Sonia and her husband were awarded death penalty by the Supreme Court in 2007 for murdering her father, mother, sister, stepbrother and his entire family, including three young kids - one 45 days old, another two and half-year-old and the third 4-year-old to resist her father’s decision to give his property to her stepbrother.

Sections 302, 34, 120B IPC, 1860 Murder or conspiracy Mens rea Common intention. Accused, husband along with other co-accused committing murder of wife by strangulating her neck with rope. Prosecution proving common intention of accused persons beyond doubt. Accused persons cannot be acquitted of charges of murder in absence of proof of criminal conspiracy. Conviction, proper. (Para 9)

Shantanu Sitaram alias Anil Divekar v State of Maharashtra

with

Deepak alias Ganesh S Patil v State of Maharashtra[111]

Per Ashok Bhushan, J:

These two appeals have been filed against the judgment of the Bombay High Court dismissing three criminal appeals filed by three accused questioning their conviction and sentence imposed by the Additional District Judge, Satara by which they were sentenced to suffer rigorous imprisonment for life and to pay fine for the offence punishable under *section 302* read with *34*, *IPC, 1860* and further to RI for three years and fine for offence under *section 201* read with *section 34*, *IPC* and for three years and fine for offence under *section 120B IPC*.

Accused No 1, Shantanu married deceased Supriya on 28 April 1999. Their daughter, Mrunal was born on 22 March 2000.

Supriya along with her daughter was living at her parents' house, Shantanu came to Supriya's parents' house and took Supriya for a ride in car in the evening at about 8.30 pm Shantanu took Supriya hurriedly without even permitting her to change her nightgown which she wore at that time. Supriya along with her daughter aged about 9 months sat in the Fiat Car of Shantanu driven by him. When till 10 pm Shantanu did not return, Shambhaji Mane, PW-6 along with certain persons went to place of occurrence and found Supriya laying in the car in unconscious condition. Shantanu along with her daughter were also taken to the place of occurrence, by that time Supriya had died.

Dismissing the appeal apex Court held recovery of stick, piece of rope and knife were proved by panch witnesses. The medical evidence of Dr Jadhav, PW-10, has been thoroughly considered by both the Courts below and from the medical evidence it is proved that ligature marks on the neck of Supriya were possible by nylon rope recovered at the instance of A-2. PW-22, Santosh Balakrishna Shete, who took the photographs of recovery of all the items proved the photographs in his evidence.

The submission by the appellants that since the High Court has acquitted the accused under *section 120B IPC, 1860* they ought not to have been convicted under *sections 302* read with *section 34*, *IPC* also cannot be accepted. The mere fact that evidence under section 120B has not been proved does not in any manner affect the charge under *sections 302* read with *34*, *IPC*. A-1 to A-3 with common intention committed the crime which has been proved by the prosecution and the conviction of A-1 to A-3 under *sections 302* read with *section 34*, *IPC* cannot be faulted.

Appeal dismissed.

Section 302 IPC, 1860—Death sentence converted to life imprisonment. By partly allowing the appeal, the apex court held that the case does not fall within "rarest of rare" category. The age of accused, possibility of accused reforming themselves, cannot be ruled out. They cannot be termed as "social menace"; It is unfortunate but a hard fact that all these accused have committed a heinous and inhumane crime for satisfaction of their lust.

Ramnaresh v State of Chhattisgarh,

AIR 2012 SC 1357 : (2012) 4 SCC 257 : 2012 (3) Scale 234 : JT 2012 (2) SC 588 : 2012 (2) Crimes 146

In this case, the sessions court convicted and awarded capital punishment to the appellants under sections 375, 376 (2)(g), and 320 *IPC, 1860* for gang raping a woman, who died, albeit accidentally, during the rape. On appeal, the High Court affirmed the decision of the session's court. Appellants appealed to the Supreme Court.

The issues raised before the Supreme Court were:

1. Whether the prosecution was able to establish the involvement of appellants in alleged crime beyond reasonable doubt?

2. Whether in the instant case where awarding death sentence was justified?

For the first issue the court held that the prosecution had been able to prove the case beyond any reasonable doubt. The court observed that the expert evidence clearly demonstrates, particularly in view of injuries caused to

deceased during heinous crime, that it could not have been done by a single person is most probable and in line with story of prosecution, cumulative effect of oral documentary and expert evidence was that prosecution had been able to prove its case beyond any reasonable doubt.

By analyzing the various judicial pronouncements on capital punishments, the apex court ruled that death penalty cannot be imposed on all heinous offences routinely but only in exceptional cases. In the instant case, death penalty was converted into life for 21 years, as it is not a rarest of rare case. The apex court observed that though the crime was heinous, the fact that the convicts were young, having no previous criminal history and the death of the victim occurred accidentally after the rapists gagged her mouth were mitigating factors for not uphold the death penalty.

Indian Penal Code, 1860, Sections 300, 34 – Murder - Role of co-accused in killing of deceased explained by eye-witness clearly suggested that co-accused were holding deceased by his hand and also exhorted accused to bring gun and shoot at the deceased. Co-accused had enemity with deceased – "Delay of 8 days in recording statement of eye-witnesses was also explained" – Under such circumstances High Court justified in holding co-accused guilty and passing order of conviction. (Para 15, Para 16, Para 19)

Mahesh v State of MP,

AIR 2012 SC 2172 : 2011 (14) SC 392 : 2011 (10) Scale 549 : (2011) 9 SCC 626

Per Mukundakam Sharma and Anil R Dave, JJ:

This appeal is directed against the judgment and order dated 16 November 2007 passed by Madhya Pradesh High Court, Jabalpur Bench at Gwalior. By the aforesaid judgment and order, the Division Bench of the High Court has not only confirmed the order of conviction and sentence of Shri ramdutt, who was convicted by the Trial Court under *section 302 of IPC* for murder of Kirori by firing a shot by single barred gun of his father, while he was going towards the field and sentenced him to undergo imprisonment of life for 3 years rigourous imprisonment under *Arms Act 1959* but also set aside the order of acquittal passed by the Trial Court in the cases of Mahesh and Kanhaiyalal. Both Mahesh and Kanhaiyalal challenged the order of High Court agaist their conviction before the apex court before dismissing the appeal and upholding the conviction awarded by the High Court, the apex court observed that, "on going through the depositions made by the two prosecution witnesses, it is evident that the present appellants were holding the deceased by his hands and also exhorted Ramdutt to bring the gun and to shoot at the deceased. The aforesaid statements of giving exhortion and holding the hand of the deceased and Ramdutt coming with the guna and fired at him are corroborated. It clearly proves and establishes from the said fact that the present appellants also had the common intention of killing the deceased. It is established from the records that they had intentionally become a party to commit the murder of the deceased."

"*Section 34 of IPC, 1860* provides that if two or more persons intentionally do an act jointly, the position in law would be just the same as if each of them has done the offence individually by himself. This doctrine of constructive criminal liability is well-established in law. The very fact that the appellants were holding the hand of the deceased and also at the same time exhorting Ramdutt to bring the gun and to fire upon the deceased so as to kill him speaks volumes and also prove and establish that they have done the act intentionally so as to see that the deceased is fired upon and shot dead.

In that view of the matter, we find no infirmity in the judgment and order passed by the High Court setting aside the order of acquittal so far the present appellants are concerned. We uphold the order of conviction and sentence passed against them and dismiss the appeal.

Appeal Dismissed.

Unexplained, unreasonable and inordinate delay in disposal of mercy petition by the President of India is one of the supervening circumstances for commutation of death sentences to life imprisonment applicable to all types of crimes including the offences under TADA - Supreme Court - 2014

Navneet Kaur v State of NCT of Delhi,

AIR 2014 SC 1935 : 2014 Cr LJ 2474 : (2014) 7 SCC 264 : 2014 (4) Scale 459

Per P Sathasivam CJ:

Navneet Kaur w/o Devender Pal Singh Bhullar, filled the present Curative Petition against the dismissed of Review Petition no 435 of 201, wherein she prayed for setting aside the death sentence imposed upon Devender Pal Singh Bhullar By Commuting the same to imprisonment for life on the ground of supervening circumstance of delay of 8 years in disposal of mercy petition by the President of India.

A three judge bench of Apex Court, in *Shatrughan Chauhan v UOI,* 2014 AIR (SCW) 793 : *2014 Cr LJ 1327* : *(2014) 3 SCC 1* : *2014 (1) Scale 437*, by order dated 21 January 2014, commuted the sentence of death imposed on the petitioners therein to imprisonment for life which has a crucial bearing for deciding the petitioners therein to imprisonment for life which has a crucial bearing for a deciding the petition at hand. In the aforesaid verdict, the apex court validated the established principle and held that unexplained/unreasonable/inordinate delay in disposal of mercy petition in one of the supervining circumstances for communication of the death sentence to life imprisonment (para 8).

The delay of three years and soliciting confinement of the accused for such a long period is violative of Article 21 of the Constitution. The accused accordingly is entitled to commutation of death sentence to life imprisonment – Supreme Court - 2015

Ajay Kumar Pal v UOI,

AIR 2015 SC 715 : 2015 Cr LJ 1161 : (2014) 42 SCD 193 : *2014 (13) Scale 762*

The death sentence awarded by the trial court on 9 April 2007, attained finality by the Supreme Court. No further proceedings in the form of review petition etc. were taken on the behalf of the petitioner. His mercy petition preferred on 10 April 2010 i.e., within a month of the decision of Supreme Court was forwarded the same day with all relevant functionaries to exercise the requisite jurisdiction. Though no time limit can be fixed within which the mercy petition ought to be disposed of, the period of 3 years and 10 months to deal with such mercy petition in the present case comes within the expression “inordinate delay”. The delay is not to the account of the petitioner or as a result of any proceedings initiated by him or on his behalf but is certainly to the account of the functionaries and authorities concerned. Further, the petitioner could never have been “segregated” till his mercy petition was disposed of. It is only after such disposal that he could be said to be a finally executable death sentence. It is complete transgression of the right under *Article 21 of the Constitution* causing incalculable harm to the petitioner. Thus, inordinate delay in mercy petition and the solitary confinements for such a long period has caused deprivation of the most cherished right A case is definitely made out under *Article 32 of the constitution of India* and the Supreme Court deems it proper to reach out and grant solace to the petitioner for the ends of justice and, therefore, commuted the sentence and substitute the sentence of life imprisonment in place of the death sentence awarded to the petitioner.

Sections 302, IPC, 1860: Charge of murder—Possibility of false implication of appellants cannot be ruled out in cases of deep rooted rivalry between the parties. Appellants in such a case is entitled to be acquitted—Supreme Court—2010

Prahlad Mahto v State of Jharkhand,

AIR 2010 SC 3740 : *(2010) 13 SCC 538* : *2010 (8) Scale 622*

Allowing the appeal of Shri Mahto, Basudeo Mahto and Koto Mahto against their conviction under *section 302 IPC, 1860* for murder, the apex court said:

> It is true that it is often difficult to arrive at a true assessment as to what has happened but in a case of deep rooted group rivalry and animosity between the rival parties and in the face of the fact that a large number of accused have been involved, the possibility of false implication cannot be entirely ruled out. Moreover, in the facts of this case, whereas accused Prahlad Mahto, Naresh Mahto and Sudhir Mahto have been attributed specific injuries, the others have been given general roles that they too had caused injuries. There is thus a possibility that some of the accused could have been booked falsely. The appellants are therefore, entitled to be acquitted.

Murder: Conviction for murder of three infant children dying for reasons not clinically explicable solely on specialist evidence is not safe and unsustainable— Court of Appeal—2004

8.5 Death Sentence

R v Cannings,

(2004) All ER 725

The defendant was convicted of the murder of two of her children who had died aged seven weeks and seventeen weeks. One had earlier suffered an acute or apparent “life threatening event” and the other a troubling “episode” although probably not such a “life threatening event”. Her eldest child had also died, at thirteen weeks. Her surviving child had experienced an acute or apparent life threatening event at the age of 11 weeks, from which she had made a full recovery. There was no direct evidence that the children had been deliberately harmed but their deaths were not clinically explicable. The Crown’s case depended on specialist evidence about the conclusion to be drawn from the history of three infant deaths and further acute or apparent life threatening events in the same family.

Allowing the appeal and setting aside the conviction the Court of Appeal held that the correct approach in a criminal prosecution where three sudden infant deaths had occurred in the same family, each apparently unexplained, and for each of which there was no evidence extraneous to the expert evidence that harm had, or must have been, inflicted, was to start with the fact that three unexplained deaths in the same family were indeed rare, but thereafter to proceed on the basis that if there was nothing to explain them in the current state of medical knowledge, they remained unexplained deaths, and still possibly natural deaths. Such unexplained deaths did not come to the inexorable (unrelenting) conclusion that they must have resulted from the deliberate infliction of harm. In the instant case the mere fact that specific natural cause had not been established for any of the deaths did not lead to the inference that the infants had been deliberately harmed, but rather left open the possibility that sudden infant death syndrome should not be excluded. There was significant and persuasive fresh evidence before the court which had not been before the jury. The fundamental basis of the Crown’s case had been demonstrably undermined. Moreover, there was a realistic, *albeit* although as yet undefined, possibility of a genetic problem with the defendant’s family, which might serve to explain the deaths.

The sole question involved in Sushil Kumar v State of Punjab was whether death or life imprisonment be awarded to the accused. The sole appellant Sushil Kumar alias Lucky has been awarded death sentence by Additional Sessions Judge, Jalandhar holding him guilty of commission of offence under section 302 of Indian Penal Code on three counts, i.e., for committing murder of his wife Pooja, son Jatin (6 years) and daughter Sofia (4 years) which was confirmed by the High Court.

Sushil Kumar v State of Punjab[112]

Weighing the mitigating circumstances the apex court arrived at the conclusion that it is not a case that would fall under the rarest of rare category. The court said the following facts are manifest to commute death sentence to life imprisonment. viz.,

(i) The appellant had been unemployed for last 7 to 8 months.

(ii) He used to borrow money from others to meet his daily needs.

(iii) He himself had consumed “surplus tablets” to commit suicide even though not medically established.

(iv) He therefore, was keen that his whole family should be finished and no one should be alive to suffer the pain and agony alone.

(v) He was fed up with his life and was seen in a perplexed condition by prosecution witness (PW-4).

(vi) In any case the accused cannot be a threat to the society and there are fairly good chances of his reformation as he has sufficient lesson from his cruel act of elimination of his own wife and children.

Extreme poverty had driven the appellant to commit the gruesome murder of three of his very near and dear family members–his wife minor son and daughter.

Commuting death sentence to life imprisonment, the apex court held there is nothing on record to show that appellant is a habitual offender. He appears to be a peace loving, law abiding citizen but as he was poverty stricken, he thought in his wisdom to completely eliminate his family so that all problems would come to an end. Precisely, this appears to be the reason for him to consume some poisonous substance, after committing the

offence of murder. He is now about 35 years of age and there appears to be fairly good chances of the appellant getting reformed and becoming a good citizen.

Section 302: Death sentence commuted to life imprisonment: Imposition of death sentence on an illiterate and rustic man having no control over his emotions for beheading mother out of anger and excitement is improper— Supreme Court—2012

Absar Alam v State of Bihar,

AIR 2012 SC 968 : (2012) 2 SCC 728 : 2012 (2) JT 76 : 2012 (2) Scale 350

While commuting death sentence to life imprisonment under *section 302 IPC, 1860* for murder of the mother by the accused appellant in an extremely brutal, grotesque, diabolical (cruel) and revolting manner, the court said:

> considering the abhorrent, dastardly and diabolical nature of the crime committed by the appellant on no other than his mother, who had given birth to him, the penalty of death was rightly awarded by courts below, nevertheless mental condition of the accused, which led the assault, cannot be lost sight of and while such mental condition of the accused may not be relevant to judge culpability, it is certainly a factor while considering the quantum of sentences.

(Referred *Lehna v State of Haryana,* (2002) 3 SCC 76 : (2002) 1 Scale 273 & *Om Prakash v State of Haryana,* AIR 1999 SC 1332 : (1999) 3 SCC 19)

Section 302, IPC, 1860 Charge for murder on circumstantial evidence unsustainable—conviction of the accused for murder and robbery of the deceased's ornaments on the basis of circumstantial evidence in the absence of events leading to the determination of inescapable conclusion is untenable— Supreme Court—2012

Madhu v State of Kerala,

AIR 2012 SC 664 : (2012) 2 SCC 399 : 2012 Cr LJ 1230 : 2012 (1) JT 181

Jagdish Singh Khehar J and Justice Ashok Kumar Ganguly while setting aside the conviction of the accused Madhu Kalikutty and Sibi Bhaskaran under sections 302 and 392 read with *section 34, IPC, 1860* for having robbed Padmini Devi's gold ornaments and, thereafter; having murdered her by smothering and drowning her on 8 May 1988 at her residence, the apex court said that in a case resting on circumstantial evidence, the prosecution chain of events leading to the determinations that the inference being drawn from the evidence is the only inescapable conclusion. In the absence of convincing circumstantial evidence, as in the present case, an accused would be entitled to acquittal.

Death by hanging is not cruel and barbaric—does not violate Article 21 of Constitution of India 1950— Appeal dismissed—Supreme Court—1983

Deena alias Deen Dayal v UOI,

AIR 1983 SC 1155 : (1983) 4 SCC 645 : 1984 SCR (1) 1 : 1983 Scale (2) 340

Chief Justice Chandrachud (for himself and on behalf of Justice RS Patnaik) held:

The petitioners who were sentenced to death challenged, through a writ petition, the validity of hanging, as a mode of death punishment. They contended that hanging a convict by rope *vide* section 354 (5)[113] of *Code of Criminal Procedure 1973* is a cruel and barbarous method of executing a death sentence, which is violative of *Article 21 of Constitution of India*.

Rejecting the petition, the Supreme Court held that the method prescribed by *section 354 (5) of Code of Criminal Procedure 1973* for executing the death sentence does not violate the provision contained in *Article 21 of Constitution of India*. It is clear that neither electrocution, nor lethal gas nor shooting, nor even the lethal injection has any distinct or demonstrable advantage over the system of hanging. Therefore, it is impossible to record the conclusion with any degree of certainty that the method of hanging should be replaced by any of these methods.

Evidence shows that the mechanics of the method of hanging has undergone significant improvement over the years and hanging has been almost perfected into a science.

The mandate of *Article 21* is not that the death sentence shall not be executed but that it shall not be executed in a cruel, barbarous or degrading manner. Hanging as a mode of execution is not harsh in its severity.

The appeal is dismissed.

Public hanging which is cruel, barbarous and degrading is identified to be violative of *Article 21 of Constitution of India*.[114]

Hanging is a common method of execution in India, Pakistan, Bangladesh, Sri Lanka, South East Asian and African countries.

Unguided discretion to impose death or life imprisonment constitutes "cruel and unusual punishment" in violation of Eighth and Fourteenth amendments to the Constitution—United State Supreme Court—1972

Furman v Georgia,

408 US 238 (1972) : 33 L Ed 2d 346 : 1972 US Lexis 169

The struggle for abolition of death penalty in the United States started in 1971 when it was brought to the attention of the Supreme Court in *McGautha v California*.[115] Virtually all States left, to the unguided discretion of judge or jury, the decision whether a particular prisoner should or should not be awarded the death penalty. McGautha challenged his death sentence as contrary to Fourteenth Amendment[116] to US *Constitution* arguing that where death was a possible sanction, the process required that the decision maker's discretion be guided by concrete standards. However, the court rejected McGautha's plea.

Surprisingly, within a month of the *McGautha* case, the US Supreme Court in one of its landmark judgments, *Furman v Georgia*,[117] by a majority of 5 to 4, set aside death sentence in a group of three cases. The court was confronted to decide whether the imposition of death penalty constitute cruel and unusual punishment in violation of the eighth and fourteenth Amendments.'

All three cases involved black prisoners—two of whom—Lucious Jackson and Elmer Branch—received death sentences for raping white women. The third accused William Furman, received death sentence for murder. In each case, the jury had complete, unguided discretion to impose a sentence of life imprisonment or death.

As a result of the decision, besides Jackson, Branch, Furman, more than 600 other condemned prisoners then incarcerated on death row throughout the United States were set free. In striking down the death penalty law of 39 States and various federal statutory provisions, the court held that the imposition and infliction of the death penalty, under arbitrarily and randomly administered systems in which juries are given unrestricted and unguided discretion to impose a sentence of life or death constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth amendments to the US *Constitution*.

Comment: It is important to note that all nine justices wrote separate opinions running into 119 pages setting forth their independent views on the subject. Two of the majority, Brennan and Marshall, JJ, concluded that the death penalty was unconstitutional regardless of how it was administered. The other justices of the majority, Stewart, Douglas and White, JJ, agreed that the system of capital punishment, then in existence, was unconstitutional.

If sentencing procedure is bifurcated and adequate information and guidelines provided, death punishment is not unconstitutional—US Supreme Court— 1976

Gregg v Georgia,

428 US 153 (1976) : 49 L Ed 2d 859 : 1976 US Lexis 82

As a result of the *Furman* decision, a number of States including Georgia, Florida, Texas, North Carolina and Louisiana, revised their death penalty statutes in an effort to satisfy the requirements of *Furman*. In 1976, the Supreme Court addressed in *Gregg v Georgia,* the constitutionality of post *Furman* death penalty statutes in the States of Florida,[118] Texas,[119] North Carolina[120] and Louisiana:[121]

> In *Gregg,* Burger, CJ, and White, Blackmun and Rehnquist, JJ, embraced *Furman's* holding that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner", but concluded that the Eighth Amendment erected no barrier per se to the punishment of death. Moreover, these seven justices agreed that the *Georgia* death penalty statute remedied the constitutional defects which in *Furman,* the court found fatal to capital sentencing procedures, and so it was held constitutional.

Justice Stewart, joined by Powell and Stevens, JJ concluded that:

> The concerns expressed in *Furman* that the penalty of death can not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition, these concerns are best met by a system [like Georgia's] that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of information.

> Justice Brennan and Marshall dissented in *Gregg, Proffitt* and *Jurek.* Their dissents built upon differing rationales, but both Brennan and Marshall JJ embraced the argument that, regardless of the nature of the offence or the procedures followed in imposing the sentence, the punishment of death invariably constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

In *Proffitt* and *Jurek,* the same seven member majority of *Gregg* found that the death penalty statutes of Florida and Texas provided procedural safeguards similar to the Georgia death penalty statute and, thus; were constitutional.

Death penalty for offenders under the age of 18 years is cruel and unusual punishment forbidden by eighth and fourteenth amendment to the US Constitution: National Decency Did Not Permit Such Executions—Stanford v Kentucky—1989 overruled—Supreme Court—2005

Donald P Roper v Christopher Simmons[122] *— Supreme Court*

543 US 551 : 161 L Ed 2d 1 : (2005) US Lexis 2200 : 125 S Ct 1183

Justice Kennedy held:

At the age of 17, Christopher planned and committed a capital murder. He along with Charles Benjamin at 2 am on the night of the murder, entered the house of the victim, Shirley Crook. Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs Crook in her mini van, arrived to a State park, covered her head with a towel, and threw her from the bridge drowning her in the water below in the Meramec river.

Christopher[123] was charged with burglary, kidnapping, stealing and murder with first degree and conspiracy to commit murder and sentenced to death. He filed a petition before the Missouri Supreme Court arguing that the reasoning of *Atkins v Virginia*, 536 US 304 (2002), that the Eighth and Fourteenth Amendment to US *Constitution* which prohibits the execution of a mentally retarded person would also apply in case of a juvenile who was under 18 when the crime was committed.

Allowing the appeal, the Missouri Supreme Court commuted the death sentence of Christopher to life imprisonment. The Court said in *Stanford,*[124] that:

> A national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen States now bar such executions for juveniles, that twelve other States bar executions altogether, that no State had lowered the age of execution below 18 since *Stanford,* that five States have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade.

The matter finally came before the US Supreme Court against Christopher's commutation of death sentence. The Supreme Court by a split majority of 5:4 approved the Missouri Supreme Court finding and overruled its judgment in *Standford* of 1989 and said that:

8.5 Death Sentence

The Eighth Amendment's prohibition against "cruel and unusual punishment" must be interpreted according to its text, by considering history, tradition, and precedents, and with due regard for its purpose and function in the constitutional design. To implement this framework the US Supreme Court has established the property and affirmed the necessity of referring to "the evolving standard of decency that mark the progress of a maturing society" to determine which punishment are so disproportionate as to be designated as "cruel and unusual" punishment.

A sequence of the events, that took place in the United States during the last two and half decades, will illustrate the development in this regard that has resulted in softening the rigorous punishment in case of juveniles, mentally retarded people and others[125] applying the provisions of Eighth and Fourteenth Amendment to US *Constitution*.

(1) In 1988, in *Thompson v Oklahoma,*[126] the US Supreme Court by a majority of 5 to 3 held that the Eighth and Fourteenth Amendment barred the death penalty for a person under 16 years of age at the time of commission of the offence, being cruel and unusual punishment. The Court held that the standard of decency does not permit the execution of any offender under the age of 16 at the time of the crime.

(2) However, the very next year in 1989, the US Supreme Court in *Stanford v Kentucky,*[127] by a majority of 5:4 concluded that Eighth and Fourteenth Amendment did not prohibit the execution of juvenile offenders over 15 but under 18 years of age. The Court noted that 22 to the 37 death penalty States permitted the death sentence for 16 year old offenders, and among these 37 States, 25 permitted it for 17 year old offenders. These numbers, in the court's view, indicated there was no national consensus sufficient to label a particular punishment cruel and unusual punishment.

(3) Interestingly, the same day in 1989 the Court (decided *Stanford v Kentucky*) in *Penry v Lynaugh*, 492 US 302 (1989) : 109 S Ct 2934 : 1989 US Lexis 3148, held that the Eighth Amendment did not mandate a categorical exemption from the death penalty of a mentally retarded prisoner. In reaching this conclusion, the court said that since only two States out of a total of 36 States that impose death penalty had enacted laws prohibiting the imposition of capital punishment on mentally retarded criminals there is no national consensus against its imposition.

(4) However, after a gap of 13 years, in 2002, the US Supreme Court in *Atkins v Virginia,* 536 US 304 (2002) : 2002 US Lexis 4648, held that "standards of decency" had evolved since *Penry* (1989) and now it demonstrated that the execution of mentally retarded people is "cruel and unusual punishment". National consensus has developed against such executions, and a significant number of states have now concluded that death is not a suitable punishment for a mentally retarded criminal and voted overwhelmingly in favour of its prohibition. The court, accordingly ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders and hence it amounts to cruel and unusual punishment in violation of the Eighth and Fourteenth amendments to US *Constitution*.

(5) As stated above in the light of the "changed circumstances and guided by the evolving standards that mark the progress of a maturing society" that had taken place since 1989 when *Stanford v Kentucky,* (1989) and *Penry v Lynaugh,* (1989) were decided, the court overruled its earlier verdicts and held death penalty disproportionate punishment for juveniles under 18 years of age. The Eighth and Fourteenth Amendment accordingly forbid the imposition of the death penalty.

(6) The court outlined three general differences between juveniles under the age of 18 and adults, that demonstrate that juvenile offenders cannot, with reliability be classified among the worst offenders:

   (i) "Juveniles" susceptibility to immature and irresponsible behaviour means "their irresponsible conduct is not as morally repressible as that of adult".

   (ii) Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failure to escape negative influences in their whole environment.

   (iii) The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.

(7) At the end the court remarked that the United States is the only country in the world that continues to give official sanction to the death penalty for juvenile below 18 years of age.

Execution of mentally retarded criminals is "cruel and unusual punishment" prohibited by the eighth amendment to US Constitution—US Supreme Court (2002), Penry v Lynaugh (1989) overruled

Daryl Renard Atkins v Virginia[128]

Justice Stevens delivered the opinion of the Court petitioner, Daryl Renard Atkins,[129] was convicted of death. The Supreme Court of the State of Virginia affirmed the death sentence. The Court was not willing to commute Atkins sentence of death to life imprisonment merely because of his IQ score (which is consistent with mental retardation) "which was much less than the normal average score of an ordinary man".

Because of the gravity of the concern expressed by the dissenters, and in the light of dramatic shift in the State Legislative landscape that has occurred in the past 13 years, the US Supreme Court granted certiorari to revisit the issue that was decided in the *Penry* case in 1989[130] permitting execution of mentally retarded criminals.

Allowing the appeal by a majority of 6:3 the court commuted the death sentence of Atkins to life imprisonment. The Court said that the Eighth Amendment succinctly prohibits "excessive" sanctions. It provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Warren, CJ said in *Trop v Dulles*,[131]

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of maturing society.[132]

After making a careful analysis of the opinion polls, independent evaluation of the issues and taking into account various factors, the Court concluded that:

> Much has changed since Penry's conclusion that the two State statutes then existing that prohibited such execution, (of mentally retarded criminals) even when added to the 14 States that had rejected capital punishment completely did not provide sufficient evidence of a consensus... Subsequently, a significant number of States have concluded that death is not a suitable punishment for a mentally retarded criminal, ... The large number of States prohibiting the execution of mentally retarded persons (and the complete absence of legislation reinstating such executions) provides powerful evidence that today society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures addressing the issues have voted overwhelmingly in favour of the prohibition. Moreover even in the States allowing the execution of mentally retarded offenders, the practice is uncommon.

Mentally retarded criminals in the aggregate, face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the fact that they are typically poor witnesses, and that their demeanour (conduct), may create an unwarranted impression of lack of remorse for their crimes.

8.5.2 Certiorari (Relief) granted: Death Sentences Commuted

A prisoner convicted of capital murder seeking stay of execution on the ground of insanity must be given a hearing in accordance with the "principle of Fundamental Fairness". Denial of request is violation of principle of natural justice—US Supreme Court—2007

Scott Louis Panetti v Director, Texas, Correctional Institution,

551 US 930 : 127 S Ct 2842 (2007) : 168 L Ed 2d 662

State prisoner Scott convicted of capital murder sought writ of habeas corpus requesting for stay of execution arguing that he was incompetent to be executed being insane. Since he was denied permission by the State Courts, the petitioner moved the United States Supreme Court, which allowed his request.

Allowing the petition the court held that once a prisoner seeking a stay of execution has made a substantial threshold showing of insanity, the protection afforded by procedural due process clause includes a fair hearing in accord with fundamental fairness, which means the prisoner must be accorded an opportunity to be heard.

Drug lethal injection method of capital punishment is constitutional not "cruel and unusual" method of punishment—US Supreme Court—2008

Ralph Baze, Thomas, C Bowling v John D Rees, Commissioner, Kentucky,

128 S Ct 1520 : 170 L Ed 2d 420

Three State death row inmates named—Ralph Baze, Thomas C Bowling brought declaratory judgment action against Commissioner of Kentucky, of Correction alleging that State's three drug lethal injection method of capital punishment posed unacceptable risk of significant pain and was "cruel and unusual" punishment under Eighth Amendment.

Rejecting the petitioner's contention the court by a majority of six to two speaking through the Chief Justice Roberts held that:

(i) Risk of improper administration of initial drug did not render three drug protocol cruel and unusual; and

(ii) State's failure to adopt proposed allegedly more humane alternative to three drug protocol did not constitute cruel and unusual punishment.

303. Punishment for murder by life convict.—Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death.

Mandatory death sentence under section 303, IPC ultra vires violates guarantee of equality under Articles 14 and 21 of Constitution of India—Supreme Court—1983

Mithu v State of Punjab,

AIR 1983 SC 473 : (1983) 2 SCC 277

Chief Justice Chandrachud observed:

The question for consideration in these proceedings is whether *section 303 of IPC, 1860* infringes the guarantee contained in *Article 21 of Constitution of India*.

...It is a travesty of justice not only to sentence such a person to death but tell him that he shall not be heard about whether he should not be sentenced to death. And, in these circumstances, how does the fact that the accused was under a sentence of life imprisonment when he committed the murder, justify the law that he must be sentenced to death? In ordinary life, we will not say it about law, it is not reasonable to add insult to injury.

A provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. Equity and good conscience are the hallmarks of justice. The mandatory sentence of death prescribed by section 303 with no discretion left to the court to have regard to the circumstances which led to the commission of the crime is a relic of ancient history. No rational distinction can be made between a person who commits a murder after serving out the sentence of life imprisonment and a person who commits a murder while he is still under that sentence.

The classification based upon such a distinction proceeds upon irrelevant considerations and bears no nexus with the object of the statute, namely, the imposition of a mandatory sentence of death.

A person who stands unreformed after a long term of incarceration is not, by any logic entitled to preferential

treatment as compared with a person who is still under the sentence of life imprisonment. We do not suggest that the latter is entitled to preferential treatment over the former. Both have to be treated alike in the matter of prescription of punishment and whatever safeguards and benefits are available to the former must be made available to the latter.

Thus, there is no justification for prescribing a mandatory sentence of death for the offence of murder committed inside or outside the prison by a person who is under the sentence of life imprisonment. A standardised mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case.

It is because the death sentence has been made mandatory by section 303 in regard to a particular class of persons that, as a necessary consequence, they are deprived of the opportunity under *section 235 (2) of CrPC, 1973* to show cause why they should not be sentenced to death and the court is relieved from its obligation under *section 354 (3) of CrPC, 1973* to State the special reasons for imposing the sentence of death. The deprivation of these rights and safeguards which is bound to result in injustice is harsh, arbitrary and unjust.

There are as many as 51 sections[133] of *IPC, 1860* which provide for the sentence of life imprisonment. A person who is sentenced to life imprisonment for any of these offences incurs the mandatory penalty of death under section 303, if he commits a murder while he is under the sentence of life imprisonment. It is impossible to see the rationale of this aspect of *section 303 IPC*.

Section 303 of IPC violates the guarantee of equality contained in *Article 14* as also the right conferred by *Article 21 of Constitution of India*.

Justice Chinnappa Reddy stated:

Section 303 IPC, 1860 is an anachronism. It is out of tune with the march of the times. It is out of tune with the rising tide of human consciousness. It is out of tune with the philosophy of an enlightened *Constitution* like ours. It particularly offends *Article 21* and the new jurisprudence which sprung around it ever since the *Bank Nationalisation* case,[134] freed it from the confines of *Gopalan*.[135]

Judged in the right shade by *Maneka Gandhi*,[136] and *Bachan Singh*,[137] it is impossible to uphold *section 303 IPC* as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the judge as soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without the involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws and must be struck down as unconstitutional.

It is ordered accordingly.

(1) ***Uganda: Mandatory Death Sentences Abolished***: The Supreme Court of Uganda on 21 January 2009 upheld the Judgment of the Uganda, Constitutional Court, which held that the mandatory application of the death penalty is unconstitutional, although the death penalty itself remains constitutional. The court also decided that the mandatorily imposed death sentences received by the vast majority of more than 400 appellants in this case should be commuted to life imprisonment.

(2) ***Barbados***: The Inter-American Court of Human Rights ruled in September 2009 in the case of *DaCosta Cadogan v Barbados,* that the mandatory death sentences, imposed in murder cases in *Barbados* violated the right to life: according to the Court, the mandatory imposition of the death penalty is arbitrary and fails to limit the application of the death penalty in the most serious crimes, in violation of *Articles 4* (1) and *4* (2) of the American Convention on Human Rights.

US Supreme Court—mandatory death sentence violates eighth and fourteenth amendments to US Constitution and, hence, void—1977

Lockett v Ohio[138]

Chief Justice Burger delivered the opinion of the court on the constitutionality of the Ohio death penalty statute under which, the petitioner was sentenced to death. The court, by a majority of 5 to 4,[139] granted certiorari to consider, amongst other questions, whether Ohio law violated the Eighth[140] and Fourteenth[141] Amendments by

sentencing Sandra Lockett to death, pursuant to a statute that narrowly limits the sentence's discretion to consider the circumstances of the crime and the record and character to the offender as mitigating factors.

While allowing the petition, the court reversed the judgment insofar as it upheld the death penalty, and remanded the case.

The Ohio death penalty statute provides that once a defendant is found guilty of murder with at least one of seven specified aggravating circumstances, the death penalty must be imposed unless, considering "the nature and circumstances of the offense and the history, character, and condition of the offender," the sentencing judge determines that at least one of the following circumstances is established by a preponderance of the evidence:

(1) the victim induced or facilitated the offence;

(2) it is unlikely that the offence would have been committed but for the fact that the offender was under duress, coercion or strong provocation or

(3) the offence was primarily the product of the offender's psychosis or mental deficiency.

The petitioner, whose conviction of aggravated murder with specifications that it was committed to escape apprehension for, and while committing or attempting to commit, aggravated robbery, and whose sentence to death was affirmed by the Ohio Supreme Court attacked the constitutionality of the death penalty statute on the ground, inter alia, that it did not give the sentencing judge a full opportunity to consider mitigating circumstances in capital case as required by the Eighth and Fourteenth Amendments.

Accepting the prisoner's contention, the court said, that the limited range of mitigating circumstances that may be considered by the Ohio death penalty statute was unconstitutional.

(a) The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any respect of a defendant's character or record and any of the circumstances of the offence that the defendant proffers (offers) as a basis of a sentence less than death.

(b) The need for treating each defendant in a capital case with the degree of respect due to the uniqueness of the individual is far more important than in capital cases, particularly in view of the unavailability with respect to an executed capital sentence of such post conviction mechanisms in non-capital cases as probation, parole, and work furloughs.

(c) A statute that prevents the sentence in capital cases from giving independent mitigating weight to aspects of the defendants character and record, and to the circumstances of the offense proffered in mitigation, creates the risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty, and when the choice is between life and death, such risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

(d) The Ohio death penalty statute does not permit the type of individualised consideration of mitigating factors required by the Eighth and Fourteenth Amendments. Only the three factors specified in the statute can be considered in the mitigation of the defendants' sentence, and once it is determined that none of those factors present, the statute mandates the death sentence.

Judgment was reversed as it upheld the death penalty.

Louisiana mandatory death sentence violates Eighth and Fourteenth Amendments—unconstitutional—US Supreme Court—1976

Roberts v Louisiana,

428 US 325 (1976)

On 18 August 1973, in the early hour of the morning, Richard G Lowe was found dead in the office of the Lake Charles, LA, gas station where he worked. He had been shot four times in the head. Four men including the petitioner were charged with first degree murder for killing Richard G Lowe, in violation of section 1 (1) of LSA-RS 14:30.[142]

According to the amended law, all persons found guilty of first degree murder, armed robbery, aggravated rape, aggravated kidnapping, or treason were automatically sentenced to death.

The jury found the petitioner guilty as charged. As required by State law, the trial judge sentenced him to death. The Supreme Court of Louisiana affirmed the sentence rejecting the petitioner's contention that the new procedure for imposing the death penalty was unconstitutional.

The judgment was reversed by the US Supreme Court insofar as it upheld the death sentence, and the case was remanded.

Justices Steward, Powell K, Stevens, (Brennan and Marshall, JJ, concurred) concluded that:

(1) The imposition of the death penalty was not per se cruel and unusual punishment violative of the Eighth and Fourteenth Amendments. *(Gregg v Georgia).*

(2) Louisiana's mandatory death penalty statute violated the Eighth and Fourteenth Amendments.

  (a) Louisiana statute imposing death sentence was invalid.

  (b) Though the respondent state claimed that it had adopted satisfactory procedures to comply with *Furman's* requirement that standard less jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences, that objective had not been realised, since the responsive-verdict procedure not only lacked standards to guide the jury in selecting among first degree murderers, but it plainly invited the jurors to disregard their oath and choose a verdict for a lesser offense whenever they felt that the death penalty was inappropriate.

Justice White filed a dissenting opinion, in which Burger, CJ and Blackmun and Rehnquist, JJ joined.

Imprisonment of life without parole in case of juvenile constituted cruel and unusual punishment in violation of the VIIIth Amendment to US Constitution—US Supreme Court—2010

Terrance Jamar Graham v Florida[143]

In *Terrance Jamar Graham v Florida*, while the defendant was a juvenile, he was convicted for armed burglary with assault and sentenced to imprisonment for life without parole.

Having lost his plea by the Court of Appeal of the State of Florida, the defendant approached the US Supreme Court against his sentence.

Allowing the appeal by a majority of 4 to 2, the US Supreme Court held the sentence of life imprisonment without parole constituted cruel and unusual punishment. Court said that the VIIIth amendment prohibited the imposition of a life sentence without parole on the juvenile offender who committed a non homicidal offence; and while the defendant need not be guaranteed eventual release from the life sentence, he must have some realistic opportunity to obtain release before the end of the life term.

The practice of sentencing of juvenile who did not commit a homicide offense to life without parole was exceedingly rare and a national community consensus has developed against it; and none of the recognized goals of penal sanctions, i.e., retribution, deterrence, incapacitation, and rehabilitation, provided an adequate justification for the sentence. Further, it could not be conclusively determined at the time of sentencing that the juvenile defendant would be a danger to society for the rest of his life, and a sentence of life without parole improperly denied the juvenile offender a chance to demonstrate growth, maturity and rehabilitation.

English Law: Mandatory life sentence is legal—House of Lords—2000

R v Secretary of State for the Home Department, ex parte Hindley,

[2000] 2 All ER 385 (HL) : [2000] UKHL 21 : *[2001] 1 AC 410*

Per Lord Steyn:

The applicant, *Myra Hindley*,[144] a prisoner serving mandatory life sentence for murder[145] was informed by the Secretary of State for the Home Department that in her case the tariff necessary to satisfy the requirements of retribution and deterrence would be whole life tariff, i.e. detention for the whole of her natural life. She challenged the order of the Secretary of State and commenced the judicial proceedings before the Divisional Court seeking an order quashing the decision to impose a whole life tariff on the ground that:

(i) The decision of the respondent, the Secretary of State for the Home Department, communicated on 19 November 1997 to maintain the whole life tariff imposed on the applicant; and

(ii) The policy of the Secretary of State to maintain a category of whole life sentence prisoners was inappropriate.

The Division Court[146] whose decision was affirmed by the Court of Appeal,[147] dismissed those proceedings. Hindley appealed to the House of Lords. Rejecting the appeal the House of Lords held that:

> It was impossible to conclude that life imprisonment meant a finite period short of the natural life of the prisoner. When that provision had been enacted, it was clear from the wording of section 27[148] of Prison Act 1952, that, as a matter of law, a sentence of life imprisonment was understood to authorise the detention of a person for an indeterminate period which was brought to an end only by the death of the prisoner or a decision by the secretary of State to release him.
>
> that certain crimes were so wicked that the requirements of retribution and deterrence would not be exhausted even if the prisoner was detained until he died. It followed that the system of imposing whole life tariffs was not unlawful. Nor was it unlawful, in the particular circumstances of the instant case, to impose such a tariff on Hindley accordingly. The appeal was dismissed.[149]

Australia - A conviction for wilful murder attracts a Mandatory penalty of life imprisonment that may be either (i) strict security life imprisonment or (ii) life imprisonment.

Roberts v The Queen,

[1957] SCR 28

This is an application for leave to appeal against the sentence of strict security life imprisonment imposed upon the appellant with a non-parole period of 20 years for wilful murder. The single ground of appeal is that:

The trial Judge erred in law in that the judge sentenced the appellant to strict security life imprisonment with a minimum of 20 years instead of life imprisonment.

The contentions relied upon in support of the ground of appeal were that the Judge failed to properly exercise the discretion in deciding that:

(a) the wilful murder was in the upper range; and

(b) even if it was in the upper range it was unnecessary to impose strict security life imprisonment instead of life imprisonment, given the absence of aggravating factors (apart from the number of stab wounds), the antecedents of the applicant and other relevant particulars.

Section 282 of Criminal Code (WA) provides that a person, other than a child, who commits the crime of wilful murder is liable to a mandatory punishment of strict security life imprisonment or life imprisonment.

On the afternoon of 20 March 2000 the accused went to the Middle Swan Park on the upper reaches of the Swan River. The accused does not seem to have gone there for any particular reason. Between about 1.15 and 2.30 pm the accused was sitting on the riverbank and talking to the deceased Mr Weston, whom he had met there. The deceased said something to the accused or made some gesture which enraged him, probably a homosexual approach of some sort. The accused took from a pouch on the side of his jeans a folding knife and attacked the deceased with it. The victim tried to defend himself by raising his arm, which received a number of slashing type wounds from the knife.

At some stage, different items in his possession, a ring and watchband were dropped and he retreated from the accused. As he retreated from the accused he pursued the victim and stabbed him many times. A large pool of blood, was left some 30 paces or thereabouts from the point where he was ultimately found. There was a trail of blood described as being a type of splashing trail as of someone bleeding heavily over a distance of 30 paces or so, indicating that he had attacked him, pursued him with the knife, over that distance.

Finally, the victim collapsed in scrub near a fence which divides the Middle Swan Park from private property. In total the accused inflicted upon the victim more than 100 wounds. Some were so savage as to almost sever his head from his body. The wounds were all over his body including his back.

Dismissing the appeal and upholding the conviction, the Court said,

> this was a wilful murder committed for no apparent motive other than to kill in response to some imagined, but apparently non-existent or, at best, marginal provocation, in circumstances which involved the frenzied infliction of continuous and repeated stab wounds amounting to 98 in all, combined with the pursuit of the victim up the river bank. The circumstances of the commission of the crime can only be described as horrific. In the circumstances under which the applicant embarked on, what can only be described as a kind of killing frenzy, were themselves sufficient to place this particular offence of wilful murder in the upper range of offences of that kind.

Appeal dismissed. Conviction upheld.

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75 *Dalip Singh v State of Punjab,* AIR 1953 SC 364 : 1954 SCR 145, held, in a case of murder, the death sentence should ordinarily be imposed unless the trying judge, for reasons which should normally be recorded, considers it proper to award the lesser penalty.

76 *Code of Criminal Procedure 1973, section 354* (3), reads: When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

77 *State of UP v Paras Nath Singh,* AIR 1973 SC 1073 : (1973) 3 SCC 647; *Ediga Anamma v State of AP,* AIR 1974 SC 799 : (1974) 4 SCC 443. In this case, the accused, a married woman of 24 years was flogged out of her husband's house by her father-in-law, and was living with her parents along with her only child. She got entangled with a middle-aged widower, who simultaneously had an affair with another young woman, the deceased. She killed her rival as well as the little baby of the deceased, with a chisel. She also disfigured the face of the victim which was found burnt. She buried the body of the child. The accused later confessed her guilt which was recorded by police and her confession led to the discovery of the child's body, a bundle containing burnt clothes, and the chisel etc. She was found guilty and sentenced to death under *sections 302* and *201* of *Indian Penal Code, 1860*, by trial court which was confirmed by the High Court. In appeal, the Supreme Court reduced the sentence to life imprisonment. See also *Balwant Singh v State of Punjab,* AIR 1976 SC 230 : (1976) 1 SCC 425.

78 AIR 1980 SC 898 : (1980) 2 SCC 684 : 1980 Cr LJ 636. The majority, led by YV Chandrachud CJ and RS Sarkaria, AC Gupta and NL Untwalia, JJ held death sentence constitutional and the minority, led by PN Bhagwati J held it unconstitutional; see also *Rajendra Prasad v State of Uttar Pradesh,* AIR 1979 SC 916 : (1979) 3 SCC 646.

79 *Deena alias Deen Dayal v UOI,* AIR 1983 SC 1155 : (1983) 4 SCC 645.

80 *Code of Criminal Procedure 1973, section 43*, reads: Arrest by private person and procedure on such arrest—(1) Any private person may arrest or cause to be arrested any person who in his presence, commits a non bailable cognizable offence, or any proclaimed offender....

81 Ibid, section 37, provides an obligation on every person to assist magistrate and police officer on demand (a) in the taking or preventing the escape of any other person whom such magistrate or police officer is authorised to arrest; or (b) in the prevention or suppression of a breach of peace; or (c) in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property.

82 Ibid, section 129, provides for dispersal of assembly by use of civil force.

83 A feud between two families has resulted in tragic consequences. 17 lives were lost (men, women and children) in the course of a series of five incidents which occurred in quick succession in five different villages, situated in the vicinity of each other in Punjab between 12 and 13 August 1977.

84 BN Agrawal, GS Singhvi and Aftab Alam.

8.5 Death Sentence

85 Appellant Swamy was prosecuted under *section 302* read with *section 201 IPC* for causing death of his wife Shokereh by administering her sleeping pills and thereafter putting her body inside a large wooden box that he had earlier got made for the purpose and dropping box into a pit that he had got specially dug up in grounds of his house just outside their common bed-room. Prosecution case is that deceased victim of the crime, came from a highly reputed and wealthy back-ground and appellant had married her for her wealth. Since the case was proved beyond reasonable doubt the appellant was sentenced to death for offence of murder under *section 302 IPC* by the trial court which was confirmed by High Court.

On appeal to the apex court appellant's conviction was upheld by bench of two judges unanimously but they were unable to agree to the punishment meted out to appellant. One of the judges felt that in facts and circumstances of case punishment of life imprisonment, rather than death would serve ends of justice making however clear that appellant would not be released from prison till the end of his life. Other judge on the other hand, took the view that appellant deserved nothing but death.

86 Criminal Appeal No 66, decided on 24 March 1949 the order of the special court Delhi. YD Padke, *Nathuramayan*—a well known historian and writer. Author is grateful to Mr PC Das for providing the materials of Gandhiji's assassination.

87 Report of the Jeevenal Kapur Commission constituted by the Government of India to investigate into the assassination of Mahatma Gandhi.

88 Pradeep Delvis, *Mee Nathuram Boltoy.*

89 The report of the commission of inquiry into the conspiracy to murder Mahatma Gandhi: Part 1, p 61. *The Murder of the Mahatma,* p 237-238.

90 Pyarelal, *Mahatma Gandhi: The Last Phase*, vol 2, p 766.

91 On 1st and 2nd December 1947, representatives of both countries—India and Pakistan had discussed the issue and decided that of the cash balance of Rs 375 crore, Pakistan's share was Rs 75 crore. Out of this sum of Rs 75 crore, Rs 20 crore had been given to Pakistan to temporarily take care of its financial needs when Pakistan was just coming into existence on 14 August 1947, and it was decided in the agreement of 2nd December 1947 that the balance amount of Rs 55 crore should be handed over later by the Indian Government to the Pakistan Government. Pakistan had a right to this cash of Rs 55 crore and the Indian Government recognised this right.

92 Pyarelal, *Mahatma Gandhi: The Last Phase*, vol 2, 1958, pp 705-731.

93 Pyarelal, *Mahatma Gandhi: The Last Phase*, 1958, pp 715-716.

94 The Bench consisted of Justices Acchuram, Bhandari and Gopaldash Khosla.

95 Since at that time, in 1948, there was no *constitution* of the Republic, the Supreme Court came into existence after 26 January 1950, when the *Constitution* came into operation the Supreme Court did not exist.

96 A single gallows had been prepared for the execution of both Nathuram and Apte.

97 In his will, made on 14 November 1949, the day before he was hanged Nathuram had stated that his bones should be handed down generations but not immersed (into a river) till the Sindhu (Indus) river became a part of united Hindustan.

98 Pyarelal, *Mahatma Gandhi: The Last Phase*, Vol 2, pp 715-716.

99 *AIR 1988 SC 1883* : *(1988) 3 SCC 609* : 1988 SCR Supl (2) 24. On 31 October 1984, around 9 am, Beant Singh and Satwant Singh (security guards) opened fire on Mrs Indira Gandhi while she was approaching her office at 1, Akbar Road adjoining her residence at Safdarjang Road for an interview with an Irish television channel. Beant Singh fired five rounds and Satwant Singh 25 shots at her from their respective weapons. Mrs Gandhi sustained injuries and fell down, and was taken to the All India Medical Institute, where she succumbed to her injuries the same day. The cause of death was certified as haemorrhage and shock due to multiple firearm bullet injuries which were sufficient to cause death in the ordinary course of nature (section 300, cl 3), Kehar Singh (said to be uncle of Beant Singh) and Balbir Singh SI were arrested on 30 October 1984 since incriminating materials in connection with assassination of Mrs Gandhi were found from them.

100 *Indian Penal Code, 1860, section 109*, provides punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment. See KD Gaur, *A Textbook on Indian Penal Code,* 4th Edn, 2008, commentary under *sections 109*, *120A* and *120B*, *IPC* Cross-reference.

101 For text of *section 120A* and *120B IPC* see Chapter 6 on "Preliminary Crimes".

102 *Code of Criminal Procedure 1973, section 235* (2), provides that: If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360 (release on probation of good conduct or after admonition) hear the accused on the question of sentence, and then pass sentence on him according to law.

103 *AIR 1992 SC 2100* : *(1992) 3 SCC 700* : 1992 SCR (3) 480. On the morning of 10 August 1986, while General Vaidya was returning to his residence in Pune around 10.30 am after shopping a red Ind-Suzuki motor cycle came parallel to the car on the side of General Vaidya and the person occupying the pillion seat of the motor cycle fired three shots from close range at the head of General Vaidya. Before his wife and security man could realize what had happened, General

Vaidya slumped on the shoulder of his wife. He was carried to the command hospital where he was declared deat. On 7 September 1986, both accused no 1 and accused no 2 were apprehended and a pistol and revolver along with live cartridges were recovered from them. Besides the two accused no 1 and 2, the other accused nos 3, 4 and 5 (Yadvinder Singh, Avtar Singh and Harjinder Singh) were also involved in the assassination of General Vaidya.

104 See *Suraj Ram v State of Rajasthan,* AIR 1997 SC 18 : (1996) 6 SCC 271; *Kamla Tiwari v State of MP,* AIR 1996 SC 2800 : (1996) 6 SCC 250—an innocent helpless girl of seven years was subjected to rape, strangled to death and her body thrown in a well which caused disappearance of evidence. Held, falls within "rarest of rare" cases therefore death sentence imposed; *Umashanker Panda v State of MP,* AIR 1996 SC 3011 : (1996) 8 SCC 110—while all members of the family were asleep, the accused killed his wife and two daughters with a sword and inflicted injuries on others when they protested. There was neither provocation nor case of mental derangement. Held, the case is within the rarest of rare cases and death sentence justified. Also see *Shaikh Ayub v State of Gujarat*, AIR 1998 SC 1285 : (1998) 9 SCC 521.

105 AIR 2011 SC 970 : [2011] 2 SCR 939 : (2011) 4 SCC 80 : 2011 Cr LJ 3137 : JT 2011 (2) SC 118, per Justice Markandey Katju and Gyan Sudha Misra, JJ.

106 The barbaric serial killing of Nithari were revealed in December 2007 after a chopped body was recovered from a drain outside pandher's house. As the CBI took over the investigation, it registered 19 FIRs. Seventeen chargesheets were filled before a special court in Noida against Koli and Pandher. They were convicted under *section 302 IPC* for murder and sentenced to death. While Koli's sentence was upheld by the High Court, the latter reversed it in Pandher's case. He was acquitted on the basis of lack of evidence. An appeal is pending before the apex court against acquittal of Pandher by High Court.

107 AIR 2006 SC 3056 : (2006) 7 SCC 442 : JT 2006 (8) SC 282 : 2006 (8) Scale 604, per Justices KG Balakrishnan and GP Mathur delivered the judgment.

108 The Times of India, 1 September 2006, p 1. The idea to kidnap children struck the trio after Renuka, caught snatching a purse at a temple, was left off by a crowd who gave her the benefit of doubt assuming that someone accompanied by a small child (in this case her son) could not commit a crime.

109 AIR 1981 SC 1572 : (1981) 3 SCC 324 : 1981 SCR (3) 512. Justices, AP Sen and Baharul Islam and YV Chandrachud delivered the judgment; Kuljeet Singh alias Ranga Khus, was convicted along with one Jasbir Singh alias Billa, by the learned Additional Sessions Judge, Delhi for various offences in connection with the murder of two young children, Geeta Chopra and her brother Sanjay. The two accused were sentenced to death for the offence under *section 302* read with *section 34* of the *IPC, 1860* and to varying terms of imprisonment under sections 363, 365, 366 and 367 read with section 34 of the Code.

110 B Sudershan Reddy, Surinder Singh Nijjar, JJ.

111 AIR 2017 SC 4970 : 2017 (4) Crimes 280, per AK Sikri and Ashok Bhushan, JJ.

112 AIR 2010 SC 832 : [2009] 13 SCR 1082 : 2009 (12) Scale 105, VS Sirpurkar and Deepak Verma, JJ.

113 *Code of Criminal Procedure 1973, section 354* (5) reads: When any person is sentenced to death, he sentence shall direct that he be hanged by the neck till he is dead.

114 *Attorney General of India v Lachma Devi,* AIR 1986 SC 467 : 1989 Supp (1) SCC 264. At present, in the United States there are five modes of executions in practice, namely; (i) hanging (the oldest), (ii) firing squad, (iii) electrocution (electric-chair); (iv) gas chamber and (v) lethal injections.

115 402 US 183 (1971) : 28 L Ed 2d 711 : 1971 US Lexis 107.

116 Fourteenth Amendment to US *Constitution* 1868, states: "...No state shall deprive any person of life, liberty or property, without due process of law...."

117 408 US 238 (1972) : 33 L Ed 2d 346 : 1972 US Lexis 169. Majority judgments were delivered by the Stewart, White, Douglas, Brennan and Marshall, JJ. Dissenting opinions were given by the Burger, Blackmun, Powell and Rehnquist, JJ.

118 *Proffitt v Florida,* 428 US 242 (1976).

119 *Jurek v Texas,* 428 US 262 (1976).

120 *Woodsan v North Carolina,* 428 US 280 (1976) : 96 S Ct 2978, 2991 : 49 L Ed 2d 944 (1976).

121 *Roberts* (*Stanislaus*) *v Louisiana,* 428 US 325 (1976).

122 Justice Kennedy, delivered the opinion of the court in which Justices Stevens, Souter, Ginsburg and Breyer joined. Justice Steven filed a concurring opinion in which Justice Ginsburg joined. "O" Connor, filed a dissenting opinion, Scalia, J filed a dissenting opinion in which Rehnquist, CJ and Justice Thomas joined.

123 Benjamin, being less than 16, was not held liable for death sentence.

124 *Stanford v Kentucky,* 492 US 361 (1989) : 109 S Ct 2969 : 106 L Ed 2d 306 : 1989 US Lexis 3195. For facts and judgment of the case see KD Gaur, *Criminal Law: Cases and Materials,* 5th Edn, 1999, pp 436-437.

125 *Erlich Anthony Coker v State of Georgia,* 433 US 584 (1977) : 97 S Ct 2861 : 53 L Ed 2d 982 : 1977 US 146. Death sentence for rape violates Eighth Amendment which prohibits cruel and unusual punishment.

126 487 US 815 (1988) : 1988 US Lexis 3028. See KD Gaur *"Criminal Law: Cases and Materials"*, 5th Edn, 2008, pp 436-437 for facts and judgment of the case.

127 492 US 361 (1989) : 1989 US Lexis 3195. See facts and judgment; of the case KD Gaur, *Criminal Law cases and Materials*, 5th Edn, (2008) pp 437-438.

128 536 US 304 (2002). Justice Stevens, delivered the opinion of the court in which O'Connor, Kennedy, Souter, Ginsburg and Breyer, JJ joined. Chief Justice Rehnquist filed a dissenting opinion, in which Scalia and Thomas, JJ joined.

129 Atkins, at approximately midnight on 16 August 1996 armed with a semi-automatic handgun, abducted Eric Nesbitt and robbed him of the money on his person, drove him to an automated teller machine in his pickup truck where cameras recorded their withdrawal of additional cash, then took him to an isolated location where he was shot eight times and killed.

130 *Penry v Lynaugh,* 492 US 302 (1989) : 106 L Ed 2d 256 : 1989 US Lexis 3148.

131 356 US 86 (1958).

132 Ibid, pp 100-101.

133 Sections 121, 121-A, 122, 124-A, 125, 128, 130, 131, 132, 194, 222, 225, 232, 238, 255, 302, 304 Pt I, 305, 307, 311, 313, 314, 326, 329, 363-A, 364, 371, 376, 388, 389, 394, 395, 396, 400, 409, 412, 413, 436, 438, 449, 459, 460, 467, 472, 474, 475, 477, 489-A, 489-B, 489-D and section 511 (attempt to commit offences punishable with imprisonment for life) of *Indian Penal Code 1860* provide for the sentence of life imprisonment.

134 *RC Cooper* v *UOI,* AIR 1970 SC 564 : [1970] 3 SCR 530.

135 *AK Gopalan v State of Madras,* AIR 1950 SC 27 : [1950] 1 SCR 88.

136 *Maneka Gandhi v UOI,* AIR 1978 SC 597 : (1978) 1 SCC 248.

137 *Bachan Singh v State of Punjab,* AIR 1980 SC 898 : (1980) 2 SCC 684.

138 438 US 586 (1977) : 98 S Ct 2954 : 57 L Ed 2d 973 : 1978 US Lexis 133; *Roberts v Louisiana,* 428 US 325 (1976).

139 Chief Justice Burger, Stewart, Powell, Blackmun and Stevens, JJ joined. Justice White, filed a dissenting opinion, in which Burger, Blackmun and Rehnquist, JJ joined.

140 Eighth Amendment 1791—cruel and unusual punishments (shall not be) inflicted.

141 Fourteenth Amendment 1869—No State (shall) deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

142 Before these amendments, Louisiana law defined the crime of "murder" as the killing of a human being by the offender with a specific intent to kill or to inflict great bodily harm or by an offender engaged in the perpetration or attempted perpetration of certain serious felonies, even without an intent to kill. The jury was free to return any of four verdicts: guilty, guilty without capital punishment, guilty of manslaughter, or not guilty.

143 560 US 48 : 2010 US Lexis 3881 : 176 L Ed 2d 825, judgment was delivered on 17 May 2010.

144 Hindley was charged with two murders and had been convicted in 1965, which were the culmination of a series of five murders committed by her and Brady. They abducted, terrified, tortured and killed their victims before burying their bodies on Saddleworth More. Hindley was a woman of competent understanding.

145 Murder (Abolition of Death Penalty) Act 1965, section 1 so far as material, provides:

> (1) A person convicted of murder shall be sentenced to imprisonment for life.
>
> (2) On sentencing any person convicted of murder to imprisonment for life the court may at the same time declare the period which it recommends to the Secretary of State as the minimum period which in its view should elapse before the Secretary of State orders the release of that person.

146 [1998] QB 751, Per Lord Bingham of Cornhill CJ, Hooper and Astill, JJ.

147 [2000] 1 QB 152, Per Lord Woolf MR, Hutchison and Judge LJJ.

148 Prison Act 1952, section 27 provides:

> (1) The Secretary of State may at any time if he thinks fit release on licence a person serving a term of imprisonment for life subject to compliance with such condition, if any, as the Secretary of State may from time to time determine.

(2) The Secretary of the State may at any time by order recall to prison a person released on licence under this section.

149 See also *State of MP v Ratan Singh, AIR 1976 SC 1552* : *(1976) 3 SCC 470* discussed under *section 57 of Indian Penal Code 1860*.

91B (2003) WASCA 237 (2003) Australia.

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8.6 Homicide by Negligence

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.6 Homicide by Negligence

304-A. Causing Death by Negligence.—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comment: To impose criminal liability under *section 304A IPC, 1860* it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that the act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans* (immediate or operating cause); it is not enough that it may have been the *causa sine qua non* (a necessary or inevitable cause).[150] That is to say, there must be a direct nexus between the death of a person and the rash or negligent act of the accused.

The "punishment of two years, fine or both", should be enhanced. With the Indian roads becoming lethal as is evident with the official figures revealing that nearly 934 people die in road accidents every day, and at least one life is lost every one and half minutes with a total of 3,40,794 death reported in 2005.[151] As figures released by the International Road federation, India has the dubious distinction and honour of topping the list of road death across the world in as much as more than Three Lakh Forty Thousand deaths on road took place in India in the year 2007. No doubt, road accidents are problem everywhere, but in India things have become worse. With just 1 per cent of the world's vehicle, India accounts for 10 per cent of road fatalities. A comparison of the United States which has close to 300 million population and more than 250 million vehicles, the number of deaths per 10,000 vehicles is 1.6 while in India the number is as high as 14. The reason is obvious—poor enforcement of traffic laws, deplorable conditions of road, lack of emergency medical services, apathetic attitude of policy makers and meagre punishment to the accused of fatal accidents.[152]

Killer Indian roads claim lives of 56 pedestrians a day. These roads are turning deadlier for pedestrians. Government data show the number of fatalities shooting up from 12,330 in 2014 to 20,457 in 2017—a jump of nearly 66%. It means 56 pedestrians died daily in road accidents last year, despite policy makers and authorities talking about prioritising safety for walkers.[153]

Pedestrians are the most vulnerable road users as they have no protection in case of an accident. Cyclists and two-wheeler occupants also fall in this category.

According to official data, an average of 134 two-wheeler occupants and nearly 10 cyclists were killed daily in road accidents in 2017.

Tamil Nadu reported a maximum number of 3,507 pedestrians killed in road accidents last year (in 2016) followed by Maharashtra (1,831) and Andhra Pradesh (1,379). Similarly, in the case of two-wheeler deaths, Tamil Nadu topped the list with 6,329 fatalities, followed by 5,699 in Uttar Pradesh and 4,659 in Maharashtra.

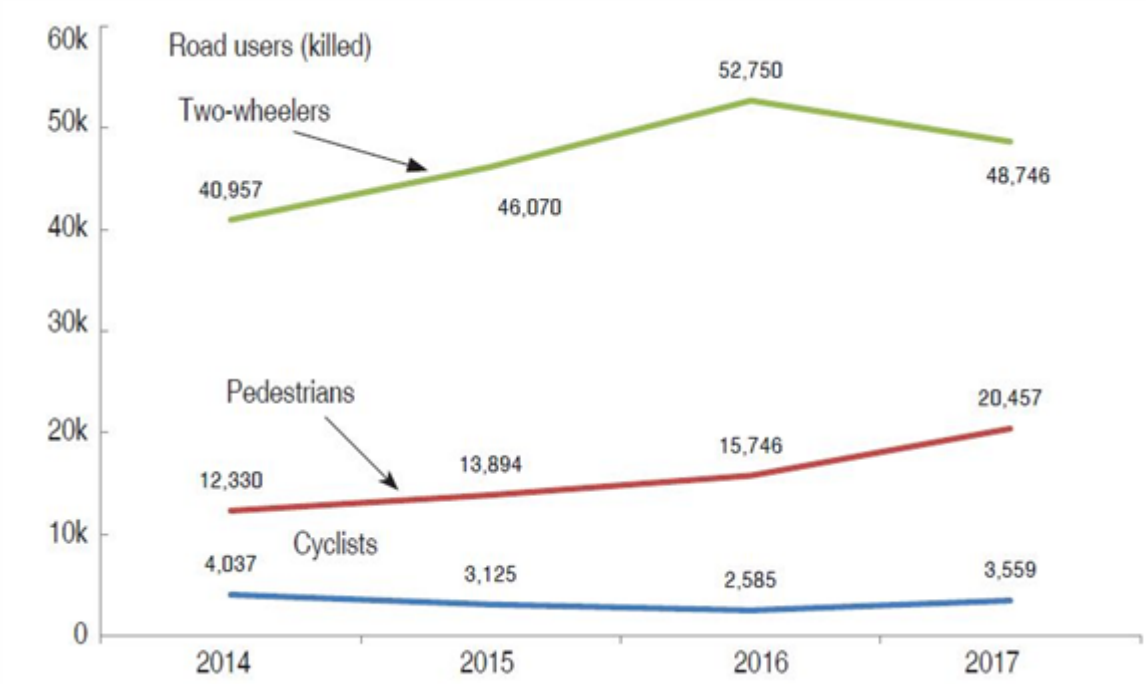
In total, the three categories of victims had more than half of the share of all road deaths across the country the last year. (2016)

In a step aimed at reducing road fatalities, the Centre has made it must for all models of two-wheelers from April 2019 to have anti-lock braking system (ABS).

Designated footpaths are routinely encroached on by parked vehicles and shops, especially in urban areas, forcing the pedestrians to walk on roads.

Generally improves control over the vehicle and decreases stopping distances on dry and slippery surfaces. Due to fear of a locked wheel, riders often don't apply the brake fully even in emergency situation which contributes to higher number of crashes. ABS can also avoid an accident or reduce collision speed significantly.

Data given below shows 134 two-wheeler riders killed every day.



It is high time that all round efforts should be made to minimize the gravity of road accidents to reduce the number of people dying on roads. Not only do these deaths have a high human cost, the World Bank estimates that they cost India approximately 3 per cent of its GDP. That itself should be enough for the policy makers to take effective measures. The meager punishment of two years with or without fine under *section 304A IPC* enacted as long ago as 1860 when road accidents were negligible and automobiles were rarely visible on roads.

Under the circumstances, punishment under *section 304A, IPC* should be enhanced to at least five years imprisonment with a minimum of two years, with fine of a minimum of Rs 1 lakh as in case of Germany.[154]

Indian Penal Code, 1860, sections 279, 337 and 304A - Rash and negligent driving - Determination – speed always does not determine the rashness and negligence - It is manner of driving that endagers the human life which is determative - Factor of rash negligent drivers - Other parameters that are applicable are "reasonable care" and doctrine of res ipsa loquitor - Supreme Court - 2012

Ravi Kapur v State of Rajasthan,

AIR 2012 Supreme Court 2006 : *(2012) 9 SCC 284*

Per Swatankar Kumar, J:

The facts relates to collision of jeep in which a person going in a jeep Govindgarh from Alwar on 20 April 1991 in Rajasthan to attend a marriage. A car was going ahead of the jeep, one bus driven by Ravi Kapur was coming from opposite direction with high speed. The driver in car immediately turned his car but it crashed with the jeep 3

persons died on the spot and the 4 persons were critically injured. A charge sheet under *section 173 of CrPC, 1973* was filed against the accused under *sections 279*, *337*, *338* and *304A IPC, 1860*. The court however acquitted the accused on the ground that the driver was negligent.

However, the High Court convicted under *section 304A IPC* and awarded to the accused simple imprisonment of two years with the fine of Rs 5000/-, in default of payment of fine, to undergo imprisonment of six months. The court also convicted the accused for offences under *section 279* and *337* of *IPC*, awarding him six months simple imprisonment with fine of Rs 1000/-, in default of payment to undergo one month imprisonment. Aggrieved from the judgment of the conviction and order of sentence passed by the High Court, the present Special Leave Petition has been filed in the apex court. Dismissing the appeal of High Court, apex court held that there are more than sufficient reasons for the High Court to interfere with Judgment of acquittal recorded by the Trial court. The court said, rash and negligent driving has to be examined in light of the facts and circumstances of a given case. It is a fact incapable of being construed or seen in isolation. It must be examined in light of the attendant circumstances. A person who drives a vehicle on the road is liable to be held responsible for the act as well as for the result. It may not be always possible to determine with reference to the speed of a vehicle whether a person was driving rashly and negligently. Both these acts presuppose an abnormal conduct. Even when one is driving a vehicle at a slow speed but recklessly and negligently, it would amount to “rash and negligent driving” within the meaning of the language of *section 279 IPC*. That is why the legislature in its wisdom has used the words “manner of rash or negligent as to endanger human life”. The preliminary conditions, thus, are that (a) it is the manner in which the vehicle should be driven; (b) it is driven rashly or negligently; and (c) such rash or negligent driving should be such as to endanger human life. Once these ingredients are satisfied, the penalty contemplated under *section 279 IPC* is attracted.

“Negligent” means omission to do something which a reasonable and prudent person guided by the considerations which ordinary regulate human affairs would do or doing something which a prudent and reasonable person guided by the similar condition would not do. Negligence is not an absolute term but is a relative one; it is rather a comparative term. It is difficult to state with precision any mathematically exact formula by which negligence or lack of it can be infallibly measured in a given case. Whether there exist negligence per se or the course of conduct to negligence will normally depend upon the attending and surrounding facts and circumstances taken into consideration by the Court. In the given case, even not doing what one was ought to do can constitute negligence.

The court has to adopt another parameter i.e. reasonable care in determining the question of negligence or the contributory negligence. The doctrine of reasonable care imposes an obligation or a duty upon a person to care for pedestrians, happen to be children of the tender years. It is axiomatic to say that while driving a vehicle on a public way, there is an implicit duty on the drivers to see that their driving a vehicle does not endanger the life of the right users of the road, may be either be either vehicular users or pedestrians. They are expected to take sufficient care to avoid danger to others.

The other principle that is pressed in aid by the courts in such cases is doctrine of *res ipsa loquitor*. This doctrine serves two purposes - one that an accident may by its nature be more consistent with its being caused by the negligence for which the opposite party is responsible than by any other causes and that in this case.

Penal Code of India, sections 53, 279, 337, 304A - Rash and neglect driving - accused endangered the life of innocent man by driving jeep on a public road in a rash and negligent manner - As a result of such accident, deceased who was traveling in jeep got injured and died, another persons, also received injuries - Order of High Court showing undue sympathy by modifying conviction period already gone - Not proper and liable to be set aside- Imposition of sentence must commensurate with gravity of offence - Supreme Court - 2015

While allowing the State appeal for enhancing the punishment, the Apex Court said, undue sympathy to impose the inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of the law. It is the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counterproductive in the long run and against the interest of the society. One of the prime objectives of the criminal law is imposition of adequate, just, proportionate punishment which commensurate with nature of crime and the manner in which the crime is committed. One should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with

gravity of crime. The punishment should not be so lenient that it shocks the conscience of the society. It is, therefore, solemn duty of the court to strike a proper balance while awarding the sentence as awarding lesser sentence encourages any criminal and, ad a result of the same, the society suffers. In the impugned case supra, the respondent-accused, who was driver of the jeep, and the accident occurred due to his rash and negligent driving. After completion of trial, the JMFC, Sabalgarh convicted the respondent-accused for the offence punishable under *sections 279*, *337*, *304A* of *IPC, 1860*. However, the High Court in revision reduced the sentence to the period already undergone through and upheld the conviction.

Appeal allowed, punishment enhanced

Death caused owing to the accused's laying a naked live electric wire amounts to gross rash and negligent act within the meaning of section 304-A of Indian Penal Code, 1860—1964

Cherubin Gregory v State of Bihar,

AIR 1964 SC 205 : *[1964] 4 SCR 199*

Facts: The appellant was charged under *section 304A of IPC, 1860* for causing the death of one Madilen by contact with an electrically charged naked copper wire which he had fixed up at the back of his house with a view to prevent the entry of intruders into his latrine. The deceased Madilen was an inmate of a house near that of the accused. The wall of the latrine of the house of the deceased had fallen down about a week prior to the day of the occurrence with the result that the latrine had become exposed to public view. Consequently the deceased, among others, started using the latrine of the accused. The accused resented this and made it clear to them that they did not have his permission to use it and protested against their coming there. The oral warnings, however, proved ineffective and it was for this reason that the accused made the entry dangerous to the intruders.

Justice Rajagopala Ayyangar observed:

The contention of the defence was that the deceased was a trespasser (*section 441, IPC*) and that there was no duty owed by an occupier like the accused towards the trespasser and therefore the latter would have no cause of action for damages for the injury inflicted and that if the act of the accused was not a tort, it could not also be a crime and that the act of the accused as a result of which the deceased suffered injuries resulting in her death was not an actionable wrong.

A trespasser is not an outlaw, a *Caput Lupinum.* The mere fact that the person entering a land is a trespasser does not entitle the owner or occupier to inflict on him personal injury by direct violence and the same principle would govern the infliction of injury by indirectly doing something on the land the effect of which he must know was likely to cause serious injury to the trespasser.

In England, it has been held that one who sets spring-guns to shoot at trespassers is guilty of a tort and that the person injured is entitled to recover.

It is no doubt true that the trespasser enters the property at his own risk and the occupier owes no duty to take any reasonable care for his protection, but at the same time the occupier is not entitled to do wilfully, acts such as set a trap or set a naked live wire with the deliberate intention of causing harm to trespassers or in reckless disregard of the presence of the trespassers. The voltage of the current fed into the wire precludes any contention that it was merely a reasonable precaution for the protection of private property.

The appeal is dismissed.[155]

A doctor administering poisonous medicines without studying its effect is liable for causing death by negligence vide section 304A IPC, 1860—Supreme Court—1965

Juggankhan v State of MP,

AIR 1965 SC 831 : *[1965] 1 SCR 14*

The appellant, a registered homoeopath administered 24 drops of mother tincture stramonium and a leaf of *dhatura* to Deobi, aged 20 years, who had been suffering from guinea worms for six weeks. She, accompanied by her mother, uncle and aunt went to the clinic of the appellant in pursuance of the advertisement made by the appellant

that he treated *naru* (guinea worm). After taking this medicine, she started feeling restless, fell ill and ultimately she died.

On chemical examination of the stomach contents, and pieces of liver, spleen and kidney, no poison could be detected in any of these items. The sessions Court and High Court convicted the accused under *section 302 of IPC* on the evidence of the deceased's uncle and Dr Patodia who deposed that the death was due to an irritant and it could be due to *dhatura.*

Allowing the appeal partly the Supreme Court held that:

A doctor administering poisonous medicine to his patient without thoroughly studying what would be the effect of such medicine is liable under *section 304A of IPC* for causing death by rash and negligent act, and not under *section 302 of IPC*. In the absence of proof that the dose given to the deceased was necessarily fatal or was administered with the knowledge that he was likely by such act to cause the death of the deceased, *section 299 of IPC* could not be invoked. Appeal partly allowed.

Res ipsa loquitor (thing speaks for itself) principle applicable in criminal law when cause of accident is unknown—Supreme Court—1979

Syed Akbar v State of Karnataka,

AIR 1979 SC 1848 : *(1980) 1 SCC 30*

While driving a bus at moderate speed, the driver suddenly noticed a four year old child attempting to cross the road. The road was 12 feet wide with deep ditches on both sides. The driver swerved the bus to extreme right to dodge the child but he was hit by the bus and died on the spot. He had swerved the bus to the extreme right, but to a certain limit, as there was a deep ditch by the side of the road, and if the bus had gone further, there was risk of the bus falling into the ditch.

It was held that the fact that the driver tried to dodge the child indicated that the accident happened due to an error of judgment and not negligence or want of driving skill. The appellant was acquitted and the appeal was allowed.

Doctor is not liable for criminal rashness or negligence under section 304A of the Indian Penal Code, 1860 for simple lack of care or error of judgment or accident in treatments—Supreme Court—2005

Jacob Mathew v State of Punjab[156]

In the case of *Jacob Mathew* (2005) the Supreme Court held that a doctor could not be prosecuted under *section 204 IPC, 1860* for causing death by negligence for a simple lack of care or error of judgment or accident that occurred during the treatment.

The deceased Jiwan Lal Sharma was admitted in a private ward of CMC Hospital Ludhiana. The patient felt difficulty in breathing on 22 February 1995 at about 11 pm. With much difficulty, two doctors—the appellant Dr Jacob Mathew and Dr Allen Joseph came to the patient after lapse of 20 to 25 minutes. An oxygen cylinder was brought and connected to the mouth of the patient but the breathing problem increased further. The oxygen cylinder was found to be empty. No other cylinder was available. Another oxygen cylinder was brought from the adjoining room. However, there was no arrangement to make the gas cylinder functional. By the time, another doctor came, five top seven minutes were wasted, and the patient was dead.

The trial magistrate framed charges under *section 304-A IPC, 1860* for causing death by negligence against both doctors and nurse and for non-availability of oxygen cylinder. The High Court of Punjab upheld the charge and quashed the revision petition filed by the doctors. The doctors moved the Supreme Court against the High Court's verdict.

Allowing the revision petition and quashing the charge, the Supreme Court held that since it is not the case of the complainant that the accused-appellant was not qualified to treat the patient when he agreed to treat, but it is a case of non-availability of oxygen cylinder either because of the hospital having failed to keep available an oxygen cylinder or because of the oxygen cylinder being found empty, the doctors are not liable. In such a condition, it is the hospital that may be liable in civil law but the accused-appellant cannot be proceeded against under *section 304A IPC, 1860*.

Some of the guidelines formulated by the Supreme Court, which should govern the prosecution of doctors for offences of criminal rashness or criminal negligence are listed below:

(i) Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to that person sued. The essential components of negligence are three: “duty”, “breach” and “resulting damage”.

(ii) A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment is also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed.

(iii) When the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment were not generally available at the time of the incident at which it should have been used.

(iv) A professional may be held liable for negligence on one of the two findings, viz, either he was not possessed of the requisite skill which he professes to have possessed, or he did not exercise, with reasonable competence in the given case, which he did possess.

(v) The standard to be applied for judging, whether the person charged had been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices.

(vi) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. The degree of negligence must be much higher, ie, gross or of a very high degree in criminal negligence. Negligence, which is neither, gross nor of a very high degree may provide a ground for action in civil law but cannot be the basis for prosecution.

(vii) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury that resulted was most imminent.

(viii) A private complaint may not be entertained against a doctor unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.

(ix) A doctor accused of rashness or negligence may not be arrested in a routine manner (simply because a charge has been levelled against him), unless the arrest is necessary for furthering the investigation or for collecting evidence.

(x) Simply because a patient has not favorably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of *res ipsa loquitur* (i.e., the thing speaks for itself).

Comments: It is submitted with due respect that perhaps the Supreme Court has failed to appreciate the gravity and importance of life of an ailing man struggling for life. It appears the Hon’ble Court has taken the matter very casually knowing fully well that under the present conditions in our country the hospitals and doctors hardly take care of the patient’s life and on times they play with life of innocent and helpless patients. A glaring case of criminal negligence can be noticed when a baby was declared dead who was later found alive in Max hospital at Delhi in December 2017 by the doctors. The Court should have taken a pragmatic and practical view in the matter and dealt with the case with an iron hand to set an example instead of letting loose both the doctors and hospital authorities. The precious life of a patient could prolong had an attempt been made to put him on oxygen cylinder. In critical cases, stand by arrangements must be available. That, it was either not available or was not provided to the hapless patient in this case is beyond any shade of doubt. What more *criminal act* of gross negligence and carelessness need be cited?

Is it not an act of criminal negligence punishable under *section 304A IPC, 1860* on the part of the doctors who did not attend the patient and the hospital authorities could not make available another oxygen cylinder when it was

found empty; and not even got the cylinder functional when patient's life was at risk and he was struggling hard for life?

It is surprising that the court neither imposed monetary compensation nor permitted prosecution of even hospital establishments for gross criminal negligence and failure in providing minimum basic life saving facilities that are guaranteed under *Article 21 of Constitution of India*. The Court has perhaps evaded its constitutional obligation by simply saying that hospital might be liable in civil law. The court should have taken a proactive and pragmatic approach and decided the case accordingly. This is a case of well-reputed hospital in a city like Ludhiana. One can imagine the plight of the patients in government hospitals and other private hospitals and clinics in small towns where fewer facilities are available.

It would perhaps be desirable if the judgment were reviewed and examined afresh and strict view is taken of gross negligence of hospitals so that the patient's precious life could not be put at the whim of the hospital authorities and doctors.

Medical Negligence: Nizam Institute of Medical Science, Hyderabad liable to pay one crore damages for negligence of the doctor damaging spinal cord paralyzing the patient—Supreme Court—2009

Prashant Dhananka v Nizam Institute of Medical Science, Hyderabad[157]

The Supreme Court on 14 May 2009 has awarded damages of Rs 1 crore, the highest ever awarded by any Court; to Prashant S Dhananka, a technocrat who found himself paralyzed waist down after a surgeon damaged his spinal cord during an operation to remove a benign tumour in the chest.[158] Prashant S Dhananka has been confined to bed since the operation 19 years ago. Though the amount of Rs One Crore is a pittance compared to the 5 million pounds (a little over Rs 37 crore) awarded to British TV actress Leslie Ash in a similar case in 2008, the Supreme Court ruling could be a trendsetter for judicial re-evaluation of compensation for victims of medical negligence while increasing the compensation amount from 15 Lakh awarded by High Court to 1 crore.

Dhananka's nightmarish experiences is similar to the case of national table tennis player V Chandrashekhar, who fought a legal battle against Apollo Hospital, Chennai, for over a decade before being awarded Rs 19 lakh by the Supreme Court in February 1995, the highest compensation in a medical negligence case in India before the Dhananka verdict. Chandreshekar too had been left partially paralyzed due to medical negligence.[159]

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150 *Baijnath Singh v State of Bihar,* AIR 1972 SC 1485 : (1972) 2 SCC 264 held, the accused bus driver was not liable under section 304A, and *section 279 of Indian Penal Code, 1860*, for accident caused as a result of fall of certain corrugated iron sheets on account of jolts from the bus roof resulting in death of one person and causing injury to several others in the absence of negligence on the part of the driver. Unless the driver could be held to be entirely responsible for loading the iron sheets and putting them in a negligent manner or not tying them properly, his conviction would not be sustainable.

151 The Times of India, 27 November 2007, p 1, *Crime in India, National Crime Record Bureau 2005*, pp 1, 31, See KD Gaur, *A Textbook on the Indian Penal Code*, 4th Edn, 2008, Commentary under *section 304A, IPC, 1860*.

152 *Accidental Damage - India tops global list of fatalities from road crashes*, 23 October 2008, p 14 (Pune edition).

153 Dipak.Dash@timesgroup.com, The Times of India, Pune, Monday October 1 2018 pp 1, 11.

154 In Germany, punishment for the homicide caused as a result of negligence is punishable to the extent of five years of imprisonment or fine under section 222 of German *Penal Code*, as amended as of 19 December 2001. **Section 222 of german *Penal Code* is Negligent manslaughter.—**"Whosoever through negligence causes the death of a person shall be liable to imprisonment not exceeding five years or a fine".

155 See *Kurban Hussain v State of Maharashtra,* AIR 1965 SC 1616 : [1965] 2 SCR 622. discussed under *section 285 of Indian Penal Code, 1860*; and *Tapti Prasad v Emperor,* AIR 1918 All 420. See also *R v Wacker,* [2003] 4 All ER 295 (CA) : (2002) EWCA Cr 1944 discussed under involuntary manslaughter.

156 AIR 2005 SC 3180 : (2005) 6 SCC 1 : 2005 (6) Scale 130, decided on 5 August 2005 by a three-member Bench of the Supreme Court consisting of RC Lahoti CJI, GP Mathur and PK Balsubramannyam, JJ.

157 [2009] 9 SCR 313 : 2009 (7) Scale 407 : 2009 Cr LJ 3012, Justice BN Agrawal, HS Bedi and GS Singhvi.

158 On 19 September 1990, Dhananka got himself examined at Nizam Institute of Medical Science Hyderabad for frequently recurring fever. The Hospital diagnosed a benign tumour in the chest. He underwent thoracotomy for

removal of the tumour but due to negligence of surgeon during the operation, his spinal cord was damaged making him paralysed waist down.

159 See KD Gaur, *Textbook on The Indian Penal Code*, 6th Edn, 2016, pp 716 to 718 for Airport Authority of India case.

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8.7 Dowry Death

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.7 Dowry Death

304-B. Dowry death.—(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subject to cruelty or harassment by her husband or any relative of her husband for, or in connection with any demand for dowry, such death shall be called "dowry death" and such husband or relative shall be deemed to have caused her death.

Explanation.—For the purpose of this sub-section "dowry" shall have the same meaning as in *section 2 of Dowry Prohibition Act 1961* (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

Comment: Section 304-B was inserted in *IPC, 1860* in 1986 *vide* Criminal Law (Amendment Act) 1986 with a view to curb the dowry deaths, suicides, bride burning etc, rampant in the country. Sub-section (1) defines dowry death, and sub-section (2) prescribes the punishment for such cases.

In the case of death, under the circumstances mentioned in sub-section (1) to section 304-B, the husband and husband's relatives, shall be presumed to have caused a "dowry death" and shall be liable for the offence unless it is proved otherwise. That is to say, the burden of proof shifts from the prosecution to the accused, unlike other offences where the accused is presumed to be innocent, unless it is proved otherwise.

The Explanation attached to sub-section (1) says that dowry[160] shall have the same meaning as given in *section 2 (1) of Dowry Prohibition Act 1961*.

An important feature of dowry related crimes is that they are invariably committed within the safe precincts of the home and the culprits are mostly close relatives—mothers-in-law and sisters-in-law—living under the same roof. Such phenomena are a consequence of the exploitation of newly-married women by husbands and relatives in direct connivance with each other. Punitive measures may be adequate in their formal content, but their successful enforcement is a matter of great difficulty. This is why men who are guilty of dowry deaths go scot-free and are seldom brought to book and punished, with the result that inspite of stringent laws the dowry death cases have gone upto 8,618 increasing by 2.7% during the year 2011 over the previous year 2010, which recorded 8,391 cases. 26.9% of the total such cases reported in the country were reported from Uttar Pradesh (2,322 cases) alone followed by Bihar (1,413 cases) (16.4%). The highest rate of crime (1.4) was reported from Bihar as compared to the national average of 0.7. (*National Crime Record Bureau*—2012).

Dowry death cases in which trials were completed during 2016 has gone upto 4351 and 1325 persons were convicted as against 3026 acquitted or discharged. On the other hand in 3233 cases where trials were completed and 494 persons were convicted and 2739 were either acquitted nor discharged. *Crime Record Bureau*—2016 p 152.

It is gratifying to note that, of late, bride burning and dowry death cases have attracted the attention of lawmakers,

law enforcement agencies and the judiciary[161] as is evident from some of the cases discussed below. It is a welcome change and will go a long way in curbing such crimes.

Dowry Death cases to be charged both under section 302 and section 304B IPC, 1860 Murder and Dowry Death—Supreme Court—2010

Rajbir @ Raju v State of Haryana,

(2010) 3 SCC 235 : (2010) 2 JT 376

The petitioner, husband of the deceased was found guilty of murdering his pregnant wife for not complying with the demand of money by his wife barely six months after their marriage. The trial court awarded life sentence under *section 304B, IPC, 1860* apart from the sentence under other sections by the trial court. However, the High Court reduced the sentence to 10 years of rigorous imprisonment.

Taking a serious note of dowry abuse resulting in rising of the dowry death cases in the country, the apex court directed to Registrar Generals/Registrars of all the High Courts to circulate to all trial courts in their jurisdiction to ordinarily add *section 302 IPC, 1860* to the charge of *section 304B IPC* so that death sentences could be imposed in such heinous and barbaric crimes against women.

Under the existing provision, dowry death cases are registered under *section 304B IPC* that provides maximum punishment of life imprisonment (with a minimum of seven years of imprisonment only). Now after this order from the apex court, a person convicted of dowry death would be charged under *section 302 IPC* along with *section 304B IPC*, and so he can get either life imprisonment or death sentence. This is a welcome step and will go a long way in reducing dowry death cases in the country.

Section 304B IPC and section 2 of Dowry Prohibition Act 1961 The expression "or any time after the marriage" and "in connection with the marriage" are of wide meaning and scope—"soon before her marriage" is to be given a wider meaning and not a restricted one—Supreme Court—2010

Ashok Kumar v State of Haryana,

AIR 2010 SC 2839 : *(2010) 12 SCC 350*

Per Swatanter Kumar, J:

Vipin @ Chanchal @ Rekha, the deceased and Ashok Kumar, the appellant were married on 9 October 1986. Harbans Lal, the father of the deceased had given sufficient dowry at the time of her marriage according to his means, desire and capacity. But, the appellant and his family members, i.e., Mukesh Kumar, the brother of the appellant and Smt Lajwanti, the mother of the appellant were not satisfied with the dowry. They allegedly used to harass and maltreat the deceased and used to give her beatings. They had demanded refrigerator, a television etc., one week prior to the date of occurrence, the deceased came to the house of her father at Kaithal and narrated the story. She specifically mentioned that her husband wanted to set a new business for which he required a sum of Rs 5000. The father of the deceased could not manage the same due to which the appellant and his family members, particularly Lajwanti and Mukesh, are alleged to have burnt the deceased by sprinkling kerosene oil on her as result of which the deceased died in the hospital at about 4.00 pm on 16 May 1988. Trial court held all the three accused viz Ashok Kumar, Mukesh Kumar and Lajwanti, guilty of the offence punishable under *section 304B of IPC, 1860* and sentenced the accused to undergo rigorous imprisonment for a term of 10 years and to pay a fine Rs 1000/-.

While referring to raising of presumption under *section 304-B of IPC, 1860*, the apex court in the case of *Kaliyaperumal v State of TN,* AIR SCW 4387 : *AIR 2003 SC 3828*, stated the following ingredients which should be satisfied.

1. Whether the accused has committed dowry death of woman.
2. The woman was subject to cruelty or harassment by her husband or his relative.
3. Such cruelty or harassment was for, or in connection with any demand for dowry.
4. Such cruelty or harassment was committed "soon before her death".

The expression “soon before her death” has to be accorded its appropriate meaning in the facts and circumstances of a given case. In the present case, there is definite evidence to show that nearly 20-22 days prior to her death the deceased had come to her parental home and informed her father about the demand Rs 5000/- and harassment and torture to which she was subjected to by the accused and her in law. Her father had consoled her assuring that he would try to arrange for the same and, thereafter; took her to her matrimonial home 7-8 days prior to the incident.

On face of the aforesaid evidence read in conjunction with the statement of Defense witness No 3, the Apex Court held that ingredients of *section 304B IPC* have been satisfied in the present case. The *concept of reasonable time* is the best criteria to be applied for appreciation and examination of such cases. As held by the Apex Court in case of *Tarsem Singh v State of Punjab*,[162] the legislative object in providing such a radius of time by employing the words “soon before her death” is to emphasize the idea that her death should, in all probabilities, has been the aftermath of such cruelty of harassment. In other words, there should be reasonable if not direct nexus between her death and the dowry related cruelty or harassment inflicted on her. Similar view was expressed by the Supreme Court in the case of *Yashoda v State of MP*,[163] where the apex court stated that determination of the period would depend on the facts and circumstances of given case.

The cruelty and harassment by the husband or any relative could be directly relatable to or in connection with any demand for dowry. The expression “demand for dowry” will have to be construed *ejusdem generis* to the word immediately preceding this expression. Similarly, “in connection with the marriage” is an expression which has to be given a wider connotation.

However, the High Court acquitted Lajwanti and Mukesh, the mother and brother of the accused Ashok Kumar for want of proper evidence, while the conviction of Ashok Kumar, was upheld and the order of sentence was also maintained.

While upholding the conviction, the apex Court held that since the accused is a young person of 48 years, keeping in view the facts and circumstances of the case the Court awarded him the minimum sentences of seven years of rigorous imprisonment.

In support of their contention the apex Court held that the expression “soon before her death” cannot be given a restricted or narrower meaning. They must be understood in their plain language and with reference to their meaning in common parlance. These are the provisions relating to human behaviour and therefore cannot be given such a narrower meaning, which would defeat the very purpose of the provisions of the Act.

Dowry death—harassing deceased for dowry, treating her cruelly and finally killing and hurriedly cremating the body even without informing the parents falls under section 304B, IPC—Supreme Court—1991

Shanti v State of Haryana,

AIR 1991 SC 1226 : (1991) 1 SCC 371 : JT 1991 (1) 118 : 1990 Scale (2) 988

Facts: The deceased was living in her matrimonial home after marriage. It is alleged that her mother-in-law, sister-in-law (husband’s brother’s wife) were harassing her for not bringing a scooter and a television as part of the dowry and she was treated cruelly and finally killed and cremated. Both the accused were convicted by the sessions court under *section 304B of IPC*, and sentenced to life imprisonment under *section 201 of IPC* (disappearance of evidence) and also under *section 498A, IPC, 1860* (cruelty by husband or relatives). The High Court set aside the conviction under *section 498A of IPC* but confirmed it under *section 304B of IPC*. The present appeal has been preferred against the judgment of the High Court.

Justice K Jayachandra Reddy held:

...As per the definition of “dowry” any property or valuable security given or agreed to be given either at or before or any time after the marriage, comes within the meaning of “dowry”, (*vide section 2 (1) of Dowry Prohibition Act 1961*).

Both the courts below have held that the two appellants did not send the deceased to her parents’ house and drove out the brother as well as the father of the deceased when they had gone to meet her complaining that a scooter and television had not been given as dowry. The appellant treated the deceased cruelly and the same squarely

comes within the meaning of “cruelty” which is an essential ingredient under section 304-B and that such cruelty was for demand for dowry.

Since death occurred within seven years of the marriage, the three essentials are satisfied. The father, the brother, and the mother, of the deceased were not even informed about the death early on and the appellants hurriedly cremated the dead body. This clearly proves that death occurred otherwise than under normal circumstances. *Section 113-B of Evidence Act* lays down that if soon before the death such woman has been subjected to cruelty or harassment for or in connection with any demand for dowry, the court shall presume that such person has committed dowry death. Thus, the presumption under section 113-B is attracted. In the absence of any material to show that the deceased suffered any attack previously, the theory of natural death pleaded by the defence cannot be accepted as held by the lower courts below.

If it was natural death, there was no need for the appellants to act in such an unnatural manner and cremate the body in great and unholy haste without even informing the parents. Because of this cremation no postmortem could be conducted and the actual cause of death could not be established clearly. There is absolutely no material to indicate even remotely that it was a case of natural death. In the result, it was an unnatural death, either homicidal or suicidal.

The mere acquittal of the appellant under section 498-A of Code in these circumstances makes no difference for the purpose of this case. However, we want to point out that this view of the High Court is not correct and sections 304B and 498-A cannot be held to be mutually exclusive. These provisions deal with two distinct offences. It is true that “cruelty” is a common essential to both the sections and that has to be proved.

The Explanation to section 498-A gives the meaning of “cruelty”. In section 304B there is no such explanation about the meaning of “cruelty” but having regard to the common background to these offences we have to take that the meaning of “cruelty or harassment” will be the same as in the explanation to section 498A under which “cruelty” by itself amounts to an offence and is punishable.

Under section 304B it is the “dowry death” that is punishable and such death should have occurred within seven years of the marriage. No such period is mentioned in section 498-A and the husband or his relative would be liable for subjecting the woman to “cruelty” any time after the marriage. A person charged and acquitted under section 304B can be convicted under section 498A without a charge being there, if such a case is made out.

Since both the appellants were women, the Court held that a minimum sentence of seven years of imprisonment would serve the ends of justice instead of life imprisonment under *section 304B IPC, 1860*.

Burning of bride by sprinkling kerosene and setting her on fire is a case of bride burning and amounts to murder under section 302 of Indian Penal Code, 1860—Appeal Allowed: Accused liable—Supreme Court—1986

State (Delhi Administration) v Laxman Kumar

and

Indian Federation of Women Lawyers v Shakuntala, AIR 1986 SC 250 : (1985) 4 SCC 476 : 1985 Scale (2) 701

These two appeals—one by the Delhi administration and the other by the Indian Federation of Women Lawyers came up before the Supreme Court of India against the judgment of the Delhi High Court acquitting the respondents of a charge of murder under *section 302* read with *section 34* of *IPC, 1860*.

The three respondents were Shakuntala, the mother-in-law, Laxman Kumar, husband of the deceased, and Subash Chandra, brother-in-law. Laxman Kumar was married to Sudha and was living with his brother Subhash and his family and two brothers Vinod and Ram Avtar. Shakuntala, the mother, used to visit her sons occasionally. Sudha was expecting to deliver a child towards the end of the first week of December 1980.

At about 9.00 pm one evening, cries for help were heard from their house. On hearing the cries, neighbours rushed to the flat and found Sudha in a standing position, but aflame. The neighbours extinguished the fire. She was taken to a hospital where she died the next day. Sudha made a categorical statement soon after the neighbours gathered near the flat, and while on her way to the hospital in the taxi, pointed to her mother-in-law, Shakuntala, as the killer,

stating that she had set her on fire after pouring kerosene on her body. Sudha also indicated Laxman as having actually set fire to her and Subhash as having assisted him in the act.

The trial judge on the basis of the evidence put forward by the prosecution and the defence came to the conclusion that the relationship of Sudha with her husband Laxman and members of his family had become strained on account of demands for more dowry, and on Sudha's refusal to oblige them, the accused had decided to do away with her before the child was born. Accordingly, kerosene had been sprinkled on Sudha's body with a view to killing her and fire was set to her clothes. The court convicted all the three accused under *section 302* read with *section 34 IPC, 1860*. Considering the murder of Sudha to be one of dowry death, the court sentenced each of them to death and referred to the Delhi High Court for confirmation of the sentence.

The High Court of Delhi differed from the trial judge and acquitted all the accused of the murder charge accepting the defence plea that it was a case of an accident. The defence pleaded that when the brother-in-law of the deceased returned to the house a few minutes before 9.00 pm at night, the deceased wanted to warm up the food for him. It was alleged that the deceased lit the kerosene stove, which was in the open space that caught fire and the deceased succumbed to injuries inflicted from the fire.

Rejecting the High Court's theory of accident, the Supreme Court rightly held that the defence plea that the bride caught fire owing to the kerosene stove is not maintainable. The court held that since the deceased did not have any warm clothing on her person and as the evidence shows, she had only a nylon saree on, it was not likely that she would have ventured going out in the cold in the month of December to operate the kerosene stove placed in an open space near the kitchen. Further, she being in an advanced stage of pregnancy would have found it very difficult to squat on the floor for operating the kerosene stove which was on the floor itself.

In these circumstances the Court did not accept the defence version explaining the manner in which the deceased's saree caught fire. Further, the relationship of bride with the members of the husband's family had become strained and she had been subjected to physical as well as mental torture for some time before the incident. It was, therefore; clear that the bride had not lit the kerosene stove that evening and her apparel had not caught fire accidentally but kerosene had been sprinkled on her clothes and she had been brought into the open space where fire was lit to her clothes. Thus, she died not as an outcome of an accidental fire but on account of a designed move on the part of the members of the family of the accused persons to put an end to her life.

The court accordingly held Shakuntala and Laxman responsible for killing Sudha by setting her on fire. In view of the acquittal of the accused by the High Court, the mother and son were awarded life-imprisonment, but the court opined that normally a death sentence would be an appropriate sentence in a case of bride-burning.

The court highlighted its concern about the evil of dowry and explained the obligations of the husband and in-laws to the newly-married bride.[164]

Presumption as to dowry death. Rebuttable, Accused-husband was in office at relevant time. But, did not make efforts to take deceased-wife to hospital which was very near to place of incident. Plea of accused that deceased was suffering from chronic depression. Ruled out when evidence revealed that accused were maltreating her and she started picking up ideas of suicide. Accused-husband did not inform parents of deceased as they received telephonic message from unknown person. Accused mother-in-law though not present at place of incident at relevant time. Evidence, however, showed that she had always accompanied accused husband to house of complainant for dowry demands. Failure of accused to rebut presumption. Conviction proper. (Paras 22, 23 Supreme Court 2016)

Maya Devi v State of Haryana[165]

Per RK Agrawal, J:

This appeal has been filed against the judgment and order dated 14 January 2010 passed by the High Court of Punjab and Haryana at Chandigarh whereby the Division Bench of the High Court dismissed the appeal, against the judgment and order of conviction of the appellants by the trial Court. Mother and husband of the deceased the appellant Nos 1 and 2 for the commission of offence under *sections 498A* and *304B* of *IPC, 1860* and sentenced them to suffer rigorous imprisonment (RI) for life under *section 304B of IPC*. Both the accused were further sentenced to undergo rigorous imprisonment (RI) for two years, along with a fine of Rs 500 each, for the offence under *section 498A of IPC*.

Marriage of Kavita alias Kusum (since deceased) was solemnized with Karamvir, son of Mahavir, resident of House No 36, Type II, MD University Campus, Rohtak according to Hindu rites and ceremonies on 17 July 1994. After 20-25 days of the solemnization of the marriage, Karamvir (appellant No 2), his mother Maya Devi (appellant No 1) started harassing, maltreating and beating Kavita (since deceased) on account of dowry. Despite all efforts, the attitude and relations of her in-laws towards her went from bad to worse.

Section 113A of the Act, dealing with abetment of suicide, uses the expression "may presume". This being the position, a two-stage process is required to be followed in respect of an offence punishable under *section 304B IPC*: it is necessary to first ascertain whether the ingredients of the section have been made out against the accused; if the ingredients are made out, then the accused is deemed to have caused the death of the woman but is entitled to rebut the statutory presumption of having caused a dowry death. From the evidence on record, we are of the opinion that in the present case Kavita died an unnatural death by committing suicide as she was subjected to cruelty/harassment by her husband and in-laws in connection with the demand for dowry which started from the time of her marriage and continued till she committed suicide. Thus, the provisions of *sections 304B* and *498A* of *IPC, 1860* will be fully attracted.

To attract the provisions of section 304B, one of the main ingredients of the offence which is required to be established is that "soon before her death" she was subjected to cruelty and harassment "for, or in connection with the demand for dowry". The expression "soon before her death" used in *section 304B IPC, 1860* and *section 113B of the Evidence Act* is present with the idea of proximity test. Though the language used is "soon before her death", no definite period has been enacted and the expression "soon before her death" has not been defined in both the enactments. Accordingly, the determination of the period which can come within the term "soon before her death" is to be determined by the Courts, depending upon the facts and circumstances of each case. However, the said expression would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. In other words, there must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence. (Para 16)

Section 304B, IPC, 1860 does not categorise death as homicidal or suicidal or accidental. This is because death caused by burns can, in a given case, be homicidal or suicidal or accidental. Similarly, death caused by bodily injury can, in a given case, be homicidal or suicidal or accidental. Finally, any death occurring "otherwise than under normal circumstances" can, in a given case, be homicidal or suicidal or accidental. Therefore, if all the other ingredients of *section 304B, IPC, 1860* are fulfilled, any death (homicidal or suicidal or accidental) whether caused by burns or by bodily injury or occurring otherwise than under normal circumstances shall, as per the legislative mandate, be called a "dowry death" and the woman's husband or his relative "shall be deemed to have caused her death". The section clearly specifies what constitutes the offence of dowry death and also identifies the single offender or multiple offenders who has or have caused the dowry death.

Dowry death, demand of dowry, statute must be given fair, pragmatic, and common sense interpretation. Any money or property or valuable security demanded by any of the persons mentioned in section 28 of 1961 Act, at or before or at any time after marriage which is reasonably connected to death of married woman. Would necessarily be in connection with or in relation to marriage unless, facts of a given case clearly and unequivocally point otherwise.

Dowry death—Expression "soon before her death" in section 304B—Is a relative expression—"Soon before" not synonymous with "immediately before"— Time lags may differ from case to case—Demand for dowry should not be stale but should be continuing cause for death of marriage woman under section 304B.

Demand for money made shortly after one year of marriage. Fifteen days before her death she visited parents house on being mal-treated. Thereafter deceased, married woman, died by poisoning. Evidence of her father not shaken. Concurrent finding of the trial and High Court as to guilt of her husband, accused—No interference by Supreme Court.

Rajinder Singh v State of Punjab[166]

Per Rf Nariman, J:

In the instance case, the demands for money were made shortly after one year of the marriage. A she buffalo was given by the father to the daughter as a peace offering. The peace offering had no effect. The daughter was ill-treated. She went back to her father and demanded money again. The father, then, went along with his brother and the Sarpanch of the village to the matrimonial home with a request that the daughter be not ill-treated on account of the demand for money. The father also assured the said persons that their money demand would be fulfilled and that they would have to wait till the crops of his field are harvested. Fifteen days before her death, a deceased, married woman again visited her parents house on being maltreated by her new family. Then came death by poisoning. The cross-examination of the father of deceased has, in no manner, shaken his evidence. On the facts, therefore, the concurrent findings, as to guilt of her husband, recorded by both the courts below would not be liable to be interfered with. (Para 26)

Young woman, namely, Salwinder Kaur was married to the appellant Rajinder Singh sometime in the year 1990. On 31 August 1993, within four years of the marriage, Salwinder Kaur consumed Aluminium Phosphide, which is a pesticide as a result of which her young life was snuffed out.

The trial Court after examining the evidence of the prosecution and the defence, convicted the appellant under section 304B and sentenced him to undergo rigorious imprisonment for seven years, which is the minimum sentence that can be pronounced on a finding of guilt under the said section.

Dismissing the appeal and upholding the conviction Apex Court said:

The facts of this appeal are glaring. Demands for money were made shortly after one year of the marriage. A she buffalo was given by the father to the daughter as a peace offering. The peace offering had no effect. The daughter was ill-treated. She went back to her father and demanded money again. The father, then, went along with his brother and the Sarpanch of the village to the matrimonial home with a request that the daughter be not ill-treated on account of the demand of money. The father also assured the said persons that their money demand would be fulfilled and that they would have to wait till the crops of his field are harvested. Fifteen days before her death, Salwinder Kaur again visited her parents' house on being maltreated by her new family. Then came death by poisoning. The cross-examination of the father of Salwinder Kaur has, in no manner, shaken his evidence. On the facts, therefore, the concurrent findings recorded by both the Courts below are upheld. The appeal is dismissed.

Appeal dismissed.

Unnatural conduct of husband, disappearance when wife was burning in flames at midnight indicates a case of murder—Appeal dismissed conviction upheld—Supreme Court—1989

Subedar Tewari v State of UP,

AIR 1989 SC 733 : 1989 Cr LJ 923 : JT 1988 (4) SC 387 : 1988 (2) Scale 1341 : 1989 Supp (1) SCC 91

The deceased, Veena, a highly educated girl was married to Dr Narendra. Within seven months of the marriage Veena died an unnatural death by sustaining burn injuries.

It was alleged that the conduct of the doctor was licentious and that he had an extra-marital relationship with his 22 year old niece, a medical student, whom he nominated as beneficiary on the death of the insured in a life insurance policy of Rs 50,000 received by Dr Tewari as dowry in marriage. It was also alleged that he had illicit incestuous relationship with his sister Meera. The death of Veena occurred in a mysterious manner in the kitchen of the two bedroom flat occupied by the husband in the campus of Banaras Hindu University of which he along with his wife, and sister Meera were the occupants. The milkman came to the house of the accused for supplying milk one morning at about 7.00 am. The door was opened by the sister of the husband. The milkman saw that smoke was coming out from inside the house and when he peeped inside, he noticed that the dead body of Veena was burning in the kitchen. Surprisingly, the husband and the co-accused sister-in-law did not try to extinguish the fire. The milkman shouted for help and the neighbours rushed, extinguished the fire and took the deceased to the hospital.

Dr Narendra and Meera were convicted by the sessions judge, Varanasi for the murder of Veena under section 302 read with section 34 of Code and sentenced to death and life imprisonment respectively. The High Court of Allahabad acquitted both of them holding it a case of "suicide".

Against the decision of the High Court the father of deceased and the State of Uttar Pradesh went in appeal to the Supreme Court.

The main issue in the case was as to whether Veena (deceased) committed suicide because her matrimonial life was disturbed or whether she was murdered by her husband.

Thakkar, J speaking for the court said:[167]

> It is extremely unlikely that an educated woman of this academic distinction who was prepared to face her problems and was optimistically looking forward to the future... [w] ould be inclined to commit suicide by burning herself... [s] he was a woman who had resolved to break herself from her husband and to start her life afresh. This discloses a strong character and a strong will to live.

The court underlined the callousness of both brother and sister who did nothing to save the girl and did not even go anywhere near the kitchen where Veena was burning; and pointed that the accused "did not show as much concern as the milkman, a stranger who shouted for help and tried to extinguish the fire". Having analysed every point raised the judge rightly concluded that "accident and suicide are excluded beyond a reasonable doubt and that the death of Veena is established to be homicidal".

Accordingly, the court allowed the appeal and convicted the accused Dr Tewari for murder and sentenced him to life imprisonment. However, the Court did not interfere with Meera's acquittal.

Bride burning—Supreme Court would not hesitate to interfere when a gruesome crime is committed, resulting in the death of a young mother— acquittal set aside—trial court conviction restored—Supreme Court—1992

State of UP v Ashok Kumar Srivastava,

AIR 1992 SC 840 : *(1992) 2 SCC 86*

Meera Srivastava, a young woman aged about 25 years, died of burns, on the night between 20 and 21 July 1974 at about 2.30 am in the two-room apartment of her husband Ashok Kumar Srivastava. The marriage had taken place on 13 May 1973 at Varanasi. After their wedding, Ashok was transferred to Lucknow where he had hired a two-room first floor apartment for his residence.

The deceased's husband, his father and sister, were unhappy about the cash and articles given by way of dowry at the time of the "*tilak*" ceremony. The accused taunted, tormented and tortured the deceased for the insufficiency of the dowry amount. Few days before the incident, while at their hometown, there was a heated argument and after that the husband of the deceased returned to the place of his posting without her. The deceased entreated her father-in-law to permit her to join her husband but the latter refused saying she will have to rot alone unless the dowry amount was made good. Ignoring her father-in-law's refusal the deceased went to her husband. The father-in-law and his daughter followed her. At about 2.30 or 2.45 am on the fateful day, they sprinkled kerosene on her and set her ablaze. While she was burning, the three accused, who were inside, came out of the room and stood in the veranda unconcerned about her plight. None of them tried to help the deceased. Soon after that, the house was locked and the accused absconded. The witnesses to the incident were persons living in the same building. The trial judge convicted all the three accused—son, father and sister under *section 302* read with *section 34* of *IPC, 1860* and sentenced all of them to imprisonment for life.

In appeal, the High Court on replication and re-evaluation of the evidence held that the deceased Meera committed suicide and set aside the conviction. The State went in appeal against the decision of the High Court to the Supreme Court.

Allowing the appeal, the Supreme Court held that the witnesses had no reason to falsely implicate the accused. There was no reason to disbelieve their testimony. Absence of their name in the FIR was also of no consequence. That was quite natural because the father who rushed to the place of the incident had not enquired of their names having regard to the strain, stress and tension in which he was at the relevant point of time. The witnesses could not be said to be falsely set up by father of deceased. The evidence of the father of the deceased regarding quarrels on account of insufficiency of dowry was corroborated by evidence of witnesses. All this coupled with the

fact that the accused persons absconded after the incident leave no room for doubt that the three persons were the joint authors of the crime.

The order of acquittal passed by the High Court was set aside and sentence passed by the trial court was restored. The appeal was allowed.

Death due to strangulation in the bedroom is murder, not suicide—acquittal by High Court set aside, trial court's verdict of conviction restored—Supreme Court—1992

Mulakh Raj v Satish Kumar,

AIR 1992 SC 1175 : (1992) 3 SCC 43

The deceased Shashi Bala was married to Satish Kumar on 1 March 1979. She was given gold ornaments, utensils, television set, etc in marriage. Some years later, she gave birth to a male child and by 10 August 1980, the boy was three months old. The deceased's father on 8 June 1980 gave Rs 5,000 to her as against Rs 10,000 requested for. He received a telegram on 10 August 1980 that Shashi Bala is dead.

As per the doctor's evidence, Shashi Bala died of strangulation, and 85% burns were found. A deliberate attempt was made to destroy the evidence by pouring kerosene on the dead body and burning the dead body extensively by 95%. The death was, therefore, homicide and not suicide as contended by the defence.

It was established from the evidence that the deceased and the husband were living upstairs alone. The fact that the death took place in the bedroom of the spouse and there was an attempt to destroy the evidence of murder by burning the dead body, and the unnatural conduct of the husband, immediately after the occurrence, the false pleas of suicide and his absence from the house, are all materially relevant circumstances which would complete the chain of circumstantial evidence leading to only one conclusion that the husband alone committed the ghastly offence of murder of his wife. Accordingly the sessions court convicted Satish Kumar under sections 302 and 201 (disappearance of evidence) for life imprisonment and one year respectively.

The Division Bench of the Punjab and Haryana High Court acquitted Satish Kumar, accepting the defence contention of suicide. The State appealed against the decision to the Supreme Court.

The crucial question in this case is whether the medical evidence of the doctor is reliable and acceptable and whether the death was due to suicide.

Allowing the appeal, the apex court held that:

> In cases of circumstantial evidence, motive bears an important significance. Motive is always locked up in the mind of the accused and sometimes it is difficult to unlock. People do not act wholly without motive. The failure to discover the motive of an offence does not signify its non-existence. The failure to prove motive is not fatal as a matter of law. Proof of motive is never an indispensable for conviction. When facts are clear it is immaterial that no motive has been proved. Absence of motive does not break the link in the chain of circumstances connecting the accused with the crime, nor militates against the prosecution case.

> The judgment and order of acquittal of Satish Kumar by High Court is set aside and judgment and order of the trial court is confirmed. Appeal allowed.

Section 304B IPC, 1860—Dowry Death: The mere fact that the husband of the deceased was acquitted of the charge of dowry death, does not mean that father-in law and mother in-law could not be convicted when the charge against them has been proved: Respondents held guilty—Supreme Court—2008

State of Rajasthan v Jaggu Ram[168]

Per GS Singhvi, J:

The respondent Jaggu Ram, his son Jeevan Ram and mother-in-law Nathi started harassing, torturing and treating

her daughter-in-law Shanti@Gokul with cruelty on the ground that she did not bring sufficient dowry from the very day of marriage. The demand continued unabated and the greed for demand of dowry being unfulfilled they finally killed her daughter-in-law on 30 March 1993 by sprinkling kerosene and setting her ablaze and cremated her body even without informing her parents or police. All the three accused, viz., husband (Jeevan Ram), father-in-law (Juggu Ram) and mother—in-law were charged under section 304B for dowry death and cruelty, torture and disappearance of dead body under *section 498A* and *section 201 IPC, 1860*.

The trial court sentenced father-in-law (Jaggu Ram) and mother-in-law (Nathi) for causing dowry death and disappearance of body under section 304B and section 201 and under *section 498A IPC, 1860* for cruelty but acquitted husband-Jeevan Ram as he was not present at the time of the occurrence. The High Court in appeal acquitted both father-in-law and mother-in-law of the charge under *sections 304B IPC* and 201 *IPC* but convicted them under *section 498A IPC* for cruelty.

Allowing the State appeal against the acquittal of the respondents, the apex court said that the mere fact that one of the accused Jeevan Ram could not be convicted for want of evidence, by itself did not justify a conclusion that the prosecution has failed to prove the charge under *sections 304B* and *201 IPC* against the remaining accused.

While restoring the trial court's verdict holding the respondents Juggu Ram and Nathi guilty under *sections 304B* and *201 IPC*, the apex Court said the facts and circumstances of each case leading to the death of the victim must be analyzed and the court must decide whether there is any proximate connection between the demand of dowry, the act of cruelty or harassment and death of the victim to convict a person under section 304B, or *section 498A IPC*.[169]

Conviction Set Aside

Section 304B: Dowry Death: Gifts Given at the time of Customary Thread changing Ceremony on the birth of the girl child is not dowry—Accused acquitted—Supreme Court—2008

Narayanamurthy v State of Karnataka[170]

Lokeshwar Singh Panta, J:

The case relates to common day occurrence in our Indian social set up of harassment, torture, cruelty leading to unnatural death of newly married brides at the hands of husband and in-laws for not bringing sufficient dowry and incapacity of brides' parents to satisfy the greed and lustful demands.

Jagadeshwari, daughter of complainant was married to the accused Narayanamurthy. She had gone to her parents' house where she gave birth to a female child. The accused was invited to participate in the customary thread changing ceremony of the child. He agreed to attend the function only on condition that a gold ring, silver plate and silver panchapatre are given to him. Since the girl's father was not financially sound he could gift only a steel panchapatre and promised to fulfill the demand later.

But, husband and in-laws could not remain content and continued to ill treat, harass and assault the deceased so much so that being fed up with the wretched life Jagadeshwari on 11 November 1990 around 2.00 pm bolted the door of the kitchen from inside and poured kerosene oil on her body and set her self on fire.

The trial court acquitted both husband and mother-in-law under *section 304B* and *section 498A IPC, 1860* for dowry death and cruelty on the ground that the prosecution could not prove its case beyond reasonable doubt. In State appeal the High Court being convinced of the *criminal act* of the husband convicted him under section 304B for dowry death.

However, the Apex Court in appeal set aside the conviction of the appellant under *section 304B IPC* on the ground that:

Gift at the time of performing customary thread changing ceremony in connection with birth of girl child; and such ceremony prevalent in their society are not enveloped within the ambit of "dowry".

Conviction Set Aside

Comment: No doubt, a customary gift which is voluntary and within the means and capacity of the donor is

acceptable and will not be termed as “dowry”, but once it assumes the colour of an extortion and is beyond the means of the donor, such a gift cannot be allowed under the pretext of custom. A custom which is torturous cannot be approved by any text of interpretation. If it were so “dowry” was a well recognized and accepted custom prevalent in our social set up since centuries.

Is not the demand of gold ring, silver plate and silver panchapatre as a condition precedent by the accused to participate in the thread ceremony a “dowry”?

A custom if it is burdensome and against the public policy, how so ever ancient it might be, it can not be recognized by law.

Unfortunately, the Apex Court has put its seal on a gift in the name of customary practices, non fulfillment of which has led to harassment, torture and finally suicide of a young married lady. The decision needs to be revised.

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160 *Dowry Prohibition Act 1961, section 2* (1) says: In this Act, “dowry” means any property or valuable security given or agreed to be given either directly or indirectly, (a) by one party to a marriage to the other party to the marriage; or (b) by the parents of either party to a marriage or by any other person to either party to the marriage or to any other person at or before or after the marriage as consideration for the marriage of the said parties.

161 *Vasant Narayan Pawar v State of Maharashtra, AIR 1980 SC 1270* : *[1980] 2 SCR 1209*; See also *Inder Sain v The State, 1981 Cr LJ 1116* (Del).

162 *AIR 2009 SC 1454* : 2009 AIR SCW 928 : *(2008) 16 SCC 155*.

163 *(2004) 3 SCC 98* : *AIR 2005 SC 1411* : 2004 AIR SCW 7299.

164 AIR 1986 SC 250, pp 267-268 : (1985) 4 SCC 476.

165 *AIR 2016 SC 125* : 2015 (4) Crimes 572 : 2016 Cr LJ 629 : JT 2015 (12) SC 24 : *2015 (13) Scale 336*, Vikramajit Sen and RK Agrawal, JJ, delivered the judgment.

166 *AIR 2015 SC 1359*, TS Thakur, RF Nariman and Prafula Pant, JJ, delivered the judgment.

167 AIR 1989 SC 733, pp 743-744, para 19 : 1989 Supp (1) SCC 91.

168 *AIR 2008 SC 982* : *(2008) 12 SCC 51*, GS Singhvi and GP Mathur, JJ.

169 See *State of AP v Raj Gopal Asawa,* (2004) AIR SCW 1566 : *2004 (4) SCC 470* : *AIR 2004 SC 1933*; *Arun Garg v State of Punjab, (2004) (8) SCC 251* : (2004) 8 JT 124; *Kaliyaperumal v State of TN, (2004) 9 SCC 157* : *AIR 2003 SC 3828*; and *Ram Badan Sharma v State of Bihar, (2006) 10 SCC 115* : *AIR 2006 SC 2855* : *2006 Cr LJ 4070* : *2006 (8) Scale 210*.

170 *AIR 2008 SC 2377* : *(2008) 16 SCC 512*; Lokeshwar Singh Panta and SB Sinha, JJ.

8.8 Abetment of Suicide

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.8 Abetment of Suicide

Sections 305 and *306* of *IPC, 1860* make abetment of suicide punishable in law. Section 305 makes abetment of suicide of a child below 18 years of age, or an insane person, or a person in the state of intoxication, or an idiot, punishable to the extent of life imprisonment. The section is intended to apply to those cases where a person in charge of a minor or *non compos* insane encourages or by commission provides them facilities for committing suicide. The section is applicable only when the person abetted commits suicide owing to the instigation.

305. Abetment of suicide of child or insane person.—If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication commits suicide, whoever abets the commission of such suicide, shall be punished with death or imprisonment for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

306. Abetment of suicide.—If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 306 punishes abetment of suicide i.e. the punishment in such a case may extend up to 10 years of imprisonment of either description and fine. A man encouraging another to commit suicide is liable and his act is punishable in law.[171]

During 2016, abetment of suicide went upto 4485 under *section 306 IPC, 1860*. And abetment of suicide of women in which trials were completed comes to 1523 and 212 persons were convicted and 1311 were acquitted or discharged.

8.8.1 Abetment of suicide - coupled with cruelty - Sections 306, 498A IPC

Wife committing suicide in matrimonial home within 7 years of marriage by consuming poison as a result of ill-treatment given to her by husband and relatives and injuries to the eye of the deceased, makes husband liable to conviction under section 306 read with section 498A IPC, 1860. Six hour delay to lodge an FIR is not fatal.

Vajresh Venkatray Anvekar v State of Karnataka[172]

The appellant husband was convicted for the abetment of suicide and cruelty by husband or relatives punishable under *sections 498A* and *306* of the *Indian Penal Code, 1860* and sentenced to five years of imprisonment with fine of Rs 1 lakh for abetment of suicide of his wife and cruelty. The appellant was tried along with his father and mother for offences punishable under *section 34 IPC*. The trial court acquitted all the accused but the High Court of Karnataka in State appeal convicted the husband, the appellant and maintained the acquittal of his father and mother.

The Apex Court while dismissing the appeal of the accused husband and restoring his conviction said delay of six hours in lodging FIR to police is immaterial and not fatal to the case of prosecution. Justice Ranjana Desai speaking

through the Court said, delay of five to six hours in lodging FIR which is unexplained is not fatal to the case of prosecution as held by trial court, she further said;

"We are amazed at this observation. When a man loses his daughter due to cyanide poisoning, he is bound to break down. He would take time to recover from shock. Six hours delay cannot make his case untrue. It is also not proper to expect him to give all minute details at that stage. The FIR contains sufficient details. It is not expected to be a treatise. We feel that the comments on alleged delay in lodging the FIR and its contents by the trial court are totally unwarranted. For the same reasons, we also reject the submission of counsel for the appellant that because PW-1 Suresh, heir of deceased, did not tell police officers who were present at the scene of offence that the appellant was responsible for the suicide, his FIR lodged after six hours is suspect."(Para 10)

In absence of evidence as to dowry demand, harassment or cruelty- Conviction of appellants unsustainable - (Para 9, 15)

Bakshish Ram v State of Punjab[173]

Per P Sathasivam, J:

While allowing the appeal and setting aside the conviction of the appellant under *sections 304B IPC, 1860* and 498A *IPC* for 7 years of rigorous imprisonment for setting the deceased wife on fire for her failure to bring more money to purchase a cooler by the trial court and upheld by the High Court, the apex court held a perusal of section 11B of Evidence Act 1872 and *section 304B IPC* shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. In other words, the prosecution has to rule out the possibility of a natural or accidental death so as to bring it within purview of the "death occurring otherwise than in normal circumstances". The prosecution is obliged to show that soon before the occurrence of unnatural death, cruelty or harassment by husband or in-laws for dowry preceded. As observed earlier, if the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence. In the case on hand, admittedly, the prosecution heavily relied on the only evidence of Sibo (PW-2) - mother of the deceased which, according to us, is a hearsay, in any event, a very general and vague statement which is not sufficient to attract the above provisions. In such circumstances, as argued by the learned counsel for the appellants, accidental death cannot be ruled out.

Under the circumstances accused/Bakshish Ram the prosecution has failed to establish guilt beyond reasonable doubt and the trial court and the High Court committed an error in convicting the appellants and the same are liable to be set aside. Since appellant No 1 has already served out the period of sentence of 7 years, no further direction is required. However, since appellant No 2, mother-in-law- (Dilip Kaur) is on bail, her bail bonds shall stand discharged. The appeal is allowed.

Penal Code of India, sections 306, 498A and Evidence Act, sections 113A, 32. Abetment of suicide. Presumption as to deceased committing suicide by pouring kerosene and setting herself on fire due to harassment by in-laws within 7 years of marriage. Dying declaration of deceased revealing harassment by in-laws and demand for dowry. No cruelty meted out by in-laws and only harassment which is of lesser degree than cruelty. Mere finding of harassment would not lead to conclusion of abetment of suicide. Absence of evidence as to intention of in-laws to assist deceased to commit suicide and presumption under section 113A cannot be raised. Offences under sections 498A and 306 not made out. Conviction of accused persons, improper. Appeal allowed.

Heera Lal v State of Rajasthan[174]

Per Rohinton Fali Nariman, J:

In the present case, an FIR was lodged in which it was stated that the father-in-law and mother-in-law of the lady who committed suicide harassed her for at least five years and this harassment, therefore, led to offences being committed under *sections 498A* and *section 306* of *Indian Penal Code*. The Trial Court relied upon the evidence of PWs 4 and 5, who were neighbours, who attested to the fact that there was harassment meted by the in-laws to the dead lady. Medical evidence also shows that there were 90% burns as the lady had poured kerosene on herself and set herself on fire. Most importantly, according to both the Trial Court and the High Court, a dying declaration was made before PW-9 who was a sub-divisional Magistrate, which reads as follows:—

> The PW-9, Himmat Singh has stated that as on 28 March 2002, he was working as SDM and on that day he had gone to the hospital to record the statement of the deceased. At that time Dr Verma was the duty doctor and he has stated that

> Lalita was in a state of fitness to record her statement. When I asked Lalita she had told that she was sleeping and her in-laws were quarrelling with her every day. Today also they quarrelled with me. They asked me to leave the house. My husband is not responsible for anything. He resides in Kuwait. He has come here now. I am residing separately from my in-laws. Today they had come with their luggage and said that they have come to say with her. I told them that I am not in good relations with them and therefore I cannot reside with them. They told, we will stay here and you get lost. Then I got angry and went inside the kitchen and poured kerosene from the stove and set myself on fire. My father-in-law was looking at me but did not try to stop me. My husband tried to save me. My in-laws were demanding dowry from me. I did not have any quarrels with my husband. My signatures are there on the statement recorded by me. Lalita's thumb impression is there at point X.

On this evidence, the trial court held that the offence of cruelty under section 498A was not made out but convicted the two appellants before under section 306 and sentenced them to imprisonment for three years. In an appeal filed by them before the High Court, appeal was dismissed. Apex Court allowing the appeal and setting aside the conviction said:

> Having absolved the appellants of the charge of cruelty, which is the most basic ingredient for the offence made out under section 498A, the third ingredient for application of section 113A is missing, namely, that the relatives i.e., the mother-in-law and father-in-law who are charged under section 306 had subjected the victim to cruelty. No doubt, in the facts of this case, it has been concurrently found that the in-laws did harass her, but harassment is something of a lesser degree than cruelty. Also, we find on the facts, taken as a whole, that assuming the presumption under section 113A would apply, it has been fully rebutted, for the reason that there is no link or intention on the part of the in-laws to assist the victim to commit suicide.
>
> In the absence of this vital link, the mere fact that there is a finding of harassment would not lead to the conclusion that there is "abetment of suicide".
>
> On the facts, therefore, we find, especially in view of the fact that the appellants have been acquitted for the crime under *section 498A of IPC, 1860* that abetment of suicide under section 306 is not made out.

Appeal allowed conviction set aside.

Conviction of the Appellant – accused and in-laws under section 306 IPC, 1860 for abetment to suicide of the deceased. Conviction is not maintainable in the absence of any act of cruelty, oppression, harassment or inducement on the part of accused husband and in-laws

Gurcharan Singh v State of Punjab[175]

Per Amitava Roy, J:

The prosecution version is that Dr Jaspal Singh, who was initially in Government service, had relinquished the same and started a coal factory at Muktsar. He suffered loss in the business and consequently failed to repay the loan availed by him in this regard from the bank. With the result Dr Jaspal Singh was thereafter not to be traced. Following this turn of events, according to the prosecution, his wife Surjit Kaur and his daughters shifted from Jalalabad where they used to stay to Abohar and started residing in a rented house of one Hansraj (PW-3). According to them, they had no source of income and further, they were also deprived of their share in the property and other entitlements, otherwise supposed to devolve on Dr Jaspal Singh. They were also not provided with any maintenance by the family members of her husband-Jaspal Singh and instead were ill-treated, harassed and intimidated.

While the matter rested at that, on 3 October 2000 at about 10.30 pm, Hansraj, the landlord of the deceased Surjit Kaur, being suspicious about prolonged and unusual lack of response by his tenants, though the television in their room was on, informed the brother of the deceased Surjit Kaur. Thereafter they broke open the door of the room and found all three lying dead. The police was informed and FIR was lodged.

The suicide note which transpires to be the sheet anchor of the prosecution case led to the conviction of the accused and co-accused to six years of imprisonment.

The High Court affirmed the conviction of the appellant and co-accused under *section 306 of Indian Penal Code, 1860*, for abetment to commit suicide as entered by the trial court. While by the decision impugned the conviction was endorsed, the substantive sentence of six years of rigorous imprisonment awarded by the trial court to each of the accused persons was scaled down to one of five years of the same description. Hence, the present appeal.

Apex Court, while allowing the appeal and setting aside the conviction said:

(i) Author of the text through an expert and both the courts below solely based their conclusion, in this regard on the evidence of the brothers of deceased, who identified the contents to be that of hers again on eye estimation. (Para 20)

(ii) The assessment of the evidence did not demonstrate with unqualified clarity and conviction, any role of the appellant or the other implicated in-laws of the deceased. The materials on record did not suggest even remotely any act of cruelty, oppression, harassment or inducement so as to persistently provoke or compel the deceased to resort to self-extinction being left with no other alternative. No such continuous and proximate conduct of the appellant or his family members with the required provocative culpability or lethal instigative content is discernible to even infer that the deceased and her daughters had been pushed to such a distressed state, physical or mental that they elected to liquidate themselves as if to seek a practical alleviation from their unbearable earthly miseries. The ingredients of the offence of *section 306 of IPC, 1860* remained unproved and thus the appellant deserved to be acquitted.

Justifying the acquittal of the accused and setting aside the conviction Apex Court said:

The assessment of the evidence on record as above, in our considered opinion, does not demonstrate with unqualified clarity and conviction, any role of the appellant or the other implicated in-laws of the deceased Surjit Kaur, as contemplated by *section 306 Indian Penal Code, 1860*. The materials on record, to reiterate, do not suggest even remotely any act of cruelty, oppression, harassment or inducement so as to persistently provoke or compel the deceased to resort to self-extinction being left with no other alternative. No such continuous and proximate conduct of the appellant or his family members with the required provocative culpability or lethal instigative content is discernible to even infer that the deceased Surjit Kaur and her daughters had been pushed to such a distressed state, physical or mental that they elected to liquidate themselves as if to seek a practical alleviation from their unbearable earthly miseries. (Para 32)

Appeal allowed conviction set aside.

Penal Code of India (45 of 1860), sections 306, 53. Accused sentenced for three years RI and fine by trial Court in absence of mitigating circumstances. Appeal accused found to have remained in jail only for period of four months and twenty days. Observation by High Court that no useful purpose would be served by sending accused persons to jail for undergoing their remaining sentences of imprisonment. Approach of High Court held, casual and fanciful rather than a just one – Reduction of sentence to period already undergone was not proper. (Paras 11, 12)

Raj Bala v State of Haryana,

AIR 2015 SC 3142 : 2015 AIR (SCW) 4774 : 2015 (6) Supreme 3772

Per Dipak Misra, J:

For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment."

Trial Court found that there was evidence on record that Seema was teased by the deceased while she was in her house and at that time she has raised an alarm which attracted the attention of the other witnesses and due to the said incident she was assaulted, and she eventually committed suicide. The trial court has recorded a finding that on being injured there was apprehension in the mind of the deceased of further maltreatment and harassment at the hands of the accused, and that led her to commit suicide by hanging herself with a rope inside her house and

thus, she was found in a hanging condition. Analysing the evidence the trial court found that the charge levelled against the accused had been proved and accordingly found them guilty for the offence under *section 306 IPC, 1860* and sentence all the three convicts to undergo rigorous imprisonment for a period of three years each with a fine of Rs 3,000.

In appeal, the High Court gave the stamp of approval to the conviction but as regards the sentence, it held thus:

“As regards the quantum of sentence of imprisonment, this Court, hereby, refers to the jail custody certificates, as per which each of the appellants has undergone a period of 4 months and 20 days.”

Allowing the appeal Apex Court held Judge of the High Court remained quite unmindful and unconcerned to the facts of the case, and reduced the sentence to the period already undergone.

Consequently, the appeal, as far as the challenge to the reduction of sentence by the High Court is concerned, is allowed and the judgment of conviction and order of sentence by the trial Judge is restored.

Appeal allowed Supreme Court 2015.

Quarrelling every day for dowry with the deceased and making offensive remarks, leading her to setting herself on fire is abetment to suicide under section 306 IPC—Appeal Allowed, Conviction restored—Supreme Court—1996

Brij Lal v Prem Chand

and

State of Punjab v Prem Chand, AIR 1989 SC 1661 : 1989 Supp (2) SCC 680

Facts: The deceased, Veena, who died of burn injuries on 15 September 1975 was married to the respondent Prem Chand in 1973. Veena Rani had passed the MA and B Ed examinations, was employed in the State Bank of Patiala and was earning about Rs 600 to 700 per month. The accused, who had obtained a degree in law set up practice in his native place Sangrur and Veena obtained a transfer to Sangrur. From the beginning, Veena had an unhappy married life because of the accused constantly demanding that she get money from her parents and because of her having to bear the household expenses from out of her salary. The accused also used to beat her frequently. She complained to her parents, her brother and her brother-in-law about the cruel treatment meted out to her by the accused.

The sessions court convicted the accused under *section 306, IPC, 1860* and sentenced him to undergo rigorous imprisonment for four years, for tormenting and physically assaulting Veena, and for instigating her to commit suicide.

The High Court acquitted the accused holding that even though Veena had committed suicide on account of her unhappy married life “there is nothing on the record to show that the appellant in any manner instigated the deceased to commit suicide”. The father of Veena and the State preferred the two appeals to the Supreme Court against High Court’s verdict.

The crucial question for consideration was whether Veena had put an end to her life on her own will and volition or whether her committing suicide had been abetted by the accused.

The court observed:

> A person can abet the commission of an offence in any one of the three ways set out in section 107 viz; (1) by instigating the commission of an offence; or (2) by engaging in a conspiracy; or (3) by intentionally aiding the commission of an offence. The case of the accused would squarely fall under the first category namely, instigating a person to do a thing. The fact that Veena Rani had forsaken her young son and had set fire to herself within a short time after reaching home will go to show that she would not have acted in that manner unless she had felt instigated to commit suicide by the utterances of the accused.
>
> The High Court besides unfortunately failing to give due weight to the evidence in the case has drawn certain inferences which are not at all warranted. For example, the High Court has stated that since Veena Rani was an earning member, the

accused would not have stood to gain by instigating her to commit suicide. This inference is totally wrong because the clear evidence in the case is that the accused had placed greater value on the payment of the money demanded by him than upon the life of his wife. It is not a case where Veena wanted to commit suicide but the accused had facilitated her to take extreme step of suicide. The accused according is liable under *section 306, IPC* as held by the sessions court.

Appeal allowed. Conviction restored.

Creation of circumstances that provoked or forced wife to commit suicide attracts section 306, IPC—Appeal Allowed, Conviction restored—Supreme Court—1991

State of Punjab v Iqbal Singh[176]

Facts: Mohinder Kaur set herself and her three children ablaze on the afternoon of 7 June 1983 at the residence of her husband Iqbal Singh. The marriage had taken place seven or eight years before the incident. The deceased was working as a teacher while her husband was a clerk in the Punjab State Electricity Board Office at Amritsar. Soon after the marriage there were disputes between them on the question of dowry. The demand for extra dowry strained the relations between them and the husband began to ill-treat the deceased wife. Before putting an end to her life, she wrote a letter on that very morning, i.e., 7 June 1983 to the Deputy Commissioner of Police, Amritsar which shows that her husband was demanding Rs 35,000 to Rs 40,000 by way of additional dowry and was ill-treating her under the influence of alcohol on that account. She also alleged that her mother-in-law and sister-in-law also conspired and made false accusations against her and instigated her husband to beat her. The question is whether the appellants were guilty of abetment.

The trial court convicted all the three accused persons—the husband, his mother and sister—under *section 306 IPC, 1860*.

The High Court on the ground that the prosecution did not establish the ingredients of *section 306 of the Indian Penal Code, 1860* allowed the appeal and set aside the order of conviction and sentence passed against the appellants.

The State challenged the decision by special leave.

Justice Ahmadi held:

The legislative intent is clear to curb the menace of dowry deaths, etc, with a firm hand. It must be remembered that since such crimes are generally committed in the privacy of residential homes and in secrecy, independent and direct evidence is not easy to get. This is why the legislature has, by introducing section 113A and section 113B in *Evidence Act 1872* tried to strengthen the prosecution hands by permitting a presumption to be raised if certain foundation facts are established and the unfortunate event has taken place within seven years of marriage. This period of seven years is considered to be the turbulent one after which the legislature assumes that the couple would have settled down in life. If a married woman is subjected to cruelty or harassment by her husband or his family members, *section 498A of IPC* would be attracted. If such cruelty or harassment was inflicted by the husband or his relative for, or in connection with, any demand for dowry immediately preceding death by burns and bodily injury or in abnormal circumstances within seven years of marriage, such husband or relative is deemed to have caused her death and is liable to be punished under *section 304B of IPC*. When the question in issue is whether a person is guilty of dowry death of a woman and the evidence discloses that immediately before her death she was subjected by such person to cruelty and or harassment for, or in connection with, any demand for dowry, *section 113 Evidence Act 1872* provides that the court shall presume that such person had caused the dowry death.

The last straw on the camel's back fell when she was severely beaten on the previous day, i.e. 6 June 1983 as is evident from her letter of 7 June 1983. An atmosphere of terror was created to push her into taking the extreme step. It would seem it was a carefully chalked out strategy to provoke her into taking the extreme step to kill herself and her children as she apprehended that they will be much more miserable after she is dead and gone. In this situation, can it be said that the husband had not been responsible in creating circumstances which would provoke or force her into taking the only alternative left open to her, namely suicide?

Can it be said that the husband did not realise where he was leading her by his wilful conduct?

In the peculiar facts and circumstances of the case, the trial court had rightly convicted the husband under *section 306 of the Indian Penal Code, 1860*. The High Court committed an error in reversing the conviction.

Appeal allowed, High Court's order set aside. Conviction and sentence passed by the trial court restored.

Section 306 IPC—Abetment to suicide involves a mental process of instigating a person or intentionally aiding a person in doing a thing. To hold a person liable for abetting suicide active role is required which can be described as instigating or aiding doing of a thing—Appeal Allowed, Conviction set aside—Supreme Court—2008

Sohan Raj Sharma v State of Haryana[177]

Per Dr Arijit Pasayat, J:

Accused Sohan Raj Sharma was charged and convicted by the trial court and confirmed by the High Court under *section 306 IPC, 1860* for abetting his wife to commit suicide who after giving poison to her three children Jyoti, Pinki and Gudiya consumed poison herself. In her eight page suicide note, she complained that the appellant-her husband was torturing her for sex in many different ways, mostly pervert and was tired of the same so much so that finally she took the extreme step of ending her and her children's life.

The court said no doubt, the accused had been a sexual pervert and had behaved like an animal, but that itself cannot be said that the ingredients of *section 306 IPC* have been established. Abetment involves a mental process of instigating a person in doing of a thing. Active role which can be described as instigating or aiding the doing of a thing is required before one can be said to be abetting the commission of the offence under *section 306 IPC*. The Court quoted from its earlier judgment in *Orillal Jaiswal,*[178] in which it was held that:

> The courts should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end her life by committing suicide. If … a victim committing suicide was hypersensitive to the ordinary petulance (bad tempered), discord and difference in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

Allowing the appeal and setting aside the conviction the apex Court held that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide as exemplified under *section 107 IPC, 1860*. In other words, the abetment may be by instigation, conspiracy or intentional aid. The mere fact that the husband treated the deceased-wife with cruelty is not enough.[179]

Contradictory statements of the deceased in dying declaration entitles acquittal under section 306, IPC, 1860—Appeal allowed—Supreme Court—2007

Sanjay v State of Maharashtra[180]

The Supreme Court held that in view of the contradictory statements made by the deceased in dying declaration it would not be safe to uphold the conviction of the appellant under *section 306 IPC, 1860* for abetment of suicide. And the accused is entitled to benefit of doubt in the absence of the prosecution having proved appellant's guilt beyond reasonable doubt.

Penal Code of India, sections 307, 53 Attempt to murder. Sentence Quantum, Interference in appeal accused armed with country-made pistols, entered house of victim and fired at him and his family members, causing serious gun-shot injuries. Relevant factors considered while imposing sentence. Sentence of life imprisonment awarded to accused for offence punishable under section 307, proper. No interference.—Supreme Court—2017

Ahsan v State of UP[181]

Abhay Manohar Sapre, J:

This appeal is filed by one out of three accused against the final judgment and order passed by the High Court of Allahabad whereby the High Court dismissed the appeal filed by the accused-appellant and affirmed the judgment of the Additional Sessions Judge, Muzaffar Nagar of by which the appellant was convicted for the offences

punishable under sections 307/34, 316/34, 452 and 504 of *Indian Penal Code, 1860* and sentenced to life imprisonment.

Dismissing the appeal, Apex Court held:

Section 307 provides three punishments for three classes of nature of cases. One class of cases, which falls in first part of section, prescribed a term “which may extend to ten years and fine”, second class of cases, which falls in second part of section, prescribed either “imprisonment for life” or “such punishment, which is prescribed in first part” and third class of cases is when any person offending under *section 307, IPC* is under sentence of imprisonment for life, causes hurt, be punished with “death”.

While sentencing accused, Court is required to take into account several factors arising in case, such as nature of offence committed, manner in which it was committed, its gravity, motive behind commission of offence, nature of injuries sustained by victim, whether injuries sustained were simple or grievous in nature, weapons used for commission of offence and any other extenuating circumstances if any. Once these factors are considered while imposing sentence, there remains little scope to interfere in quantum of punishment. In present case *firstly*, facts of case squarely fall in second part of *section 307 IPC*; *secondly*, gunshot injury caused by appellant to victim-Shahjad was grievous in nature, *thirdly,* bullet injury was caused in head which was most delicate and vital part of body, *fourthly,* facts of case satisfied ingredients of first part of *section 307, IPC*, namely, all three accused which included appellant had gone to house of victim with a common intention to kill members of family and in order to accomplish intention, each accused targeted one member of family present in room which resulted in death of a stillborn child of other victim, who was hit by gunshot in her abdomen and other two members suffered serious gunshot injuries through both survived. Hence, awarding “life imprisonment” to accused insofar as it relates to an offence punishable under section 307 is proper and cannot be interfered with. (Paras 19, 24, 25.—Supreme Court—2017)

8.8.2 Miscarriage (Abortion) and Injuries to the Unborn Child

312. Causing miscarriage.—Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—A woman who causes herself to miscarry, is within the meaning of this section.

8.8.3 Scope of Section 312

The Indian law on induced abortion contained under *sections 312* to *316*, *IPC, 1860*[182] has been enacted on the pattern of English law of abortion dealt under sections 58 and 59 of Offences Against the Person Act 1861. *Section 312, IPC, 1860* which defines criminal abortion, however, does not speak of “abortion” but of “miscarriage” only. The term miscarriage has nowhere been defined in *IPC*. Miscarriage, in its popular sense, is synonymous with abortion, and means the expulsion of the immature foetus at any time before it reaches full growth.[183] Miscarriage technically refers to spontaneous abortions, whereas the voluntary causing of miscarriage, which forms the offence under *IPC, 1860* stands for criminal abortion.

Section 312 makes voluntary miscarriage an offence in two situations. First, when a woman is with child and secondly, when a woman is quick with child. A woman is considered with child as soon as gestation begins, while a woman is quick with child, when motion is felt by the mother.

In other words, quickening is a perception by the mother that movement of the foetus has started. It obviously refers to an advanced stage of pregnancy. Taking into account the gravity of the offence in the second case, the section has prescribed punishment of imprisonment of either description which may extend to seven years, and fine, whereas in the first case, punishment is limited to three years of imprisonment, or fine or with both depending upon the nature of the offence in question.

The explanation to section 312 makes it clear that the offender could be the woman herself or any other person. As early as 1886,[184] a woman was charged for causing herself to miscarry, though she had been pregnant for only one month, and that there was nothing which could be called as a foetus or child. The lower Court acquitted the woman, taking a lenient view of the matter. The High Court, however, held the acquittal bad in law, emphasising that it was an absolute duty of a prospective mother to protect her infant from the very moment of conception.

A person who aids and facilitates a miscarriage is liable for the abetment of the offence of miscarriage under *section 312* read with *section 109* of *IPC*,[185] even though the abortion did not take place. Likewise, a person is liable for attempt to commit abortion under *section 312* read with *section 511*, *IPC*.[186] For in *Arunia Bewa,*[187] where the term of pregnancy was almost complete and an attempted abortion resulted in the birth of the child, a conviction under section 312 was set aside and one under *section 511 IPC* for attempt to bring about miscarriage was maintained.

8.8.3.1 *Abortion Permitted on Medical Grounds*

Section 312 permits abortion on therapeutic (medical) grounds in order to protect the life of the mother. In *Sharif v State of Orissa*, *(1996) Cr LJ 2826* (Ori), the Orissa High Court held that where termination of pregnancy of a minor girl was performed to save the life of the mother, *section 312 IPC, 1860* is not attracted.

The threat of life, however, need not be imminent or certain. If the act is done in good faith[188] the man is entitled to the protection of law. However, good faith is deceptive and ambiguous enough to protect most therapeutic abortions so long as they are conducted ostensibly to preserve the mother's life. In fact, what constitutes "good faith" is not a question of law, but of fact, to be decided in each case according to its facts and circumstances.

In an English case, *Rex v Bourne, [1938] 3 All ER 615*, p 621, a girl under 15, who was criminally assaulted in the most revolting circumstances, became pregnant. The doctor, who terminated the pregnancy, was charged under section 58 of Offences Against the Person Act 1861[189] for causing abortion against the law.

It was held that the Crown had not complied with the obligation of proving that the abortion was not really procured in good faith for the purpose of preserving the life of the woman. The doctor was acquitted.

Sections 313-316 provide for enhanced punishment in cases of aggravating nature. Section 313 provides that in case of causing miscarriage without the woman's consent, the accused shall be punished with imprisonment for life, or with imprisonment of either description which may extend to 10 years, and shall also be liable to fine; Section 314 says that if a man causes death of the woman while causing miscarriage, he shall be liable to imprisonment up to 10 years and fine, and if the act is done without the consent of the woman, he shall be punished either with imprisonment for life or with the punishment as stated above; Section 315 makes acts done with intent to prevent the child being born alive or to cause it to die after birth, punishable with imprisonment upto 10 years, or with fine, or with both, unless the act is done in good faith for the purpose of saving the life of the mother. It is noted that 462 miscarriages were performed without the women's consent vide *Crimes Record Bureau 2016* p 134. Section 316 prescribes punishment for causing death of a quick unborn child by an act amounting to culpable homicide up to 10 years and fine.

8.8.3.2 *Medical Termination of Pregnancy Act 1971*

The law of abortion in India, till the passing of *Medical Termination of Pregnancy Act 1971*, has been honoured more in breach than in observance.[190]

The object of *MTP Act*,[191] besides the elimination of the high incidence of illegal abortions, is to confer the woman, the right to privacy in decision-making regarding her own body, as provided under *Article 21 of Constitution of India*, which guarantees life and personal liberty to every individual.[192]

Another important objective of the Act is to encourage a reduction in the rate of population growth by permitting termination of an unwanted pregnancy on the ground that a contraceptive device has failed. As per the official statements, the Act has been envisaged with three objectives, namely:

(i) **A health measure**—when there is a danger to the life or risk to physical or mental health of the woman;

(ii) **Humanitarian grounds**—such as when pregnancy is caused as a result of a sex crime, or intercourse with a lunatic woman, etc; and

(iii) **eugenic grounds**— when there is a substantial risk that the child, if born, would suffer from deformities and disease.[193]

8.8.3.3 *Pre-Natal Diagnostic Techniques (Regulation of Misuse) Act 1994*

It is found that even in many educated and highly well placed families the birth of a female child is not welcomed

with open arms. This has resulted in the growth of Pre-Natal Diagnostic Centres in cities which help in determining sex of foetus that ultimately lead to female foeticide.

Female foeticide is a blatant violation of human rights and an insult to the dignity and status of women. Taking note of the gravity of the problem, the Parliament passed Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994[194] to ban pre-natal diagnostic techniques for determination of sex of the foetus, leading to female foeticide. *PNDT Act* 1994 envisages to provide for the regulations of the use of pre-natal diagnostic techniques for detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital abnormalities or sex linked disorders and for the prevention of misuse of such techniques for the purpose of prenatal sex determination leading to female foeticide, etc.

Section 6 (a) of PNDT Act 1994 prohibits genetic counselling centres, genetic laboratories or clinics to conduct or cause to be conducted any pre-natal diagnostic technique including ultrasonography to determine the sex of a foetus; and sub-section (b) to section 6 prohibits individuals from associating themselves in any such act of pre-natal exercise of determining the sex of the foetus of the child in the mother's womb. In case of contraventions of such provisions, persons responsible and the proprietors of such clinics, health centres etc, are liable to be prosecuted and punished with imprisonment, which may extend up to three years and fine.[195] Any person who (including the woman) seeks the aid of such clinics etc, for the purposes determining the sex of the child is liable to imprisonment, which extends to three years and fine.[196]

No doubt, *PNDT Act* 1994 has provided stringent penalties against those indulging in nefarious trade of pre-natal diagnostic techniques of determining sex of the child for the purpose of encouraging foeticide, but still the practice is rampant. This is evident from the fact that as many as 260 half-burnt foetuses dumped in a septic tank on the premise of an unauthorised nursing home of a quack, Dr AK Singh in Pataudi, Gurgaon, Haryana was discovered in June 2007. The accused had charged as much Rs 20,000 for pre-natal sex determination followed by selective abortions.[197]

Perhaps it needs education, social awareness and the elimination of the feeling of insecurity and bias towards female child, and stringent enforcement of law along with harsh punishment with exorbitant fine.

In cases where 20 week limit of pregnancy is crossed, permission to terminate pregnancy is granted only (i) when there is danger to the life of the mother, and (ii) danger to the life of the foetus is perceived.—Supreme Court—2017

Savita Sachin Patil v UOI[198]

Four women sent to the Supreme Court to enforce their right to reproductive autonomy, seeking termination of their pregnancies. They all had crossed the 20 weeks limit of *Medical Termination of Pregnancy Act 1971* and that is why the permission from the Court was required for terminations. All the cases came before the bench of SA Bobde and L Nageswara Rao, JJ. Out of the four cases, permission was granted only in two (where the foetus was diagnosed with conditions which were not compatible with extra-uterine life).

In the case under review, 37 years old Savita Sachin Patil, 37 years old into 26 weeks of pregnancy, went to Court seeking the permission to terminate the pregnancy. The foetus was diagnosed with Trisomy 21/Down's Syndrome. The Court noted that in all such cases where the 20 week limit is crossed, permission to terminate is granted when "two important considerations are involved—(i) danger to the life of the mother, and (ii) danger to the life of foetus." The second consideration, it may be noted, is not provided in *MTP Act 1971 sections 3*, *4* and *5* of the Act but is evolved through judicial decisions.

In the present case, the Court perused the medical report and found that none of the two considerations were applicable. The medical board stated that there was no risk to mother's life but it is likely that the foetus, if born would have mental and physical challenges. In the light of this expert evidence the Court denied the permission to terminate the pregnancy since there was no danger to the life of the woman. Moreover, the Court observed that not every child with Down's Syntrome has low intelligence, rather "intelligence among people with Down Syndrome is variable and a large proportion may have an intelligent quotient less than 50 (severe mental retardation)."

Sexually assaulted victim not to go through further sufferings:

Indu Devi v State of Bihar,

2017 SCC Online SC 5601

The quintessential purpose of life, be it a man or a woman, is the dignity of life and all efforts are to be made to sustain it. Where a 35-year-old woman victim of sexual assault carrying pregnancy of five months (22 to 24 weeks) had sought for termination of pregnancy on the ground that she is HIV positive, the Supreme Court, after considering the report of the medical board of All India Institute of Medical Science (AIIMS) which stated that the procedure involved in termination of the pregnancy is risky to the life of the petitioner and the foetus in the womb, held that as termination of pregnancy could not be done as per the report of the medical board of AIIMS directed the State of Bihar not only to bear the cost of her treatment but also awarded damages of 3,00,000 to the victim as compensation under the scheme of *section 357A Code of Criminal Procedure 1973* within four weeks as she has been a victim of rape.

1. Northern Ireland

Right to life of the mother is superior to right to life of the unborn— Defendant—mother permitted abortion—House of Lords—1992

Attorney General of Ireland v X,

[1992] 1 IR 1

In this case, a vexed question of law and fact as regards the right to life of the unborn and right to the life of the mother was involved.

A 14 year old school girl who discovered in January 1992 that she was pregnant as result of an alleged rape by the father of her friend in the month of December 1991 was not permitted under the Irish law to get her pregnancy terminated. The girl and her parents accordingly decided to obtain an abortion in England. In the meantime, the Attorney General obtained an interim injunction in the High Court restraining the girl and her parents from interfering with the right to life of the unborn, from leaving the jurisdiction for nine months, and restraining them from procuring or arranging an abortion within or outside the country.

Rejecting the defence plea, that psychological damage to the girl of carrying a child would be considerable and that the damage to her mental health would be devastating if the termination of pregnancy is not allowed, the High Court granted permanent injunction. A reference was made to sub-section (3) to section 3 of the *Article 40* of Irish *Constitution* to vindicate the right to life of the unborn.

The said sub-section says:

> (3) The State acknowledges the right to life of the unborn with regard to the equal right to life of the mother/guaranteed in its laws to respect, and as far as practicable by its laws to defend and vindicate that right.

While referring to the above constitutional provisions, the court observed that the right to life of the unborn is guaranteed under Irish *Constitution* and that it was the duty of the various organs of the government including the judiciary to defend and vindicate that right.

Judging and comparing the magnitude of the danger to the life of the child and the danger that exists to the life of the mother, the court said:

> The risk that defendant may take her own life if an order is made prohibiting termination of pregnancy is much less and is of a different order of magnitude than the certainty that the life of the unborn will be terminated if the order is not made. The young girl has the benefit of the love and care and support of devoted parents who will help her through the difficult months ahead. Having had the regard to the rights of the mother in this case, the court's duty to protect the life of the unborn requires it to take the order sought.[199]

However, the Supreme Court of Ireland by a majority of four to one allowed the appeal against the order of the High Court and discharged the injunction issued against the defendants. The court observed that *Constitution* requires that its provisions be interpreted harmoniously and that the rights thereby given to the unborn and to the mother be interpreted in concert. Since there was a real and substantial risk to the life of the mother by self-destruction as depicted by her suicidal tendency, which can only be avoided by termination of her pregnancy, the court observed that the defendant is permitted to obtain abortion in Ireland.

Appeal was allowed.

It is gratifying to note that in only 2018 Ireland Parliament has legalized abortion in Ireland as in case of England.

2. France

Foetus not a human being protected by French Penal Code: European Commission of Human Rights declined to acknowledge that unborn child is "A Person" within Article 2 of ECHR—2004

Vo v France,

[2004] 2 FCR 577

In *Vo v France,*[200] a doctor negligently caused fatal injury to a viable foetus after mistaking the mother's identity for that of another patient. The French criminal court acquitted him on the basis that the foetus was not a human being for the purpose of the offence.

On application to the European Commission of Human Rights, the Court declined to decide directly whether the foetus is protected by the right to life in *Article 2* of European Convention of Human Rights (ECHR.). The court ruled that the issue of life's commencement and its protection by criminal law was within the margin of appreciation extended to the member states. The Court acknowledged that in the circumstances examined to date by the convention institutions—that is, in the various laws on abortion—the unborn child is not regarded as a "person" directly protected by *Article 2* of the European Convention of Human Rights[201] and that if the unborn does have a "right to life", it is implicitly limited by the mother's rights and interests.

3. India

Foetus too a consumer (like other human beings)—entitled to insurance claim: Maharashtra State Consumer Commission—Appeal Allowed—2007

Kanta Mohanlal Motecha v Branch Manager, United India Insurance Co Ltd[202]

The Maharashtra State Consumer Commission, in a landmark judgment *Kanta Mohanlal Motecha v Branch Manager, United India Insurance Co Ltd,* on 6 March 2007 held that an unborn child killed in a car crash is entitled to insurance claim. The court referring American law under Unborn Victims of Violence Act 2004, that recognises human foetus personhood said an unborn child is a consumer and hence entitled to insurance coverage like other human beings. The court made it clear that since law recognises a pregnant woman as a consumer, the foetus in her womb be also considered a separate entity in respect of insurance claims. Mohanlal Kotecha had taken a comprehensive insurance policy for his Maruti car and it included coverage of Rs 1 Lakh each to three unnamed passengers and Rs 2 lakh for the owner-driver.

On the fateful night Mohanlal, Atul (who was driving) and Atul's wife Switi (who was seven-month pregnant) were traveling in the car when it crashed on the Yavatmal-Nagpur road. All of them died on the spot. Kanta Kotecha (widow of Mohanlal, mother of Atul and mother-in-law of Switi) succeeded in getting claims in respect of deaths of Mohanlal, Switi and Atul, from insurance company, but the claim in respect of the foetus was rejected by the District Forum on the ground that an unborn child cannot be treated as a passenger. Hence, she went in appeal before the Maharashtra State Commission.

Allowing the appeal, the Maharashtra State Consumer Commission observed that law is not static but an instrument of socio-economic change. The Court held according to science, during the second trimester of pregnancy from the thirteenth to the twenty-seventh week, the embryo turns into a foetus and attains a recognisable human form. It may be noted that Hindu law also recognises the unborn child as a living human being and is entitled to inherit the property of his parents like other family members.

4. United Kingdom

Child's death as a consequence of injury to mother resulting in premature delivery—manslaughter—House of Lords—1997

Attorney General's Reference (No 3 of 1994)[203]

Per Lord Mustill, J:

The defendant stabbed a young woman, who was to his knowledge pregnant with his child. A few weeks after the stabbing, the woman gave birth to a grossly premature child. The knife had penetrated the foetus. The child died 121 days later from a lung infection known as broncho-pulmonary dysplasia from the effects of premature birth but unconnected with the knife wound and the defendant was thereafter charged with her murder.

The trial, judge ordered acquittal on the ground that no conviction for either murder or manslaughter was possible in law.

The Attorney General subsequently referred to the Court of Appeal the following two questions for its decision, viz;

(i) Whether subject to proof of the requisite intent, the crimes of murder and manslaughter could be committed where unlawful injury was deliberately inflicted to a mother carrying a child in *utero* where the child was subsequently born alive, existed independently of the mother and them died, the injuries while in *utero* either having caused or made a substantial contribution to the death; and

(ii) Whether the fact that the child's death resulted from injury to the mother rather than as a consequence of direct injury to the foetus could remove any liability for murder or manslaughter in those circumstances.

The Court of Appeal answered the first question in the affirmative, on the ground that the foetus was to be treated as part of the mother until it had a separate existence of its own, but answered the second question in the negative.

On the defendant's application the Court of Appeal referred the points to the House of Lords, which held that:

> Manslaughter could be committed since the requisite mens rea to be proved in a case of manslaughter was an intention to do an act which was unlawful and which all sober and reasonable people would recognize as dangerous, i.e. likely to harm another person.

Since, in the instance case, the defendant intended to stab the child's mother and that was an unlawful and dangerous act, it followed that the requisite mens rea was established and although the child was a foetus at that time, on public policy grounds she was to be regarded as coming within that mens rea when she became a living person. Accordingly, the fact that the child's death was caused solely as a consequence of injury to the mother, rather than injury to the foetus, did not negative any liability for manslaughter.

Appeal allowed case sent for retrial.

Unwanted Pregnancy: Disabled woman not entitled to recover costs of bringing up a healthy child attributable to her disability where child conceived as a result of negligently performed sterilization operation except for advisory (token) Award

Rees v Darlington Memorial Hospital NHS Trust,

(2003) All ER 987 : *[2004] 1 AC 309* : [2003] UKHL 52

The claimant, a woman with a genetic condition which left her severely visually disabled, gave birth to a child inspite of having undergone sterilization operation due to negligence of the doctor. Having brought an action against the hospital for award of damages for the cost of bringing up a healthy child born after a negligent sterilization operation, the Court of Appeal held that she was entitled to recover *"extra"* costs of bringing up her child which she would incur as a result of her disability.

Allowing the appeal by the Hospital Trust against the decision of the Court of Appeal by a majority of 4 to 3 the House of Lords held that in all such cases, claimant is not entitled to recover costs of bringing up healthy child attributable to her disability. The claimant is only entitled to conventional award of £15,000 in respect of legal wrong done to her.

5. United States of America

The criminal statute of Texas prohibiting legal abortion without regard to the stage of the pregnancy is violative of the "due process clause" and is void—US Supreme Court—1973

Roe v Wade,

410 US 113 (1973)

Jane Roe brought a class action challenging the constitutionality of the Texas criminal abortion laws, restricting, procuring or attempting to procure abortion on medical advice for the purpose of saving the mother's life.[204] The petitioner pleaded that the criminal abortion laws of the State of Texas were unconstitutionally vague and that they abridged her right of personal privacy, which inter alia include right to abortion protected by the first, fourth, fifth, ninth and fourteenth amendments to US *Constitution*.

The State of Texas on the other hand, argued that the state's determination to recognise and protect parental life from and after conception constitutes "a compelling state interest" and that the foetus is a "person" within the languages and meaning of the "due process clause" of the fourteenth amendment to US *Constitution*.

The Supreme Court of the United States refrained from resolving the difficult question of when life begins and said that when those trained in the respective disciplines of medicines, philosophy and theology are unable to arrive at any consensus the judiciary is not in a position to speculate as to the answer. As regards the State's important and legitimate interest in the health of the mother, the Court said:

> In the light of present medical knowledge "the compelling point", is at approximately the end of the first trimester year, that until the end of the first trimester mortality in abortion may be less than mortality in abortion in normal child birth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible State regulation in this are requirements as to the qualifications of the person who is to perform the abortion, as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic.[205]

Measured against these standards, the court held that the Texas criminal abortion statute restricting legal abortion without regard to stage of pregnancy and without regard to other interest involved, is violative of the "due process clause"[206] of the fourteenth amendment to US *Constitution*, which protects against the State's action, the right to privacy, including a woman's qualified right to terminate her pregnancy. Thus, the court permitted abortions in three situations:

(i) within three months of pregnancy, woman is entitled to go for abortion and she is entirely free to decide;

(ii) in case of pregnancy during the next six months, the State law may regulate abortion procedure taking into consideration the mother's health;

(iii) during the last stage of pregnancy the State is free to prohibit abortions, except on the ground of saving the life of the mother.

Except notification to husband other restrictive conditions on abortion were held constitutional—US Supreme Court–1992

Planned Parenthood of South Eastern Pennsylvania v Casey,

505 US 833 (1992) : 120 L Ed 2d 674 : 1992 US Lexis 4751

The case, upholding most aspects of the restrictive Pennsylvania Abortion Control Act of 1982 added *vide* the 1988 and 1989 amendments to the Act, has given rise to a lot of controversy. The said five provisions:

(i) require that a woman seeking an abortion must give her informed consent prior to the procedure, and specified that she be provided with certain information at least 24 hours before the abortion is performed;

(ii) mandate the informed consent of one parent for a minor (expectant mother) to obtain an abortion, but provide a judicial bypass process;

(iii) command that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband;

(iv) define a medical emergency that will excuse compliance with the foregoing requirements; and

(v) impose certain reporting requirements on facilities providing abortion services.

The five abortion clinics and a physician representing himself and a class of doctors who provided abortion services, filed a suit seeking a declaratory judgment that each of the provisions, namely, informed consent, parental consent, spousal notice, reporting requirements and public disclosure of clinics were violative of the fourteenth amendment of United States *Constitution*.

The district court held all the provisions unconstitutional and granted an injunction restraining their enforcements. The Court of Appeal affirmed in part and reversed in part the amendments, striking down the husband notification provision but upholding the others.

The Supreme Court of the United States, perhaps in one of the most emotional and politically explosive cases in years, by a majority of five to four affirmed the Court of Appeals' verdict and refused to discard its 19 year old landmark decision in *Roes v Wade,* US 113 (1973), that made abortion legal as the law of the land.

While the conservative—dominated court upheld the woman's limited right to abortion recognised by Roe, it also sought to accommodate by a Bench of seven to two, the state's interest in potential life and said restrictions could be allowed as long as they do not place an undue burden on a woman's right. The court accordingly upheld most parts of the controversial Pennsylvania law that make it more difficult for a woman to obtain an abortion.

The Pennsylvania law requires a 24 hour waiting period approval for minors by a parent or a judge, doctors informing the woman about the foetal development and alternatives, such as adoption, detailed reports by doctors to the government on each abortion performed, and pre-abortion notification of the husband.

The court only struck down the husband notification provision as undue burden and approved the rest of the provisions. Thus, the Supreme Court ruling allows the States to sharply restrict but not outlaw abortions.

In *Mazurek, Attorney General of Montana v Armstrong,* 520 US 968 (1997), US Supreme Court held that Alabama Administrative Code, rules 420-5-1-01 (2) (k) limiting performance of abortions to "physicians duly licensed in the State of Alabama", is valid and constitutional. It does not pose a "substantial obstacle to a woman seeking an abortion", and it is not undue burden on the right of abortion.[207]

8.8.4 Exposure of Infants and Concealment of Birth

Sections 317 and *318* of *IPC, 1860* provide punishment for exposure and abandonment of child under 12 years of age by parents and concealment of birth by secret disposal of dead body, respectively.[208]

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171 *Gian Kaur v State of Punjab,* AIR 1996 SC 1257 : (1996) 2 SCC 648. See chapter 6, on "Preliminary Crimes" for cases on criminal attempt; Re *Mohit Pandy,* (1871) 3 NWP 316—a person assisting a widow to become *sati* is guilty of abetment of suicide under *section 306 of Indian Penal Code, 1860*. See *Commission of Sati (Prevention) Act 1987* which stipulates punishment not only for the practice of *sati* but also for its glorification.

172 AIR 2013 SC 329 : (2013) 3 SCC 462, Aftab Alam and Smt Ranjana Prakash Desai, JJ delivered the judgment.

173 AIR 2013 SC 1484 : 2013 Cr LJ 2052 : JT 2013 (9) SC 129 : 2013 (3) Scale 370, P Sathasivam and Jagdish Singh Khehar, JJ.

174 AIR 2017 SC 2425 : JT 2017 (4) SC 505, Rohinton Fali Nariman and Shantanagoudar, JJ, delivered the judgment.

175 AIR 2017 SC 74 : (2017) 1 SCC 433 : (2016) CCR 301 (SC) : 2016 (12) Scale 414, Dipak Misra and Amitava Roy, JJ delivered the judgment.

176 AIR 1991 SC 1532 : (1991) 3 SCC 1 : 1991 SCR (2) 790. See *State of Punjab v Prem Chand,* AIR 1989 SC 1661 : 1989 Supp (2) SCC 680. See also KD Gaur, *Criminal Law: Cases and Materials*, 4th Edn, 2005, pp 424-427.

177 AIR 2008 SC 2108 : (2008) 11 SCC 215, Dr Arijit Pasayat and P Sathasivam, JJ.

178 *state of WB v Orillal Jaiswal*, AIR 1994 SC 1418 : *(1994) 1 SCC 73* : JT 1993 (6) SC 69 : 1993 (3) Scale 845.

179 See *Mahinder Singh v State of MP,* 1995 AIR SCW 4570 : 1996 Cr LJ 894.

180 AIR 2007 SC 1368 : (2007) 9 SCC 148 : 2007 Cr LJ 1801 : 2007 (4) Scale 178, per SB Sinha and Markandey Katju, JJ.

181 AIR 2017 SC 4066 : 2017 (4) Crimes 307 : JT 2017 (8) SC 249 : 2017 (10) Scale 333, RK Agrawal and Abhay Manohar Sapre, JJ, delivered the judgment.

182 See KD Gaur, *A Textbook on the Indian Penal Code*, 4th Edn, (2009), Commentary sections 312-316, pp 559-573.

183 See *Modi's Medical Jurisprudence and Toxicology,* p 325. Miscarriage means the expulsion of the product of conception, an ovum or a foetus, from the uterus, at all periods before the full term is reached. See Re *Malayara Seethu,* AIR 1955 Mys 27 : 1955 Cr LJ 372, p 29.

184 Re *Ademma,* (1886) ILR 9 Mad 369.

185 *Indian Penal Code, 1860, section 108*, Explanation 2 reads: "[t] o constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused". Section 109 prescribes that if the act abetted is committed in consequence, and where no express provision is made for its punishment be punished with the punishment provided for the offence.

186 *Indian Penal Code, 1860, section 511* provides punishment for attempting to commit offences punishable with imprisonment for life or imprisonment. See Chapter 7 for commentary.

187 *Queen Empress v Arunia Bewa,* (1873) 17 WR 32.

188 *Indian Penal Code, 1860, section 52*, defines good faith as follows: "Nothing is said to be done or believed in good faith which is done or believed without due care or attention."

189 Administering drugs or using instruments to procure abortion: Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully use any instrument or other means whatsoever with the like intent, and, whatsoever, with intent to procure the miscarriage of any woman, whether she be or not with child, shall unlawfully, administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument shall be guilty of felony.

190 A survey of 208 countries by the International Planned Parenthood Federation in 1971 revealed, that more than 55 million women terminated their pregnancies by abortion. Legal or illegal giving a ratio of 40 abortions per 100 live births on a worldwide basis. Induced abortions for India have been estimated to be four to six million per year. See KP Bahadur, *Population Crisis in India,* National Publishing House, 1977, pp 165-69.

191 The Act comprises eight sections only.

192 See KD Gaur, *"Abortion and the Law"*, Journal of the Indian Law Institute, no 37, 1995, pp 293-323.

193 Statement of Objectives and Reasons of Medical Termination of Pregnancy Bill 1969, Gazette of *India,* Extraordinary, Part II, section 2, 11 November 1969.

194 Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 57 of 1994. It is a small Act consisting of 34 sections divided into eight chapters. Besides providing for regulations of genetic counselling in Chapter II and Pre-Natal Diagnostic Techniques in Chapter III (section 4-6), Chapters IV, V and VI deal with the *constitution* of Central Advisory Board, Advisory Committee and provisions of registration of genetic counselling laboratories and clinics etc. Chapter 7, provides for prosecution and imposition of penalty including imprisonment and fine.

195 Pre-Natal Diagnostic Techniques (Regulation of Misuse) Act 1994 section 23 (1).

196 Pre-Natal Diagnostic Techniques (Regulation of Misuse) Act 1994 section 23 (3).

197 Sunday Times, The Times of India, 17 June 2007, p 7.

198 (2017) 13 SCC 436 : 2017 (2) RCR (Civil) 326, decided on 28 February 2017.

199 [1992] 1 IR 1, p 12; *Attorney General (SPVC) v Open Door Counselling Ltd,* [1988] IR 593, p 598; The Times, 7 March 1992, London.

200 [2004] 2 FCR 577.

201 European Commission of Human Rights, *Article 2* says:

(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of crime for which this penalty is provided by law.

(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a not or insurrection.

202 The Times of India, 6 March 2007, p 1 and p 8.

203 [1997] 3 All ER 936 (HL) : [1997] 3 WLR 421 : [1997] UKHL 31 : [1997] Cr LR 829. Judgment was delivered by Lord Goff of Chieveley, Lord Mustill, Lord Slynn of Hadley, Lord Hope of Craighead and Lord Clyde.

204 Roe alleged that she was unmarried and pregnant, and she wished to terminate her pregnancy by an abortion performed by a competent licensed physician, under safe clinical conditions; that she was unable to get a legal abortion in Texas because her life did not appear to be threatened by the *constitution* of her pregnancy, which is the condition for permitting abortion in law.

205 410 US 113, p 163 (1973). See *Doe v Bolton,* 410 US 179 (1973).

206 The “due process” clause of US *Constitution* states: “nor shall any state deprive any person of life, liberty or property, without due process of law”.

207 See *“Editorial”*, The Times of India, 8 November 2003. See also KD Gaur, *Criminal Law Cases and Materials*, 4th Edn, 2005, pp 436-437, *“United States Proposed Law Banning Late Abortions Runs into Controversy”.*

208 See KD Gaur, *A Textbook on The Indian Penal Code,* 6th Edn, 2016, for text of the sections 317, 318 and Commentary.

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8.9 Hurt

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.9 Hurt

Penal Code of India on the basis of the gravity of the physical assault has classified hurt into simple and grievous, so that the accused might be awarded punishment commensurate to his guilt. Though, it is very difficult and absolutely impossible to draw a fine line of distinction between the two forms of hurts, simple (*sections 319*, *321* and *323*, *IPC*) and grievous, with perfect accuracy, *Penal Code of India* has attempted to classify certain kinds of hurts as grievous (*sections 320*, *322* and *325*, *IPC, 1860*) and provided for severe punishment depending upon the gravity of the offence in question.[209]

(i) ***Simple***

319. Hurt.—Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

321. Voluntarily causing hurt.—Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said “voluntarily to cause hurt”.

323. Punishment for voluntarily causing hurt.—Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

(ii) *Grievous*

320. grievous hurt.—The following kinds of hurt only are designated as “grievous”.

First.—Emasculation.

Secondly.—Permanent privation of the sight of either eye.

Thirdly. —Permanent privation of the hearing of either ear.

Fourthly.—Privation of any member or joint.

Fifthly.—Destruction of permanent impairing of the powers of any member or joint.

Sixthly.—Permanent disfiguration of the head or face.

Seventhly.—Fracture or dislocation of a bone or tooth.

Eighthly.—Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

322. Voluntarily causing grievous hurt.—Whoever voluntarily causes hurt, if the hurt which he intends to cause

or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt".

Explanation.—A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt, if intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

Illustration

A, intending or knowing himself to be likely permanently to disfigure *Z*'s face, gives *Z* a blow which does not permanently disfigure *Z*'s face, but which causes *Z* to suffer severe bodily pain for the space of twenty days. *A* has voluntarily caused grievous hurt.

324. Voluntarily causing hurt by dangerous weapons or means.— Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

325. Punishment for voluntarily causing grievous hurt.—Whoever, except in the case provided for by section 325, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

8.9.1 Aggravated form of Hurt and grievous Hurt

Sections 324-338 IPC, 1860 prescribe severe penalties when hurt or grievous hurt is caused under aggravating circumstances. This represents a judgment that the offence is more serious in some kinds of circumstances than in others. In 2013 *vide Criminal Law (Amendment) Act*, 13 of 2013, sections 326A and 326B have been inserted in *IPC, 1860* after section 326 so as to provide harsh punishment for voluntarily causing grievous hurt by use of acid etc. or voluntarily throwing or attempting to throw acid. In view of the gravity of the offence a minimum sentence of ten years that may extend to imprisonment for life with fine to meet the reasonable expenses of the treatment to the victim have been provided. The relevant sections are stated below:

326. Voluntarily causing grievous hurt by dangerous weapons or means.—Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Insertion of new sections 326A and 326B—After *section 326 of Penal Code of India*, 326A and 326B sections have been inserted, *vide Criminal Law (Amendment) Act* 13 of 2013.

326A. Voluntarily causing grievous hurt by use of acid, etc.—Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

326B. Voluntarily throwing or attempting to throw acid.—Whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of

causing permanent or partial damage or deformity or burns or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

Explanation 1.—For the purposes of section 326A and this section, "acid" includes any substance which has acidic or corrosive character or burning nature, that is capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability.

Explanation 2.—For the purposes of section 326A and this section, permanent or partial damage or deformity shall not be required to be irreversible.

The differentiating circumstances and the discrete penalties applicable to them are tabulated below:

TABLE 1

Circumstances	**Penalties**	
	Hurt	**Grievous Hurt**
(i) Injury caused by	Up to **one year** or fine up to one thousand or with both (section 323).	Imprisonment for life or with imprisonment of term up to 10 years and liable to fine (section 326).
(a) dangerous weapon likely to cause death or by means of . . .		
(b) fire,		
(c) any heated substance,		
(d) poison,		
(e) any explosive substance,		
(f) substance, or		
(g) by means of any animal.		
(ii) Causes permanent or partial damage or deformity or burns or maims or disfigures or disables any part or parts of the body by throwing acid or administering acid to that person with the intention of causing or with the knowledge that it is likely to cause such injury or hurt	Not less than 10 years imprisonment, may extend upto life imprisonment and with fine. (section 326A)	Same
(iii) Whoever voluntarily throws or attempts to throw acid with the intention of causing or with the knowledge that it is likely to cause permanent or partial damage of deformity or burns, etc.	Not less than five years imprisonment, may extend upto 7 years of imprisonment also be liable to fine. (*section 326B IPC*)	Imprisonment for life or imprisonment 10 years and fine (section 329)
(iv) Injury inflicted for purpose of extorting property or valuable security, or to constrain someone to do anything illegal, or to facilitate the commission of an offence.	Up to 10 years imprisonment and fine (section 327)	
(v) Injury caused by administering poison or any drug with intent to commit or facilitate the commission of an offence.	Up to 10 years imprisonment and fine (section 328)	—
(vi) Injury inflicted for purpose of	Up to seven years imprisonment and	Up to 10 years imprisonment and fine

8.9 Hurt

Circumstances	Penalties	
	Hurt	**Grievous Hurt**
(a) extorting a confession, or	fine (section 330)	(section 331)
(b) compelling restoration of any property.		
(vii) Injury to a public servant in the discharge of his duty.	Up to three years imprisonment and/or fine (section 332)	Up to 10 years and imprisonment fine (section 333)
(viii) Injury inflicted due to grave and sudden provocation.	Up to one month imprisonment and/or fine up to Rs 500 (section 334)	Up to four years and imprisonment and/ or fine upto Rs 2000 (section 335)
(ix) Injury inflicted by acting to rashly or negligently as to endanger human lives or the personal safety of other.	Up to six month imprisonment and/or fine up to Rs 500 (section 337)	Up to two years imprisonment and/ or fine upto Rs 1000 (section 338)

Note: Act endangering human life: An action which is so rash or negligent as to endanger human life or the personal safety of others is also an offence under *section 336, IPC, 1860* punishable by imprisonment up to three months and fine up to Rs 250 even if it does not actually culminate in hurt to anyone under *section 326A* and *326B IPC* 206 and 825 cases of acid attacks, were reported in the countries during 2016.

Non-fatal Offences under english Law—Under English law sections 47, 20 and 18 of Offences Against the Person Act 1861 has provided for four types of bodily injury that can be inflicted upon a person, viz;

(1) Common Assault (section 47), (Imprisonment for one year);

(2) Actual Bodily harm, (section 47) (Imprisonment for five years);

(3) Wounding or inflicting grievous bodily harm (section 20) (Imprisonment for five years); and

(4) Wounding or causing grievous bodily harm (section 18),[210] (Imprisonment for life).

(i) **Bodily harm**—According to section 47 of Offences Against the 1861, a person who commits an assault occasioning actual bodily harm offence is punishable with imprisonment up to five years. Term "actual bodily harm" includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor; it need not be of a permanent nature to amount to grievous bodily harm.

(ii) **Grievous bodily harm**—The House of Lords in *DPP v Smith, [1961] AC 290*, said that "grievous bodily harm" "means really serious injury". It is not necessary that it should be either permanent or dangerous.

Sections 18 and 20 of Offences Against the Person Act 1861 create offences of wounding and causing or inflicting grievous bodily harm.

"Causing" or "inflicting" grievous bodily harm is much wider than the definition of assault. Grievous bodily harm may be caused or inflicted indirectly; where as a charge of assault would not lie. Thus, a person who deliberately causes a panic in a theater so that persons are severely injured may be said to "cause" grievous bodily harm. Similarly, where the accused has so threatened a person that his victim tries to escape and in doing so injures himself is liable, however, a person who communicates a disease to another cannot be convicted of these offences.

Hurt—a state of temporary mental impairment, hysteria or terror would constitute "infirmity" within the meaning of section 319 of Indian Penal Code, 1860—Sindh High Court—now in Pakistan

Jashanmal Jhamatmal v Brahmanand Sarupanand,

AIR 1944 Sind 19

Facts: The complainant filed a complaint against the opponent, alleging that the latter confronted the complainant's wife at about 10.30 pm by uttering a piercing shout and pointing a pistol towards her. The complainant's wife

collapsed from nervous shock and was seriously ill for some time after the episode. Meanwhile, the opponent had run off after frightening her. The first class magistrate, Karachi, came to the conclusion that no offence had been committed and no hurt had been caused to her as defined in *section 319 of IPC, 1860*.

Justice Sullivan held:

... in this case more than a mere intention to annoy is to be inferred. Obviously, the intention been to frighten the woman as to cause her to vacate the premises. If this object was to be served, the scheme of the accused must have been to present himself in the dark before the woman in a sudden and horrifying manner, the inevitable consequence of which would be a sharp shock to the nervous system. It might indeed have appeared to a woman of the mentality, education and standing of the complainant's wife that the apparition she saw was supernatural. Clearly in order to induce the woman to vacate the premises sufficient reaction upon her nervous system was necessary and the intention must have been to induce in her a sufficient state of fright or hysteria to serve the accused's purpose.

Infirmity denotes an unsound or unhealthy state of the body or mind and clearly a state of temporary mental impairment or hysteria or terror would constitute infirmity, within the meaning of that expression in *section 319 of the IPC*. ...the accused must be deemed to have intended to cause hurt to the woman, and the question whether that hurt was simple or grievous would be dependent on the medical evidence.

The discharge is set aside.

A wound that results in death due to setting in of tetanus constitutes grievous hurt within the meaning of section 320 of Indian Penal Code, 1860— punishable under section 325 IPC—Lahore High Court (Pakistan)—1928

Mohinder Singh v Emperor,

AIR 1925 Lah 297

Justice martineau stated:

The appellant Mohinder Singh has been sentenced under *section 326 of IPC*, to five years imprisonment and a fine of Rs 200 for causing grievous hurt to Swaran Singh with a *gandasa.* He is said to have inflicted a wound on Swaran Singh's leg with the sharp edge, and to have given other blows with the back of the *gandasa.* The medical evidence shows that Swaran Singh had two injuries, an incised wound on the right calf cutting the muscles and deep vessels, and a bruise mark on the left shoulder. He received his injuries on 22 August 1922. Tetanus set in on 31 August, and this caused his death, which occurred on 3 September 1922.

Held, the conviction for an offence under section 326 cannot be sustained. The wound on the leg was not itself dangerous to life, Swaran Singh's death being due to tetanus which supervened on 31 August. The Magistrate has held that the injury was grievous because Swaran Singh would not, if he had lived, have been able to walk about for the space of twenty days. But the designation in section 320 of a hurt as grievous which causes the sufferer to be, during the space of twenty days, in severe bodily pain, or unable to follow his ordinary pursuits applies only when such effect actually lasts for a period of twenty days, and not when, as in the present case, the sufferer dies before that period has expired.

The offence committed by the appellant is, therefore, one falling under *section 325 of IPC* (hurt by dangerous weapon) and not under *section 326 of IPC* (grievous hurt by dangerous weapons).

The conviction is altered.

Merely because an injury proved fatal does not justify conviction under section 304 Part II of the IPC, 1860—Goa, Daman Diu—High Court—1971

Marcelino Fernandes v State,

AIR 1971 Goa, Daman and Diu 18

On 15 April 1969 at about 10 am, PW 9 purchased from Venkatesh a gold ring for Rs 25 and showed it to the

second appellant to ascertain whether it was genuine gold. On examination it was found that the ring was a fake one, and so it was returned. The appellants decided to punish Venkatesh for selling a fake ring. They got hold of him when he was returning from his shop at about 3.30 pm and they beat and kicked him. The first appellant beat Venkatesh on the back of the neck with a broken tile. Due to the injuries caused, he fell down on the ground and began to vomit blood and he ultimately died. On medical examination, it was found that the deceased had died due to traumatic shock due to head injuries, which could be caused either due to fall or the beating.

It was held that merely because it is established that the appellants injured the deceased, and due to the injuries, the deceased died within three hours, it cannot be said that the appellants committed the offence of culpable homicide not amounting to murder, punishable under section 304, Part II read with *section 34 of the Indian Penal Code*.

Where there is no evidence to show that any of the appellants injured the head of the deceased and the head injuries found on the corpse of the deceased could be caused even by falling on the ground, it cannot be said that the injuries due to which the deceased died were caused by the appellants. There was no previous enmity between the deceased and the appellants. Simply because the deceased had sold a fake ring, the appellants thought of punishing the deceased and they slapped and kicked him. They had neither intention to kill nor cause bodily injuries to him which were sufficient to cause death.

Accordingly, the appellants were convicted only for voluntarily causing hurt under section 323 of the code.

Silent telephone calls at midnight amount to assault causing, injury to all parts of the body including organs, nervous system and brain—Accused liable for Assault—House of Lords—1997

R v Ireland, R v Burstow[211]

The House of Lords in *R v Ireland, R v Burstow,* (1997) was called upon to decide as to whether silent telephone calls made by a person amount to assault punishable under sections 18, 20 and 47 of Offences Against the Person Act 1861.

In *Ireland,* the accused had made a series of telephone calls to three women. Most of the calls were at night and, when the women picked up the receiver, he would normally remain silent; occasionally he indulged in heavy breathing. This resulted in neurotic disorders by the complainants. The accused was charged and convicted with assault occasioning actual bodily harm contrary to section 47[212] of Offences Against the Person Act 1861.

The defendant in *Burstow* had seriously harassed a woman with whom he previously had a social relationship. The harassment took the form of silent and abusive telephone calls, turning up at her place of work and at her home. He covered her garden with condoms, followed her and sent her a note which the intended to be threatening and was so interpreted by the victim. Despite imprisonment and various other court attempts to curb his behaviour, he continued to harass the victim.

He was charged with unlawfully and maliciously inflicting grievous bodily harm contrary to section 20[213] of Offences Against the Person Act 1861 for activities committed between February and July, 1995. There was clear evidence from consultant psychiatrist that the complainant was suffering from a severe depressive illness.

The House of Lords were confronted with following issues viz:

(i) Did a person who made silent telephone calls commit an assault? and

(ii) Whether these women, who had required medical treatment for depressive illnesses, had suffered actual bodily harm or did the word “bodily” restrict the offences to injuries to flesh, skin and bones?

(iii) Whether an offence on inflicting grievous bodily harm under section 20 of Offences Against the Person Act 1861 can be committed where no physical violence is applied directly or indirectly to the body of the victim?

Counsel for *Ireland and Burstow* argued that the making of silent telephone calls could not under any circumstances constitute an assault. It was argued that:

(i) The Court of Appeal had fallen into error by assuming that it was sufficient that when they lifted the telephone they were immediately afraid and that this fear resulted in psychiatric injury.

(ii) The court had overlooked the essential requirement of a psychic assault that the victim's fear should be that he or she is not risk or the immediate application of unlawful force.

(iii) The "bodily harm" in Victorian legislation could not encompass psychiatric illness.

Rejecting the appellant's contention, Lord Steyn of the House of Lords concluded that:

> The 1861 Act was clearly intended to be used for many years and that it was therefore one of the always speaking "statutes which need to be interpreted" in the light of the best current scientific appreciation of the link between body and psychiatric injury.
>
> Thus we can say that in sections 18,[214] 20 and 47 of Offences Against the Person Act 1861 "bodily harm includes" recognizable psychiatric injury.'

The harassment of women by such behaviour was apparently a significant social problem. The law clearly needed to be able to deal with such behaviour that would not have occurred to the drafters of 1861 Act.

Holding the accused liable for "causing bodily injury", the House of Lords held that the word "harm" is merely a synonym for injury, and the word "bodily" does not restrict harm to injuries to the flesh, skin and bones, "The body of the victim includes all parts of his body, including his organs, his nervous system and brain. Bodily injury therefore may include injury to any of those parts of his body responsible for his mental and other faculties."

Lord Steyn concluded:

> The proposition that a gesture may amount to assault, but that words can never suffice, is unrealistic and indefensible. A thing said is also a thing done. There is no reason why something said should be incapable of causing a dark alley saying, "come with me or I will stab you". I would, therefore, reject the proposition that an assault can never be committed by words.

Lord Hope said:

> (The accused) was using his silence as a means of conveying a message to his victims. This was that he knew who and where they were, and that his purpose in making contact with them was as malicious as it was deliberate. In my opinion silent telephone calls are just as capable as words or gestures, said or made in the presence of the victim, of causing an apprehension of immediate and unlawful violence.[215]

In *R v Miller*,[216] where a husband forced his wife to have sexual intercourse, it was held that actual bodily harm was not limited to skin, flesh or bones, but included any hurt or injury calculated to interfere with the health or comfort to the victim.

Lynsky, J stated:

> There was a time when shock was not regarded as bodily hurt, but the day has gone by when that could be said. It seems to me now that, if a person is caused hurt or injury resulting, not in any physical injury, but in an injury to her state of mind for the time being, that is within the definition of actual bodily harm.

Appeal Dismissed.

Direct contact of assailant with victim not necessary to cause assault—Accused liable—House of Lords—2000

Haystead v Chief Constable of Derbyshire,

[2000] 3 All ER 890 (QBD) : [2000] EWHC QB 181 : [2000] Cr LR 758

In *Constable of Derbyshire,* it was held that in case of assault and battery direct physical contact of the assailant with the victim is not required. The appellant, *H*, punched a woman in the face while she was holding her 12 month-old child, and the child fell, hitting his head on the floor. *H* was convicted for assaulting the child by beating. He appealed contending that a person could not be convicted of a battery (hurt) unless he had direct physical contract with the victim, either through his body, eg, a punch, or through-a medium controlled by his actions, eg, a weapon.

Dismissing the appeal, the appellate court held that, although most batteries were directly inflicted, for example through one person striking another with his fist or an instrument, or through missile thrown by the assailant, it was not essential that the violence should be so directly inflicted. In the instant case, however, it was not necessary to find the dividing line between (i) cases where physical harm was inflicted by an assault and (ii) those where it was not.

Even if *H's* submission on the meaning of battery was correct, the test was made out on the facts. The movement by which the woman had lost hold of the child was entirely and immediately the result of *H's* action in punching her. There was no difference in logic or good sense between the facts of the case and one in which the defendant might have used a weapon to fell the child to the floor, save only that the instant case was one of recklessness rather than intentional battery.

Wound in the neck with a pen knife is dangerous to life—amounts to grievous hurt within clause Eightly to section 320, IPC—Lahore High Court (Pakistan)—1930

Muhammad Raft v Emperor,

AIR 1930 Lah 305

Plowden, J held:

The appellant, Muhammad alias Raffo, aged about 18 or 20, has been convicted under section 304, Part II of the *Indian Penal Code, 1860*, for causing the death of Habibullah, aged about 20, by inflicting an injury on his neck with a pen-knife and has been sentenced to rigorous imprisonment for seven years.

On 10 March 1929, at about mid-day, there was a quarrel between the two boys over a loan of ten *annas* and later on, at about 1 pm when the deceased was sitting at the shop of one Allah Rakha, the appellant came up and inflicted an injury on his neck with a pen-knife from behind. The deceased was taken to the hospital and died there 15 days later as the result of septic poisoning from the wound.

The offence probably was committed on a sudden impulse as the result of a quarrel. The medical evidence shows that the injury was on the right side of the neck and was inflicted with a sharp-edged weapon. The assistant surgeon, who treated the deceased, has, however, deposed that there was every possibility of the deceased surviving but for the wound becoming septic, apparently as a result of it being pressed with hands and bandaged with dirty cloth in the initial stages before the deceased was taken to the hospital. The wound was not in itself sufficient to cause death, as is evident from medical evidence.

The circumstances of the case do not justify a finding that the appellant knew that his act was likely to cause death. At the same time, a wound on the neck must be considered to be "dangerous to life" within the meaning of clause *Eightly* of *section 320 of IPC, 1860* and therefore "grievous".

Conviction of the appellant is altered from section 304, Part II to *section 326, IPC* (voluntarily causing grievous hurt by dangerous instrument).

It is ordered accordingly.

Husband concealing fact of contagious disease—transmitting Gonorrhea to wife is not punishable vide section 20 of Offences Against Persons Act 1861 for causing grievous bodily harm—Queen's Bench Division 9 to 4 (1888)— Overruled by R v Dica (2004)

R v Clarence[217]

Facts: The accused was charged with unlawfully and maliciously causing grievous bodily harm to his wife contrary to section 20[218] of Offences Against the Person Act 1861, and with an assault causing her actual bodily harm contrary to section 47. He had intercourse with his wife when he knew that he was suffering from gonorrhoea. His wife was unaware of his condition and would not have consented to intercourse had she known of it. The accused was convicted on both counts, but in appeal the Court for Crown Cases, by a majority of nine to four, quashed the convictions.

Per Stephen, J:

The question here is whether there is an assault. It is said there is none, because the woman consented, and to this it is replied that fraud vitiates consent, and that the prisoner's silence was a fraud. Apart altogether from this question, I think that the act of connection is not an assault at all. The only cases in which fraud indisputably vitiates consent, in there matters are cases of fraud as to the nature of the act. The conviction is quashed.

Consent defence to tattooing—does not amount to grievous bodily harm— assault—Accused Husband not liable—Court of Appeal—1966

R v Wilson,

(1966) 2 Cr App R 241

In *R v Wilson*,[219] *W* was asked by his wife to tattoo his initials on her breasts. He refused but she persuaded him to burn his initials with a hot knife on her buttocks. The wife was not only a willing partner, but she was the instigator of the activity. Her doctor who had discovered it during a routine examination reported the matter to the police. *W* was charged with an assault occasioning actual bodily harm.

Dismissing the charge, the Court of Appeal held that:

> Tattooing is a perfectly lawful activity so long as it is carried out with the consent of an adult, even though actual bodily harm is deliberately inflicted. On this basis the cases can be squared with Brown. Branding (marking), like tattooing, can be classified as one of the recognized exceptions to the rule that consent is not defence where injury is deliberately inflicted.

However, Russell LJ appeared to go further. He said:

> We are firmly of the opinion that it is not in the public interest that activities such as the appellant's in this appeal would amount to criminal behaviour. Consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgment, a proper matter for criminal investigation, let alone criminal prosecution.

Assault:—Cutting of hair without consent amounts to bodily harm contrary to section 47, Offences Against the Person Act 1861—Accused liable—Queens Bench Decision—2006

Director of Public Prosecutions v Smith (Michael Ross)[220]

The victim, who was the ex-partner of the defendant, went to visit him at his home. She went up to his bedroom where he was asleep. He woke up pushed her down on the bed and cut some of her hair, without her consent, with a pair of kitchen scissors. The defendant was charged with assaulting the victim thereby occasioning her actual bodily harm contrary to section 47[221] of Offences Against the Person Act 1861.

While acquitting the defendant, the trial court held that since the victim had not suffered actual bodily harm as there was no bruising, bleeding or cutting of her skin and that there was no expert evidence regarding psychological or psychiatric harm no case is made out against the accused.

Allowing the appeal against the acquittal the Queen's Bench Division rejected the defendants' contention that hair, according to medical and scientific material, apart from the root, was not part of the body as it was dead tissue. The court held that cutting of a substantial part of the victim's hair was capable of amounting to an assault, which occasioned actual bodily harm.

In ordinary language, “harm” was not limited to “injury” and according to the dictionary meaning extended to hurt or damage; bodily, whether used as an adjective or adverb, was concerned with the body. Actual as defined in the authorities, meant that the bodily harm should not be so trivial or trifling as to be effectively without significance.

Evidence of external bodily harm applied to all parts of the body including the victim’s organs, nervous system and brain. It followed that physical pain consequent on an assault was not a necessary ingredient of the offence. Hair whether it was alive beneath the surface of the skin or dead tissue above the surface of the skin, the hair was an attribute and part of the human body. It was intrinsic to each individual and to the identity of each individual.

The appeal was allowed, the accused was convicted.

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209 See *Draft Penal Code,* Note M, p 151.

210 Section 18, as amended by Criminal Law Act 1967 reads:

> “Whosoever shall unlawfully and maliciously by any means whatsoever *wound or cause* any grievous bodily harm to any person…with intent…to do some…grievous bodily harm to any person or with intent to resist or prevent the lawful apprehension or detainer (detained) of any person, shall be guilty of an offence, and being convicted thereof shall be liable to imprisonment for life.” See KD Gaur, *A Textbook on Indian Penal Code,* 4th Edn, 2009, commentary under *section 320, IPC*, under English Law.

211 *[1997] 4 All ER 225* (HL) : [1997] UKHL 34. See Peter Seago, *“Criminal Law”,* All England Annual Review, 1997, pp 117-124.

212 Offences Against the Person Act 1861, section 47, reads:

Assault Occasioning Bodily Harm.—Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm. Shall be liable to be kept in penal servitude.

213 Section 20, grievous bodily harm, Offences Against Persons Act 1961, now 119A as amended by Criminal Law Act, 1967 reads: “Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument shall be guilty of (an offence triable either way) and being convicted thereof shall be liable to imprisonment for five years.”

214 Offences Against the Persons Act 1861, section 18, says “Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person ... with intent ... to do some ... grievous bodily harm to any person or with intent to resist or prevent the lawful apprehension or detainer (detained) of any person, shall be guilty of an offence, and being convicted thereof shall be liable to imprisonment for life.”

215 *R* v *Burstow, R v Ireland, [1997] 4 All ER 225* (HL) : [1997] UKHL 34 : *[1998] AC 147* : *[1997] 3 WLR 534*.

216 *R v Hitler, [1954] 2 All ER 529*.

217 *[1888] 22 QBD 23* : *[1886-90] All ER Rep 133*. Overruled by *R v Dica, (2004) 3 All ER 593* : (2004) EWCA Cr 1103 : [2004] QB 1257. *R v Dica* has been discussed in Chapter 25 of KD Gaur *Criminal Law Cases and Materials,* 8th Edn under Criminalisation of HIV Transmissions.

218 For section 20 of Offences Against the Person Act 1861.

219 Offences against the Person Act 1861.

220 [2006] EWHC 94 (Admin) : [2006] 2 Cr App R 2 Queen’s Bench division (divisional court) Sir Igor Judge P and Cresswell, J.

221 Offences Against the Person Act 1861, section 47, so far as material, provides: “Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable, to imprisonment for a term not exceeding seven years”.

8.10 Wrongful Restraint

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.10 Wrongful Restraint

339. Wrongful restraint.—Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Exception.—The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

Illustration

A obstructs a path along which *Z* has a right to pass, *A* not believing in good faith that he has a right to stop the path. *Z* is thereby prevented from passing. *A* wrongfully restrains *Z*.

341. Punishment for wrongful restraint.—Whoever wrongfully restrains any person shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

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8.11 Wrongful Confinement

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.11 Wrongful Confinement

340. Wrongful confinement.—Whoever wrongfully restrains any person in such a manner as to prevent that person from proceedings beyond certain circumscribing limits, is said "wrongfully to confine" that person.

Illustration

(a) *A* causes *Z* to go within a walled space, and locks *Z* in. *Z* is thus prevented from proceeding in any direction beyond the circumscribing line of wall. *A* wrongfully confines *Z*.

(b) *A* places men with firearms at the outlets of a building, and tells *Z* that they will fire at *Z* if *Z* attempts to leave the building. *A* wrongfully confines *Z*.

342. Punishment for wrongful confinement.—Whoever wrongfully confines any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees or with both.

Wrongful restraint under section 339 means an abridgment of the liberty of a person against his will. However, where a person is deprived of his will power to movement by sleep or otherwise, he could not be said to have been subjected to any restraint. The obstruction of a person must be voluntary, and the obstruction must be such as to prevent that person from proceeding in any direction, in which he has a right to proceed. Obstruction contemplated by this section, though physical, may be caused not only by physical force but also by mere words and threats.[222] Wrongful restraint is punishable under section 341 with simple imprisonment for a term, which may extend to one month or with fine up to 500 rupees or with both.

Wrongful confinement is a form of wrongful restraint under which a person is wrongfully prevented from proceeding beyond certain circumscribed limits. For example, arrest or locking up of a man in a room or tying him up to a tree amounts to wrongful confinement.

To support a charge of wrongful confinement, proof of actual physical obstruction is not necessary. It is sufficient, if such an impression was produced on the mind of the victim as to create a reasonable apprehension that he was not free to depart and that he would be forthwith restrained, if he attempted to do so.[223] Section 342 prescribes punishment for wrongful confinement, which may extend to imprisonment of either description for one year, or fine up to 500 rupees or with both.[224]

Sections 343-348 state different situations under which the nature of the offence is aggravated either by reason of long duration of confinement, or confinement of a person of whose liberation a writ of habeas corpus has been issued, or confinement in secret, or to extort property, or constrain to illegal act, or to extort confession or to compel restoration of property.

Compensation for Miscarriage of Justice for wrongful confinement (imprisonment) statutory compensation Pecuniary and non-pecuniary loss. Independent assessor making deductions from awards for loss of

earnings to recover living expenses during period of imprisonment. Claimant could not recover more than what he has lost Criminal Appeal Act 1995 (c 35), section 28

Regina O'Brien v Independent Assessor,

(2007) UKHL 10 : *[2007] 2 All ER 833*

In 1978, a young newspaper boy was murdered when he interrupted a burglary which was in progress. In 1979, the two applicants, V (Vincent Hickey) and M (Michael Hickey) then aged 25 and 17 respectively, and a co-defendant, RS then aged 45, were convicted of the murder and the aggravated burglary. All three had several previous criminal convictions. V and R were each sentenced to life imprisonment for the murder and 10 years' imprisonment for aggravated burglary. M was sentenced to detention for the murder and 8 years' detention for aggravated burglary. In addition to those sentences, R and M were also sentenced to 15 years' imprisonment and 12 years' detention respectively to run concurrently for two other offences of armed robbery. V was also charged with one of those armed robberies but was never tried for it although he accepted that he had been involved in it.

Serious irregularities in the investigation into the murder of the newspaper boy subsequently came to light, and the prosecution then accepted that the trial had been fundamentally flawed. In 1997, the two applicants and R were released and their convictions in respect of those offences were quashed by the Court of Appeal.

They applied under section 133 of Criminal Justice Act 1988, for compensation for miscarriage of justice. In calculating the pecuniary loss suffered by each of the two applicants, the independent assessor considered what sums the applicants would have earned if they had been at liberty. He further considered that to award the applicants the whole of those sums would over-compensate them because, if they had been at liberty, they would have incurred personal living expenses to provide for the necessities of life such as food, clothing and accommodation which, because they were in prison, they had not incurred. He, therefore; deducted 25% from those lost earnings as calculated to achieve the figure of what, in his judgment, each applicant had actually lost. In calculating the applicants' non-pecuniary loss, the independent assessor made deductions of 2.5% in V's case and 20% in M's case, to take account of their other convictions and any punishment resulting from them, pursuant to section 133 (4A)(c) of the Act.

The applicants sought judicial review of the assessments in respect of their pecuniary loss on the ground that it was unfair, unjust and contrary to public policy to make a deduction from lost earnings to reflect the free board, clothing and accommodation which had been afforded to a prisoner who was wrongfully imprisoned, and therefore; no deduction should have been made from their lost earnings in respect of living expenses for the time they spent in prison; they also contended that the percentages deducted in calculating their non-pecuniary loss were too high in view of the fact that a different independent assessor had made a deduction of only 10% from non-pecuniary loss in respect of R, who was older and had a much more serious criminal record than either of the applicants. The Judge found in favour of the applicants on the assessment of pecuniary loss but rejected their application in respect of non-pecuniary loss. The Court of Appeal allowed the independent assessor's appeal and upheld both assessments.

On the applicants' appeal—

Held, (1) dismissing the appeal in respect of pecuniary loss (Lord Rodger of Earlsferry dissenting), that the rule that a claimant could not recover more than he had lost, which applied to damages in tort for personal injuries, was equally applicable to compensation for loss or deprivation caused by a miscarriage of justice; that the assessor's task in relation to the applicants' loss of earnings claim was to assess what they had really lost, and that was the only loss for which they were entitled to be compensated; that such an assessment had necessarily to be hypothetical, but it had to be as realistic as possible; that if the applicants were awarded the full sum of their notional taxed earnings that would in reality make them better off than if they had earned the money as free men, because as free men they would inevitably have had to incur the basic expenses of living in freedom; that the deduction for necessities put the applicants in the position in which they would in reality have been had they earned the money as free men, and so compensated them for their actual loss; and that, accordingly, the assessor had reached the correct conclusion.

(2) Dismissing the appeal in respect of non-pecuniary loss (Lord Scott of Foscote dissenting), that by analogy with the rule in appeals against sentence on the grounds of disparity between the sentences imposed on co-defendants, the mere fact that their co-defendant, R, had been extremely fortunate in the deduction made for past criminality in his case was not a good reason for the applicants to have similar or smaller deductions made in their cases if that was not merited on the facts; that although it was generally desirable that decision-makers should act in a broadly

consistent manner, the assessor's task was to assess fair compensation for each of the applicants, and he was not entitled to award more or less than in his considered judgment they deserved. Decision of the Court of Appeal affirmed by House of Lords.

351. Assault.—Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparations such a meaning as may make those gestures or preparations amount to an assault.

Illustration

(a) *A* shakes his fist at *Z*, intending or knowing it to be likely that he may thereby cause *Z* to believe that *A* is about to strike *Z*, *A* has committed an assault.

(b) *A* begins to unloose the muzzle of a ferocious dog, intending, or knowing it to be likely that he may thereby cause *Z* to believe that he is about to cause the dog to attack *Z*. *A* has committed an assault upon *Z.*

(c) *A* takes up a stick, saying to *Z*, "I will give you a beating". Here, though the words used by *A* could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

352. Punishment for assault or criminal force otherwise than on grave provocation.—Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Threatening Communication uttered to cause Death- Uttering threats requires subjective element cause fear which may be inferred from the appropriate circumstances in which the utterance were made.

R v O'Brien,

2013 SCC 2 : (2013) 1 WWR 639

The accused was charged with uttering threats to cause death and with breach of probation. In a telephone conversation with the complainant from jail, the accused repeatedly stated his intention to kill the complainant, and how that would occur. The complainant gave evidence at trial and testified that the accused often spoke in a belligerent manner without any hostile intent. The complainant further testified that she did not feel threatened by the accused's statements. The accused was acquitted and the Crown appealed.

The appeal was dismissed. The Court of Appeal found that the mens ran for uttering threats requires subjective intent to cause fear, which may be inferred but only where appropriate given the circumstances in which the impugned utterances were made. The Crown appealed with the Supreme Court of Canada.

Held: The appeal was dismissed, by a majority of 4 to 3.

Per Fish, J (Cromwell, Moldaver, Wagner JJ, concurring): At no point in her reasons did the trial judge state that she was acquitting the accused solely because the complainant did not take the threats seriously. The trial judge did not err in her decision that she was left with a reasonable doubt that the accused intended that the threats be taken seriously.

Per Rothstein, J (McLachlin, and Abella, JJ, concurring) dissenting: The trial judge was required to determine whether the reasonable person would consider that the words were uttered as threats. The trial judge erred in making the complainant's perception the determinate factor in assessing the accused's intent to instill fear in her and to intimidate her. The appeal should have been allowed, and a conviction should have been entered.

354. Assault or criminal force to a woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will there by outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

During 2016 a total of 20,491 cases in which trials were completed, 3930 persons were convicted as against 16561 persons were acquitted or discharged. Total pending cases are 1,91,644.

Accused convicted for offence of outraging modesty of woman was sentenced to six months RI Order reducing sentence of accused to period already undergone merely on ground that accused is first offender is detrimental to society and set aside.—Supreme Court—2015

State of MP v Bablu[225]

Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime where it relates to offences against women involving moral turpitude or moral delinquency, which have great impact on social order and public interest, cannot be lost sight of and *per se* require exemplary treatment. Liberal attitude by imposing meager sentences or taking sympathetic view merely on account of lapse of time in respect of such offences will be counter-productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence in the built in sentencing system. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The Court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter-productive in the long run and against the interest of the society. In the present case, accused was convicted for offence of outraging modesty of woman and sentenced to undergo rigorous imprisonment for six months with fine of Rs 500. The High Court in a very casual manner reduced the sentence of the accused to the period already undergone merely on the ground that the accused is first offender. If such a view is taken, the accused, who commit such offence, will be emboldened and repeat such crime, which is totally detrimental to the society. Hence, the order of High Court reducing sentence to the period already undergone would be set aside.

Note: In *section 354 of the Indian Penal Code, 1860 vide Criminal Law Amendment Act* (13 of 2013) punishment for assault to a woman with intent to outrage her modesty has been enhanced with a minimum of one year of imprisonment that may extend to five years and fine. In addition, four sections 354A, 354B, 354C and 354D stated below were inserted with a view to include (i) Sexual harassment (ii) Assault to woman with intent to disrobe (iii) Voyeurism and (iv) Stalking have been added to provide punishment under the *Penal Code of India*. These sections have been included to provide safety and security to woman against anti-social and undesirable elements—

Insertion of sections 354A, 354B, 354C and 354D.—After *section 354 of the Indian Penal Code*, the following four sections have been inserted *vide Criminal Law Amendment Act* 2013, namely:—

354A. Sexual harassment and punishment for sexual harassment.—(1) A man committing any of the following acts—

(i) physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) a demand or request for sexual favours; or

(iii) showing pornography against the will of a woman; or

(iv) making sexually coloured remarks,

shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (*i*) or clause (*ii*) or clause (*iii*) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (*iv*) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

8.11.1 Favouritism at work place is Sexual Harassment

The Department of Personal Training Government of India has issued new rules that implied or explicit promise of preferential treatment and threat about present and future employment would be considered sexual harassment.

The rule says, Government employees promising preferential treatment or threatening detrimental treatment in employment to women colleagues will be held accountable for sexual harassment, as per the revised central service conduct rules approved by the Department of Personal Training [DoPT] of Government. defining “sexual harassment” and “workplace” in detail in explanation appended to Rule 3C of Central Civil Services Rules 1964 that deals with sexual harassment of women employed in Government, the DoPT made it clear that implicit or explicit promise of preferential treatment or threat of detrimental in employment status would be considered sexual harassment. Similar consequence will follow if a Government employee interferes with a woman colleague’s work or creates an intimidating offensive or hostile environment for her, or metes out humiliating treatment likely to affect her health or safety.

The amended service conduct rules, notified on 19 November, also give an elaborate definition of workplace, including in its purview any department, organization undertaking, establishment, enterprise, institution, office, branch or unit established, owned, controlled or funded wholly or substantially by the central government.

Workplace as per the new conduct rules will also include hospitals, nursing homes, sports institutes, and stadium and sports complexes. Any place visited by the woman employee arising out of or during the couse of employment, including transportation provided by the employer for undertaking the journey will be considered a workplace and invite action under conduct rules if there is any sexual harassment there.

354B. Assault or use of criminal force to woman with intent to disrobe.—Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

354C. Voyeurism.—Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Explanation 1.—For the purpose of this section, “private act” includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim’s genitals, posterior or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.

Explanation 2.—Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.

Comment: It is the practice or sexual interest of spying or peeping on people who are engaged in Private or Sexual Activities, or in some intimate behaviour like getting physical, undressing, masturbation, or other sorts of private activities. The Voyeur is not directly interacting to his/her interest, the other person is unaware of spying. Observing is not only the essence of Voyeurism but also taking the secret photograph or making the video when the subject is doing his/her private activities.

The term *Voir* is a French word, the meaning of this is “to see”. The Male Voyeur is often called as “Peeping Tom”, which is originated from Lady Godiva legend. This term is applied when the male is observing someone secretly and, not in an open or public place.

In common law, Voyeurism is not the crime. Like, in Canada, it is not a crime, but when *Frey v Fedoruk* case arose, then it was declared as a sexual offence. Initially, it was believed that it is only present on the small portion of the population. According to the Research, around 65% men are engaged in peeping activities. Research also found that Voyeurism is one of the common law-behaviour sexual behaviours. The study said that 54% of men have voyeuristic pipe dream and 42% have check out or tried Voyeurism. Studies show that Voyeurs are generally men,

and they have the higher level of sexual interest. They have the greater number of sex-partner than the general populations.

In the UK, *R v Turner* (2002) case: The Sports Centre Manager made a video of four women taking shower. But there were no evidence on that the video was distributed or shown to anyone. The defendant was sentenced nine months imprisonment. This was done for the justice of people who had suffered from this and went through the traumatic effect because of this.

354D. Stalking.—(1) Any man who—

(i) follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or

(ii) monitors the use by a woman of the internet, email or any other form of electronic communication commits the offence of stalking:

commits the offence of stalking:

Provided that such conduct shall not amount to stalking if the man who pursued it proves that—

(i) it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or

(ii) it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or

(iii) in the particular circumstances such conduct was reasonable and justified.

(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

509. Word, gesture or act intended to insult the modesty of a woman.— Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, [226][shall be punished with simple imprisonment for a term which may extend to three years and shall also be liable to fine].

The *IPC* has dealt with force, criminal force and assault in 14 sections commencing from sections 349 to 354, 354A, 354B, 354C, 354D and 355 to 358. Assault, being the first offence in the series of infliction of bodily pain, deserves a brief discussion.

Assault as defined in section 351 signifies a threat or apprehension of threat of use of force about to be used against a person by the accused. The gist of the offence lies on the effect which the threat creates in the mind of the victim.

Sections 353, 354, 354A, 354B, 354C, 354D and 355 to 358 of *IPC, 1860*, provide for severe punishment in cases of assaults and use of criminal force in different situations, namely, to deter a public servant from discharge of his duty, to outrage a woman's modesty, to dishonour a person otherwise than on grave provocation, attempt to commit theft and wrongfully to confine a person and so on.

The object of the provisions as contained in *sections 354*, *354A*, *354B*, *354C*, *354D* and *509 IPC, 1860* are to protect a woman against indecent behaviour of others, which is offensive to morality. In fact, these offences are as much in the interest of the woman as in the interest of public morality and decent behaviour. These offences are not only offences against individual but against public morals, decency and propriety.

To attract the provisions of *section 354, IPC, 1860* it is not enough merely to show that the accused assaulted a woman; it must further be proved that he did so either with the intention to outrage her modesty, or with the knowledge that it was likely that he will thereby outrage her modesty.[227]

8.11 Wrongful Confinement

With a view to curb the growing menace of criminal assault and harassment against women in recent years, four new types of offences discussed below have been added in *IPC, 1860 vide Criminal Law (Amendment) Act* (13 of 2013). These are (i) Sexual Harassment (section 354A); (ii) Assault to disrobe a woman (section 354B); (iii) Voyeurism (section 354C) and (iv) Stalking (section 354D);

(i) **Sexual Harassment:** Section 354A after defining sexual harassment provides for punishments section 354A states that a man shall be guilty of sexual harassment against woman in following situations, namely, if a man

(i) Makes physical contact and advances unwelcome and explicit sexual overtures;

(ii) Demands or requests for sexual favours;

(iii) Shows pornography against the will of a woman;

(iv) Make sexually coloured remarks.

In case of sexual harassment in sub-clause (*i*) or sub-clause (*ii*) or (*iii*) of sub-section punishment may extend up to 3 years, or fine or both; whereas in case of sub-clause (*iv*) punishment may extend to one year or with fine or both.

(ii) **Assault to disrobe a woman or compelling her to be naked:** In case a man assaults or uses force to disrobe a woman section 354B provides punishment which shall not be less than 3 years but may extend to 7 years and fine.

(iii) **Voyeurism:** Section 354C makes voyeurism—watching or capturing the image of a woman engaged in a private act, punishable with a minimum of three years which may extend to seven years and fine.

(iv) **Stalking:** Section 354D makes stalking an offence.

A man is said to stalk a woman if he

(i) follows a woman and contacts,or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of displeasure by such woman;

(ii) monitors the use by a woman of the internet or e-mail or any other form of electronic communication,

Punishment may extend to three years of imprisonment and fine, and in case of subsequent offence upto five years and fine.

Outraging the modesty of a woman is an offence—indecent behaviour and not the age of the woman is the criteria to determine offence of outraging the modesty punishable under section 354, IPC, 1860—Supreme Court (1967)

State of Punjab v Major Singh,

AIR 1967 SC 63 : (1966) Supp SCR 286

Justice Mudholkar stated:

The respondent had caused injuries to the vagina of a seven-and-a-half months old child by fingering. He has been held guilty of causing hurt under section 323 of the Code. The State in appeal contended that the offence amounts to outraging the modesty of a woman and is, thus; punishable under *section 354 of IPC, 1860*.

The question is whether section 354 speaks of outraging the modesty of a woman and at first blush seems to require that the outrage must be felt by the victim herself. But such an interpretation would leave out of the purview of the section assaults not only on girls of tender age but on even grown up women when such a woman is sleeping and did not wake up or is under anesthesia or stupor or is an idiot. It may also perhaps under certain circumstances, exclude a case where the woman is of depraved moral character. Could it be said that the

legislature intended that the doing of any act to or in the presence of any woman which according to the common notions of mankind is suggestive of sex, would be outside this section unless the woman herself felt that it outraged her modesty? Again, if the sole test to be applied is the woman's reaction to a particular act, would it not be a variable test depending upon the sensitivity or the upbringing of the woman?

The test of a woman's individual reaction to the act of the accused is not relevant... When any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that act must fall within the mischief of this section.

The action of Major Singh in interfering with the vagina of the child was deliberate and he must be deemed to have intended to outrage her modesty. Conviction altered under *section 354 of IPC, 1860*, sentenced to six months imprisonment.

Appeal allowed.

Assault on a woman must be with the intention to outrage her modesty—mere proof of assault is not enough for conviction under section 354 of Indian Penal Code, 1860—Supreme Court (1954)

Ram Das v State of WB,

AIR 1954 SC 711 : 1954 Cr LJ 1793

The accused was charged for having committed offence under *section 354, IPC, 1860*. The accused, boarded a railway compartment at night time, in which two women were seated along with their male escorts. He took off his trousers underneath which he was wearing an underwear. Thereupon, there developed a heated exchange of words and quarrel between that group and the accused, in the course of which he gave a push to one of those women.

It was held that no inference of a criminal intention could be drawn from a man's act of removing his trousers at night time before lying down on his berth, since it is a natural preparatory act to becoming comfortable on a journey. In the absence of any evidence as to any gesture made by the accused, it was held that the accused was not liable. It was not established that the accused acted with the intention to outrage the ladies' modesty, or with the knowledge that it was likely that he will thereby outrage their modesty.

8.11.2 Indecent Assault under English Law

As noted above Indian law punishes men alone for indecent assault, women are not subject to liability for committing assault against men. On the other hand, under English law a woman can also he held liable for committing indecent assault both against a man and a woman.[228] According to repealed sections 14[229] and 15[230] of Sexual Offences Act 1956 it is an offence for "**a person**" to commit an indecent assault on a **"woman"** or a **"man"**. Punishment may extend to 10 years of imprisonment in both cases under section 14 and 15. Similar provisions have been retained in Sexual Offences Act 2003.

The offence of indecent assault includes both a battery (a touching) and psychic assault, without touching.[231] In case of battery, proof of the victim's knowledge or the circumstances of indecency is not required, whereas in case of psychic assault the victim must be aware of the assault and of the circumstances of the indecency.

Assault or battery need not be indecent in itself provided it is accompanied by circumstances of indecency. For instance, in *Beal v Kelley*, *(1951) 2 All ER 763*, where, after a boy of 14 years had declined the accused's invitation to touch his penis, the accused took the boy's arms and dragged him towards himself, the accused was held guilty of an indecent assault.

8.11.3 Indecent Assault under Indian Penal Code

It is high time that a new section be added in the *Indian Penal Code* providing punishment for "indecent assault" either committed by a man or a woman as provided under Sexual Offences Act 2003 in England. Such a provision is necessary because under Indian law persons, who are found guilty of "indecent assault", are not covered under any one of the existing provisions in the Code and go scot-free. The law should cover both a man and a woman alike as in case of English law, and punishment should be more stringent than in case of ordinary assault. The proposed section should read as stated below:

Indecent Assault.—Whoever commits indecent assault against a woman or a man shall be liable to punishment with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

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222 *Raja Ram v State of Haryana,* 1972 SCC (Cr) 193 : (1971) 3 SCC 945. A police officer keeping persons under restraint is guilty of wrongful restraint and not wrongful confinement.

223 *Lilabati v State,* 1966 Cr LJ 838.

224 *Shyam Lal Sharma v State of MP, AIR 1972 SC 886* : (1972) 1 SC 764 : 1972 SCR (3) 422.

225 *AIR 2015 SC 102*, MY Eqbal and Pinaki Chandra Ghose, JJ, delivered the judgment.

226 Subs. for the words "shall be punished with simple imprisonment for a term which may extend to one year, or with fine or with both." *Vide Criminal Law (Amendment) Act* 13 of 2013 with effect from 3 February 2013.

227 *Ram Das v State of WB,* AIR 1954 SC 711 : 1954 Cr LJ 1793.

228 Lope, J in *Armstrong*, (1885) 49 JP 745.

229 Sexual Offences Act 1956, section 14: *Indecent assault on a woman:*

"It is an offence… for a person to make an indecent assault on a woman".

230 Sexual Offences Act 1956, section 15: (1) *Indecent assault on a man:* "It is an offence for a person to make an indecent assault on a man". Replaced by Sexual Offences Act 2003.

231 *R v Court, (1987) 1 All ER 120* (122) (Crown Court of Appeal). See chapter 25 for facts of the case.

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8.12 Kidnapping and Abduction

KD Gaur: Criminal Law-Cases and Materials, 9th ed

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Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.12 Kidnapping and Abduction

Kidnapping and abduction are punishable under *sections 359-369* of the *Indian Penal Code, 1860*. The object of including such offences in *IPC* is to extend protection to children of tender age from being abducted or seduced for illegal and undesirable purposes and to preserve and protect the rights of the parents and guardians over their wards.

359. Kidnapping.—Kidnapping is of two kinds: kidnapping from India, and kidnapping from lawful guardianship.

360. Kidnapping from India.—Whoever conveys any person beyond the limits of India without the consent of that person, or of some person legally authorised to consent on behalf of that person, is said to kidnap that person from India.

361. Kidnapping from lawful guardianship.—Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words, "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

363. Punishment for kidnapping.—Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

362. Abduction.—Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

Sections 363A to *369* of *IPC, 1860* deal with aggravated forms of kidnapping and abduction.

A total of 77,250 cases of kidnapping and abduction were reported in 2014, 83,005 in 2015 and 88,008 in 2016 respectively as stated in National Crime Record Bureau 2016 at p 109. Delhi in Union Territory accounted for 7143 in 2014, 7730 in 2015 and 6619 in 2016 respectively. As stated, Uttar Pradesh accounted for 12,361, in 2014 11,999 in 2015 and 15,898 followed by Bihar at 6675 in 2014, 7128 in 2015 and 7324 respectively. In cities, Delhi accounted for 3364, Mumbai 1142 and Bengaluru 24,674.

When minor joins the accused on her own, it does not amount to "taking" from lawful guardianship punishable under section 362 IPC, 1860—Appeal allowed conviction set aside—Supreme Court (1965)

S Varadarajan v State of Madras,

AIR 1965 SC 942 : *[1965] 1 SCR 243*

Justice Mudholkar held:

This is an appeal from the judgment of the High Court of Madras affirming the conviction of the appellant under *section 363 of IPC, 1860*.

...Savitri, who was a minor, left the house of K Natarajan (a relative of her father S Natrajan) at about 10 am and telephoned to the appellant asking him to meet her on a certain road in that area and then went to that road herself,...both of them went to the registrar's office. Thereafter, the agreement to marry entered into between the appellant and Savitri, which was apparently written there, was got registered. After the document was registered the appellant and Savitri went to Ajanta Hotel and stayed there a stay of a couple of days... to Srikakulam on 4 October and stayed there for ten to twelve days. Thereafter, they went to Coimbatore ...where they were found by the police who were investigating into a complaint of kidnapping made by S Natarajan.... Savitri was born on 13 November 1942 and she was a minor on 1 October 1960.

...Accepting the appellant's contention, the court held that "taking" of Savitri out of the keeping of her father has not been established as defined in the first paragraph of *section 361 of the Indian Penal Code, 1860*.

Taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. The question remains as to what is it which the appellant did that constitutes in law "taking".

There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K Natarajan at the instance or even a suggestion of the appellant. Savitri has stated that she had decided to marry the appellant and insisted the appellant accordingly.

Complying with her wishes the appellant took her to the sub-registrar's office and got the agreement of marriage registered there. The appellant can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit.

In these circumstances no inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him.

Held, no offence under *section 363 IPC, 1860* for Kidnapping has been established against the appellant. The conviction is set aside and the appeal is allowed.

Taking or enticing of a minor from the lawful custody of guardian amounts to kidnapping Conviction upheld—Appeal dismissed Accused liable—Supreme Court (1972)

Thakorlal D Vadgama v State of Gujarat,

AIR 1973 SC 2313 : *(1973) 2 SCC 413* : 1974 SCR (1) 178

The fact that on the day of occurrence the girl voluntarily went to the accused would be no defence to a charge of kidnapping a minor girl with an intention to seduce her to engage in illicit intercourse, if there is ample material showing allurement.

Section 361 uses the expression "whoever takes or entices any minor". The word "takes" no doubt, means physical taking but not necessarily by use of force or fraud. The word "entice" seems to involve the idea of inducement or allurement by giving rise to hope or desire in the other. This may work immediately or it may create a continuous

and gradual but imperceptible impression culminating after some time in achieving its ultimate purposes of successful inducement.

The two words read together suggest that if the minor leaves her parental home, completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence of kidnapping *(Varadarajan's* case).

But, if the guilty party has laid a foundation by inducement, allurement or threat, etc, and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If the accused had at an earlier stage solicited or induced her in any manner to leave her father's protection by conveying or indicating an encouraging suggestion that he would give her shelter, then the mere circumstances that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defence and would not absolve him from criminal liability.

It was held that the accused was liable for kidnapping the minor girl in question. Evidence of the behaviour of the appellant towards the minor girl for several months preceding the incident completely brings the case within *sections 361*, *366* of the *Indian Penal Code, 1860*.

Taking a child under section 16 (with child's consent) from the custody of the mother without lawful authority amounts to abduction within section 2 (1)(b) of Child Abduction Act 1984 Conviction upheld Appeal dismissed—Court of Appeal (2000)

R v A[232]

On 19 June 1998, a 15-year old girl left her home in Cambridgeshire with the appellant *"A",* who arrived at the girl's house, and travelled with him to London. For nine days they lived together in the appellant's car.

A was charged with and convicted of taking a child under the age of 16 without lawful authority or reasonable excuse, so as to remove her from the lawful control of a person having such control over her, contrary to section 2 (1)(b)[233] of Child Abduction Act 1984.

On appeal, *A* contended that he had not taken the girl within the meaning of section 2 (1)(b) because she had wanted to go with him.

Rejecting the appeal the court said, for the purposes of sections 2 (1)(b) and 3 (a)[234] of the 1984 Act, the defendant's acts need not be the cause of the child accompanying him. Rather, it was sufficient that those acts were effective causes, such as the child's state of mind. A conclusion to the contrary would render section 3 (a) unworkable since, in many cases, the child's consent was likely to be a cause of the child accompanying the defendant. In the instant case, there was ample evidence to leave to the jury on the question on whether A's acts were cause of the girl accompanying him.

A sentence of two years' imprisonment, for taking girl from her family and keeping her in London with no contact for five days and for nine days in all was appropriate.

Appeal was dismissed.

Conviction for Abduction and Murder—Appreciation of evidence—Sections 120B, 201, 302, 328A and 364A of Indian Penal Code, 1860 and section 65B of Indian Evidence Act 1872—Trial convicted Appellants/Accused under sections 120B, 364A, 302, 328A and 201 read with 120B of Code for abduction and murder—High Court confirmed conviction order—Present appeal filed against confirmation of conviction order. Held order of conviction was justified. Apex Court affirmed conviction. Appeal dismissed.—Supreme Court—2017

Sonu v State of Haryana[235]

Per L Nageswara Rao, J:

The appellants in these appeals along with Dharmender @ Bunty were found guilty of abduction and murder of Ramesh Jain. They were convicted and sentenced for life imprisonment. Their conviction and sentence was

confirmed by the High Court. Accused Dharmender @ Bunty did not file an appeal before this Court. Accused Rampal was convicted under *section 328* read with *201 Indian Penal Code, 1860* and was sentenced to seven years imprisonment. His conviction was also confirmed by the High Court which is not assailed before us.

The Additional Sessions Judge by his order convicted accused under sections 120B, 364A, 302, 328A and 201 read with 120B of *IPC, 1860*. All the convicted accused filed appeals before the High Court. The High Court dismissed all the appeals after a detailed re-appreciation of the material on record. Accused have approached present Court by fling appeals against the confirmation of their conviction and sentence.

Held, while dismissing the appeal Apex Court said:

(i) The dead body was that of deceased as identified by his relatives. The medical evidence shows that the skin was peeled of at several places but the features of the body could easily be made out. There was sufficient evidence on record to suggest that 4th accused was in constant touch with the other accused. His mobile phone and the recoveries that were made pursuant to the disclosure statement would clearly prove his involvement in the crime. [20] and [21]

(ii) Call Detail Records (CDRs) did not fall in the said category of documents. An objection that CDRs were unreliable due to violation of the procedure prescribed in *section 65B (4) of Evidence Act 1872* could not be permitted to be raised at this stage as the objection relates to the mode or method of proof. All the criminal Courts in this country are bound to follow the law as interpreted by present Court. Because of the interpretation of *section 65B of Evidence Act 1872* in *Navjot Sandhu* case, there was no necessity of a certificate for proving electronic records. Electronic records without a certificate might have been adduced in evidence. There was no doubt that the judgment of present Court in *Anvar's* case has to be retrospective in operation unless the judicial tool of prospective overruling was applied. However, retrospective application of the judgment was not in the interests of administration of justice as it would necessitate the reopening of a large number of criminal cases. Criminal cases decided on the basis of electronic records adduced in evidence without certification have to be revisited as and when objections were taken by the accused at the appellate stage. Attempts would be made to reopen cases which have become final. [27] and [32]

Appeal dismissed.

Penal Code of India (45 of 1860), sections 300, 364, 120B—Kidnapping, murder and conspiracy. Circumstantial evidence, medical evidence proving strangulation and thus, homicidal death. Dispute between deceased and accused in respect of land transaction established by unshattered, corroborated oral evidence. Deceased after meeting with accused not seen elsewhere at later point of time. Circumstances of motive and last seen together, established. Discovery of dead body and bloodstained clothes by accused. Mere absence of evidence regarding blood group, not fatal. Involvement of accused in crime and factum of conspiracy, established. Concurrent finding about guilt of accused. No interference.—Supreme Court—2017 Appeal dismissed.

Kishore Bhadke v State of Maharashtra[236]

Per AM Khanwilkar, J:

These appeals are filed by the accused No 1, accused No 3 and accused No 6. They were tried for offence punishable under sections 364, 302, 201 read with 34/120B of *Indian Penal Code* along with four other accused, and were convicted by trial court and awarded sentence of life imprisonment which was confirmed by the High Court.

Dismissing the appeal Apex Court held:

> The fact that accused No 6 did not make similar disclosure about disposal of dead body of Raman, as made by accused No 2 and 3, cannot absolve him. The Courts below, in our opinion, have rightly concluded that the concerned accused, in particular accused Nos 1, 3 and 6 were party to the conspiracy to cause homicidal death of deceased Raman and for disposal of the evidence of crime.

The Court rejected that plea and held that merely because the recovery was not signed by accused, it will not vitiate the recovery itself. Further, every case has to be decided on its own facts. Accordingly, even this contention of the appellants must fail.

The Courts below have considered the evidence on record and found that the memorandum making disclosure about the gold ring in possession of accused No 6 was admissible and trustworthy. We are not inclined to disturb the concurrent findings recorded by the two Courts below in that behalf. Insofar as accused No 6, there is clinching evidence to hold against him on the basis of last seen together, seen loading the gunny bag in the vehicle and then travelling in the same vehicle for disposal of the dead body. This evidence cannot be disregarded. The finding recorded by the Trial Court in favour of the acquitted accused or by the High Court in favour of the accused No 7, is not by disbelieving the evidence of the same prosecution witnesses. But, it is in the context of the limited role of the concerned accused established from the evidence of the same prosecution witnesses. Court accordingly uphold the finding of guilt as against these accused Nos 1, 3 and 6 as recorded by the Courts below as also the sentence imposed in respect of the offence committed by them.

Appeal dismissed.

Penal Code of India 1860, sections 364, 302, 201—Kidnapping, murder and causing disappearance of evidence. Circumstantial evidence. Deceased and accused last seen together in car leaving temple. Recovery of dead body on next day in neighbouring State. Disclosure of accused of spot where dead body of deceased dumped by him. Identity of dead body of deceased established by DNA testing. Conduct of accused in misleading investigating agencies, burning of vehicle used in crime and then filing false insurance claim. Strong motive and conspiracy hatched in that behalf and executed. Completes chain of events indicative of involvement of accused in commission of crime. Conviction of accused persons, proper - Supreme Court 2017.

Charandas Swami v State of Gujarat[237]

Per AM Khanwilkar, J:

These appeals have been filed by accused No. 1, No. 2 and No. 5 against the judgment and final order of the High Court of Gujarat. The High Court has upheld the decision of the Sessions Court, convicting accused Nos. 1, 2, 3 and 5 for offences under sections 302 read with 120B, 364 and 201 of *Indian Penal Code, 1860* and for the murder of one Gadadharanandji. The High Court, however, has acquitted accused No. 4 of the said offences. The High Court commuted the death sentence awarded by the Sessions Court to a sentence of life imprisonment for the aforementioned four accused. Accused No. 3 has not filed appeal before this court against the impugned judgment.

According to the prosecution, the accused kidnapped Gadadharanandji from the Vadtal Temple complex, took him in a blue car/van to the Navli Temple complex where they procured a call girl for him, after which they sedated and then strangled him. However, this chain of events was at odds with the panchnama drawn at the behest of accused No. 3 wherein he is stated to have confessed that he himself kidnapped Gadadharanandji from the temple, drove him to his (accused No. 3) house in Vadtal and then strangled him there using the deceased's "khesiya" (cloth usually placed around the neck). Accused No. 3 also claimed that he returned with the deceased's body in his car to Vadtal, informed accused No. 1 about the deed and then took accused No. 5 along with him to Rajashtan where they disposed of the dead body of deceased by throwing it in a ditch and lighting it on fire.

Dismissing the appeal and upholding the conviction Apex Court held that the prosecution has clearly proved the recovery of the deceased's body and its identification. PW-50 had deposed that he found the burnt body in a ditch at Barothi Village, Rajasthan. It has been proved that the said body was of the deceased through DNA testing and by the presence of gold caps on the teeth of the body. This has been corroborated by PW-1, the doctor who put the caps on the teeth of the accused. Thus, the chain of events is complete in the present case so as to leave no manner of doubt regarding the guilt of the accused. This Court should be loath (unwilling) to interfere with the concurrent findings of guilt recorded by the two courts against the appellants herein.

Accordingly, we dismiss all the three appeals filed by the original accused Nos 1, 2 and 5 respectively and uphold the order of conviction and sentence passed by the High Court.

Appeal dismissed.

232 *[2000] 2 All ER 177* (CA), per Clarke LJ.

233 Child Abduction Act 1984, section 2 (1)(b) reads: Subject to sub-section (3) below, a person, other than one mentioned in sub-section (2) below commits an offence if, without lawful authority or reasonable excuse, he takes or detains a child under the age of sixteen (a) so as to remove him from the lawful control of any person having lawful control of the child; or (b) so as to keep him out of the lawful control of any person entitled to lawful control of the child.

234 Child Abduction Act 1984, section 3 (a) reads: For the purposes of this Part of this Act—(a) a person shall be regarded as taking a child if he causes or induces the child to accompany him or any other person or causes the child to be taken.

235 *AIR 2017 SC 3441* : 2017 Cr LJ 4352 : 2017 (3) RCR (Cr) 786 : 2017 (8) Scale 45 : *(2017) 8 SCC 570* : JT 2017 (7) SC 362. Decided on 18 June 2017 by SA Bobde and L Nageswara Rao, JJ.

236 *AIR 2017 SC 279* : 2017 Cr LJ 988 : JT 2017 (1) SC 24 : *2017 (1) Scale 270* : *(2017) 3 SCC 760*, Jagdish Singh Khehar, Arun Mishra and AM Khanwilkar, JJ, delivered the judgment.

237 *AIR 2017 SC 1761* : 2017 Cr LJ 2904 : JT 2017 (5) SC 94 : 2017 (4) Scale 403 : *(2017) 7 SCC 177*, Kurian Joseph and AM Khanwilkar, JJ, delivered the judgment.

8.13 Kidnapping for Ransom

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Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.13 Kidnapping for Ransom

364A. Kidnapping for ransom, etc.—Whoever kidnaps or abducts any persons or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the government or any foreign state or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine.

Comment: In 1993, a new section 364A entitled "Kidnapping for ransom" was added in *IPC*[238] to curb rise in militancy.

This section has the following ingredients:

(1) Kidnapping abducting a person; or

(2) Keeping such person in detention after kidnapping or abduction;

(3) (a) threatening to cause death or hurt to that person, or

(b) give rise to a reasonable apprehension that such person may be put to death or hurt or causes hurt or death to such person;

(4) Compel

(a) The government; or

(b) any foreign state; or

(c) international inter-government organisation; or

(d) any other persons to do or to abstain from doing any act or pay any ransom.

In view of the gravity and serious nature of such offences *section 364A, IPC, 1860* has provided for extreme penalty of death or life imprisonment with fine in case of kidnapping for ransom, etc. The offence under the section is cognizable, non-bailable and triable by court of sessions.

With a view to curb this the heinous offence, a consequential amendment was also made in *Criminal Procedure Code 1973* in section 39 (1) by inserting sub-clause (va)[239] imposing legal obligation on the part of "every person to inform to the nearest magistrate or police officer about kidnapping for ransom, etc, if one happens to know about it". In case of failure to discharge such legal obligation, a person is liable to punishment under *section 176, IPC, 1860* which may extend to six months of simple imprisonment or with fine up to one thousand rupees or with both.

Penal Code of India 1860, sections 368 and section 364A and section 368 IPC—Kidnapping for ransom. Proof Victims abducted by accused persons and kept in captivity for 52 days. Act of abduction is result of meticulous planning of logistics with separate roles assigned to accused persons. Demand for ransom established between informant and accused persons on mobile. Fact that it was actually paid or not is irrelevant. Offence under section 364A and section 368 made out. (Paras 30, 31, 35) Ingredients of offence under section 368 keeping in confinement established. Consequences of section 364A also attracted.—Supreme Court—2017

Birbal Choudhary alias Mukhiya Jee v State of Bihar[240]

Per AK Sikri, J:

The eleven appellants faced trial, are variously convicted under the provisions of *Indian Penal Code, 1860* for committing offences punishable under *sections 364A*, *34*, *395* and *412* of *IPC, 1860*.

The Sessions Court, finding them guilty of aforesaid offences, had sentenced two appellants, Krishna Bihari Singh alias Krishna Singh and Jawahar Koiry alias Jawahar Singh alias Neta Jee, to suffer death penalty. However, the sentence has been truncated by the High Court on appeal/reference, awarding them the punishment of imprisonment for 20 years. The High Court, having opined that the actions of all the appellants were driven by common intention, the conviction of life imprisonment of the other remaining appellants is also fixed at 20 years.

The case pertains to the abduction of Ajay Shanker Mishra (PW-17), Manoj Singh (PW-18) and Raju Mishra (PW-20) which the prosecution claims, was committed for extracting ransom.

Dismissing the appeal Apex Court confirming the conviction awarded by the trial court as well as High Court said referring to *Chittarmal v State of Rajasthan*[241], it is well-settled by a catena of decisions that section 34 as well as section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the sections deal with combinations of persons who become punishable as sharers in an offence. Thus, they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or preconcert. Though there is a substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under section 149 overlaps the ground covered by section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both section 34 and section 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of section 34 for section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of section 34 for section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non-applicability of section 149 is, therefore, no bar in convicting the appellants under *section 302* read with *section 34 IPC, 1860*, if the evidence discloses commission of an offence in furtherance of the common intention of them all.

Provision of *section 368, IPC, 1860* makes it clear that even person who wrongfully conceals or confines kidnapped person knowing that he has been kidnapped suffers some consequences at par with person who had kidnapped or abducted person with same intention or knowledge or for same purpose. In statement of accusations under *section 313, CrPC 1973* it was categorically put to him that allegation against him was of having kept kidnapped persons in confinement knowing that they had been kidnapped. Thus, specific case set up by prosecution against accused was that he had kept victims in confinement with knowledge that they were kidnapped. Thus, ingredients of *section 368, IPC* has been established against him. Once that has been proved, consequences of *section 364A IPC*, for which other co-accused persons were found convicted, shall stand attracted. *Section 368, IPC* puts offence prescribed therein at par with section 364A by raising statutory presumption based on a legal fiction of former being deemed offence under latter, if evidence be there. Further no prejudice has been caused to accused who knew ingredients of charge that were levelled against him. (Paras 59, 60)

Appeals are dismissed.

Kidnapping: In the year 2016, Delhi received 5,453 (48.3%) cases, Mumbai 1,876 (16.6%) and Bengaluru reported 879 (7.8% cases of kidnapping in the country.

Penal Code of India (45 of 1860), section 364A – Kidnapping for ransom – proof – Accused persons in glaring day light kidnapped child in presence of mother and demanded money – In her evidence, mother of child had narrated whole incident and had graphically deposted about individual action of accused – She was not only overpowered, but was also injured by accused. Ransom note demanding Rs 5 Lac which was proved to be in handwriting of accused established threat to life of child in a case of non-payment of money-Ingredients of section 364-A were proved – Conviction of accused, proper.

Shyam Babu v State of Haryana[242]

Per VS Sirpurkar, J:

As many as five accused persons came to be tried by the Sessions Judge, Faridabad confirming their conviction for offences under *sections 364A*, *325*, *323*, *384*, *342* and *506*, *IPC* all read with *section 120B, IPC*. For kidnapping for ransom of 4 ½ year old boy from his home. The boy was recovered from a sugar cane field. Their conviction for life imprisonment was upheld by the High Court also. However, only accused Nos 1, 3, 4 and 5 have come up by way of an appeal. While dismissing the appeal, apex court held that the prosecution has proved beyond doubt that all the accused persons have, undoubtedly, committed the offence under Section 364-A and the Courts below were right in convicting them for the offence, as also awarding them the life imprisonment for the same. We find no merit in the appeal. The appeal is dismissed.

Kidnapping for ransom: criminal cases cannot be withdrawn from prosecution to concede to the illegal demands of a deal. Minor discripencies rival matters not touching the core of case is immaterial - Conviction upheld Supreme Court - 2015

Vinod Kumar v State of Haryana,

AIR 2015 SC 1032 : JT 2015 (1) SC 16 : 2015 (3) SCC 138 : 2015 (1) Scale 121

Per Dipak Mishra J:

While upholding the conviction of the accused by the Punjab and Haryana High Court and dismissing the appeal, the Apex Court held the accused liable for ransom of Rs 1 lakh under *section 364A IPC*.

For kidnapping of 3½ years child, by a domestic help, the plea of the accused under section 313 that demand for ransom was done under pressure, was rejected. In brief, the facts are as stated below:

The accused with a domestic help alleged to have kidnapped the child from custody of her parents. The accused wrote letter to her mother of child and demanded ransom of 1 lakh. An FIR was lodged and the accused was apprehended by the police and produced before the Magistrate with letter to which he admitted to have been written by him. On the basis of evidence and relevant documents, the High Court of Punjab and Haryana convicted two accused under *section 364A IPC, 1860*.

While upholding the conviction the Apex Court said relating to place and time pertaining to various aspects stated by witnesses and incident of accused at the time of arrest are minor in nature when child was recovered from the accused at the railway station for which no explanation was given by the accused as to how the child could be brought to the railway station. The appeal was accordingly dismissed by the apex court.

Abdul Karim v State of Karnataka[243]

On the night of 30 July 2000, Veerappan, sandalwood smuggler, abducted film star Raj Kumar and three others from Gajanoor in Karnataka. This resulted in a large-scale agitation and demonstration, pressurising the State Government of Karnataka and Tamil Nadu to ensure safe release of the film star.

The State Government of Karnataka, being afraid of the consequences, conceded to the illegal demands of Veerappan which included inter alia, the withdrawal of cases under Terrorists and Disruptive Activities (Prevention) Act (TADA) and other criminal cases against him and his associates in lieu of safe release of the film star. The Special Public Prosecutor,[244] on the instruction of the government moved the designated court, Mysore for the withdrawal of cases from prosecution in the larger interest of the State and in order to avoid any unpleasant situation. The petition for withdrawal of cases was allowed by the court.

Aggrieved by the decision of the court, the appellant Abdul Karim, father of Shakeel Ahmed, a police officer who had allegedly been killed by Veerappan and his associates in an encounter, moved the Supreme Court for cancellation of the order of withdrawal on the ground that the State Government of Karnataka had yielded to the illegal demands of Veerappan and that no cogent reasons have been given for the decision to drop the TADA and other cases.

The Supreme Court rightly observed that while granting consent for withdrawal of a criminal case under *section 321 of the CrPC 1973* the trial court must ensure that:

(i) The public prosecutor has applied his mind independently to relevant materials and exercised jurisdiction in good faith;

(ii) The withdrawal from prosecution is in public interest; and

(iii) It will not stifle or thwart the process of law or cause injustice.

While allowing the appeal and holding the consent granted by the designated special court for withdrawal of cases bad in law, the Supreme Court observed:

> The Governments have to consider and balance between maintenance of law and order and anarchy. If Government yields to the pressure tactics of those who are to terrorise... and overawe the elected government, people may lose faith in the democratic process, when they see public authorities flouted and the helplessness of the government. The aspect of paralysing and discrediting the democratic authority has to be taken into consideration.

It was because of the timely intervention of the Supreme Court that prevented the State from granting absolute immunity to Veerappan and his associates. It is a welcome judgment and will go a long way in restraining the authorities to concede to the illegal demands of the culprits.

Section 364A: Kidnapping for Ransom—Considering alarming rise in kidnapping of children for ransom, legislature has in its wisdom provided for stringent sentence-Once Demand at ransom and its communication established-currency notes seized-accused Liable Appeal Dismissing—Supreme Court—2008

Vinod v State of Haryana[245]

Per Dr Arijit Pasayat, J:

Ten persons including one Virendar (a proclaimed offender) were convicted for kidnapping of Amit Kumar, aged 9 years on 29 May 1996 for ransom punishable under *section 364A IPC, 1860* and sentenced to imprisonment for life.

Three days after the incident on 2 June 1996 a telephone message from Saharnpur was sent to Madan Mohan father of the boy that his son Amit Kumar was well but his abductor were demanding a ransom amount of Rs 10,00,000/- failing which they were threatening to kill Anil Kumar; and that if the matter is reported to the police his son would be killed. The manner in which the money was to be paid and the place where and to whom it was to be delivered in exchange of the boy was communicated.

Being scared of the constant threat of murder of the child Madan Mohan arranged for ten lakh and arranged the notes in the denominations of Rs 500/, Rs 100/- and Rs 50/- respectively and the first and last notes of the bundles were initialed as “MM” by Madan Mohan. The bag containing currency notes was handed over to the middle man-Yashpal who had taken away the bag in the car bearing Registration No HR-06B-244 which he had driven away himself. Next day on 4 June 1996 Yashpal brought back Amit Kumar and handed him over to Madan Mohan.

After a hectic search finally all the nine accused[246] (except one Virender who was declared a proclaimed offender) were rounded up, currency notes with the initial of Madan Mohan was found from the possession of the accused. They were prosecuted for the offence of kidnapping for ransom under *section 364A IPC* and found guilty which was confirmed by the High Court.

Dismissing the appeal the apex court said that:

When the evidence on record is analysed in the background of *section 364A IPC* the inevitable conclusion is that the prosecution has clearly established commission of the said offence. Considering the alarming rise in kidnapping of young children for ransom, the legislature in its wisdom provided for stringent sentence. Therefore the High Court rightly refused to interfere in the matter.

Section 364A, IPC, 1860—Considering the alarming rise in kidnapping for ransom of young children, stringent sentence is required as provided under section 364-A IPC irrespective of the fact that kidnapping has not resulted in death of the victims—Supreme Court—2012

Akram Khan v State of WB,

JT 2011 (14) SC 299 : 2011 (13) Scale 308 : AIR 2012 SC 308 : (2012) 1 SCC 406 : 2012 (1) SCC (Cr) 447

P Sathasivam and Chelameswar, JJ:

While dismissing the appeal against the conviction and sentence of the accused appellants Akram Khan, Afzal Khan, Md Zakir and Md Kalim under *sections 364A*/*120B* read with *section 34*, *IPC* for imprisonment for life and fine, for the kidnapping for ransom (of Rs 3 lakhs) of a minor boy named Vicky Prasad Rajak in the afternoon of 17 March 2000 which was a *Bakrid* day, the court turned down the plea for leniency in punishment.

The court while endorsing its earlier views in *Malleshi v State of Karnataka*,[247] and *Vinod v State of Haryana*,[248] held that in view of the alarming rise in kidnapping for ransom, the legislature has rightly provided for stringent sentence. There is no question of showing any leniency in awarding sentence in such a crime which must be dealt with the harshest possible manner.

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238 Ins. in *Indian Penal Code* by Act 42 of 1993, section 2 (wef 22 May 1993).

239 Ins. by Act 42 of 1993, section 93, wef 2 May 1993.

240 AIR 2017 SC 4866 : 2018 Cr LJ 954 : JT 2017 (10) SC 393 : 2017 (12) Scale 317, AK Sikri and RK Agrawal, JJ, delivered the judgment.

241 (2003) 2 SCC 266 : AIR 2003 SC 796. (See *Barendra Kumar Ghosh v King Emperor,* AIR 1925 PC 1 : 26 Cr LJ 431; *Mannam Venkatadari v State of AP,* (1971) 3 SCC 254 : 1971 SCC (Cr) 479 : AIR 1971 SC 1467; *Nethala Pothuraju v State of AP,* AIR 1991 SC 2214 : (1992) 1 SCC 49 : 1992 SCC (Cr) 20 and *Ram Tahal v State of UP,* AIR 1972 SC 254 : 1972 SCC (Cr) 80 : (1972) 1 SCC 136.

242 AIR 2009 SC 577 : JT 2008 (12) SC 42 : 2008 (14) Scale 310 : (2008) 15 SCC 418, DK Jain and VS Sirpurkar, JJ.

243 AIR 2001 SC 116 : (2000) 8 SCC 710. The judgment was delivered by SP Bharucha, DP Mohapatra and YK Sabharwal, JJ.

244 *Code of Criminal Procedure 1973, section 321* reads: "The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court at any time before the judgment is pronounced withdraw from the prosecution of any person…"

245 AIR 2008 SC 1142 : (2008) 2 SCC 246 : JT 2008 (1) SC 609 : 2008 (1) Scale 711, Dr Arijit Pasayat and S Sathasivam, JJ Amit Kumar, aged 9 years of class 3rd standard son of Madan Mohan resident of Old Housing Board colony, Panipat (Haryana) was kidnapped on 29 May 1996 around noon time when the boy had gone to play with his friends outside the colony nearly 100 yards away from the gate. When the boy did not return Madan Mohan his father made a search and reported the matter to the police. But nothing could be found out.

246 Nine accused are Vinod, Vikas, Vidya Sagar, Vishav Pal, Pawan Kumar, Sunder Pal, Vinod, Sohan and Jagbir.

247 AIR 2004 SC 4865 : (2004) 8 SCC 95 : 2004 Cr LJ 4645 : JT 2004 (8) SC 72 : 2004 (7) Scale 671.

248 AIR 2008 SC 1142 : (2008) 2 SCC 246 : JT 2008 (1) SC 609 : 2008 (1) Scale 711.

8.14 Trafficking and Exploitation of a Trafficked Person

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.14 Trafficking and Exploitation of a Trafficked Person

Substitution of sections 370 and 370A for section 370.—For *section 370 of IPC, 1860*, the following sections 370 and 370A have been substituted, *vide Criminal Law (Amendment) Act* (13 of 2013) as stated below to punish the trafficking of persons and their exploitation.

370. Trafficking of persons.—(1) Whoever, for the purpose of exploitation, (*a*) recruits, (*b*) transports, (*c*) harbours, (*d*) transfers, or (*e*) receives, a person or persons, by—

First.—using threats, or

Secondly.—using force, or any other form of coercion, or

Thirdly.—by abduction, or

Fourthly.—by practising fraud, or deception, or

Fifthly.—by abuse of power, or

Sixthly.—by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received,

commits the offence of trafficking.

Explanation 1.—The expression “exploitation” shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation 2.—The consent of the victim is immaterial in determination of the offence of trafficking.

(2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

(3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(5) Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.

(6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

(7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

370A. Exploitation of a trafficked person.—(1) Whoever, knowingly or having reason to believe that a minor has been trafficked, engages such minor for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than five years, but which may extend to seven years, and shall also be liable to fine.

(2) Whoever, knowingly by or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than three years, but which may extend to five years, and shall also be liable to fine.

Sections 370 and *370A IPC, 1860* aim at suppressing trafficking and exploitation of persons. It makes the trafficking of person (s) a cognizable and non-bailable offence punishable with imprisonment that may vary depending on the gravity of the offence. Section 370 (1) defines trafficking and clauses (2) to (6) prescribes the punishment in case of aggravated kinds of trafficking.[249]

Explanation 1 defines "exploitation" to include:

(i) any act of physical exploitation;

(ii) any form of sexual exploitation, slavery, servitude or bondage; or

(iii) forced removal of organs.

Explanation 2 makes the consent of the victim immaterial in determination of the offence of trafficking.

According to section 370, a person commits the offence of trafficking if he

(a) recruits;

(b) transports;

(c) harbours;

(d) transfers; or

(e) receives a person or persons by

  (1) using threats; or

  (2) using force, or any other form of coercion; or

  (3) abduction; or

  (4) by practicing fraud or deception;

  (5) by abuse of power or

  (6) by inducement, including the giving or receiving of payments or benefits in order to obtain to the consent of any person having control over the person recruited, transported, harboured, transferred or received.

Taking into account gravity of the offence "trafficking" has been divided under six categories for the purpose of punishment, viz,

Offence	Punishment

8.14 Trafficking and Exploitation of a Trafficked Person

Offence	Punishment
(i) Trafficking of person	Not less than 7 years rigorous imprisonment upto 10 years + fine [section 370 sub-section 2]
(ii) Trafficking of more than one person	Not less than 10 years—upto life imprisonment + fine [section 370 sub-section 3]
(iii) Trafficking of a minor	Not less than 10 years—upto life + fine [section 370 sub-section 4]
(iv) Trafficking of more than one minor	Not less than 14 years—upto life + fine [section 370 sub-section 5]
(v) Person convicted of trafficking of minor on more than one occasion	imprisonment for remainder of natural life + fine [section 370 sub-section 6]
(vi) Public servant/police officer involved in trafficking of minor	imprisonment for life till death + fine [section 370 sub-section 7]

According to section 370A clause (1) if a person knowingly engages a trafficked minor for sexual exploitation, he shall be punished for a minimum of 5 years of rigorous imprisonment which may extend to 7 years; and shall also be liable to fine.

According to 370 A clause (2) if a person knowingly engages a trafficked person for sexual exploitation, he shall be liable to a minimum of 3 years imprisonment which may extend to 5 years and fine.

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249 Subs. *vide Criminal law (Amendment) Act* 13 of 2013 (w.e.f. 3 February 2013).

8.15 Selling or Buying of Minors for Prostitution

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.15 Selling or Buying of Minors for Prostitution

Sections 370 and *371*, *IPC, 1860*, aim at suppression of slavery and *sections 372* and *373*, *IPC, 1860* punish the trade of minor for purposes of prostitution. These sections are in consonance with *Article 21 of Constitution of India 1950* which prohibits traffic in human beings and forced labour, as these acts are in violation of one's fundamental right against exploitation.

8.15.1 Unlawful Compulsory Labour

Section 374, IPC, 1860 embodies the principle that no man can be unlawfully forced to labour against his will. it makes forced labour punishable to the extent of one year imprisonment or fine or with both.[250]

Sentence of rigorous imprisonment is not begar and thus not violative of Article 23 of Constitution of India 1950—Supreme Court (1998)

State of Gujarat v High Court of Gujarat[251]

The question that arose before the Court is whether prisoners, who are required perform labour as part of their punishment should necessarily be paid wages for such work at the rates prescribed under *Minimum Wages Act*, and if prisoners are not paid, should the authorities be accused of violating *Article 23 of the Constitution*. The Court held that *Article 23* is to be given a purposive interpretation.

The matter has come before the Supreme Court by way of appeals filed by some State government challenging the judgments rendered by the respective High Court,[252] which in principle upheld the contention that denial of wages at such rates as prescribed under *Minimum Wages Act 1948*, would fringe on infringement of the constitutional protection against exaction of forced labour.

A Division Bench of the High Court of Kerala in 1983 in its decision entitled "In the matter of prison reform enhancement of wages of prisoners",[253] seems to have taken the lead in this area and suggested that the wages given to prisoners must be at par with the wages fixed under *Minimum Wages Act 1948* (*MW Act*) and the request to deduct the cost for providing food and clothes to the prisoner from such wages was spurned down.

Per KT Thomas, J:

There will be no violation of *Article 23* if prisoners doing hard labour, when sentenced to rigorous imprisonment, are not paid wages. Wages are payable only under the provisions of *Prisons Act* and Rules made there under. Though prison reforms are must and prisoners doing hard labour are now being paid wages, but the message must be loud and clear and in unmistakable terms that crime does not pay. The prisoners and the potential offenders must realize this: Prison cannot be made a place where object of punishment is wholly lost.

The court held that making a prisoner do hard labour while he is undergoing sentence of rigorous imprisonment awarded to him by a court of competent jurisdiction cannot be equated with "*begar*" or "other similar forms of forced labour" and there is no violation of clause (1) of *Article 23 of the Constitution*. Clause (2) of *Article 23* has no application in such a case. *Constitution*, however, does not bar a state, by appropriate legislation, from granting wages (by whatever name called) to prisoners subject to hard labour under Courts' orders, for their beneficial purpose or otherwise.

Order accordingly.

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250 See chapter 25, pp 876, 877, *Peoples Union for Democratic Rights v UOI,* AIR 1982 SC 1473 : (1982) 3 SCC 235 : 1983 SCR (1) 456 and *Bandhua Mukti Morcha v UOI*, AIR 1984 SC 802 : (1984) 3 SCC 161 : 1984 SCR (2) 67.

251 AIR 1998 SC 3164 : (1998) 7 SCC 392, per MM Punchhi, CJI, KT Thomas and DP Wadhwa, JJ.

252 The High Court of Gujarat, Rajasthan and Himachal have taken similar views as those of Kerala High Court in (1986) Ker LT 512.

253 *Re Prison Reforms Enhancement v Unknown,* (1983) Ker LT 512 : AIR 1983 Ker 261. Judgment delivered by Subramaniam Poti, CJ and Chandrasekhara Menon, J.

8.16 Sexual Offences

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.16 Sexual Offences[254]

8.16.1 Introduction

"Sexual offences" relating to rape and unnatural offences constitute an altogether different kind of crime, which is the result of a perverse mind. The perversity may result in rape or in homosexuality. Those who commit such crimes are psychologically sadistic persons exhibiting that tendency in rape forcibly committed by them.[255] An attempt has been made to examine statutory provisions, and critically evaluate courts' attitude towards such crimes. Provisions relating to rape under English law, which have been drastically amended, have been discussed. Rape in England is no more confined against man only. A woman can also be subjected to committing the offence of rape *vide* section (1) of Sexual Offences Act 2003.[256]

The law of homosexuality discussed under *section 377 IPC*, has now been abolished in India as in the West, It has been discussed in the context of constitutional right to privacy guaranteed under *Articles 14* and *21* of *Constitution*.

It is important to note Supreme Court in *Novtej Singh Johar v UOI*[257]. In a historic landmark verdict running into 493 pages detangling a 158 year old Victorian law on 6 September 2018 in a unanimous verdict of five judges headed by CJI Dipak Mishra, RF Nariman, AN Khanwilkar, DY Chandrachud and Indu Malhotra legalised consensual sexual relation among gay adults by partially decriminalizing *section 377 IPC* in so far as it penalizes any consensual sexual relationship between two adults be it homosexual between man and man, woman and woman or lesbian woman and woman cannot be regarded as unconstitutional and however, if anyone both a man and woman engages in any kind of sexual activity with an animal said aspect of *section 377 IPC* shall remain a penal offence under *section 377 IPC*. It is importunate to note that except for Islamic countries homosexuality is not an offence between two adults above the age of 18 years in private world over.

The question of desirability of death sentence for rapists in the context of demand by a large section of the people and women's organisations, in the wake of increasing rape cases in the country, has been analysed in the light of constitutional provision under *Article 21* "right to life and liberty", and American cases of *Erlich Anthony Coker*,[258] and *Patrick Kennedy*, (2008)[259] in which the US Supreme Court has turned down death sentence for a rapist on the ground that it violates the prohibition against cruel and unusual punishment under Eighth and Fourteenth amendment to US *Constitution*, have been included in this section. Of course, in India *vide Criminal Law Amendment Act* 2018 rape of a child below 12 years prescribes death punishment or life imprisonment till natural life.

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254 Substituted by Act 43 of 1983, section 3, for the heading "of rape".

255 *TK Gopal v State of Karnataka,* (2000) 3 Supreme 706 (SC) : *AIR 2000 SC 1669* : *(2000) 6 SCC 168*.

256 Sexual Offences Act 2003, section 1. According to section 142 of Criminal Justice and Public Order Act 1994, “Man” includes boy. The common law rule that a boy under the age of fourteen is incapable of sexual intercourse was abolished for act done on or after 20 September 1993 by Sexual Offences Act 1993, section 1.

257 *Novtej Singh Johar v UOI,* AIR 2018 SC 4321 : 2018 (3) Crimes 233 : *2018 (10) Scale 386*. Dated 7 September 2018 TOI p 1, 10 (Pune Edn).

258 *Erlich Anthony Coker v State of Georgia,* 433 US 584 (1977) : 53 L Ed 982 : 97 S Ct 2861 (1977) : 1977 US Lexis 146.

259 *Patrick O Kennedy v State of Louisiana,* 128 S Ct 2641 : 2008 US Lexis 5262 : 171 L Ed 2d 525 (October 1 2008).

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8.17 Rape and the Law

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Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.17 Rape and the Law

The alarming frequency of crime against women and the inadequacy of the law of rape manifested in a number of judgments and strong protests by social activists, jurists, judges and scholars in general, and women's organisations in particular, against the failure of the antiquated law to protect victims of rape.[260] This ultimately led the Parliament to extensively amend the law of rape first in 1983 and then in 2013 *vide Criminal Law (Amendment) Act* 43 of 1983 and *Criminal Law (Amendment) Act* 13 of 2013, respectively.

The amendment of 2013 has been necessitated as a result of countrywide peaceful demonstrations by the members of the civil society, youth and women, organisations and activists against the failure of governance to provide a safe and dignified environment for women in the country. The protests started as a response to the brutal gang rape of a young woman, Nirbhaya (name changed)) in the heart of the national capital in a public transport vehicle in the late evening of 16 December 2012 that ended her precious life in the prime of youth.[261]

Three cities that top the list of rape during 2016 are Delhi 1196 followed by Mumbai at 712 and Bengaluru 354 respectively. There are five cases of rape reported in Delhi every day. Delhi experienced 10% hike in the criminal cases in 2016 as compared to 2015.

States and Union Territories with the highest report of Rape (2015):

- Madhya Pradesh with 4391 reported Rape Cases.
- Maharashtra with 4144 reported Rape Cases.
- Rajasthan with 3644 reported Rape Cases.
- Uttar Pradesh with 3025 reported Rape Cases.
- Odisha with 2215 reported Rape Cases.

Relationship of Rape Perpetrators: The crime of rape can be classified basically into two types, viz[262],

Firstly, rape in which the victim and the rapist are unknown to each other, i.e., they are strangers. (Table 1, section (i))

Secondly, there is what has come to be known as "date" or "acquaintance rape," which involves at least some degree of familiarity between the victim and offender. (Table 1, sections (ii to vi))

It is estimated that both in India and England known persons commit most of the rapes. This is also true in case of the United States and other countries as stated below:

A study published in *Crime Record Bureau 2016* gives an account of Rape offenders given in Table IA[263]

TABLE I

• Male Family Member	– 1.4%
• Other Relatives	– 5.2%
• Other Close Family Members	– 2.6%
• Neighbour	– 27.4%
• Husband/Live-in-Partner	– 2%
• Employer/Co-Workers	– 1.6%
• Known Person who promised for marriage	– 22.1%
• Other known people	– 33.2%
• Stranger	– 4.5%

TABLE II

(i) Strangers	08 per cent[264]
(ii) Victim's current partner	45 per cent
(iii) Acquaintances	16 per cent
(iv) Ex-partners	11 per cent
(v) Dates	10 per cent
(vi) Other intimates	10 per cent

8.17.1 Incidence of Crime Against Women

Incidence of Crime Against Women particularly with reference to Rape and Custodial Rape. Rape other than custodial rape and attempt to rape have been discussed below as given in crime in India 2015.[265]

Out of total 1,34,651 reported cases of rape during 2015 age-wise victims are as stated below.

(i) Women between 18 to 30 years are 19,000 (Nineteen thousand).

(ii) Women between 16 to 18 years are 8,000 (Eight thousand).

(iii) Women between 12 to 16 years.

(iv) Women (girls) between 6 to 12 years. Death punishment in case of Rape of Girls below 12 years of age prescribed by law.

(v) Girls between 0 to 6 years.

A total of 3,38,954 case of crime against women were reported in 2016 as against 3,27,394 cases of crime against women (both under various sections of *IPC* and SLL) in the country during the year 2016 as compared to 3,27,394 in the year 2015, thus; showing an increase of 1.3% as against decline of 1.03% in comparison to decline of 3.1% during the year 2015. These crimes have continuously increased during 2011-2014 with 2,28,650 cases in 2011, which further increased to 2,44,270 cases 2012 and 3,09,546 cases in 2013, to 3,37,922 cases in 2014. It declined to 3,27,394 in 2015.

Uttar Pradesh with 16.8% share of country's female population has reported nearly 10.9% of total crimes committed against women at all India level, by registering 35,527 cases and West Bengal accounting for nearly 7.4% of the country's female population, has accounted for 10.1% of total cases of crimes against women in the country by registering 33,218 cases during the year 2015.

Out of 3,27,394 cases of crime against women registered during 2015.

A total of 34,651 cases of rape under *section 376 IPC, 1860* were registered during 2015 (excluding cases under *Protection of Children from Sexual Offences Act 2012*). An increasing trend in the incidence of rape has been observed during the periods 2011-2014. These cases have shown an increase of 9.2% in the year 2011 (24, 206 cases) over the year 2010 (22,172 cases), an increase of 3.0% in the year 2012 (24,923 cases) over 2011, with further increases of 35.2% in the year 2013 (33,707 cases) over 2012 and 9.0% in 2014 (36,735 cases) over 2013. A decrease of 5.7% was reported in 2015 (34,651 cases) over 2014 (36,735 cases). 12.7% (4,391 out of 34,651 cases) of rape cases were reported in Madhya Pradesh followed by Maharashtra (4,144 cases), Rajasthan (3,644 cases), Uttar Pradesh (3,025 cases) and Odisha (2,251 cases) accounting for 11.9%, 10.5%, 8.7% and 6.5% of total cases respectively. Delhi Union Territory reported highest crime rate of 23.7 followed by Andaman & Nicobar at 13.5 as compared to national average at 5.7.

Incest Rape: Incidence: 557 Victims 561

Incidents of incest rape (rape by blood relation like father, brother, etc.) in the country have declined by 17.4% during 2015 over the previous year (from 674 cases in 2014 to 557 cases in 2015). Maharashtra (139 cases with 141 victims) has reported the highest such incidence followed by Rajasthan (98 cases with 98 victims), Delhi (80 cases with 80 victims) and Kerala (70 cases with 71 victims).

There were 561 victims in 557 reported incest rape cases in the country during the year 2015.

34.9% of the total victims of incest were in the age group of 18-30 years (196 victims) followed by 23.9% in age group 12-16 years (134 victims), 19.3% in age group 16 – below 18 years (108 victims), 9.8% in age group 6 – below 12 years (55 victims) and 9.4% in age group 30 – below 45 years (53 victims). Thus 54.5% of total incest rape victims were children (below 18 years) (306 out of 561 victims). Some States have not furnished data on children rape reported under *Protection of Children from Sexual Offences Act 2012*, the figures of the same have been given in Chapter 6 separately.

A total of 34,094 cases were registered for 34,210 victims under “other than incest rapes” during 2015 Madhya Pradesh has registered maximum such cases (4,365 cases) followed by Maharashtra (4,005 cases) and Rajasthan (3,546 cases during 2015. Maximum such victims were from the age group of 18-30 years (16,770 victims). Age group-wise detail on victims of rape including incest rape is given in Table 5.3.

Out of 34,651 rape cases, in 33,098 cases the offenders were known to the victims accounting for 95.5% of total rape cases during 2015. 33 out of 36 States/ Union Territories have reported more than 90% of such rape cases during 2015. Apart from 557 incest rape cases (i.e. rapes by blood relatives), in 891 cases victims were raped by close family members and in 1,788 cases victims were raped by other relatives. A total of 9,508 cases were reported in which victims were raped by her neighbours, maximum such cases were reported in Assam (1,098 cases), Uttar Pradesh (1,083 cases), Madhya Pradesh (883 cases) and Rajasthan (865 cases) and these four States together accounted for 41.3% of total such rape cases. In 557 cases, employers/co-workers have raped their female employees or colleagues.

During 2015, majority of rapes were committed by unknown persons in Odisha (327) followed by West Bengal (316).

Custodial Rape Incidence: 95

Custodial rape refers to cases of rape under custody of police, of hospital, judicial custody etc., earlier data on rape under police custody only was collected. It has been further sub-categorized as custodial gang rape and other than custodial rape and gang rape.

Out of 34,651 total rape cases registered in the country, 95 cases were registered as custodial rapes during the year 2015. Highest number of custodial rape cases were reported in Uttar Pradesh (91 cases consisting of 4 cases of gang rape and 87 cases of other custodial rapes) followed by Uttarakhand (2 cases of custodial rape other than gang rape), one case each in Andhra Pradesh and West Bengal of custodial rape other than gang rape were also registered in 2015.

Rape other than Custodial Rape Incidence: 34,556 Rate: 5.7

Out of 34,651 total rape cases in the country, 34,556 cases were registered as other than custodial rape cases during the year 2015. Rape other than custodial rape has been further sub-categorized as gang rape and other

rape. Out of 34,556 rape cases (other than custodial rape cases) in the country, 2,113 cases were registered as gang rape cases and 32,443 cases were registered under other rape cases.

Maximum rape cases (other than custodial rape cases) were reported in Madhya Pradesh (4,391 cases, consisting of 270 gang rape cases and 4,121 other than gang rape cases), followed by Maharashtra with 4,144 such cases (consisting of 141 gang rape cases and 4,003 other than gang rape cases) and Rajasthan 3,644 (consisting of 411 gang rape cases and 3,233 other than gang rape cases). A rape occurs in every five minutes in Delhi.

Maximum number of gang rape cases were reported in Uttar Pradesh with 462 cases (consisting of 4 custodial gang rape cases and 458 other than custodial gang rape cases) followed by Rajasthan with 411 cases (all 411 cases other than custodial gang rape cases) [Table 5.2].

Attempt to Commit Rape Incidence: 4,437 Rate: 0.7

A total of 4,437 cases were registered under attempt to commit rape during 2015. Maximum number of such cases were reported from West Bengal (1,551 cases) followed by Assam (499 cases), Uttar Pradesh (422 cases) and Rajasthan (407 cases).

Table III

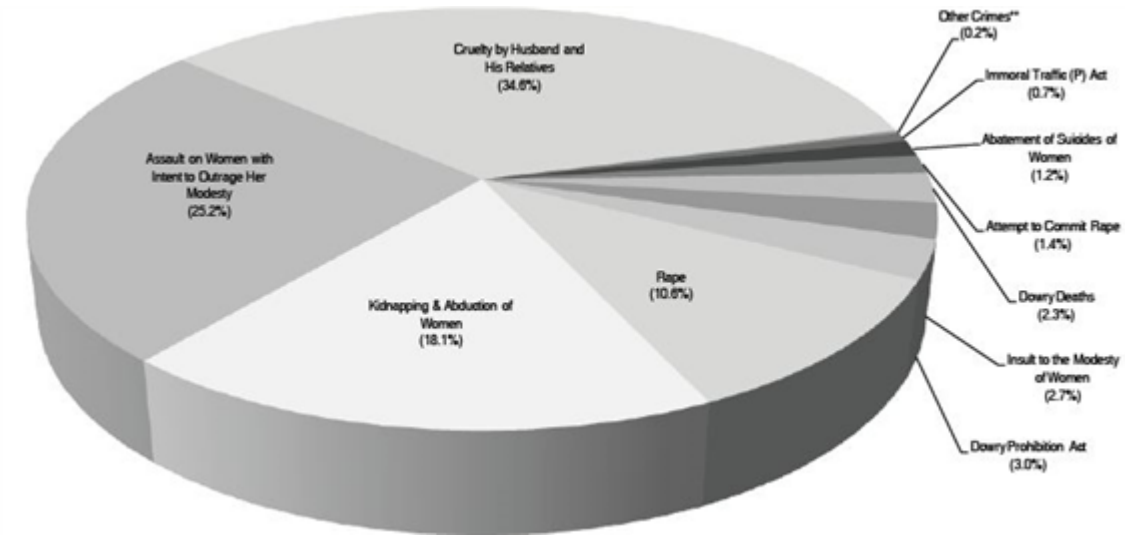
Crime Head-wise Cases Registered under Crime against Women Relating to Rape and Attempt to Rape during 2011-2015 and Percentage Variation in 2015 over 2014 given in the table[266]

8.17 Rape and the Law

Sl. No.	Crime head	Year					Percentage variation in 2015 over 2014
		2011	2012	2013	2014	2015	
1.	Rape#	24,206	24,923	33,707	36,735	34,651	–5.7
2.	Attempt to Commit Rape*	–	–	–	4,232	4,434	4.8

In the Figure 5.1 depicting Crime Head-wise Percentage Distribution as much as 10.6% of rape and 1.4% of attempt to rape for the year 2015 is given.

Crime Head-wise Percentage Distribution under Crime Against Women during 2015



*The cases of importation of Girls from Foreign Country, *Indecent Representation of Women (Prohibition) Act 1986*, *Commission of Sati (Prevention) Act 1987*, *Protection of Women from Domestic Violence Act 2005* altogether have been shown as Other Crimes.

Note: Rape and Attempt to Rape constitute 12% per cent of total Crime Against Women - 2015.

Crime in India 2015.

In India the situation is much worse. In 2001, the Deccan Herald revealed that for every case of rape reported 68 (1:68) go unreported; and that the ratio of reported and unreported cases of sexual harassment is approximately 1 to 10,000. The National Family Survey of India has revealed that 1 to 5 women face domestic violence from their husbands. Global statistics estimate between 20 to 50 percent.[267]

In the United Kingdom, only 7% of the cases reported to the police result in a conviction for rape or attempted rape. Perhaps the conviction rate in India in rape cases is much worse.

The relevant statutory provisions given in sections 375, 376, 376A, 376AB, 376B, 376C, 376D and 376E are stated in the following pages.

[268]**[375. Rape.—**A man is said to commit “rape” if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, "vagina" shall also include *labia majora*.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years changed. Changed from 15 years vide Supreme Court (*Independent Thought v UOI,* 2017) discussed in the foregoing pages.

Penal Code of India, section 375, Exception 2 Constitution of India, Articles 14, 15, 21. Constitutional validity. Sexual intercourse with girl below 18 years of age is rape irrespective of whether she is married or not. Exception 2 to section 375 creating distinction between married girl child and unmarried girl child. Violative of Articles 14, 15 and 21. It be read as "Sexual intercourse or sexual acts by man with his own wife, wife not being 18 years, is not rape".

Sections 6[269], 42A[270].

Interpretation of Statutes—Harmonious and purposive construction is desirable.

Independent Thought v UOI[271]

Per Madan B Lokur, J:

Sexual intercourse with girl below 18 years of age is rape regardless of whether she is married or not. Exception creates unnecessary and artificial distinction between married girl child and unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. Artificial distinction is arbitrary and discriminatory and is definitely not in best interest of girl child. Artificial distinction is contrary to philosophy and ethos of *Article 15* (3)[272] of *Constitution* as well as contrary of *Article 21 of Constitution* and our commitments in international conventions. It is also contrary to philosophy behind some statutes, bodily integrity of girl child and her reproductive choice.

Per Deepak Gupta, J (Concurring):

Exception 2 to *section 375 IPC, 1860* insofar as it relates to girl child below 18 years is liable to be struck down on following grounds:—

(i) it is arbitrary, capricious, whimsical and violative of rights of girl child and not fair, just and reasonable and, therefore, violative of *Articles 14*, *15* and *21* of *Constitution of India*;

(ii) it is discriminatory and violative of *Article 14 of Constitution of India* and;

(iii) it is inconsistent with provisions of POCSO, protection of children from sexual offences which must prevail.

Therefore, Exception 2 to *section 375 IPC* is read down as follows:

8.17 Rape and the Law

“Sexual intercourse of sexual acts by man with his own wife, wife not being 18 years, is not rape”.

An account of disposal of crime against women cases of rape, gang rapes, custodial rape and attempt to commit rape for the year 2016 are given below:

8.17 Rape and the Law

Sl. No.	Crime Head	Cases in which India were employed	Case Convicted	Cases Acquitted or Discharged	Total cases disposed off by Courts	Total cases/pending trial at the end of year	Conviction Rate	Pendency percentage
1	Rape	18,552	4,739	13,813	18,792	1,33,373	25.5	87.7
2	Gang Rape	17,807	4,475	13,332	18,043	1,29,015	25.1	87.7
3	Custodial Rape	732	260	472	736	4,113	35.5	84.8

Section 375 and 376 of IPC- Supreme court in Roop Singh explained what amounts to consent.

Roop Singh v State of HP[273]

The Supreme Court held, what amounts to consent of women to sexual intercourse "Against her will and without her consent" for rape. Held, unless there is voluntary participation by woman to a sexual act after fully exercising choice in favour of assent, court cannot hold that woman gave consent to sexual intercourse—In instant case, from evidence of PW-4 (sister-in-law of victim) and PW-5 (victim), it cannot be held that PW-5 voluntarily participated in sexual intercourse with appellant-accused after fully exercising her choice in favour of assent. Hence, conviction of appellant for rape, confirmed. (Para 10 Supreme Court 2013)

Justice AK Patnaik held:

In brief the facts reported was that:

When PW-5 - (the complainant victim) was sleeping at night in her house, the appellant accused, who was her neighbour, entered into her house at about 2 am, and forcibly had sexual intercourse with her. When PW-5's (victim's) sister-in-law (PW-4), sleeping in a nearby cot, woke up after listening to weeping of the complainant, then the appellant ran away. On the basis of the ocular evidence of PWs-4 and 5, (victim and sister-in-law) medical evidence and forensic report, the trial court convicted the appellant under sections 376 and 450, (rape and criminal trespass) for seven years rigorous imprisonment and three years with fine respectively) which was affirmed by the High Court.

Dismissing the appeal and confirming the conviction Apex Court held referring to the judgment of a three-Judge Bench of this Court in *State of HP v Mango Ram*[274] on the meaning of "consent" for the purpose of the offence of rape as defined in *section 375 IPC, 1860*, is quoted: (*Chhotey Lal* case[275], SCC p 560 para 20)

> "*20. … '13. …* Consent for the purpose of section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances." (*Mango Ram* case, SCC pp 230-31, para 13)"

8.17.2 Absence of injury on the male organ of the accused

Where a prosecutrix is a minor girl suffering from pain due to a ruptured hymen and bleeding from her vagina, some minor contradictions in her statements are not of much value. Also the absence of any injury on male organ of the accused is no valid ground for innocence of accused. Conviction under *section 375, IPC, 1860* is proper.[276]

[277]**[376. Punishment for rape.—**(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,—

(a) being a police officer, commits rape—

(b) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

[278][***]

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.—For the purposes of this sub-section,—

(a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c) "police officer" shall have the same meaning as assigned to the expression "police" under *Police Act 1861* (5 of 1861);

(d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.]

[279](3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.]

[280]**376AB. Punishment for rape on woman under twelve years of age.** —Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

8.17.3 Death for Rape of a Girl Below 12 Years

It is gratifying to note that to deter criminals from rampant cases of rape of a girl below 12 years *Criminal Law (Amendment) Act 2018* has been passed by the Parliament. The Act provides for stringent punishment including death penalty for those convicted of raping girls below the age of 12 years. The Act followed a public outcry over the rape and murder of a minor girl in Kathna in Jammu and rape of a woman in Unnao in Uttar Pradesh. The minimum punishment for rape of a girl below 12 years will be 20 years of imprisonment extendable to life in prison

or death sentence. In case of a gang rape of a girl below 12 years, the punishment will be life imprisonment or death sentence.

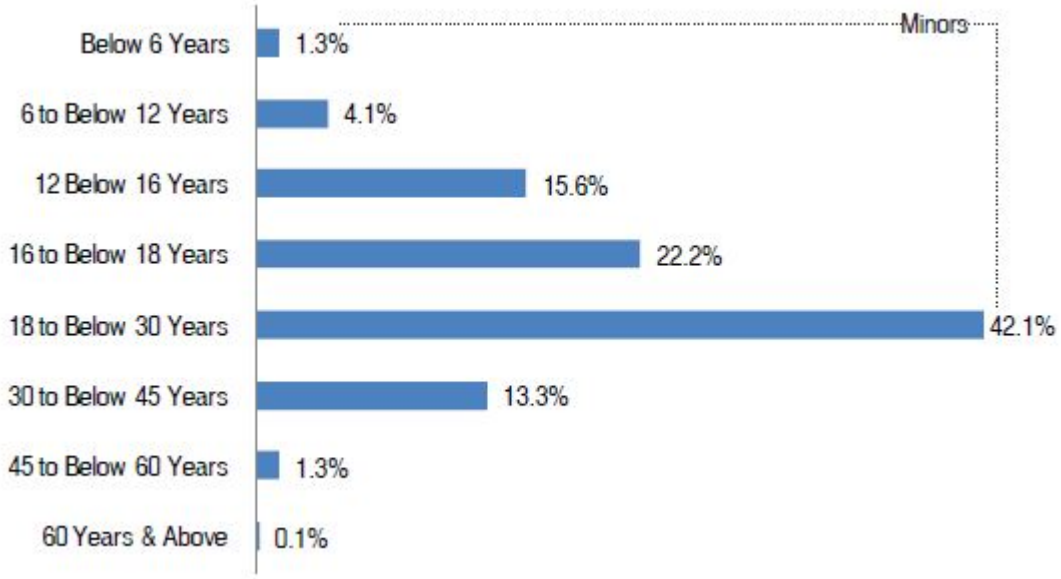
According to the Act, in case of rape of a girl under 16 years, the minimum punishment has been increased from 10 years to 20 years, extendable to imprisonment for rest of life, which means jail term till the convict's natural life.

The Act also outlines the plan for fast track Court to decide such cases within two months and for a specialized forensic lab and rape investigation kits for police stations to ensure evidence is gathered and analyzed speedly.[281] In a nutshell provisions relating to quantum of punishment under the Act are as stated below:

Quantum of Punishment*

- Rape of girl below 12 years, **minimum 20 years' imprisonment maximum jail for rest of life or death**
- Gang rape of girl below 12 years, **minimum life imprisonment maximum jail for rest of life or death**
- Rape of girl above 12 and under 16, **minimum punishment up from 10 years to 20; extendable to life**
- Gang rape of girl above 12 and under 16, **prison for life**
- Rape of woman, **rigorous imprisonment up from 7 years to 10 years; extendable to life**

The age-wise break-up of NCRB's (National Crime Record Bureau) data shows that more than 43% of rape survivors were minor, some even younger than six years. More than 94% women were betrayed and raped by people known to them, which includes neighbours or people who promised marriage to get physical intimacy.



8.17.4 Death for Rape in United States Unconstitutional

In case of United States in *Erlich Anthony Coker*,[282] (1977) Georgia's death penalty statutes which authorised capital punishment for rape,[283] and in *Patrick Kennedy*,[284] (2008) in which Louisiana State statute that provided death for rape of child under 12 years of age was declared unconstitutional by the US Supreme Court. The Court upheld that the death sentence violated the prohibition against cruel and unusual punishment under the Eighth[285] and Fourteenth Amendments[286] to the US *Constitution*.

8.17.5 Suggestions to Streamline the Law of Rape

The entire gamut of laws dealing with rape need to be reviewed and necessary changes, amendments in substantive and procedural laws should be made to ensure high rate of conviction which is at present hardly five or six percent of the total crime as reported in Crime Record Bureau.[287]

Rape by police officer or a public servant or member of armed forces or a person being on the management or on the staff of a jail, remand home or other place of custody or women's or children's institution or by a person on the

management or on the staff of a hospital, and rape committed by a person in a position of trust or authority towards the person raped or by a near relative of the person raped.—Punishment—Rigorous imprisonment of not less than 10 years but which may extend to imprisonment for life which shall mean the remainder of that person's natural life and with fine—Cognizable—Non-bailable—Triable by Court of Session.

[288]**[376A. Punishment for causing death or resulting in persistent vegetative state of victim.—**Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.]

Classification of Offence

Punishment—Rigorous imprisonment of not less than 20 years but which may extend to imprisonment for life which shall mean imprisonment for the remainder of that person's natural life or death—Cognizable—Non-bailable—Triable by Court of Session.

[289]**[376B. Sexual intercourse by husband upon his wife during separation.—**Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Classification of Offence

Punishment—Imprisonment for not less than two years but which may extend to seven years and with fine—Cognizable (but only on the complaint of the victim)—Bailable—Triable by Court of Session.

[290]**[376C. Sexual intercourse by a person in authority.—**Whoever, being—

(a) in a position of authority or in a fiduciary relationship; or

(b) a public servant; or

(c) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or

(d) on the management of a hospital or being on the staff of a hospital,

abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

Explanation I.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Explanation 2.—For the purposes of this section, *Explanation 1* to section 375 shall also be applicable.

Explanation 3.—"Superintendent", in relation to a jail, remand home or other place of custody or a women's or children's institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Explanation 4.—The expressions "hospital" and "women's or children's institution" shall respectively have the same meaning as in *Explanation* to sub-section (2) of section 376.]

Classification of Offence

Punishment—Rigorous imprisonment for not less than five years but which may extend to 10 years and with fine—Cognizable—Non-bailable—Triable by Court of Session.

[291]**[376D. Gang rape.—**Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.]

[292]**376DA. Punishment for gang rape on woman under sixteen years of age.—**Where a woman under sixteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

Classification of Offence

Punishment—Rigorous imprisonment for not less than 20 years but which may extend to imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and with fine to be paid to the victim—Cognizable— Non-bailable—Triable by Court of Session.

[293]**[376E. Punishment for repeat offenders.—**Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376AB section 376D or section 376DA or section 376DB and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.]

Some of the important changes made in the law of rape *vide Criminal Law (Amendment) Act* 13 of 2013 are stated below:

8.17.6 Rape: Meaning and Extent

The word "rape", which is derived from the Latin term *rapio*, means "to seize". Thus, rape literally means a forcible seizure. It signifies in common terminology, "as the ravishment of a woman without her consent and against her will, by force, fear, or fraud" or "the carnal knowledge of a woman by force against her will". In other words, rape is violation with violence of the private person of a woman, an outrage by all means.

"Carnal Knowledge" means penetration to any slightest degree beyond vaginal penetration which has been incorporated under the Explanation clause to *section 375 IPC, 1860*. The offence of rape as stated in *section 375 IPC* may be defined in its simplest terms as an unlawful sexual intercourse between a man and a woman without the women's consent and against her will under any one of the seven circumstances mentioned in the section. The offence of rape requires both *mens rea* and *actus reus*. That is to say, rape requires that the man intends to have sexual intercourse[294] and that he knows that the woman does not consent to the intercourse. A woman cannot be held liable for rape unlike in England where a woman is liable for punishment to the same extent as a man.[295] However, a woman can be liable for abetment of rape under *section 109 IPC, 1860*. According to section 375 clauses (a), (b), (c) and (d):

A man is said to commit "rape" if he—

(a) penetrates his penis, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts any object or a part of the body, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, annus, urethra of a woman or makes her to do so with him or any other person.

As stated above the act to constitute rape must be committed by a man with a woman against her will and without her consent under any one of the following seven descriptions, viz.,

(i) Against her will.

(ii) Without her consent.

(iii) With consent obtained by putting her or any other person in whom she is interested under fear of death or of hurt.

(iv) With consent but given under misconception of fact that the man was her husband.

(v) Consent given by reason of unsoundness of mind, or under influence of intoxication or any stupefying or unwholesome substance.

(vi) When the woman is under eighteen with or without her consent (previously age was 16 only).

(vii) When the woman is unable to communicate consent.

Two explanations I and II have been appended to the section. Explanation 1 explains that “vagina” includes *labia majora*; and

Explanation 2 states that women’s consent for sexual act must be explicit, unequivocal and voluntary and the willingness for the particular act must be communicated by words, gestures or any form of verbal or non-verbal communication. The mere absence of physical resistance to sex will not *ipso facto* be considered as consent to sex.

Section 375 provides two exceptions when the act will not be considered rape, namely,

(i) A medical procedure or intervention,

(ii) Sexual intercourse by a man with his own wife when she is not below 15 years of age.

8.17.7 Punishment

Drastic changes have been brought about in the case of punishment of rape *vide Criminal Law (Amendment) Act* (13 of 2013) to deter people from committing such a heinous crime. Section 376, sub-section (1) provides a minimum sentence of seven years of imprisonment of either description of that may extend to life imprisonment.

Section 376 (2) enumerates 14 situations stated below in which punishment shall not be less than ten years but which may extend to imprisonment for the remainder of that person’s natural life or death.

(2) Whoever,—

(a) being a police officer, commits rape—

  (i) within the limits of the police station to which such police officer is appointed; or

  (ii) in the premises of any station house; or

  (iii) on a woman in such police officer’s custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant’s custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody or of a women’s or children’s institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

[296][***]

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

8.17.8 Ingredients of the offence of rape

1. *Consent*

To bring home charges of rape, it is necessary, to establish that "sexual intercourse" was done by the man *against the will* or *without the consent* of the woman under the circumstances enumerated under clauses *firstly* to *seventhly* of *section 375 of Indian Penal Code, 1860*.

While distinguishing between two expressions "*against the will"* and *"without the consent*" under clause (i) and (ii) of *section 375 IPC*. The Supreme Court in *Deelip Singh v State of Bihar*, *(2005) 1 SCC 88* : *AIR 2005 SC 203* : *2004 (9) Scale 278*, observed that:

> though will and consent often interlace and an act done against the will of the person can be said to be an act done without consent, *Indian Penal Code, 1860* categorizes these two expressions under separate heads in order to [make it] as comprehensive as possible.

The distinction between the two expressions was spelled out by the Supreme Court in *State of UP v Chholey Lal, (2011) 2 SCC 550* : *AIR 2011 SC 697* : *2011 (1) Scale 454*, in the following words:

> Be that as it may, in our view, clause Sixthly of *section 375 IPC* is not attracted since the prosecutrix has been found to be above 16 years (although below 18 years). In the facts of the case what is crucial to be considered is whether clause First or clause Secondly of *section 375 IPC* is attracted. The expressions "against her will" and "without her consent" may overlap sometimes but surely the two expressions in clause First and clause Secondly have different connotation and dimension. The expression "against her will" would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression "without her consent" would comprehend an act of reason accompanied by deliberation.

It may be noted that for establishing prosecutrix "consent" for sexual act, the courts have followed the tests laid down under *section 90 of the Penal Code of India*, which says:

(i) If the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

(ii) if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent (clause 5 to section 375); or

(iii) the consent is given by a person who is under twelve years of age," such consent is not a valid consent, the decision of Supreme Court in *State of HP v Mango Ram, AIR 2000 SC 2798* : *2000 (6) Scale 89*, is

noteworthy. The court while holding the accused liable for conviction under *section 376 IPC, 1860* for rape said:

> …The evidence as a whole indicates that there was resistance by the prosecutrix and there was no voluntary participation by her for the sexual act. Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. From the evidence on record, it cannot be said that the prosecutrix had given consent and thereafter she turned round and acted against the interest of the accused. There is clear credible evidence that she resisted the onslaught and made all possible efforts to prevent the accused from committing rape on her. Therefore, the finding entered by the learned Sessions Judge that there was consent on the part of the prosecutrix is without any basis.

Thus, "consent" to exonerate the accused from the charge of rape must be an "unequivocal and voluntary agreement" and the accused must provide proof of the steps taken to ascertain whether the complainant was consenting. This has the advantage of shifting the burden to the defence to prove that such steps were taken.

Similarly, under Canadian law, if the accused did not take reasonable steps to ascertain that there was consent to the specific sexual activity he will be liable for sexual assault.[297] It is not enough that the accused subjectively believed there was consent. He must also demonstrate that he took reasonable steps to ascertain it.

According to English law, a person consents if he or she "agrees by choice and has the freedom and capacity to make that choice".[298] There are certain statutory presumptions regarding consent. For example, lack of consent is assumed if violence was used or threatened or the accused had induced a fear of violence, the complainant was unlawfully detained, asleep or made unconscious, or the accused had administered a substance capable of causing the complainant to be stupefied or overpowered. Lack of consent is conclusively proved if the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act or induced consent by impersonating a person known to the complainant.[299] The underlying principle is that consent to sexual activity '*requires a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act.*[300]

2. *Burden of proof of innocence on the accused*

In a criminal case, the charge against the accused must be proved beyond reasonable doubt. The presumption is that the burden of proving everything necessary to bring home the guilt of the accused is on the prosecution. One of the most important elements of the offence of rape under *section 375, IPC, 1860* is the lack of consent of the victim. It is of common knowledge that a large number of cases result in acquittal for want of such proof.

To remove this infirmity and other procedural difficulties in prosecution of a rape case section 114A was inserted in *Evidence Act 1872* with effect from 3 February 2013 *vide Criminal Law (Amendment) Act* 13 of 2013 that shifts the burden of proof on the accused to prove his innocence. Section 114A, provides that:

Presumption as to absence of consent in prosecutions for rape.—In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of *section 376 of Indian Penal Code, 1860*, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

Explanation.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of *section 375 of Indian Penal Code*. In England and countries influenced by common law such as the United States of America, Australia, and Canada the element of want of consent in cases of rape has to be proved by the prosecution.

A careful perusal of *section 114A of Indian Evidence Act 1872* would reveal that *vide Criminal Law (Amendment) Act* 13 of 2013 the legislature has made a fine distinction between:

(i) Rape falling within sub-section (1) to section 376, and

(ii) Rape falling within clauses (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m) or (n) of clause (2) of *section 376 of the Indian Penal Code, 1860*.

In the former case, the accused is considered innocent unless it is proved beyond reasonable doubt that the accused committed the crime. In other words, the onus is on the prosecution to prove affirmatively each and every ingredient of the offence and it never shifts on the defence.

On the other hand to the latter fourteen types of cases listed below, when the woman (prosecutrix) states before the court that she did not give consent for sexual intercourse, the court shall presume that it was not with by consent and the burden of proof to the contrary is on the accused.[301]

3. *Presumption of absence of consent*

Section 114A of Evidence Act 1872, states that in a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of *section 376 of Indian Penal Code*, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the Court that she did not consent, the court shall presume that she did not consent.

Explanation.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of *section 375 of Indian Penal Code*.

Unreasonable belief in consent no defence to charge of Rape and Sexual Assault: In *R v Whitta*,[302] (2006) *D* had attended a party at *C*'s house at the invitation of *C*'s son. During the party *D* met *S*, a young woman with whom he became friendly and stayed in the night in *C*'s house. When the party broke up *D* was shown a bedroom in which he was invited to stay for the night. Once in his bedroom, *D* decided to visit the bedroom of *S* believing she would be amenable to sexual intercourse with him. *D* entered what he believed to be *S*'s room. In fact, it was *C*'s Bedroom. *D* approached *C*, (believing her to be *S*) who was asleep, and penetrated her vagina with his finger. *C* woke and told *D* to desist. *D*, realizing his error, apologised and left.

D was charged with rape contrary to section 1 of Sexual Offences Act 2003, and assault by penetration contrary to section 2 of Sexual Offences Act 2003. *D*'s argument was that he had reasonably believed *C* was consenting because he had mistakenly believed *C* to be *S*. Hence, *D* is entitled to acquittal.

Rejecting the defence plea the court said the offender's belief was not reasonable and if the offender had not taken the necessary care to ascertain who was in the bed, he had committed the offences of sexual penetration by omission punishable under section 2 of Sexual Offences Act 2003. *D* was accordingly sentenced for three years of imprisonment, which was upheld by the Court of Appeal.

Consent of the prosecutrix for sexual intercourse is proved, when she stayed with the appellant at night in the hotel without protest and did not inform the police about the incident—Supreme Court—2010

Musauddin Ahmed v State of Assam,

AIR 2010 SC 3813 : (2009) 14 SCC 541 : JT 2009 (9) SC 65 : 2009 (9) Scale 155

Per Dr BS Chauhan and Dr Mukundakam Sharma, JJ:

Allowing the appeal and setting aside the convictions under *section 376 IPC, 1860* against the judgment of the Gauhati High Court, the Apex Court said that since the prosecution has failed to prove its case beyond reasonable doubt no case is made out against the appellant Musauddi Ahmed for committing rape under *section 376 of the Penal Code of India* of the prosecutrix.

The prosecutrix accompanied the appellant to the room who, closed the door and windows and committed rape on her. Both of them remained there throughout the night and next day left the hotel. No objection or resistance of any sort was made by the prosecutrix that the appellant had misbehaved with her in any manner. Such conduct of the prosecutrix makes the prosecution case unbelievable and shows willingness on the part of the prosecutrix for sexual intercourse. Had it been a case of no consent, the prosecutrix had enough time and opportunities to inform the police or any other person in the hotel.

In case a witness is unable to communicate, he may give evidence as provided under *section 119 of Evidence Act 1872* in any other manner as stated below:

> **119.** A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open court, evidence so given shall be deemed to be oral evidence:
>
> Provided that if the witness is unable to communicate verbally, the court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be videographed.

Criminal Law Amendment Act 2013 has also substituted the proviso to *section 146 of Indian Evidence Act*, which now states:

> ...that in a prosecution for an offence under section 376, section 376A, section 376B, section 376C, *section 376D* or *section 376E* of the *Indian Penal Code* or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent.

The *Criminal Law Amendment Act* 2013 has also inserted section 53A in *Indian Evidence Act 1872* which states:

> **53A. Evidence of character or previous sexual experience not relevant in certain cases.—**In a prosecution for an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, *section 376D* or *section 376E* of the *Indian Penal Code* or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.

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260 *Tukaram v State of Maharashtra,* AIR 1979 SC 185 : (1979) 2 SCC 143 : 1979 SCR (1) 810; *Sidheswar Ganguly v State of WB,* AIR 1958 SC 143 : 1958 SCR 749; *Bharvada v State of Gujarat,* AIR 1983 SC 753 : (1983) 3 SCC 217.

261 A high power Committee of three eminent-jurists handed by Justice JS Verma, Former Chief Justice of India, Justice (Retired) Leila Seth and Gopal Subramanium was constituted by the Government of India to suggest required amendments in criminal law to provide speedy justice and adequate punishment to curb sexual assault against women. The Committee in view of the urgency of the matter after making a comprehensive study of the various provisions submitted its recommendations to the Government within 30 days that resulted in large scale amendment in law by the Parliament as *Criminal Law (Amendment) Act* 13 of 2013.

262 See Susan Estrich, *Real Rape* (Cambridge, Mass: Harvard University Press, 1987).

263 *National Crime Record Bureau* 2016.

264 *National Crime Record Bureau* 2016, p 30.

265 *Crime in India* 2015, pp 84, 85, 86.

266 *Crime in India 2015* p 83.

267 Naina Kapoor, *Criminal Justice Reform: What's in it for Women?* vol XXX. The Indian Advocate (2001-2002), p 143.

268 Subs. by *Criminal Law (Amendment) Act 2013, section 9* (w.r.e.f. 3 February 2013), for section 375. Earlier it was substituted by Act 43 of 1983, section 3 (w.e.f. 25 February 1983). Section 375, before substitution stood as under:

> **"375. Rape.—**A man is said to commit "*rape*" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:
>
> *First.*— Against her will.

Secondly.— Without her consent.

Thirdly.— With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.— With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.— With her consent, when, at the time of giving of such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequence of that to which she gives consent.

Sixthly.— With or without her consent, when she is under sixteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

269 Section 6 of Prevention of Children from Sexual Offences Act 2012 (*POCSO Act 2012*) provides punishment for aggravated penetrative sexual assault with rigorous imprisonment for a term not less than 10 years but which may extend to life imprisonment and shall also be liable to fine.

270 Section 42A of Prevention of Children from Sexual Offences Act 2012 (*POCSO Act 2012*) provides for in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

271 AIR 2017 SC 4904 : 2017 (12) Scale 621 : (2017) 10 SCC 800 : 2018 (1) SCC (Cr) 13, Madan B Lokur and Deepak Gupta, JJ, delivered the judgment.

272 *Article 15* (3) empowers state….."to make any special provisions for women and children."

273 *(2013) 7 SCC 89* : JT 2013 (12) SC 196 : *2013 (7) Scale 761*, AK Patnaik and Gyan Sudha Misra, JJ.

274 *(2000) 7 SCC 224* : 2000 SCC (Cr) 1331 : *2000 Cr LJ 4027* : JT 2000 (9) SC 408 : *2000 (6) Scale 89*.

275 *(2011) 2 SCC 550* : JT 2011 (14) SC 602 : *2011 (8) Scale 257*.

276 *Mohd Zuber Noor Mohammed Changwadia v State of Gujarat, 1999 Cr LJ 3419* : (2000) 1 GLR 396 (Guj).

277 Subs. by *Criminal Law (Amendment) Act 2013, section 9*, for section 376 (w.r.e.f. 3 February 2013). Earlier section 376 was substituted by Act 43 of 1983, section 3 (w.e.f. 25-12-1983). For comparison section 376 as stood before substitution by *Criminal Law (Amendment) Act 2013*, is given below:

376. Punishment for rape.—(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,—

(a) being a police officer commits rape—

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed, or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such Jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age, or

(g) commits gang rape;

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.—"Women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3.—"Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation."

278 Clause (i) omitted by Act 22 of 2018, section 4 (b) (w.r.e.f. 21-4-2018). Clause (i), before omission, stood as under:

"(i) commits rape on a woman when she is under sixteen years of age; or".

279 Ins. by Act 22 of 2018, section 4 (c) (w.r.e.f. 21-4-2018).

280 Ins. by Act 22 of 2018, section 5 (w.r.e.f. 21-4-2018).

281 Sunday Times of India dated 21 April 2018, p 1 (Pune Edn).

282 *Erlich Anthony Coker v State of Georgia,* 433 US 584 (1977) : 53 L Ed 2d 982 : 1977 US Lexis 146; the petitioner, Coker, was granted a writ of certiorari, limited to the single claim that the punishment of death for rape violates the Eighth Amendment, which prohibits cruel and unusual punishments' and which must be observed by the States as well as the federal government.

283 Georgia Code Ann, 26-2001 (1972) provides that "[a] person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than 20 years".

284 *Patrick Keneddy v Louisiana,* 128 S Ct 2641 : 171 L Ed 2d 525 : 2008 US Lexis 5262 (1 October 2008).

285 Eighth Amendment 1791 says "cruel and unusual punishment (shall not be) inflicted".

286 Fourteenth Amendment 1869 says, "No State (shall) deprive any person of life, liberty of property without the process of law, nor deny to any person within its jurisdiction the equal protection of laws".

287 *"Crime in India-1999",* Crime Record Bureau, pp 202-214.

288 Subs. by *Criminal Law (Amendment) Act 2013, section 9*, for section 376A (w.e.f. 3 February 2013). Earlier section 376A was substituted by Act 43 of 1983, section 3 (w.e.f. 25 December 1983). Section 376A, before substitution by *Criminal Law (Amendment) Act 2013*, stood as under:

"376-A. Intercourse by a man with his wife during separation.—Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.".

289 Subs. by *Criminal Law (Amendment) Act 2013, section 9*, for section 376B (w.r.e.f. 3 February 2013). Earlier section 376B was substituted by Act 43 of 1983, section 3 (w.e.f. 25 December 1983). Section 376B, before substitution by *Criminal Law (Amendment) Act 2013*, stood as under:

"376-B. Intercourse by a public servant with woman in his custody.—Whoever, being a public servant, takes advantage of his official position and induces or seduces, any woman, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse, with him, such sexual intercourse not amounting to an offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine."

290 Subs. by *Criminal Law (Amendment) Act 2013, section 9*, for section 376C (w.e.f. 3 February 2013). Earlier section 376C was substituted by Act 43 of 1983, section 3 (w.e.f. 25 December 1983). Section 376C, before substitution by *Criminal Law (Amendment) Act 2013*, stood as under:

"376-C. Intercourse by superintendent of jail, remand home, etc.—Whoever, being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and induces any female inmate of such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation 1.—Superintendent in relation to jail, remand home or other place of custody or a women's or children's institution includes a person holding any other office in such jail, remand home, place or institution by virtue of which he can exercise any authority or control over its inmates.

Explanation 2.—The expression "women's or children's institution" shall have the same meaning as in *Explanation* 2 to sub-section (2) of section 376."

291 Subs. by *Criminal Law (Amendment) Act 2013, section 9*, for section 376D (w.r.e.f.3 February 2013). Earlier section 376D was substituted by Act 43 of 1983, section 3 (w.e.f. 25 December 1983). Section 376D, before substitution by *Criminal Law (Amendment) Act 2013*, stood as under:

"376-D. Intercourse by any member of the management or staff of a hospital with any woman in that hospital.—Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his position and has sexual intercourse with any woman in that hospital, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation.—The expression "hospital" shall have the same meaning as in *Explanation* 3 to sub-section (2) of section 376."

292 Ins. by Act 22 of 2018, section 6 (w.r.e.f. 21-4-2018).

293 Ins. by *Criminal Law (Amendment) Act 2013, section 9* (w.r.e.f. 3 February 2013).

294 Sexual Offence Act 1956 of United Kingdom in section 44 defines, meaning of sexual intercourse. "The intercourse shall be deemed complete upon proof of penetration only"; *RV Hughes,* (1841) 9 C 725. Although sexual intercourse is deemed complete on penetration, it is a continuing act, which ends only with withdrawal; *Kaitanaki v R, [1985] AC 147* : *[1984] 2 All ER 435* (PC).

295 Sexual Offences Act 2003, section 1.

296 Clause (i) omitted by Act 22 of 2018, section 4 (b) (w.r.e.f. 21-4-2018). Clause (i), before omission, stood as under:

"(i) commits rape on a woman when she is under sixteen years of age; or".

297 Canadian Criminal Code section 273.2. Where no consent obtained - No consent is obtained, for the purposes of sections 271, 272 and 273, where (a) the agreement is expressed by the words or conduct of a person other than the complainant; (b) the complainant is incapable of consenting to the activity; (c) the accused counsels or incites the complainant to engage in the activity by abusing a position of trust, power or authority; (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) the complainant having consented to engage in the sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity In Canada instead of "rape", "sexual assault" has been used.

298 Sexual Offences Act 2003 (UK), section 74.

299 Sexual Offences Act 2003, sections 75 and 76.

300 Sexual Offences Act 2003, sections 75 and 76.

301 *Ranjan Kumar Nag v State of Orissa,* (1994) 1 Ori WLR 325, p 326.

302 *Attorney General's Reference (No 79 of 2006),* [2006] EWCA Crim 2626.

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8.18 Special Category of Cases of Rape that attract Severe Punishment

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.18 Special Category of Cases of Rape that attract Severe Punishment

A group of five sections 376A, 376B, 376C, 376D and 376E have been added in *IPC, 1860 vide Criminal Law Amendment Act* 13 of 2013 with a view to provide severe punishment to deter criminal from indulging into different type of aggravated crimes against woman. These are:

(1) Rape Causing Death or Resulting in Persistent Vegetative State (PVS) of the Victim (section 376A)

(2) Marital Rape (section 376B)

(3) Custodial Rape (section 376C)

(4) Gang Rape (section 376D)

(5) Punishment for repeat offenders (section 376E)

1. Death or Resulting in Vegetative State

In case of causing death of the victim or resulting her being in a persistent vegetative state as a result of inflicting injury during the cause of rape the accused shall be punished with a minimum of 20 years of rigorous imprisonment that may extend to life imprisonment which shall mean imprisonment for the remainder of the person's natural life or till death.

2. Marital Rape

The exemption from criminal liability for marital rape stems from an out-dated notion of marriage that regarded wives as the property of their husbands. According to the common law a wife was deemed to have consented unequivocably at the time of the marriage to have intercourse with her husband at his whim. As far back as 1736 Sir Matthew Hale said.

The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.[303]

This immunity has, however; now been abolished[304] in England and Wales. The House of Lords held in 1991 that the status of married women had changed since Hale set out his proposition. Lord Keith, speaking for the court, declared, "marriage is in modern times regarded as a partnership of *equals,* and no longer one in which the wife must be the subservient chattel of the husband".[305]

The European Commission of Human Rights in *CR v United Kingdom*, held that a rapist remains a rapist regardless of his relationship with the victim. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the European Convention on Human Rights and Fundamental Freedom, the very essence of which is respect for human rights, dignity and freedom.[306] This was given statutory recognition in Criminal Justice and Public Order Act 1994.[307]

The same is true in Canada, South Africa and Australia. In Canada, it is a crime for a husband to rape his wife. South Africa criminalised marital rape in 1993, reversing the common law principle that a husband could not be

found guilty of raping his wife. Section 5 of Prevention of Family Violence Act 1993 provides: “Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.” In Australia, the common law “marital rape immunity” was abolished from 1976.

According to Justice Brennan of Australian High Court (as he then was)[308] “*The common law fiction has always been offensive to human dignity and incompatible with the legal status of a spouse*”.

Consent should not be implied by the relationship between the accused and the complainant in any event. The Supreme Court of Canada in *R v JA,*[309] Speaking through chief Justice McLachlin emphasised that the relationship between the accused and the complainant “does not change the nature of the inquiry into whether the complaint consented” to the sexual activity.[310] The defendant cannot argue that the complainant’s consent was implied by the relationship between the accused and the complainant. In South Africa, Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 (“Sexual Offences Act”) provides, at section 56 (1), that a marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation.

Marital Rape in India

The Indian Law on marital rape has been extensively amended *vide Criminal Law (Amendment) Act* (13 of 2013) keeping in view that marriage is regarded as a partnership of equals.

The Code in the newly added *section 376B IPC, 1860* makes husband liable to punishment with imprisonment of either description for a term which shall be not less them two years of imprisonment but which may extend to seven years and fine in case of intercourse with his wife during the period of separation without her consent. As a general principle, a husband cannot be guilty of rape upon his wife because by marriage she has given consent to the husband to exercise the marital rights during such time as the ordinary relations created by the marriage subsists between them, but by a further process of law, namely under a decree of judicial separation, or under any custom or usage, when wife and husband are living separately, consent is withdrawn.

The amended provisions will go a long away in establishing equal status between men and women and women will no longer be treated as subservient to men.

It may however be noted that even when marital rape is recognised as a crime, there is a risk that judges might regard marital rape as less serious than other forms of rape requiring more lenient sentences.[311]

It is therefore necessary that the legal prohibition on marital rape is accompanied by changes in the attitudes of prosecutors, police officers, judges and social activists. For example, in South Africa despite these legal developments, rates of marital rape remain shockingly high. A 2010 study suggests that 18.8% of women are raped by their partners on one or more occasion. Rates of reporting and conviction also remain low, because consent was considered implied by the relationship between the accused and complainant.

3. Custodial Rape: Sexual intercourse by a person in Authority

Section 376C IPC, 1860 creates a new category of sexual offences which do not amount to rape, because the consent of the victim is given in such cases, but under compelling circumstances. These offences are committed by those persons who happen to occupy a supervisory position and power in the institution under their authority and obtain the consent of the woman by inducing or seducing her for sexual intercourse. These offences have been designated as custodial rape. For instance according to section 376C, whoever, being—

(a) in a position of authority or in a fiduciary relationship; or

(b) a public servant; or

(c) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women’s or children’s institution; or

(d) on the management of a hospital or being on the staff of a hospital,

abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be

less than five years, but which may extend to ten years, and shall also be liable to fine.

4. Gang Rape

Section 376D makes punishment very severe in case of gang rape that may be imprisonment till the natural life of the person depending on the gravity of the offence. The section says that where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

5. Punishment for Repeat offenders

Section 376E provides punishment for the repeat offenders. Section 376E states that whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.

8.18.1 Corroboration not Sine Qua Non for Convictions

Confirming evidence is known as corroboration. As a general proposition of law, the court requires sufficient and convincing evidence before determining the guilt of the accused and convicting him for the offence.[312] The Court, therefore; must as a matter of prudence, except when the circumstances make it safe to dispose with it, get all the evidence corroborated before holding the accused liable for the crime. However, if the Judge is convinced about the guilt of the accused, the court need not insist the requirement of corroboration in a particular case or set of cases. For instance, the Supreme Court of India, has said on many occasions that the corroboration is not *sine qua* non (not necessary) for conviction in a rape case unless the woman is found in a compromising position.[313]

It may be noted that the Supreme Court in the case of *Bharvada Bhoginbhai Hirjibhai v State of Gujarat, (1983) 3 SCC 217* : *AIR 1983 SC 753*, reversed the trend and came to a conclusion that it was open to the court to rely upon the evidence of a complainant even without seeking corroboration if corroboration by medical evidence is available.

The court said that in the Indian context refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. The argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination must be analysed in proper perspective with a logical, and not an opiniated, eye in the light of probabilities taking place on the soil of India and with our eyes focussed on the Indian horizon. One must not be swept off the feet by the approach made in the Western World which has its own social milieu, its own social mores, its own permissive values, and its own code of life.[314]

Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot, therefore; be identical. It is conceivable in the Western society that a female may level false accusation as regards sexual molestation against a male for several reasons such as:

(1) The female may be a "gold digger" and may well have an economic motive to extract money by holding out the gun of prosecution or public exposure.

(2) She may be suffering from psychological neurosis and may seek an escape from the neurotic prison by fantasizing or imagining a situation where she is desired, wanted, and chased by males.

(3) She may want to wreak vengeance on the male for real or imaginary wrongs. She may have a grudge against a particular male, or males in general, and may have the design to square the account.

(4) She may have been induced to do so in consideration of economic rewards by another person.

In India, the natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent".

However, it may be noted that situation in India is fast changing. In fact, it has already given much beyond one's speculation and cases have started surfacing particularly in the public sector where women under advantage in the garb of legal protection available under the law. Hence, a continuous approach is needed is this regard before it may became counter productive.

8.18.2 Special and Adequate Reasons to Award Lesser Punishment

To mitigate the rigorous law, the proviso to *section 376, IPC, 1860* of the law before *Criminal Law (Amendment) Act* 13 of 2013 has given discretion to the courts to award a lesser sentence than the minimum prescribed for rape when there exists "special and adequate reasons" so that injustice might not be done to an accused in a particular case. Whether there exists "any special and adequate reasons" would depend upon a variety of factors and the particular facts and circumstances of each case. No hard and fast rule can be laid down in that behalf of universal application. However, the amended *section 376 IPC* does not provide any discretion to the Court.

In *TK Gopal alias Gopi,*[315] the appellant was found guilty of raping a child of one and half years and sentenced to 10 years rigorous imprisonment. After undergoing a sentence of nine years, the appellant filed appeal before the Supreme Court for release on compassionate ground. Allowing the appeal, the Supreme Court held that having regard to the extenuating circumstances that the appellant's two daughters have come of age and are to be married, the present period of incarceration of the appellant in jail for nine years is enough and he should not be made to further suffer the consequences of his bestiality.

However, the Supreme Court has cautioned the lower judiciary to take a pragmatic view in respect of crimes against women which are on the rise and not be swayed by extraneous considerations. For instance, the Supreme Court in *State of AP v Bodem Sundra Rad,*[316] held that the High Court committed error in taking a lenient view of the offence of rape under *section 376 of IPC* and reducing the sentence from 10 years awarded to the accused by the trial court to four years of imprisonment. While enhancing the sentence from four years to the minimum of seven years prescribed under section 376, sub-section (1), *IPC*, the Court said that:

> Imposition of grossly inadequate sentence particularly against the mandate of the legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The courts must not only keep in view the rights of the criminals but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment. The heinous crime of committing rape on a helpless 13/14 years old girl shakes our judicial conscience. The offence was inhumane. There are no extenuating or mitigating circumstances available on record, which may justify imposition of a sentence less than the minimum prescribed by the legislature under section 376 (1) of the Act.[317]

Similarly, in *Krishnappa*,[318] the question was whether the High Court was justified, in the facts and circumstances of the case, to reduce the sentence of 10 years rigorous imprisonment imposed by the trial court on the respondent for an offence under *section 376, IPC, 1860* to four years of rigorous imprisonment. The trial Court was of the view that in view of the cruel nature of the sexual assault on an innocent helpless girl of seven or eight years by a married man of 49 years of age, having own children, the accused was not entitled to any leniency.

Restoring the sentence of 10 years awarded by the trial court, the Supreme Court held that these factors did not justify recourse to the proviso to section 376 (2). The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the State and age of the sexually assaulted female and the gravity of the *criminal act*. Crimes of violence upon women need to be severely dealt with.

To show mercy in the case of such a heinous crime would be travesty of justice and the plea for leniency would be wholly misplaced. The High Court exhibited lack of sensitivity towards the victim of rape and the society by reducing the substantive sentence in the established facts and circumstances of the case. The courts are expected to properly operate the sentencing system and to impose such sentence for a proved offence, which may serve as a deterrent for the commission of like offences by others.

Some of the suggestions are listed below that will go a long way to curb sexual offences.

(1) *The Definition of Rape be Widened*

It is pleaded in some quarters that the antiquated law of "rape" under *section 375, IPC, 1860* should be redefined in terms of English law,[319] which, under section 1 of Sexual Offences Act 2003 makes both a woman and a man subject of rape.

However, the Supreme Court in *Sakshi v UOI*,[320] perhaps rightly rejected a plea for reinterpretation of the provisions of *section 375, IPC* to give it a wider import at par with English Law by expressly specifying "various forms of penetration within its ambit." The court said the 'reinterpretation of section 375 will lead to a serious confusion and would have an adverse impact on the society as a whole."

(2) *Evidence by Way of Video Recording*

It is gratifying to note that the Supreme Court in *Sakshi*,[321] has confirmed the admissibility of evidence by way of video-conferencing *vis-à-vis section 273, CrPC*.[322] The Court took a pragmatic view that questions to be put by the accused in cross examination to the victim or witnesses should be given in writing to the presiding officer in a language which is not embarrassing.

(3) *Incest*[323]

Incest consists of sexual intercourse between persons within a specified degree of consanguinity and is a crime punishable in India under section 376G IPC.

English law is more pragmatic and prohibits sexual intercourse both by a man or a woman with near relatives,[324] under section 64[325] and section 65[326] Sexual Offence. Liability is fixed on both men and women equally. Incest is also an offence in Canada under sub-section (1) to section 155 of the Criminal Code of Canada and is punishable to the extent of 14 years of imprisonment under sub-section (2) to section 155. The section holds both sexes equally guilty for incest.

Similarly German Criminal Code makes sexual intercourse between relatives punishable under section 173 which states:

(1) Whoever completes an act of sexual intercourse with a consanguine (having the same ancestors closely related) contract a marriage with a married person shall be punished with imprisonment for not more that three years or a fine.

(2) Whoever completes an act of sexual intercourse with a consanguine relative in an ascending (moving upward) line shall be punished with imprisonment for not more than two years or a fine; this also shall apply if the relationship as a relative has ceased to exist. Consanguine relationship by birth siblings who complete an act of sexual intercourse with each other shall be similarly punished.

Incest under Singapore: Incest[327] is punishable in Singapore under sections 376B[328] and 376C[329] of Singapore *Penal Code*, which makes both man and woman liable to imprisonment. To initiate prosecution the sanction of Attorney General or Solicitor General of Singapore is required.

A man who knowingly commits incest shall be liable to five years of imprisonment and if the women is under 14 years up to 14 years imprisonment (376B). In case a woman is found guilty of incest she will be liable for five years of imprisonment (section 376C).

In view of large number of reported cases of incest in recent years, it is made an offence under *Indian Penal Code* as in case of United Kingdom, Germany Singapore and Canada.[330]

(4) *Rape Complaint to be Taken Seriously*

A woman's complaint that she has been raped must be taken at face value in a conservative society like India where indelible stigma is attached to the victim, unless of course, there appears to be a blatant flaw in the case.[331] Of course, a woman's past sexual history[332] can no longer he held against her *vide* section 155 (4)[333] of *Evidence Act 1872* as happened in *Mathura rape* case.

(5) *Proper Counselling Required*

It is noticed that the stigma attached to a rape victim stops her from reporting the crime or makes her delay in reporting the incident to the police. Hence, it is necessary that proper counselling should be provided to rape victims to inculcate confidence in them and initiate action immediately.

(6) *Child Sexual Abuse*

There is no specific provision in *Indian Penal Code* to deal effectively with cases of child abuse. As a result, the culprits go unpunished. It is high time that a comprehensive law to protect the children from sexual abuse and exploitation be enacted as under English law *vide* Sexual Offences Act 2003,[334] given below with necessary modifications keeping in view our social conditions.

Offences against Children under English Law

The British Parliament in 2003 with a view to protect children from sexual exploitation has created a series of specific offences under sections 5 to 24 of Sexual Offences Act 2003 targeting a wide range of sexual activity with children. The object is to provide maximum protection to children against sexual exploitation. It is presumed that since youth lack the capacity to provide meaningful consent to sex, children should be protected against sexually exploitative behaviour by adults. A graded provision of liability has been fixed depending on the age of the consent of youth for sex. Such offences have been bifurcated into three sub parts according to the nature and gravity of the offence, namely;

(a) *Children under 13 years of age:* Sections 5 to 8 create sexual offences in respect of child victims under the age of 13, and to these offences consent is irrelevant.

(b) *Children under 16 years of age:* Sections 9 to 15[335] create a number of sexual offences against children under 16 years, with differing maximum penalties according to whether the offender is an adult or is under 18.

(c) *Children under 18:* Sections 16 to 24 contain various offences of "abuse of trust" committed against persons under 18 by those in a position of trust.[336]

(7) *Special Prosecutors for Rape Cases*

In view of the sensitive nature of rape trials it is necessary that the prosecutors should be well trained and conversant with the psychology of women, who happens to be victim of rape.

(8) *Scientific Investigation*

The police officers, as in United Kingdom, must collect all vital forensic evidence in rape cases and obtain a specialized opinion before a decision is taken to initiating a rape prosecution.

(9) *Proper Investigation and early Disposal of Rape Cases*

With a view to facilitate proper and effective investigation and to ensure speedy trial of offence relating to sections 376, 376A to 376D *IPC, 1860* following amendments of far reaching significance have been made in *Code of Criminal Procedure 1973 vide Code of Criminal Procedure* (Amendment) Act 2008 (5 of 2009).

(i) *Trial of offences under section 376 and sections 376A to 376D, IPC*—Proviso to section 26 of the Amended Act provides that trial of offences relating to rape shall be conducted by a woman judge.[337]

(ii) *Recording of the statements of the victims of rape*—In *section 157 of CrPC 1973* dealing with the Procedure for Investigation a "Proviso" has been added in sub-section (1)(A) making it obligatory for the investigating officer to record statement in relation to rape at the residence of the victim as far as practicable.[338]

(iii) *Investigation of Rape of Child*—In *section 173 of CrPC 1973* a new sub-section (1A) has been added directing the police to complete investigation in relation to rape of a child victim within a period of three months from the date of the information recorded by the police.[339]

(iv) *Inquiry or Trial relating to offences under sections 376 and 376A to 376D, IPC, 1860*—Proviso to sub-section 1 to *section 309 of Code of Criminal Procedure 1973* provides that trial of offences relating to section 376 and sections 376A to *section 376B IPC* should be completed within a period of two months from the date of commencement of the Examination of witnesses.[340]

In addition to strengthening the law, it is necessary to have a cooperative victim, professional investigation, diligent prosecution, expeditious trial and sensitive judges to ensure proper investigation, trial and conviction in sexual crime.[341] Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court.[342]

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303 Sir Matthew Hale, History of the Pleas of the crown, 1 Hale PC (1736) 629, S Fredman, Women and the Law (Oxford University Press, (1997) pp 55-57.

304 *R v R,* *[1991] 4 All ER 481* at p 484 : [1991] UKHL 12 : *[1992] 1 AC 599*.

305 *CR v United Kingdom,* App No 20190/92 : IHRL 2595 (ECHR 1995); see Palmer Feminist Legal Studies Vol V no 1 [1997] pp 1-7.

306 Section 142 abolished the marital rape exception by excluding the word “unlawful” preceding “sexual intercourse” in section 1 of Sexual Offences Act 1956.

307 R.S.C. 1985, c. C-46.

308 *Her Majesty The Queen v JA*, 2011 SCC 28 : (2011) 2 SCR 40 para 64.

309 *Her Majesty The Queen v JA,* 2011 SCC 28 : (2011) 2 SCR 40 para 47.

310 See JS Verma committee report on amendments to Criminal Law p 117.

311 See JS Verma committee report on amendments to Criminal Law, p 117.

312 *Bharvada Bhoginbhai Hirjibhai v State of Gujarat,* *AIR 1983 SC 753* : *(1983) Cr LJ 1096* : 1983 SCR (3) 280, where the appellant undressed and exposed himself to two girls who came to his home to meet his daughter, and he sexually assaulted one of the girls.

313 *Chiu Nang Hong v Public Prosecutor,* (1965) 31 MLJ 40 (PC); see KD Gaur, *Criminal Law Cases and Materials,* 3rd Edn, pp 522-526.

314 As stated by Justice JS Verma Committee in its report at pp 83-84.

315 *TK Gopal alias Gopi v State of Karnataka,* (2000) 3 Supreme 706 : *AIR 2000 SC 1669* : (2009) 6 SCC 168.

316 *AIR 1996 SC 530* : *(1995) 6 SCC 230*. On 16 February 1985 the prosecutrix, aged between thirteen or fourteen years was sexually assaulted by the respondent in broad daylight. The girl was carrying lunch for her father, who was grazing cattle in the fields when the respondent all of a sudden took hold of her and committed rape on her, despite her protests.

317 *AIR 1996 SC 530*, p 531, paras 9 and 10 : *(1995) 6 SCC 230*.

318 *AIR 2000 SC 1470* : *(2000) 4 SCC 75*.

319 Substituted by Sexual Offences Act 2003, which came into effect from 1 May 2004.

320 *(2004) 6 Scale 15* : *AIR 2004 SC 3566* : *(2004) 5 SCC 518*. The Bench consisted of Rajendra Babu, CJI and CP Mathur, J.

321 *Sakshi v UOI*, *(2004) 6 Scale 15* : *AIR 2004 SC 3566* : *(2004) 5 SCC 518*. The Bench consisted of Rajendra Babu, CJI and CP Mathur, J.

322 *Code of Criminal Procedure 1973, section 273* deals with evidence to be taken in the presence of the accused: Except as otherwise expressly provided, all evidence taken in the course of trial or other proceedings shall be taken in the presence of the accused or, when his personal attendance is dispensed with, or in the presence of the pleader.

323 Smith and Hogan, *Criminal Law,* 11th Edn, 2005, pp 469-470.

324 Near relative includes parent, grandparent, child grandchild, brother, sister, half brother, half sister, and blood relationship of uncle, aunt, nephew or niece. See Smith and Hogan, *Criminal Law,* 11th Edn, 2005, p 638.

325 Sexual Offence Act 2003 in section 64 makes it an offence for A aged 16 or over to intentionally penetrate sexually (anally, vaginally or orally) a relative B who is aged 18 or over if he knows or could reasonably have been expected to know that B is his relative.

326 Sexual Offence Act of 2003, section 65 makes a consenting person liable for the offence in the same manner and to the same extent as the person performing the act viz, A aged 16 or over commits an offence by consenting to being penetrated sexually by a relative B aged 18 or over if he knows or could reasonably have been expected to know that B is his relative. See *R v Carmichcal, [1940] 2 All ER 165*, p 167.

327 Singapore *Penal Code, section 376A*. (a) Any man who has carnal knowledge of a women with or without her consent who is to his knowledge his grand-daughter, daughter, sister, half-sister of mother (whether such relationship is or is not traced through lawful wedlock); or

(b) Any woman of or above the age of 16 who with consent permits her grandfather, father, brother, half-brother or son (Whether such lawful wedlock) to have carnal knowledge of her (knowing him to be her grandfather, father, brother, half brother or son, as the case may be), is said to commit incest"

328 Singapore *Penal Code section 376B*.

329 Singapore *Penal Code section 376C*.

330 Criminal Code of Canada 1985, section 155:

(1) Every one commits "incest" who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

(2) Everyone who commits incest is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.

331 Kirti Singh, *"The laws are extremely inadequate and need drastic change"*, The Times of *India,* 25 November 2002, p 6.

332 *Evidence Act 1872, section 155* (4) provides impeaching credit of witness as: The credit of a witness may be impeached in the following ways by the adverse party, or with the consent of the court, by the party who calls him... (4) When a man is prosecuted for rape, or attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

333 *Tukaram v State of Maharashtra, AIR 1979 SC 185* : *(1979) 2 SCC 143*.

334 Sexual Offences Act 2003 provides punishment for offence against children under 13 under Section 5 deals with rape of a child under 13 by penetration, section 6 punishes sexual activity with a child, section 7 deals with sexual assault of a child, and section 8 with causing or inciting a child to engage in sexual activity.

335 Sexual Offences Act 2003 provides punishment for sexual offences against children aged between 13 to 16; (i) Section 9 punishes sexual activity with a child; (ii) Section 10 punishes causing or inciting a child to engage in sexual activity; (iii) Section 11 punishes engaging in sexual activity in the presence of a child; (iv) Section 12 causing a child to watch sexual act; (v) Section 13 provides punishment for Child Sex offences committed by young person under age of 18, in which case the maximum sentence is five years; (v) Section 14 punishes arranging or facilitating commission of a child sex offence; and (vi) Section 15 punishes "meeting a child following sexual grooming".

336 See KD Gaur, *A Textbook on IPC*, 4th Edn, 2009, commentary, under *section 376B of IPC* for abuse of position of trust under English Law.

337 Ins. by *Code of Criminal Procedure* (Amendment) Act 2008, Section 4. Section 26 states: "Courts by which offences are triable—

(a) Any offence under the *Indian Penal Code (45 of 1860)* may be tried by—

(i) the High Court, or

(ii) the Court of session, or

(iii) Any other Court by which such offence is shown in the First Schedule to be triable;

Provided that any offence under section 376 and section 376A to 376D of India *Penal Code* (45 of 1860) shall be tried as far as practicable by a Court presided over by a woman."

338 Inserted by *Code of Criminal Procedure* (Amendment) Act 2008, section 11. Proviso to section 157 (1) (a)(b) states: "Provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality."

339 Inserted by *Code of Criminal Procedure* (Amendment) Act 2008, section 16. Clause (IA) of section 173 states: "The investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer-in-charge of the police station."

340 Ins. by *Code of Criminal Procedure* (Amendment) Act 2008, section 21 Proviso to section 309 clause (1) states: "Provided that when the inquiry or trial relates to an offence under section 376 to 376D of India *Penal Code* (45 to 1860), the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses."

341 Kiran Bedi, *"What use is the law if the victim herself does not wish any action taken?",* The Times of *India,* 25 November 2002.

342 *State of Karnataka v Krishnappa, AIR 2000 SC 1470* : *(2000) 4 SCC 75*.

8.19 Rape and Sexual Assault in Other Countries

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.19 Rape and Sexual Assault in Other Countries

(1) Rape and Sexual Assault under English Law

Rape and sexual assault rank among the most serious crimes causing enormous emotional and physical harm that can last throughout victims' lifetimes. Rape reflects the imprint of evolving social values, practices and understanding. Rape was an offence[343] at common law and for many centuries rape was defined as: "The carnal knowledge of a woman forcibly and against her will,"[344] although placed on a statutory basis in Sexual Offences Act 1956, section 1, there was no statutory definition' of the offence.

(a) Sexual Offences Act 2003

Since most of the provisions relating to sexual offences contained in Sexual Offences Act 1956 had become obsolete and outdated in view of change in values and concept of equality between sexes, as it was "fragmented, cumbersome and inadequate".

With the result in 2003 a comprehensive Act on rape and sexual assault entitled Sexual Offences Act 2003 came into operation[345] repealing the earlier Act of 1956 and related statutes. The Act has some 143 sections, of which the first 71 sections create sexual offence.[346]

Sexual Offences Act 2003 is a far-reaching reform that was intended to mark a fresh start in the criminal law's response to sexual misconduct,[347] to modernize the law, and to bring it more closely in line with contemporary attitudes. The Act mostly creates gender-neutral offences, apart from the offence of rape, which can only be committed by a man as principal; a male or female against a male or female can commit the offences. This ensures equality of protection and of criminalisation, thereby avoiding discrimination mat might violate a person's convention rights.[348] The Act redefines many of the offences found in the old legislations besides adding many more offences.[349]

Adequate and appropriate protection for the vulnerable, and to this end it includes several separate offences against children and also several separate offences against persons with mental disorder. Appropriate penalties have been provided according to the seriousness of the crimes committed.

The new offence of rape is created by section 1 of 2003 Act, which provides:

Section 1. Rape.—(1) A person (A) commits an offence if—

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,

(b) B does not consent to the penetration, and

(c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

The scope of the offence of rape in England has been enlarged by the Act of 2003. It now includes besides vaginal and anal by mouth as well as against earlier Act of Criminal Justice and Public Order Act 1994 that provided vaginal and anal rape only. This new offence carries a maximum sentence of life imprisonment, as the earlier law does rape.

To bring an action under section 1 of Sexual Offence Act 2003, the prosecution must prove that there was penetration by the penis,[350] and that it was intentional. Since "penetration is a continuing act from entry to withdrawal",[351] this means that the offence can be committed by intentionally failing to withdraw the penis as soon as non-consent is made clear.[352]

One of the most dramatic changes to the offence relates to the defendant's mental element. Under section 1 (1) of the Act the prosecution has to prove intentional penetration of the vagina, anus or mouth of the complainant, and an absence of a reasonable belief that the complainant was consenting. "Reckless rape" as it was previously understood has been abolished. Thus, the mens rea under the old law was an intention to have sexual intercourse with *V*, (i) knowing that *V* does not consent, or (ii) being aware that there is a possibility that she does not consent.

Other significant effects of the 2003 Act are to reverse *Morgan:* a genuine but unreasonable belief in consent will be a sufficient mens rea for the offences in section 1 to 4.[353] The mens rea in rape and the other non-consensual offences (sections 1 to 4) comprises two elements:

(i) *A* does not reasonably believe *B* consents.

(ii) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps *A* has taken to ascertain whether *B* consents.

The new provisions do not render the test wholly objective. The defendant's personal characteristics and beliefs remain important, as to consent and me manner by which *A* reached it are to be assessed by reference to some objective criteria.

Section 2. Assault by Penetration.—(1) A person (A) commits an offence if—

(a) he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,

(b) the penetration is sexual,

(c) B does not consent to the penetration, and

(d) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

This is entirely a new offence. The conduct element of the offence includes penetration with any part of the body, such as with fingers and inanimate objects, like knives, pencils, bottles, etc. Such acts under the previous law would have fallen into the category of an indecent offence only. This new offence carries a maximum sentence of life imprisonment, as does rape, but like most other offences in the Act a man or woman as principal can commit it. According to section 79 of the Act surgically reconstructed penises can penetrate, and surgically reconstructed vaginas be penetrated.[354]

Section 3. Sexual Assault.—(1) A person (A) commits an offence if—

(a) he intentionally touches another person (B),

(b) the touching is sexual,

(c) B does not consent to the touching, and

(d) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

It is altogether a new section which makes sexual touching[355] of another's body without his or her consent with any part of the body (such as a finger, but also including the penis, so that the offence overlaps with rape),[356] or penetration with an instrument, such as a bottle. The penetration must be without consent.

Section 4. Causing a person to Engage in Sexual Activity.—(1) A person (A) commits an offence if—

(a) he intentionally causes another person (B) to engage in an activity,

(b) the activity is sexual,

(c) B does not consent to engaging in the activity, and

(d) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section, if the activity caused involved—

(a) penetration of B's anus or vagina,

(b) penetration of B's mouth with a person's penis,

(c) penetration of a person's anus or vagina with a part of B's body or by B with anything else, or

(d) penetration of a person's mouth with B's penis,is liable, on conviction on indictment, to imprisonment for life.

(5) Unless subsection (4) applies, a person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

It is altogether a new offence, which has one of its purposes criminalizing the action of women who force men to penetrate them. Thus, a female can aid and abet the offence[357] as where she encourages or assists a man, *A*, to penetrate *B* without consent. It may be possible for the woman aider and abettor to be convicted even though *A* is acquitted of rape on the basis of his lack of mens rea[358] in such circumstances, a female can also now be charged with an offence under section 4 of Sexual Offences Act 2003—causing a person to engage in sexual activity.

(b) Absence of Reasonable Belief in Consent

In case of the offences in sections 1 to 4, it must not only be proved that *B* did not consent to what was done, but also that *A* did not reasonably believe that *B* was consenting. Sub-section (2) to sections 1 to 4 of the Act provides that "whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps *A* has taken to ascertain whether *B* consents."[359]

The reference in sub-section (2) to "any steps *A* has taken to ascertain whether *B* consent's is important, in that it directs the court to consider whether *A* attempted to verify his assumption or belief about consent."

Sexual Offences Act 2003, section 30 (1)(a) Sexual Touching: Consent to Sexual touching because of inability to refuse due to irrational fear on account of mental disorder will not exonerate the accused of the offence—House of Lords—2009

Regina v Cooper (Gary Anthony)[360]

Lord Hope of Craighead

The House of Lords in *Regina v Cooper* (2009) held that consent accorded by the complainant to sexual touching because complainant was unable to refuse due to an irrational fear of what was happening to her will not exonerate the defendant with the charge of the intentionally touching the complainant under section 30 (1) of Sexual Offences Act 2003.[361]

The defendant was charged with intentionally touching the complainant by penetrating her mouth with his penis in circumstances where the touching was sexual, the complainant was unable to refuse because of or for a reason related to a mental disorder and the defendant knew or could reasonably have been expected to know that she had a mental disorder and because of it or for a reason related to it she would be likely to be unable to refuse.

The issue in this case is as to the scope of the words "*unable to communicate*" in section 30 (2)(b)[362] of Sexual Offences Act 2003 read together with section 30 (2)(a), that provides as stated below:

> A complainant is unable to refuse, if she is unable to communicate to the defendant a choice whether to agree to the touching, whether because she lack sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason.

The complainant has an established diagnosis of schizo-affective disorder, an emotionally unstable personality disorder the effects of which could come and go, a low IQ and a history of harmful use of alcohol. Having left a community mental health team resource center, she met the defendant, who accompanied her to a friend's house, gave her crack cocaine and asked her to engage in sexual activity with him, which she did.

The defendant was charged with an offence of sexual touching of a person with a mental disorder impeding choice, contrary to section 30 of Sexual Offences Act 2003. The complainant gave evidence that she had been panicky and afraid and because she did not want to die (as she believed people using crack were crazy and could kill) had stayed and submitted to the defendant's request. A forensic psychiatrist gave evidence that in her metal state at the time, with her learning disability, her impaired intellectual functioning and her highly aroused state, the complainant would not have had the ability to consent to sexual contact at the time of the alleged offence.

Relying on psychiatrist's evidence the defendant was convicted by the trial Judge, However the Court of Appeal allowed defendants appeal against conviction, stating *inter alia*, that irrational fear which prevented the exercise of choice could not be equated with lack of capacity to choose, that a lack of capacity to choose was issue—specific and not person or situation-specific and that inability to communicate referred to a physical inability and there was no evidence that she was physically unable to communicate any choice that she had made.

Allowing the Crown's appeal and restoring the defendant's conviction their Lordships held that:

> The words "or for any other reason" in section 30 (2)(a) of the 2003 Act encompassed wide range of circumstances in which a person's mental disorder might make her unable to make an autonomous choice whether to agree to sexual touching even though she might have sufficient understanding of the information relevant to making it; that those

circumstances could include an irrational fear preventing the free exercise of choice; that incapacity to choose could be person and situation-specific; that section 20 (b)[363] of the 2003 Act referred to an inability to communicate; and that, accordingly, the trial judge's directions on lack of capacity and inability to communicate would be upheld.

67. Voyeurism. Section 67 of Sexual Offences Act 2003 makes voyeurism punishable as stated below:

(1) A person commits an offence if—

(a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and

(b) he knows that the other person does not consent to being observed for his sexual gratification.

(2) A person commits an offence if—

(a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and

(b) he knows that B does not consent to his operating equipment with that intention.

(3) A person commits an offence if—

(a) he records another person (B) doing a private act,

(b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and

(c) he knows that B does not consent to his recording the act with that intention.

(4) A person commits an offence if he instals equipment, or constructs or adapts a structure or part of a structure, with the intention of enabling himself or another person to commit an offence under subsection (1).

(5) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years.]

68. Voyeurism: Interpretation

(1) For the purposes of section 67, a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and—

(a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,

(b) the person is using a lavatory, or

(c) the person is doing a sexual act that is not of a kind ordinarily done in public.

(2) In section 67, "structure" includes a tent, vehicle or vessel or other temporary or movable structure.

Indecent Exposure and Threat to Rape: Disclosure to a social work agency of the allegations of two incidents of indecent exposure and threat to rape for which the claimant was arrested and was charged but acquitted because of no positive identification and evidence at the trial without being told previously—suffers from procedural unfairness-unjustified and illegal—contrary to Article 8 of Human Rights Act, 1998, of United Kingdom.

R (on application of X) v Chief Constable of the West Midlands Police,

(2004) 2 All ER 1 (QB) : *[2005] 1 WLR 65*

Allowing the application against the disclosure of information by the Chief Constable about the arrest of the claimant for misconduct of the Social Work Agency which sought an enhanced criminal record certificate (ECRH) from the Criminal Record Bureau (CRB) about the claimant under section 115 of Police Act 1997 without previously being told to the claimant that it suffers from procedural unfairness.

The duty to act with procedural fairness under section 115 of the 1997 Act of European Commission of Human Rights and Fundamental Freedom meant that the person affected by the decision had to have the opportunity to make representation on his own behalf. Without such representation it would not be possible for a Chief Constable to fairly balance the risk of disclosure and non disclosure. It would be in exceptional circumstances that an individual who had not been convicted of an offence, nor gone through some other judicial process, should have allegations of serious misconduct disclosed without his previously being told of the case against him, and being permitted to make observations on the same. As that had not occurred in the instant case, there had been procedural unfairness. It followed that the application would be allowed and the declarations sought granted.

Prosecution for unlawful sexual intercourse with girl under 16 precluded by expiry of period of limitation of 12 months—House of Lords—2005

R v J,

(2005) All ER 1 (HL) : [2004] UKHL 42 : *(2005) 1 AC 562*

Allowing the appeal and setting aside the conviction against the defendant on the charges of indecent assault, the House of Lords held that no prosecution for indecent assault under section 14 (1) of Sexual Offence Act 1956 could be entertained after expiry of limitation of 12 months in the circumstance where the conduct upon which that charge was based was only an act of unlawful sexual intercourse with a girl under the age of 16. The prosecution could have been initiated within 12 months of the incident under section 6 (1) of the Act by virtue of section 37 (2) of, and section 2 of the Act of 1956.

(2) Rape and Sexual Assault in the United States

At present in most of the westerns countries, unlike the counties of Asian and African continent in the United States of America the law does not require that a rape victim be a woman; although statistically rare, males can be victims of rape. Moreover the law recognises that object other than the male penis can be used to commit rape.

Another, perhaps more significant change in the definition and prosecution of rape over time concerns the role of force. Rape has always required that the sexual act occur without the consent of the victim, a requirement satisfied when the victim is unconscious, asleep, or mentally impaired, or when the sexual act was induced by fraud. In recent decades, this requirement, have been done away with in response to claims that physical resistance can serve to worsen the injuries suffered by victims.[364]

(3) Rape in Russian Federation

Rape in Russian Federation has been defined in *Article 131* of Russian Criminal Code of 1994. It states:

Rape**,** that is sexual intercourse with the application or threat of the application of force against the victim or other persons or by taking advantage of the helpless state of the victim—shall be punished by deprivation of freedom (imprisonment) for a term of from three up to six years.

In case of repeated rape or organised rape by a group of persons or with threat of homicide punishment may extend from four to 10 years and if death of the victim is caused punishment may extend from eight years upto 15 years.

(4) Rape under Swedish Law

In Sweden and Russian Federation unlike India, United Kingdom, United States of America rape is not considered to be a heinous offence in as much as the maximum punishment provided for rape varies from two to six years of imprisonment. Section 1 of Chapter 6 dealing with Sexual Crimes states:

A person who by violence or threat which involves, or appears to the threatened person to involve an imminent

danger, forces another person to have sexual intercourse or to engage in a comparable sexual act, that having regard to the nature of the violation and the circumstances in general, is comparable to enforced sexual intercourse, shall be sentenced for rape to imprisonment for at least two years and at most six years of imprisonment.

Gross Rape

If the violence involved causes danger to life or caused serious injury or serious illness rape will be termed as gross rape punishable to the extent of four to ten years. As in the United Kingdom, in Sweden and Russian Federation, both a man and woman can be liable for rape.

(5) Rape in Peoples Republic of China

The offence of rape in China is punishable under *Article 236* of Criminal Code of Peoples Republic of China 1997. *Article 236* defines rape and provides for its punishment. It states:

Anyone who rapes a woman by violence, coercion or other means shall be sentenced to fixed-term imprisonment of not less than three years nor more than ten years.

Anyone who has sexual relations with a minor girl under the age of 14 shall be deemed to have committed rape and shall be given a heavier punishment.

Anyone who rapes a woman or has a sexual relation with a minor girl in any of the following listed ways shall be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death:

(1) raping a woman or having sexual relations with a minor girl in disgusting way;

(2) raping many women or having sexual relation with many minor girls;

(3) raping a woman before many people in a public place;

(4) raping woman in turn with another man or other men; or

(5) causing a severe injury, death or other serious consequence to the victim.

In China unlike India, United Kingdom, United States and European countries etc even death sentence is prescribed for rape in cases enumerated above. A sexual relationship with a minor will be considered rape and consent of the girl is immaterial for the offence.

(6) Rape in Germany

The provisions relating to rape is provided under sections 177 and 178 of "German *Penal Code*"[365] section 177 defines rape and bifurcates rape into four categories with a view of fix criminal liability ranging from 1 year to 5 years depending upon the nature and gravity of the offence in question. An important feature of the definition of rape is that the word "sexual coercions" has been used instead of rape. Section 177 reads as follows.

Section 177 (1) Rape in General.—Imprisonment for not less than 1 year:

(1) Whoever coerces another person:

1. with force;
2. by a threat of imminent danger for life or limb; or
3. by exploiting a situation in which the victim is unprotected and at the mercy of the perpetrator's influence to suffer the commission of sexual acts of the perpetrator or a third person on himself or to commit them on the perpetrator or a third person.

Section 177 (2) Rape in serious case.—Imprisonment for not less than 2 years:

An especially serious case exists, as a rule, if;

1. the perpetrator completes an act of sexual intercourse with the victim or commits similar sexual acts on the victim, or allows them to be committed on himself by the victim, which especially degrade the latter, especially if they are combined with penetration of the body (rape); or
2. the act is committed jointly by more than one person.

Section 177 (3) Rape committed if the perpetrator carries a weapon.—Imprisonment for not less than 3 years:

If the perpetrator:

1. Carries a weapon or another dangerous tool;
2. otherwise carries a tool or means to prevent or overcome the resistance another person through force or threat of force; or
3. places the victim by the act in danger of serious health damage.

Section 177 (4) Rape Committed when weapon is used.—Imprisonment for not less than 5 years:

1. the perpetrator uses a weapon or another dangerous tool during the act; or
2. the perpetrator

   (a) seriously physically maltreats the victim through the act; or

   (b) places the victim in danger of death through the act.

Section 178 Sexual Coercion and Rape Resulting in Death.—If the perpetrator through sexual coercion or rape causes the death of the victim, then the punishment shall be imprisonment for life or for not less than ten years.

(7) Rape in Korea

Korean *Penal Code*[366] in *Article 297* define rape and makes rape punishable to the extent of three years and if death of the victim results, the punishment will be enhanced upto life imprisonment (*Article 301*).

Article 297 states that a person who, by means of violence or intimidation, perpetrates an act of sexual intercourse with a female shall be punished by limited penal servitude for imprisonment not less than three years.

Article 301 states that if death or injury results from rape, punishment may extend upto life imprisonment with a minimum of five years of imprisonment.

(8) France

Articles 222-23 to 222-26 provides for provisions relating to rape in France.

Article 222-23 states any act of sexual penetration, whatever its nature, committed against another person by violence, constraint, threat or surprise, is rape which is punishable to 15 years of imprisonment. In case death of the victim is caused, punishment may extend upto thirty years' criminal imprisonment. (*Article 222-25*) ***Article 222-26*****:** Rape is punished by imprisonment for life when it is preceded, accompanied or followed by torture or acts of barbarity.

According to *Article 222-24* rape is punished by 20 years' criminal imprisonment:

1. where it causes mutilation or permanent disability;
2. where it is committed against a minor under the age of fifteen years;
3. where it is committed against a person whose particular vulnerability, due to age, sickness, an infirmity, a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator;
4. where it is committed by a legitimate, natural or adoptive ascendant, or by any other person having authority over the victim;

5. where it is committed by a person misusing the authority conferred by his position;
6. where it is committed by two or more acting as perpetrators or accomplices;
7. where it is committed with the use or threatened use of a weapon;
8. where the victim has been brought into contact with the perpetrator of these acts through the use of a communications network, for the distribution of messages to a non-specified audience;
9. where it is committed because of the sexual orientation of the victim.

***Article 222-25*:** Rape is punished by thirty years' criminal imprisonment where it causes the death of the victim.

***Article 222-26*:** Rape is punished by imprisonment for life when it is preceded, accompanied or followed by torture or acts of barbarity.

Sexual aggressions other than rape are punished by five years imprisonment and a fine of € 75,000.

Sexual aggression is any sexual assault committed with violence, constraint, threat or surprise.

Where a sexual aggression was committed abroad against a minor by a French national or a person habitually resident in France, French law applies.

Sexual aggressions other than rape are punished by seven years imprisonment and a fine of € 100,000 where they are committed against:

1. a minor under the age of fifteen years;
2. a person whose particular vulnerability due to age, sickness, infirmity, to a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator.

***Article 222-32*:** An indecent sexual exposure imposed on the view of others in a public place is punished by one year's imprisonment and a fine of € 15,000.

***Article 222-33*:** The harassment of another person for the purpose of obtaining favours of a sexual nature is punished by one year's imprisonment and a fine of € 15,000.

Harassing another person by repeated conduct which is designed to or which leads to a deterioration of his conditions of work liable to harm his rights and his dignity, to damage his physical or mental health or compromise his career prospects is punished by a year's imprisonment and a fine of € 15,000.

(9) Italy

Rape: Article 519 of Penal Code of Italy defines Rape as stated below:

Article 519: Rape: Whoever, by force or threat, forces someone to carnal intercourse is guilty of rape and shall be punished with imprisonment from three to ten years.

Article 520: A public official who, joins carnally (sexually) with a person arrested or detained, which has custody by reason of his office, or with the person who is entrusted to him in pursuance of a decision of the 'competent authority, shall be punished with imprisonment from one to five years.

The same penalty applies if the offense is committed by another public official vested by reason of his office, any authority over any individual above.

***Article 257*: Indecent exposure:** Whoever, in a public place or open or exposed to the public, performs lewd acts shall be punished with imprisonment from three months to three years.

The penalty is increased by a third to half if the offense is committed within or in the immediate vicinity of places if the frequented by minors and if hence the danger that they will attend. If the offense is to blame, you shall impose a fine ranging from EUR 51 to EUR 309.

Article 528 Publications and obscene performances: Whoever, in order to make trade or distribution or to expose them publicly, factory, introduced in the State, acquires, holds, exports, or puts into circulation writings, drawings, images or other obscene objects of any kind, shall be punished with imprisonment from three months to three years and a fine of not less than EUR 103.

The same punishment applies to any person selling, although illegal, items shown in the foregoing provision, or distributes or exposes them publicly.

This penalty also applies to those who:

(1) use any form of advertising designed to promote circulation or trade items shown in the first part of this article;

(2) give the public theatre or cinema, or hearings or public recitations, having the character of obscenity.

(10) Canada

Canadian Criminal (Penal) Code unlike English law Indian law and laws of other commonwealth countries does not have a separate definition of rape. The Code simply prohibits, sexual assault, under section 265 which defines "sexual assault" as non-consensual touching in circumstances of a sexual nature and section 271 provides punishment for sexual assault.

271. Sexual assault.—Everyone who commits a sexual assault is guilty of—

(a) an indictable offence and is liable to imprisonment for a term not exceeding 10 years and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding 18 months and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of 90 days.

272. Sexual assault with a weapon, threats to a third party or causing bodily harm is punished under this section.—(1) Every person commits an offence who, in committing a sexual assault,

(a) carries, uses or threatens to use a weapon or an imitation of a weapon;

(b) threatens to cause bodily harm to a person other than the complainant;

(c) causes bodily harm to the complainant; or

(d) is a party to the offence with any other person.

Punishment.—(2) Every person who commits an offence under sub-section (1) is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

(ii) in the case of a second or subsequent offence, seven years;

(a.1) in the other case where a firearm is used in the commission of the offence, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of four years; and

(a.2) if the complainant is under the age of 16 years, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of five years; and

(b) in any other case, to imprisonment for a term not exceeding fourteen years.

Section 273 defines consent as:

273.1 Meaning of "consent".—(1) The voluntary agreement of the complainant to engage in the sexual activity in question.

(2) Where no consent obtained.—(2) No consent is obtained for the purposes of sections 271, 272 and 273, where

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(b) the complainant is incapable of consenting to the activity;

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Sub-section (2) not limiting.—(3) Nothing in sub-section (2) shall be construed as limiting the circumstances in which no consent is obtained.

273.2. Where belief in consent not a defence.—It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief arose from the accused's

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

(c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

(11) Singapore

Penal Code of Singapore is based an *Indian Penal Code*. It defines rape in section 375 as follows

375. Rape.—(1) Any man who penetrates the vagina of a woman with his penis—

(a) without her consent; or

(b) with or without her consent, when she is under 14 years of age,

shall be guilty of an offence.

(2) Subject to sub-section (3), a man who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.

(3) Whoever—

(a) in order to commit or to facilitate the commission of an offence under sub-section (1)—

(i) voluntarily causes hurt to the woman or to any other person; or

(ii) puts her in fear of death or hurt to herself or any other person; or

(b) commits an offence under sub-section (1) with a woman under 14 years of age without her consent,

shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes.

(4) No man shall be guilty of an offence under sub-section (1) against his wife, who is not under 13 years of age, except where at the time of the offence—

(a) his wife was living apart from him—

(i) under an interim judgment of divorce not made final or a decree nisi for divorce not made absolute;

(ii) under an interim judgment of nullity not made final or a decree nisi for nullity not made absolute;

(iii) under a judgment or decree of judicial separation; or

(iv) under a written separation agreement;

(b) his wife was living apart from him and proceedings have been commenced for divorce, nullity or judicial separation, and such proceedings have not been terminated or concluded;

(c) there was in force a court injunction to the effect of restraining him from having sexual intercourse with his wife;

(d) there was in force a protection order under section 65 or an expedited order under section 66 of the Women's Charter (Cap 353) made against him for the benefit of his wife; or

(e) his wife was living apart from him and proceedings have been commenced for the protection order or expedited order referred to in paragraph (*d*), and such proceedings have not been terminated or concluded.

(5) Notwithstanding sub-section (4), no man shall be guilty of an offence under sub-section (1)(b) for an act of penetration against his wife with her consent.

376. Sexual assault by penetration.—(1) Any man (*A*) who.—

(a) penetrates, with *A'*s penis, the anus or mouth of another person (*B*); or

(b) causes another man (*B*) to penetrate, with *B'*s penis, the anus or mouth of *A*,

shall be guilty of an offence if B did not consent to the penetration.

(2) Any person (*A*) who—

(a) sexually penetrates, with a part of *A'*s body (other than *A'*s penis) or anything else, the vagina or anus, as the case may be, of another person (*B*);

(b) causes a man (*B*) to penetrate, with *B'*s penis, the vagina, anus or mouth, as the case may be, of another person (*C*); or

(c) causes another person (*B*), to sexually penetrate, with a part of *B'*s body (other than *B'*s penis) or anything else, the vagina or anus, as the case may be, of any person including *A* or *B*,

shall be guilty of an offence if *B* did not consent to the penetration.

(3) Subject to sub-section (4), a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.

(4) Whoever—

(a) in order to commit or to facilitate the commission of an offence under sub-section (1) or (2)—

(i) voluntarily causes hurt to any person; or

(ii) puts any person in fear of death or hurt to himself or any other person; or

(b) commits an offence under sub-section (1) or (2) against a person (*B*) who is under 14 years of age,

shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes.

376A. Sexual penetration of minor under 16.—(1) Any person (*A*) who—

(a) penetrates, with *A*'s penis, the vagina, anus or mouth, as the case may be, of a person under 16 years of age (*B*);

(b) sexually penetrates, with a part of *A*'s body (other than *A*'s penis) or anything else, the vagina or anus, as the case may be, of a person under 16 years of age (*B*);

(c) causes a man under 16 years of age (*B*) to penetrate, with *B*'s penis, the vagina, anus or mouth, as the case may be, of another person including *A*; or

(d) causes a person under 16 years of age (*B*) to sexually penetrate, with a part of *B*'s body (other than *B*'s penis) or anything else, the vagina or anus, as the case may be, of any person including *A* or *B*,

with or without *B*'s consent, shall be guilty of an offence.

(2) Subject to sub-section (3), a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.

(3) Whoever commits an offence under this section against a person (*B*) who is under 14 years of age shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.

(4) No person shall be guilty of an offence under this section for an act of penetration against his or her spouse with the consent of that spouse.

(5) No man shall be guilty of an offence under sub-section (1)(*a*) for penetrating with his penis the vagina of his wife without her consent, if his wife is not under 13 years of age, except where at the time of the offence—

(a) his wife was living apart from him—

(i) under an interim judgment of divorce not made final or a decree nisi for divorce not made absolute;

(ii) under an interim judgment of nullity not made final or a decree nisi for nullity not made absolute;

(iii) under a judgment or decree of judicial separation; or

(iv) under a written separation agreement;

(b) his wife was living apart from him and proceedings have been commenced for divorce, nullity or judicial separation, and such proceedings have not been terminated or concluded;

(c) there was in force a court injunction to the effect of restraining him from having sexual intercourse with his wife;

(d) there was in force a protection order under section 65 or an expedited order under section 66 of the Women's Charter (Cap. 353) made against him for the benefit of his wife; or

(e) his wife was living apart from him and proceedings have been commenced for the protection order or expedited order referred to in paragraph (*d*), and such proceedings have not been terminated or concluded.

376B. Commercial sex with minor under 18.—(1) Any person who obtains for consideration the sexual services of a person, who is under 18 years of age, shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with both.

(2) Any person who communicates with another person for the purpose of obtaining for consideration, the sexual services of a person who is under 18 years of age, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

(3) No person shall be guilty of an offence under this section for any sexual services obtained from that person's spouse.

(4) In this section, "sexual services" means any sexual services involving—

(a) sexual penetration of the vagina or anus, as the case may be, of a person by a part of another person's body (other than the penis) or by anything else; or

(b) penetration of the vagina, anus or mouth, as the case may be, of a person by a man's penis.

376C. Commercial sex with minor under 18 outside Singapore.—(1) Any person, being a citizen or a permanent resident of Singapore, who does, outside Singapore, any act that would, if done in Singapore, constitute an offence under section 376B, shall be guilty of an offence.

(2) A person who is guilty of an offence under this section shall be liable to the same punishment to which he would have been liable had he been convicted of an offence under section 376B.

376D. Tour outside Singapore for commercial sex with minor under 18.—(1) Any person who—

(a) makes or organises any travel arrangements for or on behalf of any other person with the intention of facilitating the commission by that other person of an offence under section 376C, whether or not such an offence is actually committed by that other person;

(b) transports any other person to a place outside Singapore with the intention of facilitating the commission by that other person of an offence under section 376C, whether or not such an offence is actually committed by that other person; or

(c) prints, publishes or distributes any information that is intended to promote conduct that would constitute an offence under section 376C, or to assist any other person to engage in such conduct,

shall be guilty of an offence.

(2) For the purposes of sub-section (1)(c), the publication of information means publication of information by any means, whether by written, electronic, or other form of communication.

(3) A person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.

376E. Sexual grooming of minor under 16.—(1) Any person of or above the age of 21 years (A) shall be guilty of an offence if having met or communicated with another person (B) on 2 or more previous occasions—

(a) A intentionally meets B or travels with the intention of meeting B; and

(b) at the time of the acts referred to in paragraph (a)—

(i) A intends to do anything to or in respect of *B*, during or after the meeting, which if done will involve the commission by *A* of a relevant offence;

(ii) *B* is under 16 years of age; and

(iii) *A* does not reasonably believe that *B* is of or above the age of 16 years.

(2) In sub-section (1), "relevant offence" means an offence under—

(a) section 354, 354A, 375, 376, 376A, 376B, 376F, 376G or 377A;

(b) section 7 of Children and Young Persons Act (Cap 38); or

(c) section 140 (1) of Women's Charter (Cap 353).

(3) For the purposes of this section, it is immaterial whether the 2 or more previous occasions of *A* having met or communicated with *B* referred to in sub-section (1) took place in or outside Singapore.

(4) A person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both. [*UK SOA 2003, section 15*]

376F. Procurement of sexual activity with person with mental disability.—(1) Any person (*A*) shall be guilty of an offence if—

(a) A intentionally touches another person (*B*) who has a mental disability;

(b) the touching is sexual and *B* consents to the touching;

(c) *A* obtains *B*'s consent by means of an inducement offered or given, a threat made or a deception practised by *A* for that purpose; and

(d) *A* knows or could reasonably be expected to know that *B* has a mental disability.

(2) Subject to sub-section (3), a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

(3) If the touching involved—

(a) penetration of the vagina or anus, as the case may be, with a part of the body or anything else; or

(b) penetration of the mouth with the penis,

a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.

(4) No person shall be guilty of an offence under this section for any act with that person's spouse.

(5) For the purposes of this section—

"mental disability" means an impairment of or a disturbance in the functioning of the mind or brain resulting from any disability or disorder of the mind or brain which impairs the ability to make a proper judgment; in the giving of consent to sexual touching;

"touching" includes touching—

(a) with any part of the body;

(b) with anything else; or

(c) through anything,

and includes penetration.

[*UK SOA 2003, sections 34, 79, UK MH Bill 2004, clause 2 (6)*]

376G. Incest.—(1) Any man of or above the age of 16 years (*A*) who—

(a) sexually penetrates the vagina or anus of a woman (*B*) with a part of *A*'s body (other than *A*'s penis) or anything else; or

(b) penetrates the vagina, anus or mouth of a woman (*B*) with his penis, with or without *B*'s consent where *B* is to *A*'s knowledge *A*'s grand-daughter, daughter, sister, half-sister, mother or grandmother (whether such relationship is or is not traced through lawful wedlock), shall be guilty of an offence.

(2) Any woman of or above the age of 16 years who, with consent, permits her grandfather, father, brother, half-brother, son or grandson (whether such relationship is or is not traced through lawful wedlock) to penetrate her in the manner described in sub-section (1)(a) or (b), knowing him to be her grandfather, father, brother, half-brother, son or grandson, as the case may be, shall be guilty of an offence.

(3) Subject to sub-section (4), a man who is guilty of an offence under sub-section (1) shall be punished with imprisonment for a term which may extend to 5 years.

(4) If a man commits an offence under sub-section (1) against a woman under 14 years of age, he shall be punished with imprisonment for a term which may extend to 14 years.

(5) A woman who is guilty of an offence under sub-section (2) shall be punished with imprisonment for a term which may extend to 5 years.

[*UK SOA 2003, section 64; SPC 1985 Ed., sections 376A, 376B, 376C (repealed)*]

377. Sexual penetration of a corpse.—(1) Any man who penetrates, with his penis, the vagina, anus or mouth, as the case may be, of a human corpse, shall be guilty of an offence.

(2) A man who is guilty of an offence under sub-section (1) shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.

(3) Any person (A) who causes any man (B) to penetrate with B's penis, the vagina, anus or mouth, as the case may be, of a human corpse, shall be guilty of an offence if B did not consent to the penetration.

(4) A person who is guilty of an offence under sub-section (3) shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning. [*UK SOA 2003, section 70*]

377A. Outrages on decency.—Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.

377B. Sexual penetration with living animal.—(1) Any person (*A*) who—

(a) penetrates, with *A's* penis, the vagina, anus or any orifice (mouth) of an animal; or

(b) causes or permits *A's* vagina, anus or mouth, as the case may be, to be penetrated by the penis of an animal,

shall be guilty of an offence.

(2) A person who is guilty of an offence under sub-section (1) shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

(3) Any person (A) who—

(a) causes any man (*B*) to penetrate, with *B's* penis, the vagina, anus or any orifice of an animal; or

(b) causes the vagina, anus or mouth, as the case may be, of another person (*B*) to be penetrated with the penis of an animal,

shall be guilty of an offence if B did not consent to the penetration.

(4) A person who is guilty of an offence under sub-section (3) shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning. [*UK SOA 2003, section 69*]

377C. Sexual offences.—In sections 375 to 377B—

(a) penetration is a continuing act from entry to withdrawal;

(b) references to a part of the body include references to a part which is surgically constructed (in particular, through a sex reassignment procedure);

(c) for the purposes of identifying the sex of a person—

(i) the sex of a person as stated in that person's identity card issued under the National *Registration Act* (Cap 201) at the time the sexual activity took place shall be *prima facie* evidence of the sex of that person; and

(ii) a person who has undergone a sex reassignment procedure shall be identified as being of the sex to which that person has been reassigned;

(d) penetration, touching or other activity is "sexual" if—

(i) because of its nature it is sexual, whatever its circumstances or any person's purpose in relation to it may be; or

(ii) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual;

(e) "vagina" includes vulva.

(12) Malaysia

Penal Code of Malaysia like *Indian Penal Code* defines Rape under section 375 and provides punishment in section 376. An important feature of Malaysia *Penal Code* is that it provides specific provision of incest. Under sections 376A and 376B as stated below:

375. Rape.—A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

(a) against her will;

(b) without her consent;

(c) with her consent, when her consent has been obtained by putting her in fear of death or hurt to herself or any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception;

(d) with her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent;

(e) with her consent, when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent;

(f) with or without her consent, when she is under sixteen years of age.

Explanation—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception—Sexual intercourse by a man with his wife by a marriage which is valid under any written law for the time being in force, or is recognized in Malaysia as valid, is not rape.

Explanation 1—A woman—

(a) living separately from her husband under a decree of judicial separation or a decree *nisi* not made absolute; or

(b) who has obtained an injunction restraining her husband from having sexual intercourse with her,

shall be deemed not to be his wife for the purposes of this section.

Explanation 2—A Muslim woman living separately from her husband during the period of "iddah, which shall be calculated in accordance with Hukum Syara", shall be deemed not to be his wife for the purposes of this section.

376. Punishment for rape.—Whoever commits rape shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.

376A. Incest.—A person is said to commit incest if he or she has sexual intercourse with another person whose relationship to him or her is such that he or she is not permitted, under the law, religion, custom or usage applicable to him or her, to marry that other person.

376B. Punishment for incest.—(1) Whoever commits incest shall be punished with imprisonment for a term of not less than six years and not more than twenty years, and shall also be liable to whipping.

(2) It shall be defence to a charge against a person under this section if it is proved—

(a) that he or she did not know that the person with whom he or she had sexual intercourse was a person whose relationship to him or her was such that he or she was not permitted under the law, religion, custom or usage applicable to him or her to marry that person; or

(b) that the act of sexual intercourse was done without his or her consent.

Explanation.—A person who is under sixteen years of age, if female, or under thirteen years of age, if male shall be deemed to be incapable of giving consent.

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343 Smith & Hogan, *Criminal Law,* 11th Edn, 2005, p 614.

344 William Blackstone, *Commentaries*, p 1769.

345 Sexual Offences Act 2003 came into force on 1 May 2004.

346 Andrew Ashworth, *Principles of Criminal Law,* 5th Edn, 2006, Oxford University Press, p 339. See Smith and Hogan, *Criminal Law*, 11th Edn, 2005, chapter 17, Sexual Offences, pp 592-694.

347 Andrew Ashworth, *Principles of Criminal Law,* 5th Edn, 2006, Oxford University Press, p 339. See Smith and Hogan, *Criminal Law,* 11th Edn, 2005, chapter 17, Sexual Offences, pp 592-694, pp 337 to 351.

348 *Sutherland and Morris v United Kingdom,* (1997) 24 EHRR; *ADT v United Kingdom,* (2000) 31 EHRR 803 : [2000] ECHR 401 : [2000] ECHR 402.

349 Sexual Offences Act 2003, section 79 (3), for this purpose, the vagina includes the vulva, and surgically reconstructed organs.

350 Sexual Offences Act 2003, section 79 (3), for this purpose, the vagina includes the vulva, and surgically reconstructed organs.

351 Sexual Offences Act 2003, section 79 (2).

352 KD Gaur, *Criminal Law; Cases and Materials*, 4th Edn, 2005, pp 483-485.

353 Smith and Hogan, *Criminal Law: Cases and Materials*, 9th Edn, 2006, Oxford University Press, pp 726-735.

354 Section 79 (3) of Sexual Offences Act 2003. This puts on a statutory footing the ruling in Matthews (unreported) October 1996. See also M Hicks and G Branston, *"Transsexual Rape—A Loophole Closed?",* 1997, Cr IR, p 526.

355 Section 79 (3) of Sexual Offences Act 2003, section 79 (8) defines touching. It says: Touching includes touching—(a) with any part of the body, (b) with anything else, (c) through any thing, and in particular includes touching amounting to penetration.

356 Relevant in cases where the victim is unsure what penetrated him or her.

357 *R v Ram and Ram,* (1893) 17 Cox CC 609; *Lord Baltimore's* Case, (1768) 1 Black W 648.

358 *Cogan and Leak, [1975] 2 All ER 1059*.

359 David C Brody, James R Acker and Wayne A Logan, *Criminal Law,* Aspen Publication, 2001, p 419. See KD Gaur, *A Textbook on IPC*, 4th Edn, 2008, position of rape victims in United Kingdom and India.

360 *R v C,* [2009] UKHL 42 : [2009] WLR (D) 272. House of Lords (2009) UKHL p 42; Lord Hope of Craighead, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood, Lord Mance.

361 Sexual Offences Act 2003 Act provides a number of offences against persons "with a mental disorder impending choice" in sections 30 to 33, and a number of offences involving inducements, threats or deception to procure sexual activity with a person with a mental disorder, in sections 34 to 37. The relevant section 30 (1)(b) states:

(1) A person (A) commits an offence if—(a) he intentionally touches another person (B), (b) the touching is sexual, (c) B is unable to refuse because of or for a reason related to a mental disorder, and (d) A Knows or could reasonably be expected to Know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse.

362 The offence in section 30 (2)(b): states

(2) B is unable to refuse if—(a) he lacks the capacity to choose whether to agree to the touching (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason, or (b) he is unable to communicate such a choice to A.

363 (2009) Cr Apr R 211.

364 Joshua Dressier, *Understanding Criminal Law*, 2nd Edn, New York: Matthew Bender & Co, 1995, p 541.

365 German *Penal Code* as amended as of 19 December 2001, Translated by Stephen Thaman, William S Hein & Co, Inc Buffalo, New York, 2002, pp 112-114.

366 Korean Criminal Code, Gerhard OW Mueller, Fred B Rothamn & Co, South Hackensack, NJ, Sweet & Maxwell Limited, London.

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8.20 Leading Cases on Rape

Part II Specific Offences

8 OFFENCES RELATING TO HUMAN BODY

8.20 Leading Cases on Rape

Meekly following the accused and allowing him to have sexual intercourse amounts to passive submission and hence not "Rape"—Supreme Court (1979)

Tukaram v State of Maharashtra,

AIR 1979 SC 185 : (1979) 2 SCC 143 : 1979 SCR (1) 810

Mathura a minor girl aged 14-16 years was raped, on 26 March 1972. Gama, brother of Mathura lodged a report at police station Desai Gunj, alleging that Mathura had been kidnapped by Nushi, her husband Laxman and Ashok. The report was recorded by Head Constable Baburao. After Baburao had gone away, Mathura, Nushi, Gama and Ashok started leaving the police station. The appellants, however, asked Mathura to wait at the police station and told her companions to move out. The direction was complied with. Immediately thereafter Ganpat appellant took Mathura to a *chhapri* which serves the main building as its back verandah. In the *chhapri* he felled her on the ground and raped her in spite of protests and stiff resistance on her part.

The appellant thereafter tried to rape her but was unable to do so as he was in a highly intoxicated condition. The sessions court, after examining the accused and prosecution, came to the conclusion that she had sexual intercourse and that, in all probability, this was with accused no 2. He added however that rape had not been proved. Accordingly both the accused were set free. However, the High Court reversed the finding of the lower court and convicted both the accused. The High Court held that the session's court erred in appreciating the difference between a consent and passive submission. The sexual intercourse in question was forcible and amounted to rape, the High Court remarked:

> ... [M] ere passive or helpless surrender of the body and its resignation to the other's lust induced by threats or fear cannot be equated with desire or will, nor can furnish an answer by the mere fact that the sexual act was not in opposition to such desire or volition.... [O] n the other hand, taking advantage of the fact that Mathura was involved in a complaint filed by her brother and that she was alone at the police station at the dead hour of night, it is more probable that the initiative for satisfying the sexual desire must have proceeded from the accused, and that the victim Mathura must not have been a willing party to the act of the sexual intercourse. Her subsequent conduct in making a statement immediately not only to her relatives but also to the members of the crowd leave no chance of doubt that she was subjected to forcible sexual intercourse.

Rejecting the High Courts contentions the Supreme Court held that the circumstantial evidence available, therefore, is not only capable of being construed in a way different from that adopted by the High Court but actually derogates in no uncertain measure from the inference drawn by it.

Accordingly, the Supreme Court held the sexual intercourse in question is not proved to amount to rape and that no offence is brought home to Ganpat appellant. Conviction was quashed.

With due respect it is submitted that Apex Court has erred in arriving at the conclusion that it was not rape. It is a clear case of rape as inferred by High Court.

False promise to marry will not ipso facto make a person liable for rape, if prosecutrix is above 16 and impliedly consented to sex. However, the accused may be liable for breach of promise to marry and liable for damages—Supreme Court—2005

Deelip Singh v State of Bihar,

(2005) 1 SCC 88 : AIR 2005 SC 203 : JT 2004 (9) SC 469 : 2004 (9) Scale 278

The appellant has been charged and convicted under *section 376, IPC, 1860* for committing rape of a minor girl. The victim lodged a complaint to the police, alleging that the accused forcibly raped her and later consoled her by saying that he would marry her. She agreed to have sexual relations with him, on account of the promise for marriage made by him. After she became pregnant, she revealed the matter to her parents. The efforts made by the father to establish the marital tie failed and therefore, she was constrained to file the complaint. The trial court sentenced him to imprisonment for a period of 10 years, on appeal, the High Court upheld the conviction but modified the sentence to seven years. Aggrieved thereby, the accused filed appeal before the Supreme Court.

Justice P Venkataraman Reddi observed:

It is fairly clear from the evidence of the victim that the predominant reason for sexual intimacy with the accused was the hope generated in her about the prospect of marriage with the accused ... There is nothing in her evidence to demonstrate that without any scope for deliberation, she succumbed to the psychological pressure exerted or allurements made by the accused in a weak moment. Nor does her evidence indicate that she was incapable of understanding the nature and implications of the act which she consented to. On the other hand, the scrutiny of evidence of gives a contra indication.

Consent given by a woman believing the man's promise to marry her would fall within the expression "without her consent" *vide* clause (ii) to *section 375, IPC, 1860*, only if it is established that from the very inception the man never really intended to marry her and the promise was a mere hoax.[367] When prosecutrix had taken a conscious decision to participate in the sexual act only on being impressed by the accused's promise to marry her and the accused's promise was not false from its inception with the intention to seduce her to sexual act, clause (ii) to *section 375, IPC* is not attracted and established. In such a situation the accused would be liable for breach of promise to marry for which he will be liable for damages under civil law. False promise to marry will not ipso facto make a person liable for rape if the prosecutrix is above 16 years of age and impliedly consented to the act.

In the result, the conviction and sentence is set aside and the appeal is allowed.

Submission to sex in the face of inevitable compulsion is not consent—Appeal dismissed—Punjab High Court—1958

Rao Harnarain Singh and Sheoji Singh v State of Punjab,

AIR 1958 Punj 123 : 1958 Cr LJ 563

This is an application under section 498 CrPC 1898 (= *section 438 CrPC 1973*) for release of the petitioners on bail pending their trial for offences said to have been committed under *sections 302*, *109* and *201* of *IPC, 1860*.

On the evening of 18 August 1957, Rao Harnarain Singh was entertaining Ch Mauji Ram, Deputy Superintendent Jails, Gurgaon, on the eve of his transfer. Rao Harnarain Singh is said to have required Kalu Ram his tenant to send his wife, Mrs Surti aged 19 years for the carnal pleasure of himself and his guests.

The girl protested vehemently against this outrageous demand, but under pressure of her husband, she was induced to surrender her chastity. Three accused person—Rao Harnarain Singh, Ch Mauji Ram and Balbir Singh ravished her during the night and she died almost immediately. Her shrieks were heard by some advocate living in the neighbourhood.

The defence contended that the commission of offence of rape on the girl could not be established. The girl was

produced for the satisfaction of the carnal desires of Rao Harnarain Singh and his guests, with the consent of the girl's husband Kalu Ram, and that the girl was also a consenting party and she surrendered her body to the three persons willingly and with the approval and at the bidding of her husband.

Refuting the defence contention, the court rightly said that:

> A mere act of helpless resignation in the face of inevitable compulsion, quiescence non-resistance passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, can not be deemed to be 'consent' as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.
>
> Submission of her body under the influence of fear or terror is not consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent.
>
> ...A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted.
>
> ...On the material placed before the court it cannot reasonably be argued that Mrs Surti was an assenting victim to the outrage perpetrated on her, on the fatal night.

The court accordingly dismissed the appeal.

Consent to sexual assault during voluntary intoxication—Complainant having voluntarily consumed large amount of liquor lost her capacity to consent for sexual intercourse but was aware of what was happening—would not make defendant liable for rape—Court of Criminal Appeal—2007

R v Bree,

(2007) 2 All ER 676 : [2007] EWCA Cr 804

The defendant appellant and the complainant had voluntarily consumed a large amount of alcohol and indulged in a sexual activity. The defendant was charged and convicted for rape on the ground that complainant had not consented.

Setting aside the defendant's conviction, the Court of Criminal Appeal held that, since the complainant was affected by her own voluntarily induced intoxication and she had the capacity to consent the act did not amount to rape. Further, the jury had not been given any directions by the judge regarding issues of consent and voluntary intoxication that had been fundamental to the outcome of the decision. The court allowed the appeal.

Consent given under misconception will not exonerate the accused of the charge of rape—No defence in rape—Queens Bench Division—1877

Queen v Flattery,

(1877) 2 QBD 410 : (1877) 13 Cox CC 388

The girl, along with her mother, approached him for medical advice as she was prone to fits. Flattery took the girl aside and gratified his lust through sexual intercourse. He pleaded there was consent and therefore no rape.

Kell, CB, J:

Up to the time when the victim and the prisoner went into the room alone, it is clearly found on the case that the

only thing contemplated either by the girl or her mother was the operation which had been advised, sexual intercourse was never thought of by either of them.

And after she was in the room alone with the prisoner, what the case expressly states is that the girl made but feeble resistance, believing that she was being treated medically, and that what was taking place was a surgical operation.

She submitted to a surgical operation and nothing else. It is said, however, that having regard to the age of the prosecutrix, she must have known the nature of the act. I know no ground in law for such a proposition. And, even if she had such knowledge, she might suppose that penetration was being effected with the hand or with an instrument.

The conviction is affirmed.

False pretence does not vitiate consent in rape—accused acquitted—Court of Appeal—1945

R v Linekar[368]

Linker was held guilty of procuring a woman, a part-time prostitute, to have sexual intercourse, with him, by promising to pay her USD 25, never intending to pay. The judge directed that her consent would be vitiated by fraud.

The accused went in appeal against his conviction to the Court of Appeal which acquitted him of charge of rape. The court said the distinction that can be drawn between fraud, which is sufficient to vitiate consent and other types of fraud, is a question of fact.

An essential ingredient of the offence of rape is the proof that the woman did not consent to the actual act of sexual intercourse with the particular man who penetrated her. For instance, in *R v Flattery,*[369] she agreed to a surgical procedure, which she hoped, would cure her fits. In *R v Williams, [1923] 1 KB 340*, she agreed to a physical manipulation, which would provide her with extra air supply to improve her singing. It is the no-consent to sexual intercourse rather than the fraud of the doctor or choir-master that makes the offence rape.

Similarly, that ingredient is not proved in the husband impersonation cases because the victim did not consent to sexual intercourse with the particular man who penetrated her.

In *R v Jackson,* (1882) Russ and Ry 487 : 168 ER 911, a Court of 12 judges decided by eight to four, that carnal knowledge of a woman whilst she was under the belief that the man is her husband was not rape.

In *R v Barrow,* (1868) LR 1 CCR 156, Bovill, CJ, giving judgment of the Court, said:

> It does not appear that the woman, upon whom the offence was alleged to have been committed, was asleep or unconscious at the time when that act of connection commenced. It must be taken, therefore, that the act was done with the consent of the prosecutrix, though that consent was obtained by fraud.

However, the court of the Crown Cases Reserve of Ireland, consisting of six judges, resolve the problems in *R v Dee,* (1884) 15 Cos CC 579 : [1884] 14 LR Ir 468, Judith Gorman, the wife of one J Groman, who was absent, having gone out to fish, lay down upon a bed in her sleeping room in the evening when it was dark; that she did not at first resist, believing the man to be her husband, but that on discovering that he was not her husband, which was after the commencement, but before the termination of the proceeding, her consent or acquiescence terminated, and she ran down stairs. Holding the prisoner liable for rape, May, CJ, delivering the judgment of the court said:

> Rape being defined [in section 1 (1) of Sexual Offences Act 1957] to sexual connection with a woman without her consent, or without and therefore against her will, it is essential to consider what is meant and intended by consent.
>
> Does it mean an intelligent, positive concurrence of the will of the woman, or is the negative absence of dissent sufficient?

> In these surgical cases it is held that the submission to an act believed to be a surgical operation does not constitute consent to a sexual connection, being of a wholly different character; there is *no consensus quoad hoc* (no consent to the act).
>
> In the case of personation there is *no consensus quoad hanc personam.* (no consent to the particular person).

Applying those dicta to the fact of the present case, there was consent by the prostitute to sexual intercourse—*consensus quoad hoc.* There was consent by the prostitute to sexual intercourse with this particular appellant—*consensus quoad hanc personam.*

The so-called “medical case”, such as *Flattery and Williams* are examples of *no consensus quoad hoc* (no consent).

The husband impersonation cases are examples of *no consensus quoad hanc personam* (no consent to the particular person).

In 1988, *R v Clarence,*[370] a well-known case of a husband who knew that he was suffering from gonorrhoea but his wife did not, and he deliberately had sexual intercourse with her with the result that the disease was communicated to her. The Court of 13 judges, by a majority of nine to four, decided that Clarence was not guilty under section 47 of Offences against Persons Act 1861.

The importance of Clarence, in our judgment, is that it exposes the fallacy of the submission that there can be rape by fraud or false pretences.

Wills, J says:[371]

> That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent. In respect of a contract, fraud does not destroy the consent. It only makes it revocable...

Stephen, J went on to say:[372]

> Consent to a surgical operation or examination is not a consent to sexual connection or indecent behaviour. Consent to connection with a husband is not consent to adultery. I do not think that the maxim that fraud vitiates consent can be carried further than this in criminal matters.

The women’s consent here was as full and conscious as consent could be. It was not obtained by any fraud either as to the nature of the act or as to the identity of the agent.

The High Court of Australia in *Papadimitropoulos v Queen,* (1957) 98 CLR 249, held that where a women consented to sexual intercourse under the belief, fraudulently induced by the man, that she was married to him, the man was not guilty of rape. Dixon, CJ said:

> Rape is carnal knowledge of a woman without her consent. Carnal knowledge is the physical act of penetration. It is the consent to such physical act of penetration, which is in question upon an indictment for rape. Such consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. Once the consent is comprehending and actual, the inducing causes cannot destroy its reality and leave the man guilty of rape.

The prostitute here consented to sexual intercourse with the appellant. Being induced by the appellant’s false pretence that his intention was to pay the agreed price of $25 for her services does not destroy the reality of that consent. Therefore, he was not guilty of rape.

The appeal was allowed and the conviction and sentence was quashed.

A girl whose mental faculties were undeveloped cannot legally give consent— Appeal dismissed, Accused liable—Supreme Court (2003)

Tulshidas Kanolkar v State of Goa,

(2003) 8 SCC 590 : *AIR 2004 SC 978*

The case in hand is a classic example when the base instinct of the appellant over took his moral values and human sensitivity and he ravished the unsuspecting victim incapable of comprehending the vicissitudes of the dastardly act, not once, but several times. So innocent was the victim that she was not even aware of the dreadful consequences. The mental faculties of the victim were undeveloped and her Intelligence Quotient ("IQ") was not even one-third of what a normal person has. Tragedy struck on the victim sometime in 1999, when the parents of the victim noticed that her legs were swollen and there were signs of advanced state of pregnancy. They were shocked beyond limits. Additional Session Judge, Panji holding the accused liable for rape under section 376 imposed a sentence of ten years of rigorous imprisonment along with a fine of Rs 10000. However, the High Court in appeal reduced the sentence to seven years. Hence appellant went in appeal to Supreme Court against his conviction.

Dismissing the appeal, the Supreme Court held, where such a girl was ravished by accused several times, it could not be said that victim had suffered sexual intercourses with consent. For constituting consent there must be exercise of intelligence based on the knowledge of the significance and the moral effect of the act. Consent is different from submission as every consent involves a submission but the converse does not follow.

In law, an act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in when the faculty is either clouded by fear or vitiated by duress or impaired due to mental retardation or deficiency, held, cannot be considered to be consent. It has to be a conscious and voluntary act.

Criticising the High Court for reducing the sentence to seven years, the Supreme Court said that it should not have interfered in the sentence. And the court suggested to the Government amendment of law and provided a minimum of ten years of sentence in case of rape of a mentally challenged or deficient woman as in case of a woman below 12 years under sub-clause (f) to clause (2) to *section 376 IPC* since the gravity of the offence in such a case is more serious and a women of this type are more vulnerable to sexual abuses by unscrupulous people.

Birth certificate is conclusive proof of a girl's age—Supreme Court—1958

Sidheswar Ganguly v *State of WB*,

AIR 1958 SC 143 : *1958 SCR 749*

It was held that the consent of the victim is immaterial when she happens to be under sixteen years of age on date of the occurrence, i.e. 20 April 1954, when the accused was alleged to have had sexual intercourse with the girl. Though the ossification test (X-ray examination) is not a sure guide to determine age, in the absence of birth certificate the conclusion as to the age could be drawn from the fact and circumstances including physique of the person and medical examination.

Sexual intercourse with a woman by beating her husband and threatening to put him in police remand amounts to rape within clause (iii) to section 375 of Indian Penal Code, 1860—Supreme Court—1992

State of Maharashtra v Prakash,

AIR 1992 SC 1275 : (1993) Supp (1) SCC 653

This appeal preferred by the State of Maharashtra against the judgment of the Bombay High Court allowing the criminal appeal filed by the respondent-accused (Prakash a constable and Sudhakar a businessman) acquitting them of rape and wrongful confinement. The learned sessions judge, Amravati, had convicted both the accused-respondents for rape under *section 376* read with *section 34* of *IPC* as well as for wrongful confinement under *section 342* read with *section 34* of *IPC*.

The High Court of Bombay acquitted the accused holding consent on the part of the victim for the sexual act. The

victim Nirmala (PW 1) was married to PW 2. They had gone to Pathrot village to attend a village fair called *"Dwarkecha Baill"*. They were staying in the house of Nirmala's parents. The first respondent Prakash—a police constable was deputed to village Pathrot on 6 September 1978 for duty at the time of the Ganapati festival. The second respondent, Sudhakar, a businessman is a resident of the village. An idol of Ganapati was installed in the courtyard of Sudhakar.

The first and the second respondent raped the prosecutrix and threatened her not to report the matter to the police.

The only question is whether the said intercourse had taken place with the consent of the prosecutrix PW 1 or was it a case where she was deprived of her will by show of authority and by the beating administered to her husband by the respondent Prakash a constable accompanied by threat of putting him in police remand? Not only that, after the act, they were threatened not to report to the police. This explains their silence for a few hours. Only when another constable, Kailashpuri PW 4 advised PW 2, did they pick up the courage to go and report to the police station next morning.

The theory of the prosecutrix PW 1 being a willing party to sexual intercourse is totally misplaced in the circumstances. For the offence of rape, it is not necessary that there should be actual use of force. A threat or use of force as in clause (3) to section 375 is sufficient.

To these poor rustic helpless villagers, the police constable represents absolute authority. They had no option but to submit to his will. The judgment of the High Court was set aside and the session judge's verdict restored.

State appeal allowed: Sessions' court conviction restored.

Corroboration is not the sine qua non (not a necessary requirement) for a conviction in a rape case—Appeal dismissed, accused liable—Supreme Court —1983

Bharwada Bhoginbhai Hirjibhai v State of Gujarat,

AIR 1983 SC 753 : *1983 Cr LJ 1096* : *(1983) 3 SCC 217*

The appellant, a government servant employed in the Sachivalaya at Gandhinagar was found guilty of serious charges of sexual misbehaviour with two young girls (aged about ten or twelve) on Sunday, 7 September 1975, at about 5.30 pm at the house of the appellant. The appellant was convicted for attempt to rape under section 376 read with section 511, outraging the modesty of women (section 354) and wrongful confinement (section 342) both by the session court and High Court.

As regards the need for insisting on corroboration to the testimony of the prosecutrix in a sexual offence as insisted upon by the defence, the Supreme Court held that in the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.

(1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.

(2) She would be conscious of the danger of being ostracised by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours.

(3) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy.

(4) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.

Corroboration is not the *sine qua non* for a conviction in rape case.

Corroboration may, however, be insisted upon when a woman having attained majority is found in a compromising position and there is likelihood of her having levelled such an accusation on account of the instinct of self-preservation or when the probability factor is found to be out of tune.

Appeal dismissed, conviction upheld.

8.20.1 Case from Malaysia

Conviction of rape on wrongly founded corroboration not proper—may lead to miscarriage of justice—Appeal Allowed—Privy Council (1965)

Chiu Nang Hong v Public Prosecutor[373]

The appellant was convicted in the High Court of Kuala Lumpur on 2 November 1962 of rape under section 376, Malaysian *Penal Code* and sentenced to 18 months imprisonment. His appeal to the Court of Appeal at Kuala Lumpur was dismissed on 24 January 1963. Hence the present appeal to Privy Council.

Allowing the appeal their Lordships of the Privy Council said the crucial question was whether the complainant consented for sex, and the risk of conviction on her own evidence alone was proper. Some corroborative evidence was most desirable, that is to say, some evidence coming from a source independent of her, which tended to show that she did not consent of her own free will. She did not struggle or shout, she did not try to leave the room, her clothing remained intact and her body unmarked. She made no complaint until after 48 hours.

Their Lordships of the Privy Council disagreed with the trial courts findings and held that corroboration in the legal sense of the term must not be misinterpreted to mean that the circumstances were consistent with the complainant's story.

Their Lordships do not need to emphasise that the circumstances did not afford corroboration of the complainant's allegation of no consent. The case is one therefore where the appellant has been convicted on the basis that the complainant's allegation was corroborated when it was not. It is accordingly one of those cases where the protection of the rule which guides courts in these matters has, in effect, been withheld from the appellant. There is thus a miscarriage of justice bringing the case within the category of cases where the Board will intervene.

Their Lordships would add that even had this been a case where the learned judge had in mind the risk of convicting without corroboration, but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, nevertheless they do not think that the conviction could have been left to stand.

Their Lordships have reported to the head of Malaysia their opinion that the appeal should be allowed and the appellant's conviction quashed.

Appeal was allowed.

Testimony of prosecutrix in case of sexual assault is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the court should find no difficulty in convicting the accused on prosecutrix testimony alone—Accused liable—Supreme Court—1996

State of Punjab v Gurmit Singh[374]

This appeal under *section 14 of Terrorist Affected Areas (Special Courts) Act 1984* is against the judgment and order of Additional Judge, Special Court, Ludhiana by which the respondents Gurmit Singh, Jagjit Singh alias Bawa and Ranjit Singh, were acquitted of the charge of abduction and rape.

On 30 March 1984, at about 12.30 pm (noon) after taking her test in geography the prosecutrix a girl below 16 years was going to the house of her maternal uncle Darshan Singh about 100 karmas from the High School, a blue ambassador car being driven by a Sikh youth aged 20/25 years came from behind. In that car Gurmit Singh, Jagjit Singh alias Bawa and Ranjit Singh accused were sitting. The car stopped near her. Ranjit Singh accused came out of the car and caught hold of the prosecutrix by her arm and pushed her inside the car. Accused Jagjit Singh alias Bawa put his hand on the mouth of the prosecutrix, while Gurmit Singh accused threatened the prosecutrix that in case she raised an alarm she would be done to death.

All the three accused (respondents herein) drove her to the tubewell of Ranjit Singh. She was taken to the kotha of the tubewell. They forced her to consume liquor and all of them committed rape inspite of her protest and threatened to kill her if she resisted.

Next morning at about 6.00 am the three accused made her sit in the car and left her near about the place from where she had been abducted. The prosecutrix after taking her examination, reached her village, at about noon and narrated the entire story to her mother Gurdev Kaur PW7, which was in turn narrated to her father Tirlok Singh, who lodged FIR with the police station Raikot and the investigation began.

The prosecutrix (girl) was medically examined by lady doctor Dr Sukhwinder Kaur (PW 1) on 2 April 84, who found that the hymen of the prosecutrix was lacerated with fine radiate tears, swollen and painful. Her pubic hair were also found matted. Accordingly to PW 1 intercourse with the prosecutrix could be one of the reasons for laceration which was found in her hymen.

The trial court disbelieved the version of the prosecutrix and dismissed the case on both the counts of abduction and rape. As regards the testimony of the prosecutrix the trial court said it did not inspire confidence for the reasons:

(i) That there had been delay in lodging the FIR and as such the chances of false implication of the accused could not be ruled out;

(ii) That the medical evidence did not help the prosecution case;

(iii) There was no independent corroboration of her testimony; and

(iv) That the accused had been implicated on account of enmity as alleged by the accused in-their statements recorded under *section 313, CrPC*.

Allowing the State appeal against the acquittal, the Supreme Court held that:

> The grounds on which the trial court disbelieved the version of the prosecutrix are not at all sound. The findings recorded by the trial court rebel against realism and lose their sanctity and credibility.
>
> ...In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay it was natural. The courts cannot overlook the fact that in sexual offences delay in lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.
>
> The courts must while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her.
>
> Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubts, disbelief or suspicion?
>
> Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion treating her as if she were an accomplice.

Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.[375]

As regards the trial court's observation casting a stigma on the character of the prosecutrix, the Supreme Court rightly said:

> The observations lack sobriety expected of a judge. Such stigmas have the potential of not only discouraging an even otherwise reluctant victim of sexual assault to bring forth a complaint for me trial of criminals, thereby making society to suffer by letting the criminal escape even a trial. The courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole, where the victim of crime is discouraged and the criminal is encouraged and in turn crime gets rewarded.

While allowing the appeal, the court convicted the accused and sentenced them to five years of rigorous imprisonment with fine of Rs 45,000 and in default of payment, of further rigorous imprisonment for one year on each of the respondents for the offence under *section 376, IPC*.

The court made a significant observation asking the trial courts to conduct rape trial in camera as provided under *section 327 (2) and (3) of CrPC, 1973*.[376]

Appeal allowed. Accused convicted.

Compensation to victims of rape payable during pendency of trial—Supreme Court—1996

Bodhisattwa Gautam v Subhra Chakraborty,

AIR 1996 SC 922 : *(1996) 1 SCC 490*

The complainant Subhra Chakraborty filed a complaint in the court of the Judicial Magistrate, Kohima, Nagaland against the accused Bodhisattwa Gautam who was a lecturer in Baptist College, Kohima under section 312 (causing miscarriage), section 420 (cheating), section 493 (cohabitation by deceitfully inducing a belief of lawful marriage), section 496 (marriage ceremony fraudulently gone through without lawful marriage) and section 498-A (cruelty by husband or relatives of husband) of the code.

The accused filed a petition in the Guwahati High Court under *section 482 of Code of Criminal Procedure 1973* for quashing the complaint on the ground that the allegations do not make out any case. The High Court dismissed the petition. Hence the accused went to the Supreme Court.[377]

Dismissing the appeal, the Supreme Court *suo motu* awarded an interim compensation of Rs 1000 per month payable by the accused to the victim from the date of the institution of the case until her charges were decided by the trial court.

The court observed that if the court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the court the right to award interim compensation which should also be provided in the scheme for awarding compensation to victims of rape, etc. Jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the court's trying the offence of rape.

The court observed:

> Rape is not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will power that she rehabilitates herself in the society, which on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated dime. It is a crime against basic human rights and is also violative of the victim's most cherished of the fundamental rights, namely, the right to life contained in *Article 21*. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not unfortunately, take care of the social aspect of the matter and are inept in many respects.[378]

Broad parameters for assisting rape victims formulated—Supreme Court (1995)

Delhi Domestic Working Women's Forum v UOI[379]

On 10 February 1993, six domestic servants were travelling by Muri Express from Ranchi to Delhi. At about 11 pm

when the train was near Khurja railway station they were sexually assaulted and raped by seven army personnel. The FIR for offences under sections 376B[380] and 341,[381] *IPC* was registered at the Police Station, New Delhi Railway Station.

The petitioner, Delhi Domestic Working Women's Forum, moved the Supreme Court under *Article 32 of the Constitution* to espouse the pathetic condition of the victims. The court while discussing at length the plight of rape victims and the lacunae in the law and delay in disposal of such cases directed the National Commission for Women to evolve a scheme for compensation and rehabilitation of rape victims *vide section 10 of National Commission for Women Act 1990* and the Union Government was asked to take necessary steps for implementation of the scheme. The court indicated the broad parameters in assisting the victims of rape and observed that:

(1) The complainants of sexual assault cases should be provided with legal representation.

(2) Legal assistance will have to be provided at the police station since the victim of social assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

(3) The police should be under a duty to inform the victim of her right to representation before any question were asked of her and that the police report should state that the victim was so informed.

(4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

(5) The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, the advocate would be authorised to act at the police station before leave of the court was sought or obtained.

(6) In all rape trials anonymity of the victim must be maintained, as far as necessary.

(7) It is necessary, having regard to the Directive Principles contained under *Article 38* (1)[382] of *Constitution of India*, to set up the Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some for example, are too traumatised to continue in employment.

(8) Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape.

"Special and adequate reasons" for reduction of punishment in rape cases under section 376 (1) Proviso required—Supreme Court (2000)

State of Karnataka v Krishnappa[383]

The question in this case was whether the High Court was justified in the fact and circumstances of the case, to reduce the sentences of 10 years rigorous imprisonment imposed by the trial court on the respondent for an offence under *section 376, IPC* to four years rigorous imprisonment?

The normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years rigorous imprisonment though in exceptional cases "for special and adequate reasons" sentence of less than 10 years can also be awarded.

In the instant case, the trial court gave sufficient and cogent reasons for imposing the sentence of 10 years rigorous imprisonment for the offence under *section 376, IPC* on the accused. Accused was a married man of 49 years of age having his own children and the victim of his sexual lust was an innocent helpless girl of seven to eight years of age at that time. The medical evidence provided by doctor showed the cruel nature of the act. The trial Court had, therefore, opined that because of the cruel nature of the act, the accused was not entitled to any leniency.

The High Court, however, differed with the reasoning of the trial court in the matter of sentence. The High Court reduced the sentence on the ground that the accused was "chronic addict to drinking" and had committed rape on the girl while in a state of "intoxication" and that his family comprising "an old mother, wife and children" were dependent upon him.

Allowing the appeal the Apex Court held that these factors did not justify recourse to the proviso to section 376 (2), *IPC*, to impose a sentence less than the prescribed minimum. These reasons were neither special nor adequate. The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the State and age of the sexually assaulted female and the gravity of *Criminal Act*. Crimes of violence upon women need to be severely dealt with.[384]

To show mercy in the case of such a heinous crime would be travesty of justice and the plea for leniency would be wholly misplaced. The approach of the High Court was most casual and inappropriate. There were no good reasons to reduce the sentence, let alone "special or adequate reasons". The High Court exhibited lack of sensitivity towards the victim of rape and the society by reducing the substantive sentence in the established facts and circumstances of the case. The courts are expected to properly operate the sentencing system and to impose such sentence for a proved offence, which may serve as a deterrent for the commission of like offences by others.

The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of heinous crime of rape on innocent helpless girls of tender years, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court.

Sentence was enhanced to 10 years. Appeal was allowed.

Section 376 IPC, 1860—In view of the gravity of the offence of rape accused will not be entitled to reduction in punishment—Supreme Court—2010

Jaswant Singh v State of Punjab[385]

Four persons were tried and convicted by the Additional Sessions Judge, Ludhiana, under *sections 376* and *366* of *Indian Penal Code, 1860*. All the accused were convicted and sentenced to undergo rigorous imprisonment for ten years under *section 376, IPC* and for five years under *section 366, IPC* by the trial court which was confirmed by the High Court.

Dismissing the appeal, the apex court held that the trial court as well as the High Court have, after considering the evidence carefully, given good reasons in support of the order of conviction. This court, in exercise of its jurisdiction under *Article 136 of Constitution of India*, does not act as a third appellate court. The court held that the verdict in the instant case did not result in any miscarriage of justice nor was it an erroneous one. The judgment is not vitiated on account of any error either in appreciation of evidence or application of legal principles.

Having regard to the gravity of the crime, the court declined to consider the request to reduce the sentence.

Section 376 (2) of Indian Penal Code, 1860—mitigating circumstances that appellant—a sole bread earner has two daughters of marriageable age, already in jail for nine years is enough—enhancement of sentence not approved— Supreme Court (2000)

TK Gopal alias Gopi v State of Karnataka,

AIR 2000 SC 1669 : (2000) 6 SCC 168 : (2000) 3 Supreme 706

The appellant was found guilty of the offence under *section 376, IPC, 1860* and was sentenced to 10 years rigorous imprisonment and to pay a fine of Rs 1000, in default of which he was to undergo rigorous imprisonment for another three months, by the additional sessions judge. This has been upheld by the High Court on appeal. From the jail the appellant filed the present appeal for release after serving for more than nine years.

A perusal of section 376 (2) would indicate that where the victim is a woman of less than 12 years of age, the minimum sentence that can be awarded to the accused is ten years, but it may also extend to life imprisonment apart from a fine which may also be imposed upon him. The proviso to this section, however, gives discretion to the court to award a sentence of less than 10 years for adequate and special reason which have to be mentioned in the judgment.

Since the victim of sexual assault in the instant case was an infant child of one and half year, the trial court as also

the High Court both were right in awarding a sentence of 10 years to the appellant, in consonance with the provisions of *section 376 (2) of IPC, 1860*.

Allowing the appeal the Supreme Court held that having regard to the extenuating circumstances that the appellant's two daughters have come of age and are to be married, the period of incarceration of the appellant in jail is enough and he should not be made to further suffer the consequences of his bestiality.

Section 376 (2)(f) IPC, 1860: Imposition of sentence less than the minimum prescribed for rape on a girl below 12 years on the ground that the accused was young and that he is the only bread earner of the family is "not special and adequate reason" for imposing less sentence than the prescribed sentence of 10 years—Supreme Court—2008

State of Rajasthan v Madan Singh[386]

Allowing the State appeal against the High Court's verdict of awarding 7 years of imprisonment for rape on a young girl of 12 years, the Apex Court held that the very fact that the accused is the only bread earner of the family is not the special and adequate reason *vide* Proviso to section 376 to award less sentence than the prescribed sentence of 10 years of imprisonment.

Section 376 of Indian Penal Code, 1860—in the absence of adequate and special reasons lenient punishment for rape is not permissible—Sentence enhanced—Supreme Court (2000)

Kamal Kishore v State of HP[387]

The victim of a rape narrated the story of her rape to the sessions judge, Una (Himachal Pradesh) who tried the case, but the story did not impress the judge and hence her testimony was jettisoned (discarded) and the rapist was exonerated.

However, a Division Bench of the High Court of Himachal Pradesh dissented from the said verdict and convicted him under *section 376 of Indian Penal Code*. Nonetheless, the Division Bench was not disposed to award the minimum sentence prescribed for the offence on the premise that the accused who was 35 might have settled in life. Since Bhishna Devi (victim) has since been married and she is now mother of children and is well settled in life and the accused was aged 23 when the offence was committed and now he is 34, but he remains unmarried. On two occasions his marriage had to be dropped off due to the social stigma and disrepute which surrounded him. Considering the above factors as "adequate and special reasons", the High Court directed accused to undergo rigorous imprisonment for three years and to pay a fine of Rs 10,000.

The Supreme Court while upholding the High Court order of conviction enhanced the punishment for seven years. The court said that as Parliament has disfavoured the sentence to plummet (Hung) below the minimum limit prescribed. Parliament used the expression "shall not be less than" which is peremptory in tone. The court has, normally, no discretion even to award a sentence less than the said minimum.

Nonetheless, Parliament was not oblivious of certain very exceptional situations and hence to meet them it made a departure from the said strict rule by conferring discretion on the court subject to two conditions, viz,

(i) There should be "adequate and special reasons"; and

(ii) Such reasons should be mentioned in the judgment.

Such reason can be noticed in many other cases but not in case of heinous crime like rape and hence they cannot be regarded as special reasons. No catalogue can be prescribed for adequacy of reasons nor can instances be cited regarding special reasons, as they may differ from case to case. The circumstances pleaded in the case are not special reasons for tiding over the legislative mandate for imposing the minimum sentence.

Sentence was enhanced to imprisonment for seven years.

Proof of knowledge of pregnancy is condition precedent for the award of minimum punishment of 10 years—section 376 (2)(e), Indian Penal Code, 1860—Supreme Court (2006)

Om Prakash v State of UP[388]

Justice Arijit Pasayat stated:

One of the categories, which attract more stringent punishment, is the rape on a woman who is pregnant. In such cases where commission of rape is established for operation of section 376 (2)(e) *IPC, 1860* the prosecution has to further establish that accused knew the victim to be pregnant. In the instant case there was no such evidence led. The trial court came to the conclusion that there was "full possibility" of the accused knowing it and awarded a minimum of 10 years of imprisonment, the High Court did not apply its mind and approved of the trial court's finding.

Rejecting the trial court's contention the Supreme Court said that there is a gulf of difference between "possibility" and "certainty". While considering the case covered by section 376 (2)(e) the Supreme Court said, "what is needed to be seen is whether evidence establishes knowledge of the accused. Mere possibility of knowledge is not sufficient when a case relates to an offence of the serious nature and more stringent sentence is provided, it must be established and not a possibility is to be inferred."

The language of section 376 (2)(e) is clear. It requires prosecution to establish that the accused knew her to be pregnant. This is clear from use of the expression "knowing her to be pregnant." In the absence of any material brought on record to show that the accused knew the victim to be pregnant section 376 (2)(e), *IPC, 1860* cannot be pressed into service. To that extent the judgment of the courts below are unsustainable. However, minimum sentence of seven years prescribed under section 376 (1), *IPC* is clearly applicable.

Appeal Dismissed.

Penal Code of India, sections 302, 376 (2)(f) Criminal PC (2 of 1974), section 235 (2) Evidence Act, section 3 Murder and rape. Question of imposing of death sentence. Victim/minor girl of four years raped and battered to death by accused. Accused by luring victim kidnapped her and committing rape and caused crushing injuries to her with stones weighing about 8.5 kg. and 7.5 kg. Giving due weightage to brutality and diabolical nature of crime and fact that victim reposed trust and confidence in accused. Aggravating circumstances completely outweighing other factors. Sentence of death penalty, proper.—Supreme Court—2017

Vasanta Sampat Dupare v State of Maharashtra[389]

Per Uday Umesh Lalit, J:

These review petitions are directed against the judgment and order passed by court affirming conviction of the petitioner for the offences punishable under sections 302, 363, 367, 376 (2)(f) and 201 *IPC, 1860* and various sentences imposed upon the petitioner including death sentence under *section 302 IPC* and life imprisonment under section 376 (2)(f) *IPC*. The charge against the petitioner was that the victim, a minor girl of four years was raped and battered to death by the petitioner. The petitioner allegedly lured the victim by giving her chocolates, kidnapped her and after satisfying his lust caused crushing injuries to her with the help of stones weighing about 8.5 kg. and 7.5 kg. Dismissing the review petition the court said.

It is thus well-settled,

> the Court would consider the cumulative effect of both the aspects (namely aggravating factors as well as mitigating (circumstances) and it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes completely ignoring other classes under other heads and it is the primary duty of the Court to balance the two.

Further,

> it is always preferred not to fetter the judicial discretion by attempting to make excessive enumeration, in one way or another; and that both aspects namely aggravating and mitigating circumstances have to be given their respective weightage and that the Court has to strike the balance between the two and see towards which side the scale/balance of justice tilts.

The material placed on record shows that after the Judgment under review, the petitioner has completed Bachelors Preparatory Programme offered by the Indira Gandhi National Open University enabling him to prepare for Bachelor level study and that he has also completed the Gandhi Vichar Pariksha and had participated in drawing competition organized sometime in January, 2016. It is asserted that the jail record of the petitioner is without any blemish.

What is now being projected is that there is a possibility of the accused being reformed and rehabilitated. Though these attempts on part of the petitioner are after the judgment under review, we have considered the material in that behalf to see if those circumstances warrant a different view. We have given anxious consideration to the material on record but find that the aggravating circumstances namely the extreme depravity and the barbaric manner in which the crime was committed and the fact that the victim was a helpless girl of four years clearly outweigh the mitigating circumstances now brought on record. Having taken an overall view of the matter, in our considered view, no case is made out to take a different view in the matter.

Petitions dismissed, conviction upheld.

Indian Penal Code, 1860, section 376 (2)(g) Explanation 1: Gang rape—mere presence of the appellant-accused at spot is insufficient to show that there was prior concert or meeting of mind or plan formed at the time of commission of offence by appellant with other accused persons for commission of rape on prosecutrix—Supreme Court (2006)

Pradeep Kumar v Union Administration, Chandigarh[390]

The accused Pradeep Kumar[391] whose conviction along with Lalit Gupta by the Additional Sessions Judge, Chandigarh under section 376 (2)(g), *IPC, 1860* read with explanation[392] for gang rape was upheld by the High Court has preferred this appeal by special leave. Lalit Gupta did not go in appeal.

The Supreme Court allowed the appeal and set aside the conviction of the appellant.

Justice PP Naolekar held:

To bring the offence of rape within the purview of section 376 (2)(g), *IPC, 1860* read with Explanation 1 to this section, it is necessary for the prosecution to prove:

(i) That more than one person had acted in concert with the common intention to commit rape on the victim.

(ii) That more than one accused had acted in concert in commission of crime of rape with pre-arranged plan, prior meeting of mind and with element of participation in action. Common intention would be action in consort in prearranged plan or a plan formed suddenly at the time of commission of offence that is reflected by element of participation in action or by the proof of the fact of inaction when the action would be necessary. The prosecution would be required to prove pre-meeting of mind of accused persons prior to commission of offence of rape by substantial evidence or by circumstantial evidence; and

(iii) That in furtherance of such common intention one or more persons of the group actually committed offence of rape on victim or victims. Prosecution is not required to prove actual commission of rape by each and every accused forming group.

On proof of common intention of the group of persons which would be of more than one, to commit the offence of rape, actual act of rape by even one individual forming group, would fasten the guilt on other members of the group, although he or they have not committed rape on the victim or victims. However, mere presence at such place is insufficient to show that there was a prior concert or meeting of mind or plan formed suddenly at the time of commission offence by the accused appellant with the other accused persons for the commission of rape on her since the prosecutrix in her earlier version had mentioned that the accused-appellant arrived late at the place of incident and thereafter he was consuming liquor with the accused persons in a room.

Moreover, where specific acts had been attributed to the other accused persons to show their connivance and pre-concert to facilitate the offence in preplanned manner, no such act or conduct has been attributed to portray the accused-appellant's role in furtherance of the common intention to commit rape. Thus, statement of the prosecutrix does not inspire confidence to reach to the conclusion that the accused-appellant was present at the place of incident right from the very beginning to infer any pre-concert of the appellant with other accused persons to commit rape and therefore, the accused-appellant is entitled to the benefit of doubt.

A woman cannot be prosecuted for the offence of gang rape under section 376 (2)(g) IPC—Appeal allowed—Supreme Court (2006)

Priya Patel v State of MP[393]

A complaint was lodged by the prosecutrix alleging that while she was returning by Utkal Express after attending a sports meet, as she reached her destination at Sagar, the accused Bhanu Pratap Patel husband of appellant-accused (Priya Patel) met her at the railway station and told her that her father has asked him to pick her up from the railway station. Since the prosecutrix was suffering from fever, she accompanied accused Bhanu Pratap Patel to his house. He committed rape on her. When commission of rape was going on, his wife, the present-appellant accused reached there. The prosecutrix requested the appellant (wife of the accused) to save her. Instead of saving her, the appellant slapped her, closed the door of the house and left the place of incident. On the basis of the complaint lodged, investigation was undertaken and charge sheet was filed.

While accused (husband-Bhanu Pratap) was charged for rape under *section 376 IPC* (along with causing hurt under section 323) and the appellant-lady was charged for gang rape under section 376 (2)(g) *IPC* read with Expln I to section 376.[394] The High Court was of the view that though a woman cannot commit rape, but if a woman facilitates the act of rape[395] then Expln 1 to section 376 (2) (g) comes into operation and she can be prosecuted for "gang rape".

Allowing the appeal, the Supreme Court held, the language of sub-section (2)(g) of section 376 provides that whoever commits "gang rape" shall be punished, etc. The explanation only clarifies that when one rapes a woman or more in a group of persons acting in furtherance of their common intention each such person shall be deemed to have committed gang rape within sub-section (2) to *section 376 IPC*. That cannot make a woman guilty of committing rape. This is conceptually inconceivable. The explanation only indicates that when one or more persons act in furtherance of their common intention to rape a woman, each person of the group shall be deemed to have committed gang rape.

By operation of the deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the groups in furtherance of the common intention has committed rape. The *sine qua non* for bringing in application of *section 34 IPC* that the act must be done in furtherance of the common intention to do a *criminal act*. The expression "in furtherance of their common intention" as appearing in the Explanation I to section 376 (2)(g) *IPC* relates to intention to commit rape.

The court held that a woman cannot be said to have an intention to commit rape and, therefore, appellant-accused cannot be prosecuted for alleged commission of the offence punishable under section 376 for committing gang rape.

Comments—It is respectfully submitted that perhaps the Supreme Court has not visualised the gravity of the matter and given a blank chit to the accused. No doubt, a woman under the Indian Law, unlike its counterpart under English Law, cannot be guilty of rape.[396] Nevertheless, a woman can be liable for aiding and abetting for the commission of an offence, when she encouraged and assisted her husband to commit rape for the punishment to the same extent as provided for rape *vide section 109, IPC*.[397] Of course, English Law appears to be more pragmatic where a female can also now be charged under Sexual Offences Act 2003, section 4[398] for intentionally causing someone to engage in sexual activity.

Sections 376 (2)(f) and 506 IPC, 1860 Rape and Criminal intimidation it is well-settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the Courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury.—Supreme Court—2016

State of HP v Sanjay Kumar[399]

Per AK Sikri, J:

Respondent uncle of the prosecutrix aged nine years was convicted under section 376 (2)(f) for rape and criminal intimidation as well as under *section 506 of IPC, 1860*, High Court concluded that prosecution had failed to prove its

case. According to it there existed certain circumstances which created reasonable doubt in version of Prosecution – It had resulted in setting aside conviction recorded by Trial Court thereby acquitting respondent. Hence, present appeal question before Apex Court was – Whether impugned order of conviction for a period of for offence under section 376 (2)(f) and section 506 for two year was sustainable.

Facts: It was a case where the respondent was charged for having committed an offence punishable under *sections 376* and *506* of *Indian Penal Code, 1860*. After trial, the Additional Sessions Judge convicted the Respondent under section 376 (2)(f) as well as under *section 506 of Indian Penal Code, 1860*.

The respondent challenged the order by preferring the appeal before the High Court in which he succeeded as the High Court, after revisiting the issue, had come to the conclusion that the prosecution had failed to prove its case beyond reasonable doubt. According to it there existed certain circumstances which created reasonable doubt in the version of the prosecution. It had resulted in setting aside the conviction recorded by the Trial Court thereby acquitting the respondent.

Hence, the present appeal, before Apex Court. Held, while allowing the State appeal Supreme Court held:

(i) Apart from some minor and trivial discrepancies with regard to the period of stomach ache or about the medicine taken from the local doctor/chemist, insofar as material particulars of the incident were concerned, version of both these witnesses was in sync with each other. Here was a case where charge of sexual assault on a girl aged nine years was leveled. More pertinently, this was to be seen in the context that the Respondent, who was Accused of the crime, was the uncle in relation. [22]

(ii) The High Court has been swayed by this delay of three years in the particular circumstances in reporting the matter with omnibus statement that it is not satisfactorily explained without even an iota of discussion on the explanation that was offered by the prosecution in the form of testimonies of prosecutrix and her mother. [27]

(iii) Delay of three days in lodging the FIR, after eliciting the information from prosecutrix, was inconsequential. The person accused by the prosecutrix was none else than her uncle. It was not easy to lodge a complaint of this nature exposing prosecutrix to the risk of social stigma which unfortunately still prevails in our society. [29]

(iv) None of the grounds, on which the High Court cleared the Respondent, had any merit.

The deposition of the prosecutrix had, thus, to be taken as a whole. The victim of rape is not an accomplice and her evidence can be acted upon without corroboration. The prosecutrix stood at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. The evidence brought on record contains positive proof, credible sequence of events and factual truth linking the respondent with rape of the prosecutrix and had criminally intimidated her. Hence, respondent was found to be guilty for offence under sections 376 (2)(f) and 506 of *IPC, 1860* since he committed rape with a minor girl aged nine years. The judgment of the High Court was set aside and the conviction recorded by the Trial Court for a period of 12 years RI with a fine of Rs 50,000 and 2 years respectively.

8.20.2 Gang Rape and Murder

Penal Code of India (45 of 1860), sections 376 (2)(g), 302, 120B, 377, 365, 366, 396, 397, 307, 412, 201. Imposition of death penalty. Hearing on question of sentence. Rarest of rare case Agony suffered by family of victims cannot be ignored gang rape and murder—Accused persons allegedly committing rape and assault on deceased and injured informant and throwing them out of running bus resulting in death. Persons rescuing deceased and injured informant shifting them to hospital for medical treatment. Delay in lodging FIR due to medical treatment to seriously injured victim and informant. Not fatal—Supreme Court—2017

Mukesh v State of NCT of Delhi[400]

Pursuant to arrest of all accused, there were disclosure statements recorded under *section 27 of Evidence Act 1872*

which led to recoveries of incriminating articles such as objects belonging to victims as also objects which have been linked orally or scientifically (such as through DNA profiling) to prosecutrix and informant. These material objects recovered are used to link convicts with crime and corroborate version of eyewitness and dying declaration of deceased victim. On arrest of each of accused persons, important articles relating to case and articles belonging to victim and informant seized from custody of accused persons. Such recoveries made on basis of disclosure statements by accused persons cannot be discarded.

Dying declaration is substantial piece of evidence provided it is not tainted with malice and is not made in unfit mental state. Each case of dying declaration has to be considered in its own facts and circumstances in which it is made. However, there are some well-known tests to ascertain as to whether statement was made in reference to cause of death of its maker and whether same could be relied upon or not. Court also has to satisfy as to whether deceased was in a fit mental state to make statement. Court must scrutinize dying declaration carefully and ensure that declaration is not result of tutoring, prompting or imagination. Once court is satisfied that declaration is true and voluntary, it can base its conviction without any further corroboration. It cannot be laid down as absolute role of law that dying declaration cannot form sole basis of conviction unless it is corroborated. Rule requiring corroboration is merely rule of prudence, that deceased had opportunity to observe and identify assailants and was in a fit state to make declaration. (Para 388)

Per Dipak Misra, J (for himself and on behalf of Ashok Bhushan, J):

The present case amounts to devastation of social trust and destroys collective balance and invites indignation of society. It is submitted that crime of this nature creates fear psychosis and definitely falls in category of rarest of rare cases. It is necessary to state here that in instant case, brutal, barbaric and diabolic nature of crime is evincible from acts committed by accused persons viz., assault on informant with iron rod and tearing off his clothes; assaulting informant and deceased with hands, kicks and iron rod and robbing them of their personal belongings like debit cards, ring, informant's shoes, etc.; attacking deceased by forcibly disrobing her and committing violent sexual assault by all appellants; their brutish behaviour in having anal sex with deceased and forcing her to perform oral sex; injuries on body of deceased by way of bite marks (10 in number); and insertion of rod in her private parts that, *inter alia,* caused perforation of her intestine which caused sepsis and, ultimately, led to her death. The medical history of victim demonstrates grave injuries which ultimately annihilated her life. As has been established, prosecutrix sustained various bite marks which were observed on her face, lips, jaws, near ear, on right and left breast, left upper arm, right lower limb, right inner groin, (that part of the body were legs meet) right lower thigh, left thigh lateral, left lower anterior and genitals. These acts themselves demonstrate mental perversion and inconceivable brutality as caused by appellants.

As further proven, they threw informant and deceased victim on road in cold winter night. After throwing informant and deceased victim, convicts tried to run but over them so that there would be no evidence against them. They made all possible efforts in destroying evidence by washing bus and burning clothes of deceased and after performing gruesome act, they divided loot among themselves. Narration of incident corroborated by medical evidence, oral testimony and dying declarations, it is absolutely obvious that accused persons had found an object for enjoyment in her and, as is evident, they were obsessed with the singular purpose sans any feeling to ravish her as they liked, threat her as they felt and, if we allow ourselves to say, the gross sadistic and beastly instinctual pleasures came to forefront when they, after ravishing her, thought it to be just matter of routine to throw her along with her friend out of bus and crush them. The casual manner with which she was treated and devilish manner in which they played with her identity and dignity is humanly inconceivable. It sounds like a story from different world where humanity has been treated with irreverence. The appetite for sex, hunger for violence, position of empowered and attitude of perversity, are bound to shock collective conscience which knows not what to do. It is manifest that wanton lust, servility to absolutely unchained carnal desire ruled mind set of appellants to commit a crime which can summon with immediacy "tsunami" of shock in mind of collective and destroy civilized marrows of milieu in entirety. When we cautiously, consciously and anxiously weigh aggravating circumstances and mitigating factors, we are compelled to arrive at singular conclusion that aggravating circumstances outweigh mitigating circumstances now brought on record. Therefore, Supreme Court concludes and holds that High Court has correctly confirmed death penalty and there is no reason to differ with same. (Paras 354, 355, 356, 357).

Per Mrs R Banumathi, J:

Before court proceeds to make choice whether to award death sentence or life imprisonment, court is to draw up balance-sheet of aggravating and mitigating circumstances attending to commission of offence and then strike balance between those aggravating and mitigating circumstances. Two questions are to be asked and answered:—

(i) Is there something uncommon about crimes which regard sentence of imprisonment for life inadequate?

(ii) Whether there is no alternative punishment suitable except death sentence.

Where a crime is committed with extreme brutality and collective conscience of society is shocked, courts must award death penalty, irrespective of their personal opinion as regards desirability of death penalty. By not imposing death sentence in such cases, courts may do injustice to society at large. (Paras 479, 495, 497)

In present case, there is not even hint of hesitation in my mind with respect to aggravating circumstances outweighing mitigating circumstances and do not find any justification to convert death sentence imposed by courts below to "life imprisonment for rest of life." Gruesome offences were committed with highest viciousness. Human lust was allowed to take such demonic form. Accused may not be hardened criminals; but cruel manner in which gang rape was committed in moving bus; iron rods were inserted in private parts of victim and coldness with which both victims were thrown naked in cold wintery night of December shocks collective conscience of society. The present was clearly comes within category of "rarest of rare case" where question of any other punishment is unquestionably foreclosed. If at all there is case warranting award of death sentence, it is present case. If dreadfulness displayed by accused in committing gang rape, unnatural sex, insertion of iron rod in private parts of victim does not fall in "rarest of rare category" then one may wonder what else would fall in that category. One live in civilized society where law and order is supreme and citizens enjoy inviolable fundamental human rights. But when incident of gang rape like present one surfaces, it causes ripples in conscience of society and serious doubts are raised as to whether we really live in civilized society and whether both men and women feel same sense of liberty and freedom which they should have felt in ordinary course of civilized society, driven by rule of law. Certainly, whenever such grave violations of human dignity come to fore, an unknown sense of insecurity and helplessness grabs entire society, women in particular, and the only succor people look for, is State to take command of situation and remedy it effectively. Battle for gender justice can be won only with strict implementation of legislative provisions, sensitization of public, taking other pro-active steps at all levels for combating violence against women and ensuring widespread attitudinal changes and comprehensive change in existing mind set. (Paras 499, 503, 504, 505, 506)

Appeal dismissed. Death sentence confirmed.

Rape and murder house trespass—Sections 454, 376 (G), 302 and 34 of Indian Penal Code, in the case of consensual sexual intercourse victim would not have raised hue and cry and would not have immediately threatened the perpetrator of the crime with the disclosure of the incident to her mother. She was clothless when kerosene oil was poured on her. To remove the evidence of rape accused Ramen had poured kerosene on her and set her ablaze so that she is silenced and his sin does not see the light of the day. However, the minor brother had witnessed the incident by peeping from the slit of door and victim also survived for some time to narrate the incident. Apex Court held the High Court has erred in law in acquitting the accused Ramen from commission of the offence under section 376 Indian Penal Code, 1860. Men may lie but the circumstances do not is cardinal principle of evaluation of evidence. The circumstances, the oral evidence and dying declarations of the deceased unerringly pointed out that it was not a case of consensual sexual intercourse.

State of Assam v Ramen Dowarah[401]

Per Arun Mishra, J:

On 1 May 2003 at about 5 pm when accused Ramen Dowarah and Janmejoy Gogoi alias Sanju entered the house of victim and committed rape on her and after pouring kerosene oil set her ablaze. When the victim raised hue and cry, people assembled and the victim was taken to the Civil Hospital. She sustained 55% burn injuries as per her condition was serious and in the course of her treatment she died after two months on 11 July 2003.

Trial Court convicted accused/respondent under sections 376 (G), 302/34 *IPC, 1860* for rape and murder. Appeal before High Court – Partly allowed – High Court set aside conviction under section 376 – Altered conviction under section 302 to 304 Part II *Indian Penal Code* – Present Appeal question is before Apex Court.

Whether the High Court was correct in reversing the findings of the Trial Court – Whether it was a case of consensual sexual intercourse. Whether the High Court was correct in holding that the accused did not intend to cause death.

Facts: The appeal has been preferred by the State against the judgment and order of the High Court thereby setting aside the conviction of the accused under *section 376 Indian Penal Code* and altering the conviction under section 302 to section 304 Part II *Indian Penal Code, 1860* while maintaining the conviction recorded by the trial court under section 454 house trespass to commit our offence under *Indian Penal Code* thereby sentencing him to undergo RI for one year.

Aggrieved thereby, State has come up in appeal before Apex Court. Held, while allowing the appeal considering the state of evidence what emerges is that it could not be said to be a case of consensual sexual intercourse.

It is a case where accused clearly intended to kill deceased after committing the crime so as to silence her. The overall circumstances established to the hilt that accused intended to cause death by setting her ablaze after committing forcible sexual intercourse. The submission of the accused that the accused poured kerosene oil on being threatened disclosure of the incident by victim to her mother, was the cause of setting her ablaze. The aforesaid conduct does not exculpate but indicates the intendment of accused to cause death and makes him liable for punishment under *section 302 Indian Penal Code*. The act was done with the intention of causing death. The intention to kill is present in the case. The act amounts to murder. In view of the aforesaid discussion, the Court is of the considered opinion that the judgment and order partly allowing the appeal by the High Court, deserves to be set aside. The judgment and order of conviction and sentence passed by the trial court is hereby restored. The appeal is accordingly allowed. (Para 11)

Conviction upheld.

Sections 366, 376 (g) and 392 read with section 34 of IPC, 1860. While allowing the appeal: (i) The conduct of Prosecutrix during the alleged ordeal was unlike a victim of forcible rape and betrays somewhat submissive and consensual disposition. From the nature of the exchanges between her and the Accused persons as narrated by her, the same were not at all consistent with those of an unwilling, terrified and anguished victim of forcible intercourse, if judged by the normal human conduct. Her post incident conduct and movements are also noticeably unusual. The medical opinion that she was accustomed to sexual intercourse when admittedly she was living separately from her husband for 1½ years before the incident also had its own implication. The medical evidence as such in the attendant facts and circumstances in a way belied the allegation of gang rape. The prosecution case, when judged on the touchstone of totality of facts and circumstances of the case.

Raja v State of Karnataka[402]

Per Amitava Roy, J:

Allowing the appeal and setting aside the conviction awarded by the Apex Court Justice Amitava Roy said:

The prosecution case, when judged on the touchstone of totality of the facts and circumstances, does not generate the unqualified and unreserved satisfaction indispensably required to enter a finding of guilt against the appellants. Having regard to the evidence on record as a whole, it is not possible for this Court to unhesitatingly hold that the charge levelled against the appellants has been proved beyond reasonable doubt. In our estimate, the view taken by the Trial Court is the overwhelmingly possible one. In contrast, the findings of the High Court are decipoherably strained in favour of the prosecution by overlooking many irreconcilable inconsistencies, anomalies and omissions rendering the prosecution case unworthy of credit. Noticeably, the High Court has exonerated the appellants of the charge of abduction under *section 366 Indian Penal Code, 1860*, which is an inseverable component of the string of offences alleged against them. Judged by the known parameters of law, the view adopted by the High Court is not a plausible one when juxtaposed to that of the Trial Court. We are of the unhesitant opinion that the prosecution has failed to prove the charge against the appellants to the hilt as obligated in law and thus, they are entitled to the benefit of doubt. The appeal thus succeeds and is allowed. The impugned judgment and order is set aside. The appellants are on bail. Their bail bonds are discharged.

Gang Rape: 376 (2)(g) Common intention of all accused need not be supported by fact that each one of them took part in actual commission of offence of rape when the evidence of victim herself was cogent and convincing—Supreme Court 2008.

Viswanathan v State of TN[403]

Per SB Sinha, J:

Appellants—A1, A2, A3, A4, A5 and A6 were convicted under section 376 (2) (g) for gang rape and sentenced to rigorous imprisonment for 10 years. On 20 November 1994 the victim, a coolie-mother of two children while she was returning to her home after the day's work on a bicycle with her brother around 10 pm[404] was raped by the accused persons.

All the above noted persons were prosecuted under section 376 (2)(g) *IPC, 1860* for gang rape. Since it was moonlight, the victim could recognize the accused persons. She named four accused A1 to A4 involved in the crime[405] but accused A5 and A6 were not named. However, before the trial judge she identified only three accused A1, A2 and A3 and not others.

Being convinced of the involvement to all the accused persons in heinous crime the trial court as well as the High Court convicted all of them under section 376 (2)(g) for gang rape.

Allowing the appeal of accused 4 to accused 6 and acquitting them of the charge, the Apex Court said that since the prosecutrix in her deposition before the Trial judge neither named nor identified accused No A4 to A6 they cannot be held guilty of the commission of the said offence. However, with regard to accused 1 to accused 3 the Court held that common intention on the part of all the three accused 1 to accused 3 is sufficient to bring the case under section 376 (2)(g) *IPC, 1860*.[406]

8.20.3 History of Death Penalty for Rape in the United States

In 1925, 18 States, the District of Columbia, and the Federal government had statutes that authorized the death penalty for the rape of a child or an adult. Between 1930 and 1964, 455 prisoners were executed for those crimes.[407] The last executed individual for rape of a child was Ronald Wolfe in 1964. In 1972, *Furman,*[408] invalidated most of the State statutes authorizing death penalty for crime of rape; and only six States enacted their capital rape provisions. Three States Georgia, North Carolina and Louisiana did so with respect to all rape offences; whereas the other three States, Florida, Mississippi and Tennessee did so with respect to child rape. All six statutes were later invalidated under state or Federal law.

Georgia Death penalty Statute for rape unconstitutional violated Eighth Amendment—United States Supreme Court 6 to 2—1977

Erlich Anthony Coker v State of Georgia[409]

The petitioner-accused, while serving various sentences for murder, rape, kidnapping, and aggravated assault, escaped from the Ware Correctional Institution near Waycross, Georgia. On 2 September 1974, at approximately 11 o'clock in the night, petitioner entered the house of Allen and Elnita Carver through an unlocked kitchen door. Threatening the couple with a knife the accused raped Mrs Carver.[410]

The defendant was convicted of various offences, including armed robbery and rape.[411] Pursuant to Georgia's death penalty[412] statues which authorise capital punishment for rape, the accused was sentenced to death. The Supreme Court of Georgia affirmed both the conviction and the sentence.

However, on certiorari, the United States Supreme Court reversed the Georgia Supreme Court's judgment by a majority of 6-2. The Court held the Georgia's death penalty statute for rape unconstitutional as it violates the prohibition against cruel and unusual punishment under the eighth[413] and fourteenth[414] amendments to US *Constitution*.

Per White, J:

The Eighth Amendment bars not only those punishments that are "barbaric" but also those that dare "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. The court observed that death is a disproportionate penalty for rape is strongly indicated by the objective evidence of present public judgment, as represented by the attitude of State Legislatures and sentencing juries, concerning the acceptability of such a penalty. Although rape deserves serious punishment, the

death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such and as opposed to the murderer, does not unjustifiably take human life.

Chief Justice Burger, joined by Rehnquist J, dissented, expressing the view that:

(1) In striking down the death penalty imposed on the defendant case, the court overstepped the bounds of proper constitutional adjudication by substitution of its policy judgment for that of the State Legislature.

(2) While the Eighth Amendment's concept of disproportionality barred the death penalty for minor crimes, nevertheless, rape was not a minor crime.

(3) It impinged upon the State's Legislative judgment to hold that the State could not impose the death sentence upon an individual such as the defendant, who had shown total and repeated disregard for the welfare, safety, personal integrity, and human worth of others, and who seemingly could not be deterred from continuing such conduct.

(4) The court's concern for human life should not be confined to the guilty, and a State Legislature should not be thought to be insensitive to human values because it acted firmly to protect the lives and related values of innocent victims.

(5) Rape was not a crime "light-years" removed from murder in the degree of its heinousness, and thus under the broad standard of the Eighth Amendment, the State could properly punish rape as well as murder by death, if that was the considered judgment of the legislators, and

(6) The court's holding cast serious doubt upon the constitutionality of statutes which imposed the death penalty for a variety of conduct which, though dangerous, might not result in any immediate death, such as treason, airplane hijacking, kidnapping, and mass terrorist activity.

Appeal allowed by a majority of five to four conviction quashed.

Louisiana Death—Punishment for Rape of child under 12 years of age violated Eighth Amendment proscription against cruel and unusual punishment—US Supreme Court 2008 (Majority of 5 to 4)

Patrick Keneddy v Louisiana[415]

Patrick Kennedy, the petitioner-accused seeks to set aside his death sentence under the Eighth Amendment.[416] He was charged by the respondent-State of Louisiana with the aggravated rape of his eight year old stepdaughter.[417] After a jury trial petitioner was convicted of aggravated rape and was sentenced to death. On his appeal, the Supreme Court of Louisiana, while affirming the death sentence, held that:

> Children are a class in need of special protection…child rape to be unique in terms of the harm it inflicts upon the victim and society…concluded that short of first-degree murder, there is no crime more deserving of death.

The appellant moved the United States Supreme Court which allowed the petition by a majority of 5 to 4. The Court held that Eighth Amendment prohibits for death penalty for the rape of a rape of a child where the crime did not result, in death of the victim. Therefore:

> Louisiana status authorizing death penalty for rape of a child under 12 years of age violated Eighth Amendment proscription against cruel and unusual punishment when applied to defendant convicted of aggravated rape of his then eight year old stepdaughter, applied to defendant convicted of aggravated rape of his then eight year old stepdaughter, where crime did not result, in death of victim, considering national consensus against capital punishment as for as crime of child rape and evolving standard of decency that mark the progress of maturing society.[418]

The Court accordingly held that:

> Based both on the consensus and our independent judgment, our holding is that a death sentence for one for who raped but did not kill a child and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendment to the US *Constitution*.

Appeal Allowed

Saudi Arabia: Gang rape victims sentenced to 200 lashes and six months jail for being in company of persons other than husband or relatives—13 November 2007

X v States[419]

In a shocking and rare incidence of crude justice in Jeddah Saudi Arabia on 13 November 2007 an appellant court, instead of awarding compensation to a 19 year old gang rape victim, doubled the number of lashes from 90 to 200 and pronounced a six month jail term for "her attempt to aggravate and influence the judiciary through media." The girl was raped in Qatif a city in the Eastern Province of Jedah and has become known as "the Qatif girl". About 18 months ago the victim was sitting in a car with a former boy friend when a group of seven men kidnapped them and raped both of them. Her offence was in meeting a former boy friend, whom she had asked to return pictures he had of her because she was about to marry another man.

In Saudi Arabia, for a woman to be in seclusion with a man who is not her husband or a relative is a crime. The woman and the former boyfriend were originally sentenced to 90 lashes each for being together in private while attackers received sentences raging from 10 months to 5 years in prison and 80 to 1000 lashes each.

Mistaken belief in consent though based on unreasonable grounds negates mens rea in rape—House of Lords 1975—Judgment reversed vide Sexual Offences Act 2003

Director of Public Prosecution v Morgan,

[1975] 2 All ER 347 (HL) : [1975] UKHL 3 : *[1976] AC 182* : [1975] Cr LR 717

The appellant Morgan was a senior NCO in the Royal Air Force, and the other three appellants were younger and junior members of that service. On the night of the offences, Morgan invited the other three to come to his house and have intercourse with his wife, the prosecutrix.

Mrs Morgan was awakened from sleep. Her husband and the other men in part dragged and carried her into another room that contained a double bed. She struggled and screamed and shouted to her son to call the police, but one of the men put a hand over her mouth. The appellants had intercourse with her in turn. Immediately afterwards Mrs Morgan drove to a hospital and complained that she had been raped.

The three men were charged and convicted by the trial judge for committing rape and Morgan for aiding and abetting rape. The defence plea that Mrs Morgan's sexual cooperation and enjoyment was manifestation of her consent and any element of resistance on her part was, no more than a plaything was rejected.

Their appeal to the Court of Appeal was dismissed, but the House of Lords by a majority of five to two disapproved the direction. According to their Lordships the question was whether the belief was honestly held, not whether it was reasonable.

The decision proceeds on basic reasoning that, rape is a crime requiring mens rea; intention of recklessness. If the man believes that the woman is consenting he does not intend to rape, and is not reckless. Hence, even an unreasonable belief negatives liability.

Per Lord Cruss, J:

The question to be answered in this case, is whether a man can be said to have committed rape if he believed that the woman was consenting to the intercourse and would not have attempted to have it, but for his belief, whatever his grounds for so believing. I do not think that he can. Rape, to my mind, imports at least indifference as to the woman's consent.

To the question whether a man, who has intercourse with a woman believing, on inadequate grounds, that she is consenting to it, though she is not, commits rape, I think that, he would reply "No".

If he were grossly careless, then he may deserve to be punished but not for rape. For these reasons, the summing up contained misdirection.

The jury obviously considered that the appellants' evidence as to the part played by Mrs Morgan was a pack of lies. So I would apply the proviso, affirm the conviction and dismiss the appeal.

The appeal is dismissed.

8.20.3.1 *An Analysis*

One of the most significant effects of Sexual Offences Act 2003 is to reverse *Morgan*: a genuine but unreasonable belief in consent will be a sufficient mens rea in rape and the other non-consensual offences under sections 1-4 that comprises two elements:

(i) *A* does not reasonably believe *B* consents.

(ii) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps. *A* has taken to ascertain whether *B* consents.

Sexual intercourse by husband with his wife during separation, without her consent, amounts to rape—However, mere filing of a petition of divorce is not enough to make the husband liable for rape—Court of Appeal—1977

R v Steele,

(1977) 65 Cr App R 22 (CA)

Per Geoffery Lane, LJ:

As a general principle, a husband cannot be guilty of rape upon his wife. Sir Mathew Male's *Pleas of the Crown*[420] said: "...by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

The first case in which an exception to the general rule was made is of *Clarke,* decided in 1949.[421] In Clarke, there was in existence at the time of the alleged rape, a separation order on the grounds of the prisoner's persistent cruelty towards his wife. That separation order was in force and it contained a clause that the wife was no longer bound to cohabit with the prisoner. Cohabitation had not been resumed. The learned judge Bryne ruled that in those circumstances the wife's consent had been revoked. He said:

> The wife, by process of law, namely, by marriage, had given consent to the husband to exercise the marital right during such time as the ordinary relations created by the marriage contract subsisted between them, but by a further process of law, namely, the justices' order, her consent to marital intercourse was revoked.[422]

The next case sequence is of *Miller*,[423] (1954) in which the wife had filed a petition for divorce on the grounds of adultery.

Subsequently, the husband met her and had sexual intercourse with her without her consent. He was indicted for rape and also for assault occasioning actual bodily harm.

It was held that the mere filing of a petition for a divorce, even though there had been a partial hearing of that petition, without any order from the court at all, was not sufficient to revoke the wife's consent and consequently the husband was entitled to have intercourse, albeit by force, with his wife without being guilty of rape although, in certain circumstances, he might be guilty of inflicting harm and violence upon her.[424]

The third decision is of *O'Brien (Edward*),[425] decided in 1974. In that case, the wife was granted a decree *nisi* and it was after that decree that the husband had intercourse with her by force. The learned judge held that the decree *nisi* effectively terminated the wife's consent to marital intercourse. Therefore, the husband was liable to be convicted of rape.

A separation agreement with a non-cohabitation clause, a decree of divorce, a decree of judicial separation, a separation order containing a non-cohabitation clause and an injunction restraining the husband from molesting the

wife or having sexual intercourse with her are all obvious cases in which the wife's consent would be successfully revoked.

On the other hand, the mere filing of a petition for divorce would clearly not be enough.[426]

The appeal is allowed and conviction quashed.

A student cannot be considered to be in "custody" of a teacher of government school, though a public servant, to attract section 376 (2)(b) Indian Penal Code, 1860—Appeal allowed, conviction set aside—Supreme Court (2007)

Omkar Prasad Verma v State of MP[427]

The accused, appellant a teacher of a Government School, who allegedly committed rape on a student, was convicted by the trial court under section 376 2 (b) *IPC, 1860* and sentenced to two years of imprisonment and fine of Rs 1000. The High Court confirmed the conviction.

Allowing the appeal and setting aside the conviction their Lordships of the Supreme Court held that no doubt the accused being a teacher of the government school was a public servant, but all the students of the school, only thereby, were not in the "custody" of the accused, the expression "custody" implies guardianship.

Justice SB Sinha held:

Custody must be a lawful custody. It may arise within the provision of the statue or actual custody conferred by reason of an order of a Court of law or otherwise.

Section 376 (2)(b) *IPC, 1860* provides for sentences against a public servant who takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him. The ingredients of the said provisions are:

(i) the accused must be a public servant:

(ii) he must take advantage of his official position;

(iii) he must induce or seduce any woman;

(iv) such a woman must be in his custody in such a capacity or she is in the custody of public servant subordinate to him; and

(v) he must have sexual intercourse with her which does not amount to the offence of rape.

Further sexual intercourse, for the purpose of attracting section 376 (2)(b) *IPC, 1860* must take place at a place where the woman was in custody. In this case, since it did not take place within the precincts of the school but outside the school, conviction of accused was improper.

If a student and a teacher fall in love with each other, the same would not mean that the teacher has taken undue advantage of his official position. Even then, there must be an inducement or seduction by a public servant so far as the woman in his custody is concerned.

Since the ingredients of the offence under *section 376 (2)(b) of Indian Penal Code* are not satisfied, the appeal is allowed.

Conviction set aside.

377. Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

The unnatural offences discussed under this section are:

(i) Sodomy; and

(ii) Bestiality.

8.20.3.2 *Sodomy*

The word “sodomy” generally denotes anal intercourse by a man with a man or with a woman or with an animal.[428] Sodomy may be either homosexual or heterosexual.[429] In case the parties are of same sex, it will be termed, as homosexual and if the parties are of opposite sex it will be called as heterosexual. Consent unlike rape is not a defence to the charge. The person affecting the intercourse is known as the “agent” and the other party as the “patient”.

8.20.3.3 *Bestiality*

Bestiality means the sexual intercourse either by a man or by a woman carried out in any way with a beast (an animal).[430] The section is wide enough to include a woman for committing unnatural offence.

The section requires proof of the following conditions to hold a person liable for the offence, viz,

(1) The accused must have carnal intercourse with a man, or a woman or an animal;

(2) The act was against the order of nature;

(3) The act was done voluntarily by the accused; and

(4) There was proof of penetration.

Homosexuality: In Europe the colonial masters had two sets of morality in respect of sexual behaviours. The countries with Napoleonic Code did not pick out the same sex acts for criminal sanction, whereas Common Law did criminalise homosexual acts and carried it to India and other parts of the colonies.

Historically, it has been proved that homosexual “erotic” acts occur in all culture and in all societies in all periods. In India, there exists sufficient documentary archaeological and anthropological evidences to suggest that same sex ties especially among men, were not only culturally, but dignified and revered by attributing similar traits to religious deities. The homoerotic carvings among the erotic carvings on the Hindu temples of Khajuraho (Madhya Pradesh) and Konark Temple (Orissa) and on the great Buddhist monument at Bora bordur in Indonesia are well known.[431] The *Kama Sutra* has a chapter on same sex love. The apparent acceptance of boy lovers in Mogul and lesbianism in the confines of harems are well known facts of state approval and recognition of homosexuality.

Even same sex marriages in China, Canada[432] *(Leyland,* same sex marriage case) and other places got approval and state sanction. In a case from Kerala where the judicial magistrate, Thrissur has allowed two young nurses Shiby and Prema to live “together for ever”[433] and they have decided to solemnise their relationship in marriage soon. This is an example of judicial approval of same sex relationship.

However, in recent years due to recognition of right to life and liberty, as a basic human right, it is believed that interference of law in private life (affairs) of an individual amounts to invasion on his bedroom. Perhaps it is to safeguard the individual’s rights to privacy that England decriminalised homosexual acts in private between consenting partners[434] (1967).

In 1969, Canada and Australia followed England. In the United States, it is considered inappropriate to regard homosexual relations as blameworthy for assigning criminal sanction and US *Constitution* does not require States to do so or not to do so.[435]

In Asian context, it is found that there is no criminal prohibition to homosexual behaviour in Cambodia, China, Indonesia, The Philippines, Thailand, Vietnam and Hong Kong. Of course, India, Pakistan, Bangladesh, Srilanka, Malaysia and Singapore have retained British-era prohibition.

Section 377 IPC, 1860 - Consensual Sex in Private between adults of the same sex criminalised vide Section 377 IPC is not violative of Fundamental Right to Personal Liberty (Article 21), Equality (Article 14), and Prohibition against Discrimination on Grounds of Sex (Article 15), of the Constitution—Supreme Court - 2018 - Overruled 2018.

8.20 Leading Cases on Rape

Suresh Kumar Koushal v Naz Foundation[436]

In view of recognition of right to personal freedom as a fundamental human right, Naz Foundation, working on HIV/AIDS filed a PIL in Delhi High Court seeking that homosexuality between consenting adults should not be penalised.

The PIL said that *section 377 IPC* which makes carnal intercourse against the order of nature punishable with imprisonment for life or 10 years' was violative of *Articles 14*, *15*, *19* (1)(a-d) and 21 of the *Constitution of India* (Fundamental Rights relating to Equality and Freedom) to the extent that it penalises sexual acts between consenting adults. There is no compelling state interest that exists to justify the curtailment of such an important element in the fundamental right to life and liberty, the petition said.

Allowing the petition, a bench of Delhi High Court comprising of Chief Justice AP Shah and Justice S Murlidhar delivered a path-breaking judgment on 2 July 2009 "decriminalising consensual sex of adults of the same sex in private" under *section 377 IPC, 1860*. The court declared *section 377 IPC ultra vires* so far as it ''criminalised consensual sexual acts of adults above 18 years of age in private,'' since it is violative of fundamental rights to personal liberty, equality before law and discriminates people on the ground of sex under *Articles 21*, *14* and *15* respectively of the *Constitution*.

The court clarified that hence forth *section 377 IPC* which was enacted in 1860 to deal with an unspecified range of "unnatural offences" would hereafter be restricted to "non-consensual penile," ''non-vaginal sex'' (rape by a homosexual) and ''penile non-vaginal sex involving minors'' (paedophilia). The bench, in support of its contention invoked Pundit Jawaharlal Nehru's stirring words to the Constituent Assembly, linking the issue of homosexuality with the politically resonant theme of inclusiveness, when he said:

> If there is one constitutional tenet that can be said to be (the) underlying theme of the Indian *Constitution*, it is that of inclusiveness.

As a corollary to it, the Court added that:

> Those perceived by the majority as "deviants" or "different" are not... excluded or ostracised.

Upholding the petition, the Court ruled:

> Indian constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs (lesbians, gays, bisexuals and transgender) are. It cannot be forgotten that decriminalisation is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.

Elaborating its contention the Court said:

> There is almost unanimous medical and psychiatric opinion that homosexuality is not a disease or a disorder and is just another expression of human sexuality and that the Law Commissions' suggestion to repeal *section 377 IPC* while redefining rape to include sexual offences of non-consensual sex between adults of the same sex and paedophilia in its 172nd Report[437] (2000) was most appropriate.

> While allowing the appeal and setting aside the verdict of Delhi High Court decriminalizing *section 377 IPC* being violative of *Arts 14*, *15*, *19* and *21* of *Constitution*. Supreme Court in *Suresh Kumar Koushal v Naz Foundation,*[438] held *section 377 IPC* is valid nad does not suffer from vice of unconstitutionality- However, competent legislature is free to consider desirability and propriety of either deleting section 377 or amending it.

Justice GS Singhvi while delivering the judgment of the court said:

> Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the

order of nature constitute different classes and the people falling in the later category cannot claim that section 377 suffers from the vice of arbitrariness and irrational classification. What section 377 does is merely to define the particular offence and prescribe punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the *Code of Criminal Procedure* and other statutes of the same family the person is found guilty. Therefore, the High Court was not right in declaring *Section 377, IPC* ultra vires *Articles 14* and *15* of the *Constitution*.

Section 377 IPC—Consensual sex between two adults of the same sex is decriminalized. On 6 September 2018 by Constitution Bench of the Supreme Court with one stroke of Judicial wisdom flung the draemial 1860 colonial law that criminalized homosexuality into dustbin of history and wrote a new freedom song for lakhs of members of the LGBT community. Freedom to love the person you choose freedom, from fear of persecution. Freedom to just be who you are.—Supreme Court—2018

Navtej Singh Johar v UOI Thr Secretary Ministry of Law and Justice[439]

Per Navtej Singh, J:

It is submitted on behalf of the petitioners and the intervenors that homosexuality, bisexuality and other sexual orientations are equally natural and reflective of expression of choice and inclination founded on consent of two persons who are eligible in law to express such consent and it is neither a physical nor a mental illness, rather they are natural variations of expression and free thinking process and to make it a criminal offence is offensive of the well-established principles pertaining to individual dignity and decisional autonomy inherent in the personality of a person, a great discomfort to gender identity, destruction of the right to privacy which is a pivotal facet of *Article 21 of the Constitution*, unpalatable to the highly cherished idea of freedom and a trauma to the conception of expression of biological desire which revolves around the pattern of mosaic of true manifestation of identity.

It is further argued that their growth of personality, relation building endeavour to enter into a live-in relationship or to form an association with a sense of commonality have become a mirage and the essential desires are crippled which violates *Article 19 (1)(a) of Constitution*.

The petitioners have highlighted that the rights of the lesbian, gay, bisexual and transgender (LGBT) community, who comprise 7-8% of the total Indian population, need to be recognized and protected, for sexual orientation is an integral and innate facet of every individual's identity.

The LGBT persons cannot, according to the petitioners, be penalized simply for choosing a same sex partner, for the constitutional guarantee of choice of partner extends to the LGBT persons as well.

The petitioners are of the view that *section 377 of IPC* be read down qua the LGBT community so as to confine it only to the offence of bestiality and non-consensual acts in view of the fact that with the coming into force of *Criminal Law (Amendment) Act 2013* and *Protection of Children from Sexual Offences Act 2012* (*POCSO Act*), the scope of sexual assault has been widened to include non peno-vaginal sexual assault and also criminalize non-consensual sexual acts between children thereby plugging important gaps in the law governing sexual violence in India.

It is urged by the petitioners that individuals belonging to the LGBT group suffer discrimination and abuse throughout their lives due to the existence of *section 377 IPC* which is nothing but a manifestation of a mindset of societal values prevalent during the Victorian era where sexual activities were considered mainly for procreation. The said community remains in a constant state of fear which is not conducive for their growth.

Allowing the petition, the Supreme Court in a historic verdict running into 495 pages said defanging a 158-year-old Victorian era law, the Supreme Court, in a landmark judgment on Thursday 6 September 2018, legalised consensual sexual relations among gay adults by partially striking down section 377—a momentous event, perhaps the first step towards the gradual embrace of the LGBTS community and hesitant acquiescence of alternative sexuality.

In a unanimous 5-0 verdict, Chief Justice of India, Dipak Misra led Justices RF Nariman, AM Khanwilkar, DY Chandrachud and Indu Malhotra in declaring that a two-judge bench's decision in December 2013 in the *Suresh Koushal v Naz Foundation* case, which had recriminalized section 377, was "arbitrary, fallacious and retrograde".

In the *Suresh Koushal v Naz Foundation* case, the SC had reversed a Delhi High Court verdict in *Naz Foundation* case which had decriminalized gay sex among consenting adults by reading down the controversial section 377.

As it righted the error it made five years ago with yet another verdict which seeks to expand personal freedoms, the Court invoked “transformative constitutionalism” and struck a confessional note, saying “history owned an apology to LGBTQ members and their families” for the wrongs inflicted on them.

In the four concurrent opinions cumulatively running into 493 pages that abhorred imposition of the majoritarian view on the LGBTQ community to snuff out their fundamental rights, Chief Justice Misra, writing for Justice Khanwilkar and himself, said targeting LGBTQ community members for their sexual preference violated their fundamental right to equality (*Article 14*), right to freedom of expression (*Article 19*) and right to choice coupled with right to dignity (*Article 21*).

Elaborating the judgment, the Court said in striking down *section 377 IPC* it also recognizes the triumph of constitutional morality over public morality. LGBTQ have a fundamental right to live with dignity. In brief it can be said that majoritarian view could not extinguish the rights of a minority community over its sexual preferences and that sexual morality could not be used to snuff out fundamental rights of minority. Justice RF Nariman, AM Khanwilkar, DY Chandrachud and Indu Malhotra agreed with CJI Mishra’s view that freedom of choice cannot be scuffled or abridged on the threat of criminal prosecution and cannot be judged on mercurial stance of majoritarian perception.

“*Section 377 IPC*, so far as it penalizes any consensual sexual relationship between two adults, be it homosexuals (man and man), heterosexuals (man and woman) or lesbians (woman and woman), cannot be regarded as unconstitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of section 377 is constitutional and it shall remain a penal offence under *section 377 IPC*,” the CJI said.

The CJI, who read the judgment for Justice Khanwilkar and himself to begin the pronouncement of verdict, started by saying there were four separate but concurrent opinions. The tense anticipation inside the Court melted the moment he said section 377 was partially struck down to decriminalise gay sex. Only the strict Court etiquette prevented gathered LGBTQ members from applauding in relief.

Justice Nariman said,

> Persons who are homosexuals have a fundamental right to live with dignity… We further declare that such groups (LGBTQ) are entitled to the protection of equal laws, and are entitled to be treated in society as human beings without any stigma being attached to any of them. We further direct that section 377 insofar as it criminalises homosexual sex and transgender sex between consenting adults in unconstitutional.

He directed the Centre to take all measures for wide publicity of the judgment at regular intervals through media and also initiate sensitisation programmes for society, government and police officials to “reduce and finally eliminate the stigma associated with such persons” by making them aware of the plight of the LGBTQ community.

Justice Chandrachud said it was axiomatic that lesbians, gays, bisexuals, transgenders and queer members continued to be denied a truly equal citizenship seven decades after Independence. “The law has imposed upon them a morality which is an anachronism. Their entitlement should be as equal participants in a society governed by the morality of the *Constitution*. That in essence is what section 377 denies to them,” he said.

Justice Chandrachud was cited by colleague judges for laying the foundation for liberating the LGBTQ community from section 377 as he, in the Puttaswamy judgment in August 2017 had ruled that sexual orientation was part of right to life and indirectly said that the Suresh Koushal judgment was not in sync with constitutional ethos. “It is difficult to right the wrongs of history. But we can certainly set the course for the future. That we can do by saying, as I propose to say in this case, that lesbians, gays, bisexuals and transgenders have a constitutional right to equal citizenship in all its manifestations. Sexual orientation is recognised and protected by the *Constitution*,” he said. Justice Malhotra said,

> History owes an apology to the members of this community and their families, for the delay in providing redressal for the

ignominy and ostracism that they suffered through centuries. The members of this community were compelled to live in fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality. “The misapplication of this provision (section 377) denied them the fundamental right to equality guaranteed under *Article 14*. It infringed on the fundamental right to non-discrimination under *Article 15* and the fundamental right to live a life of dignity and privacy guaranteed by *Article 21*. LGBT persons deserve to live life unshackled from shadows of being ‘un apprehended felons.

No kind of prejudice and discrimination can continue in perpetuity. Section 377 was introduced in Indian criminal law in furtherance of western notions of morality, based on Abrahamic ideologies. At the time of its introduction, limited consideration was given to a contradictory morality that existed in the subcontinent, which acknowledged and recognised homosexuality, and did not criminalise it. Even as the UK and other jurisdictions abandoned it for a more reasoned position of homosexuality being nothing but a variation in human nature, Indian governments and other public institutions, over the decades, have tried to perpetuate antiquarian ideas. There was no explicable justification for this law to remain. This decision has thankfully undone the artificial construct that was section 377, and in doing so, it also recognises the triumph of constitutional morality over public morality.

Throughout this process, and indeed, through deliberations around law making generally, we should not lose sight of the fact that laws like *IPC* are neither Indian nor god-given. Laws like these are not immutable. And in fact, they lose value if they are not abandoned, rewritten, or amended, to suit changing social, cultural, and economic needs.

Even as our immediate reaction is one of relief, and joy, this decision is only the beginning of the long walk to ultimate freedom for all. International law strictly prohibits any discrimination on the grounds of sexual orientation or gender identity. The Office of the UN High Commissioner of the Human Rights oblige states to protect individuals from homophobic violence; prevent such violence; decriminalise homosexuality; prohibit discrimination; and respect fundamental freedoms of all persons. The removal of section 377, which decriminalises homosexuality, is but one step towards meeting these obligations.

An idea about Global picture of homosexuality is given in the map given below:

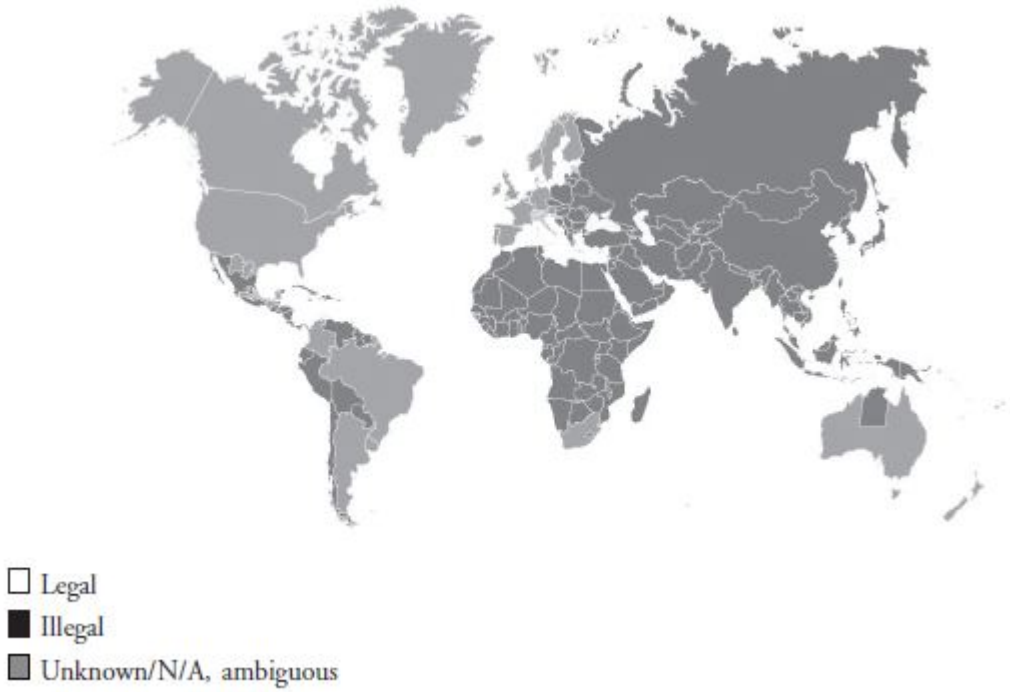
Where Homosexual Ties are Allowed - I

Consensual sexual activity between individuals of the same sex.



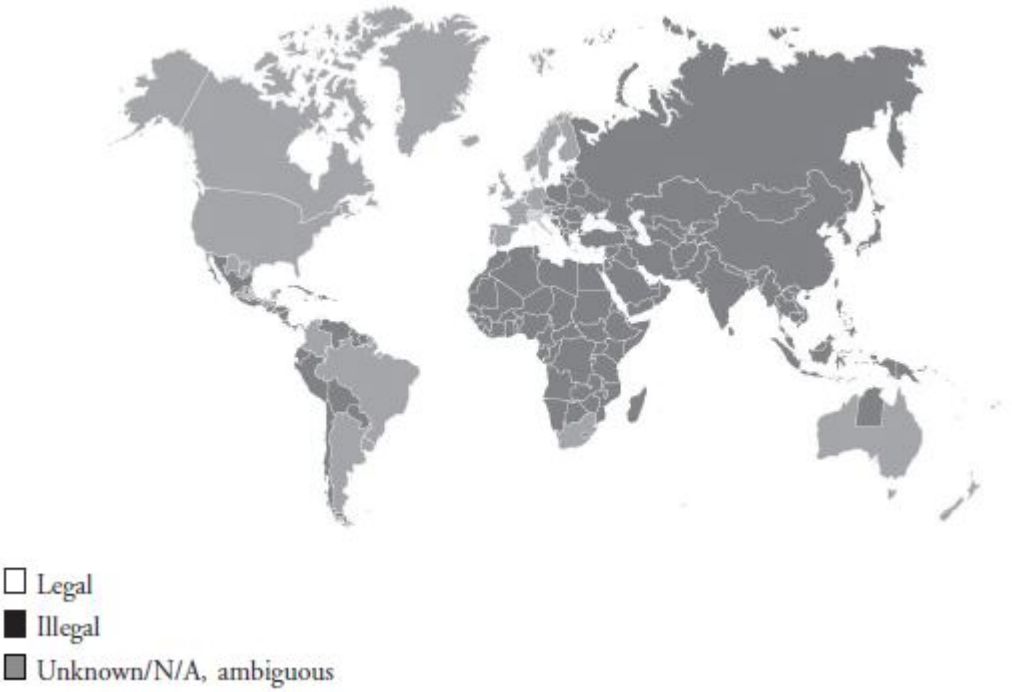
Same-Sex Adoption - II

The ability of same-sex couples to legally adopt a child.



Same-sex Marriage - III

Marriage and marriage recognition between two people of the same biological sex and/or gender identity



Texas statute making it a crime for two persons of the same sex to engage in consensual sexual act of sodomy in privacy of home is violative of the Due Process clause of the Fourteenth Amendment to US Constitution—US Supreme Court, 5 to 4 (2003).

Lawrence v Texas[440]

Kennedy, J:

Houston police entered petitioner Lawrence's apartment and saw him and another adult man, petitioner Garner, engaging in a private, consensual sexual act. Petitioners were arrested and convicted of deviate sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct, *vide* section 21.06 (a) (2003)[441] of Texas *Penal Code*.

In affirmation, the State Court of Appeals held, *inter alia,* that the statute was not unconstitutional under the Due Process Clause of the Fourteenth Amendment. The petitioner accordingly moved the US Supreme Court against the State courts' verdict as unconstitutional.

The question before the court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

Overruling *Bowers v Hardwick,*[442] (1986), the US Supreme Court by a majority of five to four[443] held that Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in consensual act of sodomy in privacy of home, as impinging on their exercise of liberty interests protected by the Due Process Clause of the Fourteenth Amendment.

Justice Kennedy speaking for the court observed:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the *Constitution* that there is a realm of personal liberty which the government may not enter." ....The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual [page 578].

Justice O'Connor while concurring with the majority judgment added that:

> Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons [page 582].

Appeal allowed.

Global Trend to recognise Dignity Rights of Same Sex Relations of Homosexuals in Private:

The European commission of Human Rights (ECHR) in 1981 for the first time in *Dudgeon v The United Kingdom,*[444] *held that* criminalisation of homosexual practices is a violation of the privacy protection in *Article 8* of the ECHR. The court held that:

> Criminalising homosexual acts constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of *Article 8* para 1 (*Article 8-1*)… The very existence of such legislation continuously and directly affects his private life.

Similarly in *Norris v Republic of Ireland*,[445] the European Court of Human Rights ruled that Ireland's blanket prohibition on gay sex breached the ECHR. The court quoted with approval the finding of an Irish Judge that:

> [O] ne of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasion, to depression and the serious consequences which can follow ... [para 21].

> Finally, the catholic dominated country Ireland on 22nd of May, 2015 became the first country to legalise same sex marriages via referendum, just two decades after decriminalising homosexuality with a strong turn out in favour of a 'yes'. The Irish *Constitution* will now read as:

> "Marriages may be contracted in accordance with law by two persons without distinction as to their sex with Ireland joining the group of same sex marriages country, same sex is now legal in 20 countries world wide including Britain which allowed same sex marriages from March 2014.[446]

In view of the decision of United Nations Human Rights Committee in *Toonen v Australia,*[447] consensual sexual relations between adult males have been de-criminalised in New Zealand in 1992. In Canada, consensual adult sodomy ("Buggery") and so-called "gross indecency" were decriminalised by statute in 1989 in respect of such acts committed in private between 18 years or more.

In the United States of America though the challenge to sodomy laws was turned down by the US Supreme Court in *Bowers v Hardwick*,[448] (1986) but subsequently in 2003 in *Lawrence v Texas*,[449] (2003) the sodomy laws insofar as between consenting adults in private were concerned was struck down by the US Supreme Court by a majority of 5 to 4. The court held that moral disapproval is not by itself a legitimate state interest to justify a statute that bans homosexual sodomy.

In recent years, a number of open democratic societies have turned their backs to criminalisation of sodomy laws in private between consenting adults despite the fact that sexual orientation is not expressly protected in the equality provisions of their constitutions. Homosexuality has been de-criminalised in several countries of Asia, Africa, and South America. For instance, the High Court of Hongkong in *Leung TC William Roy v Secy for Justice,*[450] and the High Court of Fiji in *Dhirendra Nandan v State,*[451] struck down sodomy law in their respective countries in 2005. Nepalese Supreme Court has also struck down the laws criminalising homosexuality in 2008[452].

Similarly, the Constitutional Court of South Africa in 1998 in *The National Coalition for Gay and Lesbian Equality v The Minister of Justice,*[453] struck down the sodomy laws on the ground of violation of rights to privacy, dignity and equality. Ackermann, J, speaking for the Court said:

> The common-law prohibition on sodomy criminalises all sexual intercourse *per anum* between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of the *Constitution*. [para 28]

> Two important cases relating to legality of same sex marriages and their constitutional rights to which same sex, examples (i.e. gay and lesbians) are entitled was decided by the US Supreme Court on 26 June 2013, are being discussed below to apprise the readers of latest position on this important topic.

United States v Windsor - Same sex marriages legal classification of state privileges based on sexual orientation unconstitutional - Same sex couple entitled to and enjoy all the benefits and privileges applicable to couple of opposite sex - Windsor entitled to refund of federal estate taxes paid to Internal Revenue Service on the ground of exemption applicable to surviving spouses. The definition of "marriage" and "spouse" provided by section 3 of Defence of Marriage Act (DOMA) by the Congress (US) only as a legal union between "a man" and "a woman" and "spouse" only as "a person of opposite sex", who is a husband or wife violate Fifth Amendment to US Constitution[454]. Supreme Court of the United States - 26 June 2013 - 5 to 4.

United States v Edith Schlain Windsor, in her capacity as the executor of the Estate of Thea Clara Spyer, et al.,

570 US 744 : 133 S Ct 2675 (2013) : 2013 US Lexis 4921

Kennedy, J, delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor and Kagan, JJ, joined.

Roberts, CJ Scalia, Thomas, Alito, J - Dissenting

Edith Windsor and Thea Spyer, both women met in New York City in 1963 and began a long—term relationship. Windsor and Spyer registered as domestic partners and married in 2007 when New York City gave that right to same sex couples in 1993. Concerned about Spyer's health, the couple made trip to Canada in 2007 for their marriage, but they continued to reside in New York City.

The State of New York recognizes the marriage of New York residents Edith Windsor and Thea Spyer, who wed in Ontario, Canada, in 2007. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the federal estate tax exemption for surviving spouses, but was barred from doing so by section 3 of Federal Defense of Marriage Act (DOMA)', which define marriage between man and woman only. With the result Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation" any interest in property which passes or has passed from the decedent to his surviving spouse." [26 USC Section 2056 (a)] Windsor paid $363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a "surviving spouse." Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment. Windsor paid $363,053 in estate taxes and sought a refund, which the Internal Revenue Service denied. Windsor brought refund suit, contending that DOMA violates the principles of equal protection incorporated in the Fifth Amendment to US *Constitution* 2. While the suit was pending, the Attorney-General of United States notified the Speaker of the House of Representatives that the Department of justice would no longer defend section 3's constitutionality. In response, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend section 3's DOMA's constitutionality. The District Court permitted the intervention. On the merits, the court ruled against the United States, finding 3 DOMA's unconstitutional and ordering the Treasury to refund Windsor's tax with interest. The Second Circuit Court affirmed. The United States Internal Revenue Service has not complied with the judgment.

Background: Taxpayer who, as surviving spouse of same-sex couple, was denied benefit of spousal deduction due to definition of "marriage" and "spouse" provided by Defense of Marriage Act (DOMA) brought action for refund of federal State taxes and for declaration that pertinent provision of DOMA violated Fifth Amendment. After Department of Justice (DOJ) declined to continue its defense of statute, congressional group was allowed to intervene to defend statute's constitutionality. The United States District Court for the Southern District of New York, [Barbara S Jones J, 833 Supp. 2d 394] granted summary judgment— for taxpayer. The United States, as nominal defendant, and congressional group appealed. The United States Court of Appeals for the Second Circuit, Dennis Jacobs, Chief Judge, affirmed. *Certiorari* was granted.

While affirming the judgment of the Court of Appeal the Supreme Court of the United States by a majority of 5 to 4 speaking through Justice Kennedy said.

The power the *Constitution* grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the *Due Process Clause* of the *Fifth Amendment*.

What has been explained to this point should more than suffice to establish that the principal purpose and the

necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the *Constitution* (para 27).

The liberty protected by the Fifth Amendment's Due Process clause contains within it the prohibition against denying to any person the equal protection of the laws[455]. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved (para 28).

The class to which DOMA (Defence of Marriage Act) directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State of California. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

Provision of Defense of Marriage Act (DOMA) defining, for federal law, "marriage" only as a legal union between a man and a woman and "spouse" only as a person of opposite sex who was a husband or wife, was unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment; DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage operated to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages and placed a stigma upon all who have entered into same-sex marriages made lawful by the unquestioned authority of the States.

Judgment of the Court of Appeals for the Second Circuit is affirmed (vide majority)

Dissenting Judgment by Chief Justice Roberts [Scalia, Thomas and Alito, JJ]

> "I agree with Justice SCALIA that this Court lacks jurisdiction to review the decisions of the courts below. On the merits of the constitutional dispute the Court decides to decide, I also agree with Justice SCALIA that Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world." (dissenting opinion).

The majority sees a more sinister motive, pointing out that the Federal Government has generally (though not uniformly) deferred to state definitions of marriage in the past. That is true, of course, but none of those prior state-by- state variations had involved differences over something as the majority puts it - "thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization."

By majority the appeal allowed. Same&sex marriage upheld constitutional, treated this fundamental question differently than it treated variations over consanguinity or minimum age is hardly surprising— and hardly enough to support a conclusion that the "principal purpose," [*ante*, at 2694, of the 342] Representatives and 85 Senators who voted for it, and the President who signed it, was a bare desire to harm. Nor do the snippets of legislative history and the banal title of the Act to which the majority points suffice to make such a showing. At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered no legitimate government interests, I would not tar the political branches with the brush of bigotry.

But while I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their "historic and essential authority to define the marital relation," *ante*, at 2692, may continue to utilize the traditional definition of marriage.

Denial of marriage license to the same sex couples by the Governor of California and other local officials in pursuance of California proposition of a voter enacted initiative that amended the California *Constitution* to provide that only "marriage" between a "man" and "woman" was valid, thereby eliminating the right of same sex examples,

(i.e., gays and lesbians) to marry, violate their right to due process and equal protection clause under the Fourteenth Amendment to US *Constitution*-Supreme Court of United States - 2013 5 to 4)

Dennis Hollingsworth v Kristin M Perry,

133 S Ct 2652 : 570 US 693 : 186 L Ed 2d 768

Background: Same-sex couples who had been denied marriage licenses brought civil rights action against Governor of California and other state and local officials, alleging that California's Proposition 8, a voter-enacted ballot initiative that amended the California *Constitution* to provide that only marriage between a man and a woman was valid, thereby eliminating the right of same-sex couples to marry violated their rights to due process and equal protection under the Fourteenth Amendment to the Federal *Constitution*. Initiative's official proponents intervened on behalf of defendants, and municipality and county intervened on behalf of plaintiffs. After a Bench trial, the United States District Court for the Northern District of California [Vaughn R Walker, Chief Judge,] granted judgment for plaintiffs' and proponents' motion to vacate was denied by the District Court. Proponents appealed both decisions.

The United States Court of Appeals for the Ninth Circuit, certified question, and the California Supreme Court answered that question. The Court of Appeals, Reinhardt Circuit Judge, [671 F 3d 1052 affirmed,] Certiorari was granted.

Holding: The Supreme Court of United States Chief Justice Roberts, Scalia, Ginsburg, Breyer, and Kagan, JJ, joined. By a majority of 5 to 4 held that petitioners did not have standing to appeal district court's order declaring the Proposition unconstitutional.

Justice Kennedy, joined by Justices Thomas, Alito, and Sotomayor, filed a dissenting opinion.

In 2008, the California Supreme Court held that limiting the official designation of marriage to opposite-sex couples violated the equal protection clause of the California *Constitution*.[456] Later that year, California voters passed the ballot initiative at the center of this dispute, known as Proposition 8. That proposition amended the California *Constitution* to provide that "[o] nly marriage between a man and a woman is valid or recognized in California." Shortly thereafter, the California Supreme Court rejected a procedural challenge to the amendment, and held that the Proposition 8 was properly enacted under the California law.

According to the California Supreme Court, Proposition 8 created a "narrow and limited exception" to the state constitutional rights otherwise guaranteed to same-sex couples. Under California law, same-sex couples have a right to enter into relationship's recognised by the State as "domestic partnerships," which carry "the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law as are granted to and imposed upon spouses." Cal Fam Code Ann § 297.5 (a) (West 2004).

Re Marriage Cases, the California Supreme Court concluded that the California *Constitution* further guarantees same-sex couples "all of the constitutionally based incidents of marriage," including the right to have that marriage "officially recognized" as such by the State. The court left those rights largely undisturbed, reserving only "the official designation of the term "marriage" for the union of opposite-sex couples as a matter of state constitutional law."

On merits, the Ninth Circuit affirmed the District Court. The court held the Proposition unconstitutional under the rationale of our decision, in *Romer v Evans.*[457] In the Ninth Circuit's view, Romer stands for the proposition that "Equal Protection Clause" requires the state to have a legitimate reason for withdrawing a right or benefit from one group but not others, whether or not it was required to confer that right or benefit in the first place[458]. The Ninth Circuit concluded that "taking away the official designation" of "marriage" from same-sex couples, while continuing to afford those couples all the rights and obligations of marriage, did not further any legitimate interest of the State 101, at 1095. Proposition 8, in the court's view, violated the Equal Protection clause because it served no purpose "but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships."

We granted certiorari to review that determination, and directed that the Partiesalso brief and argue, "Whether petitioners have standing under Article III, section 2[459] of the *Constitution* in this case."[460]

It is worth while mentioning that Justice Michael D Kirby former Judge of the High Court of Australia (the notion's apex court) while delivering 2013 Tagore Law Lectures at Calcutta University said:

Sexual intimacy is inextricably linked to the development of sustaining human realationshps and personal feelings of identity and self worth. And those, most recent constitutional decisions have held fall outside the bounds of permissible state interference because of hugher constitutional guarantees.[461]

8.20.4 Homosexuality in Islamic World[462]

Homosexuality is forbidden in Islam, though punishment vary among major schools of Islamic Law. A massacre (killing) of at least 49 people at a gay night club in Orlando in the State of Florida of United State on 12 June 2016 by Omar Matin Claiming allegiance to Islamic State has raised questions of intolerance and hate towards gays, lesbians and bisexuals. Homosexuality is outlawed in most of the countries of the Muslim World as reported by the International Gay. Bisexual, Trans and Inter-sex Association with a few exceptions of Bahrain and Mali.

Gay intercourse in Pakistan is punishable by life in prison, though the government seldom sentences people, according to a 2015 report by the US State Department.

In Iran and Afghanistan, homosexuality is banned, and harsh penalties have been enforced against it. Iran executed three men in 2011 on charges that included homosexual acts.

Afghan law penalizes homosexual relations with five to 15 years in prison. A 2015 human rights report by the (State Department said police routinely harass, detain and use violence against gay people.

In Saudi Arabia, homosexuality can be punishable by death, but there have not been any such executions in the country's recent history. Committing or promoting homosexual acts in public is usually punished by jail time, lashes and fines.

Islamic State and other extremist organizations are known for an extreme hatred of homosexuals. In the territory it controls in Syria and Iraq, Islamic State has made executions a hallmark of its bloody reign. In one instance reported by the activist group Raqqa is Being Slaughtered Silently, a blindfolded man was thrown from the roof of a two-storey building in Iraq. He survived the fall with critical injuries and was subsequently stoned to death in front of a crowd of spectators, including children.

In his 2006 book *"Crime and Punishment in Islamic Law,"* the Dutch scholar Rudolph Peters notes that most schools of Islamic law proscribe homosexuality. They differ only on the mode of punishment.

Iran is notorious for hanging men accused of homosexual behavior. The Associated Press reports that since 2014 ISIS has executed at least 30 people in Syria and Iraq for being homosexual, including three men who were dropped from the top of a 100-foot building in Mosul in June 2015.

No fewer than 40 out of 57 Muslim-majority countries or territories have laws that criminalize homosexuality, prescribing punishments ranging from fines and short jail sentences to whippings and more than 10 years in prison or death.

These countries' laws against Homosexuality align with the attitudes of the overwhelming majority of their populations. In 2013 the Pew Research Center surveyed the beliefs of Muslims in 36 countries with a significant Muslim population or majority, including asking about their views of homosexuality. In 33 out of 36 countries, more than 75% of those surveyed answered that homosexuality was "morally wrong," and in only three did more than 10% of those surveyed believe that homosexuality was "morally acceptable."

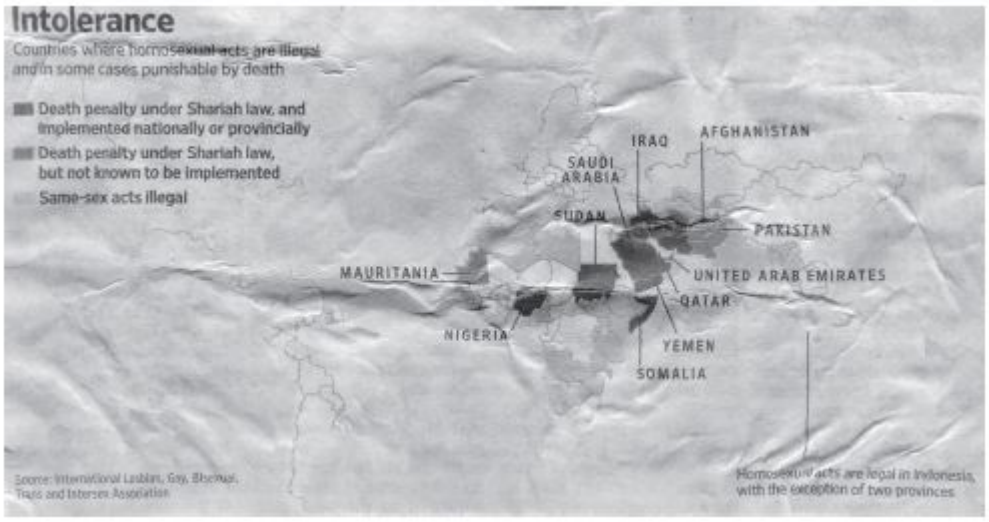
In many Muslim-majority countries—including Afghanistan, where Omar Mateen's parents came from — LGBT people face as much danger from their families or vigilantes as they do from the authorities.

The Malikites the Shiites and some Shafi'ites and Hanbalites are of the opinion that the penalty is death, either by stoning (Malikites), the sword (some Shafi'ites and Hanbalites) or, at the discretion of the court, by killing the culprit in the usual manner with a sword, stoning him, throwing him from a (high) wall or burning him (Shiites)."

Under Shariah—Islamic law—those engaging in same-sex sexual acts can be sentenced to death in nearly a, dozen countries or in large areas of them: Iran, Saudi Arabia, Yemen, Sudan, the northern states of Nigeria, southern parts of Somalia, two provinces in Indonesia, Mauritania, Afghanistan, Qatar, the United Arab Emirates.

Death is also the penalty in the territories in northern Iraq and Syria controlled by ISIS. The details are given below in the map. For ready reference.

Map given below depicts countries where homo-sexuality is punishable



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367 *Uday v State of Karnataka,* AIR 2003 SC 1639 : (2003) 4 SCC 46 : (2003) 2 Scale 329.

368 [1995] 3 All ER 69 : [1994] EWCA Crim 2 : [1995] 2 WLR 237 : [1995] QB 250. Court of Appeal, Swinton Thomas LJ, Morland and Steel, JJ.

369 (1877) 2 QBD 410 : (1877) 13 Cox CC 388.

370 22 QBD 23-27 : [1886-90] All ER Rep 133. Read the cases discussed under Grievous Hurt *section 320 IPC*. Overruled by *R v Dica,* (2004) 3 All ER 593.

371 22 QBD 23-27 : [1886-90] All ER Rep 133, p 135.

372 22 QBD 23-27 : [1886-90] All ER Rep 133, pp 144-145.

373 [1965] 31 MLJ 40 (PC), per Lord Reif, Lord Hodson and Lord Donovan JJ.

374 AIR 1996 SC 1393 : (1996) 2 SCC 384, per Dr AS Anand and Saghir Ahmad, JJ.

375 *State of Maharashtra v Chandraprakash Ewalchand Jain,* AIR 1990 SC 658 : (1990) 1 SCC 550 : 1990 SCR (1) 115.

376 *Code of Criminal Procedure 1973, section 327* (2) and (3) [prior to amendment by *Criminal Law (Amendment) Act 2013*] reads:

> The inquiry into and trial of rape or an offence under section 376, section 376-A, section 376-B, section 376-C or section 376-D of India *Penal Code* shall be conducted in camera: Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in the room or building used by the court.
>
> (3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court.

377 Bodihsattwa Gautam developed intimacy with his student Subhra Chakraborty and on the basis of his assurance to marry her, she developed sexual relationship. When complainant became pregnant, she persuaded Gautam to marry her, but he deferred the proposal. He however, agreed to marry her secretly, and took her to a temple and put vermilion on her forehead and accepted her as his lawful wife. However, he compelled her to abort child twice which took place in a clinic, where he signed the consent paper and deliberately mentioned himself as Bikash Gautam instead of his name Bodihsattwa Gautam.

378 AIR 1996 SC 922, pp 926–927 : (1996) 1 SCC 490.

379 *(1995) 1 SCC 14* : (1994) 7 JT 183. See also *Chairman Railway Board v Chandrima Das,* (2000) 2 SCC 465 : *AIR 2000 SC 988* and *AK Singh v Uttarakhand Jan March, AIR 1999 SC 2193* : *(1999) 4 SCC 476* discussed under "Vicarious liability", chapter 4.

380 *Indian Penal Code, 1860, section 376B*, prescribes punishment for intercourse by public servant with woman in his custody.

381 *Indian Penal Code, 1860, section 341*, prescribes punishment for wrongful confinement.

382 *Constitution of India 1950, Article 38* (1) reads: The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life.

383 *(2000) 4 SCC 75* : *AIR 2000 SC 1470*, per Dr AS Anand CJI, RC Lahoti and SN Variava, JJ.

384 *State of Punjab v Gurmit Singh, AIR 1996 SC 1393* : *(1996) Cr LJ 1728* : *(1996) 2 SCC 384*, relied on.

385 *AIR 2010 SC 894* : 2010 Cr LJ 41 : (2009) 14 JT 149. B Sudershan Reddy and JM Panchal, JJ.

386 *AIR 2008 SC 1292* : *(2008) 5 SCC 147* : 2008 Cr LJ 1939 : JT 2008 (2) SC 158 : *2008 (2) Scale 211*, Justices Dr Arijit Pasayat and P Sathasivam.

387 *AIR 2000 SC 1920* : *(2000) 4 SCC 502* : *2000 Cr LJ 2292* : JT 2000 (5) SC 202 : *2000 (4) Scale 52*, per KT Thomas, Doraiswamy Raju and SN Variava, JJ. See also *TK Gopal alias Gopi v State of Karnataka, AIR 2000 SC 1669* : *(2000) 6 SCC 168*.

388 *AIR 2006 SC 2214* : *(2006) 9 SCC 787* : *2006 Cr LJ 2913* : JT 2006 (5) SC 460 : *2006 (5) Scale 614*, per Arijit Pasayat and SH Kapadia, JJ.

389 *AIR 2017 SC 2530* : 2017 AIR (SCW) 2530, Dipak Misra, Rohinton Fali Nariman and Uday Umesh Lalit, JJ, delivered the judgment.

390 *AIR 2006 SC 2992* : *(2006) 10 SCC 608* : 2006 Cr LJ 3894 : JT 2006 (7) SC 457 : *2006 (8) Scale 68*, per BN Agrawal and PP Naolekar, JJ.

391 Five accused Lalit Gupta, Ashok Kumar alias Babbu, Pardeep Kumar, Inderjit Singh and Karam Chand were tried and convicted under *section 376* read with *section 109* of *Indian Penal Code, 1860* for gang rape by the additional Sessions Judge, Chandigarh and sentenced to rigorous imprisonment for 10 years and to pay fine of Rs 500 each. The High Court of Punjab and Haryana in appeal upheld the conviction of Lalit Gupta and Pradeep Kumar under section 376 while acquitted Inderjit Singh. Ashok Kumar and Karam Chand died during the pendency of proceedings.

392 *Indian Penal Code, 1860, section 376* (2)(g), Expln 1 [prior to amendment by *Criminal Law (Amendment) Act 2013*], says, Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

393 *AIR 2006 SC 2639* : *(2006) 6 SCC 263* : JT 2006 (6) SC 303 : 2006 (7) Scale 37 : 2006 Cr LJ 3627, per Arijit Pasayat and SH Kapadia, JJ.

394 *Indian Penal Code, 1860*, Explanation I to section 376 (2)(g) [prior to amendment by *Criminal Law (Amendment) Act 2013*] provides, "Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape…"

395 *Indian Penal Code, 1860, section 107* defines abetment of a thing: A person abets the doing of a thing, who—*First*-instigates any person to do that thing; or *Secondly.*-Engages with one or more other persons in any conspiracy for the doing of that thing if the act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; *Thirdly* intentionally aids, by any act or illegal omission, the doing of that thing." *Section 109 of Indian Penal Code, 1860*, prescribes punishment of abetment: "Whoever abets any offence shall, be punished with the punishment provided for the offence."

396 Sexual Offences Act 2003, section 1.

397 See Chapter 6 Preliminary crimes note stated under *sections 107*, *108* and *109*, *IPC*, Commentary.

398 Sexual Offence Act 2003, section 4 (1) A person (*A*) commits an offence if—(a) he intentionally causes another person (*B*) to engage in an activity, (b) the activity is sexual, (c) *B* does not consent to engaging in the activity, and (d) *A* Does not reasonably believe that *B* consents. (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps *A* has taken to ascertain whether *B* consents.

399 *AIR 2017 SC 835* : 2017 Cr LJ 1443 : 2016 (4) Crimes 424 (SC) : 2016 (12) Scale 831, AK Sikri and Abhay Manohar Sapre, JJ, delivered the judgment.

400 AIR 207 SC 2161 : 2017 Cr LJ 4365 : JT 2017 (5) SC 159 : 2017 (5) Scale 506, Dipak Misra, Mrs R Banumathi and Ashok Bhushan, JJ.

401 *AIR 2016 SC 341* : 2016 Cr LJ 1125 : 2016 (1) Crimes 5 (SC) : *2016 (1) Scale 258* : *(2016) 3 SCC 19* : 2016 (1) UC 225, Kurian Joseph and Arun Mishra, JJ, delivered the judgment.

402 2017 Cr LJ 186 : JT 2016 (10) SC 18 : 2016 (9) Scale 627 : *2016 (10) SCC 506*, Pinaki Chandra Ghose and Amitava Roy, JJ, delivered the judgment.

403 *AIR 2008 SC 2222* : *(2008) 5 SCC 354* : JT 2008 (5) SC 629 : *2008 (6) Scale 462*. Justices SB Sinha and VS Sirpurkar, JJ.

404 The accused persons caught hold of the victim and took her to a lonely place. When her brother objected they slapped him and threatened of dire consequences. He ran away with tears towards the village out of fear. The victim was raped by each one of the accused one after the other. Thereafter, they left the place leaving the victim there.

405 The victim in FIR narrated that happened on the fateful night. She said

"she saw all the faces in the moon light. Three person pushed me with force near a damaged wall of a building. I tried to escape but could not. They closed my mouth with my saree. Accused 1-Babu called Accused 2-Thangavelu who placed hand on me without dress and raped me. Thereafter, Accused 3 Shakti and Accused 4 Murugesan raped me. Then I felt unconscious. I do not know about the further."

406 See *Devinder Singh v State of HP,* (2003) AIR SCW 4779 (para 21) : (2003) 11 SCC 488 : *AIR 2003 SC 3365*.

407 See 5 Historical statistics of the Earliest Times to the present, pp 5-262-263.

408 408 US 238 (1972).

409 433 US 584 (1977) : 97 S Ct 2861 : 53 L Ed 2d 982 : 1977 US 146. Majority per White, Stewart, Blackmun, Stevens, Brennan, and Marshall, JJ. Dissenting opinion per Burger, CJ and Rehnquist, J.

410 Georgia Code Ann 26-2001 [1972] the section defines rape as having "carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ."

411 Georgia Code Ann 26-3102 (Supp 1976):

Capital offenses: jury verdict and sentence. Where upon a trial by jury, a person is convicted of an offense, which may be punishable by death; a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and recommendation of death is made, the court shall sentence the defendant to death.

412 Georgia Code Ann section 26-2001 [1972] provides that a person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one year and not more than 20 years. If the evidence shows one or more of the aggravating circumstances that the rape was: 1. Committed by a person previously convicted for a capital felony; 2. Committed during the commission of another capital felony (including armed robbery) or aggravated battery; or 3. Outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim—the jury, after a sentencing hearing, found that the first two aggravating circumstances were present and returned a verdict on the rape count of death by electrocution.

413 The Eighth Amendment to US *Constitution* provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

414 Fourteenth Amendment to US *Constitution section 1* reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny the equal protection of the laws".

415 128 S Ct 2641 : 2008 US Lexis 5262 : 171 L Ed 2d 525 (1 October 2008) Majority judgment was delivered by Judged Kennedy, Stevens, Souter, Ginsburg and Breyer, JJ Joined; Dissenting opinion given by Alito, Roberts, CJ, Scalia and Thomas includes JJ joined.

416 Eighth Amendment ".. cruel and unusual punishment shall not be inflicted…"

417 Louisiana State statue provided that "Aggravated rape is committed. (4) when the victim is under the age of 12 years…(a) And if the District Attorney seeks a capital (punishment) verdict, the offender shall be punished by death or life imprisonment…" Louisiana is the only State since 1964 that has sentenced an individual to death for the crime of child rape—petitioner and Richard Davis who was convicted and sentenced to death for the aggravated rape of a 5-year old child.

418 *Trop v Dulles,* 356 US 86, 101; See David C Brody, James R Acker and Wayne, *Criminal Law,* Aspen Publishers, Gaithersburg Maryland, 2001, pp 453. See Michael Higgins *"Is Capital Punishment for Killers Only?"* American Bar Association Journal, 30 August 1997. See *State v Wilson*, 685 So 2rd 1063, 1070 (La 1996).

419 Rasheed Abou Alsamh, The Times of India, 19 November 2007, pp 1 and 6.

420 Sir Mathew Male's, *Pleas of the Crown,* vol I, p 629.

421 (1949) 33 Cr App R 216.

422 *R v Clarke, [1949] 2 All ER 448* : (1949) 33 Cr App R 216, p 218.

423 *R v Miller, [1954] 2 All ER 529* : [1954] 2 QB 282 : (1954) 38 Cr App R 1.

424 *R v Miller*, *[1954] 2 All ER 529* : [1954] 2 QB 282 : (1954) 38 Cr App R 1, pp 8-9.

425 *[1974] 3 All ER 663*.

426 See Richard Brooks, *"Marital Consent in Rape"*, (1989) Cr LR 877, p 878.

427 *AIR 2007 SC 1381* : *(2007) 4 SCC 323* : JT 2007 (4) SC 333 : *2007 (4) Scale 150*, SB Sinha and Markandey Katju, JJ.

428 *Russell on Crime,* vol I, Indian Reprint, 2001, p 735; *Kenny's Outlines of Criminal law,* 19th Edn, p 205.

429 Smith and Hogan, *Criminal Law,* 9th Edn, 1999, p 479.

430 *Russell on Crime,* vol I, Indian Reprint, 2001, p 735. *R v Ford,* [1978] All ER 1129; *R v Grey,* (1982) Cr LJ 177 (CA).

431 Douglas Saunders, *"A new Imperialism, Is the west forcing lesbian and gay rights on Asia"*, University of British *Columbia.* There are three general kinds of same-sex relationships: (a) age stratified (Greece, Melanesia), (b) gendered (where one partner is an effeminate or cross-dressing male, or a masculine "tom" woman), and (c) egalitarian (the modern western same-sex relationship).

432 Douglas Saunders, *"A new Imperialism, Is the west forcing lesbian and gay rights on Asia",* University of British Columbia.

433 Ramesh Babu, *"Court Nod for Lesbians in Kerala,"* Hindustan Times, 29 October 2002, p 13.

434 Ashok Rao, *"Should Homosexuality be legalised?"* The Times of India, 29 June 2002, p 6.

435 Paul H Robinson, *Criminal Law,* Aspen Publishers, 1997, pp 766-767.

436 *AIR 2014 SC 563* : 2014 Cr LJ 784 : 2014 (1) JT 27 : *2013 (15) Scale 55*, GS Singhvi, J and Sudhansu Jyoti Mukhopadhaya, J delivered the judgment—has now been overruled by 2018 judgment.

437 172nd Report of Law Commission of India as on Review of Rape Laws, March 2000.

438 *(2013) 15 Scale 55* : *(2014) 1 SCC 1*.

439 AIR 2018 SC 4321 : 2018 (3) Crimes 233 : *2018 (10) Scale 386* : 2018 (10) SCC 1, per Dipak Misra, CJI, AM Khanwilkar, J.

440 *John Geddes Lawrence and Tyron Garner v Texas,* 539 US 653 (2003) : 539 US 558 : 156 LEd 2d 508 (2003) : 2003 US Lexis 5013.

441 Tex *Penal Code* Ann § 21.06 (a) (2003) provides:

> ''A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.'' The statute defines ''[d] eviate sexual intercourse'' as follows:
>
> ''(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or ''(B) the penetration of the genitals or the anus of another person with an object. § 21.01 (1)''

442 478 US 186 : 106 S Ct 2841 : 92 L Ed 2d 140 : 1986 US Lexis 123 (1986).

443 KENNEDY, J, delivered the opinion of the court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ, joined. O'CONNOR, J, filed an opinion concurring in the judgment. SCALIA, J, filed a dissenting opinion, in which REHNQUIST, CJ, and THOMAS, J, filed a dissenting opinion.

444 45 Eur Ct HR (Ser A) (1981).

445 142 Eur Ct HR (Ser A) (1988) : [1983] IESC 3 : [1984] IR 36. The European Court of Human Rights again held in *Modinos v Cyprus,* 259 Eur Ct HR (Ser A) (1993) that such a law violated the right to privacy.

446 See Kounteya Sinha @Timesgroup.com, Times of India-Times Global p 7, Times of India dated 23 May 2015.

447 No 488/1992 CCPR/C/ 50/D/488 /1992, 31 March 1994.

448 478 US 186 : 106 S Ct 2841 : 92 L Ed 2d 140 : 1986 US Lexis 123, See KD Gaur, *Criminal Law: Cases and Materials*, 5th Edn 2008, pp 591, 592 for facts and judgment of the case.

449 39 US 653 (2003) : 539 US 558 : 156 LEd 2d 508 (2003) : 2003 US Lexis 5013.

450 *Leung TC William Roy v Secretary for Justice*, [2005] 3 HKLRD 657 (CFI) : [2006] 4 HKLRD 211 (CA) Dated 24 August, 2005 and 20 September 2006.

451 (2005) FJHC 500, Criminal Appeal Case No HAA 85 & 86 of 2005, decided on 26 August 2005.

452 Supreme Court of Nepal, Division Bench, Initial Note of the Decision 21 December 2007.

453 In *The National Coalition for Gay and Lesbian Equality v The Minister of Justice,* decided by the constitutional court of South Africa on 9 October 1998.

454 5th Amendment to US *Constitution* "No person shall be deprived of .... property without due process of law .... ..".

455 See *Bolling v Sharpe,* 347 US 499 (500) : 74 S Ct 693 : 98 L Ed 884 : 1954 US Lexis 2095; *Adarand Constructors, Inc v Pena,* 515 US 200 (217-18) : 115 S Ct 2097 : 132 L Ed 2d 158 (1995) : 1995 US Lexis 4037.

456 *Re*: *Marriage Cases*, 43 Cal 4th 757 : 76 Cal Rptr 3d 683 : 183 P 3d 384.

457 517 US 620 : 116 S Ct 1620 : 134 L Ed 2d 855 : (1996) 671 F 3d 1076 (1095).

458 671 R 3d at 1083 (1084).

459 Article III, section 2, clause 1 subjects of jurisdictions "The judicial power shall extend to all cases, in Law and equity arising under the *Constitution*, the Law of the United States…"

460 133 S Ct 786 (2012) : 184 L Ed 2d 526 (2012) : 81 USLW 3322.

461 Justice Michael D Kirby, *Sexual Orientation and Gender Identity- A New Province of Law for India*, Tagore Law Lectures delivered at University of Calcutta, Universal Law Partnership Co Ltd P111 (2015).

462 Koreen Leigh and Asa Pitch, *The Wall Street Journal,* 14 June 2016, A8 A 15.

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9.1 Introduction

Part II Specific Offences

9 CRIME AGAINST WOMEN

9.1 Introduction

The global campaign for elimination of violence against women in the recent years indicates the enormity as well as the seriousness of the atrocities committed against women that are being witnessed world over. Changes in lifestyle, living standards, disparity in economic growth due to urbanisation, and changes in social ethos and lack of concern for moral values, contribute to more violent tendencies towards women, which have resulted in an increase in crimes against women.[11] Such incidents are a matter of serious concern and its containment is a necessity, so that the women of India attain their rightful share and can live with dignity, honour, freedom and peace. A careful perusal of various provisions relating to crimes against women would reveal that in spite of a number of laws passed from time to time to protect and safeguard the interests of women, they continue to suffer in various walks of life due to lack of awareness of their rights, illiteracy, oppressive practices, customs and male domination etc., and become victims of exploitation.

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11 Tribune, 15 April 1999, p 1; The Times of India, 18 December 2002, p 12; Hindustan Times, Delhi Edition, 24 October 2000; See AS Anand, *Justice for Women: Concerns and Expressions,* 2002, pp 1-13. Rape takes place once in every 54 minutes, eve-teasing every 51 minutes, molestation once in every 26 minutes, and dowry death every 1000 minutes. In Delhi alone, during 2000, up to 30 September 2000, 350 rape cases were reported.

9.2 Crimes against Women—Legal Provisions

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

9 CRIME AGAINST WOMEN

9.2 Crimes against Women—Legal Provisions

Although women may be victims of many crime under *Indian Penal Code, 1860* such as “murder”, “robbery”, “cheating”, etc., but only those crimes, which are directed specifically against women, are characterised as “crimes against women”. In order to curb ever growing crimes relating to women a number of laws have been enacted and amendments made in existing laws from time to time to curb such crimes effectively. The laws may broadly be classified into two categories, *viz*:

(1) Crimes under *IPC, 1860*;[2]

(2) Crimes under the special statutes to root out the evil social practices, and exploitation of women, such as dowry, immoral trafficking of women; indecent representation of women, forcing women to commit suicide, the practice of *sati,* etc.[3]

9.2.1 Crimes under Indian Penal Code, 1860

(i) Rape and custodial rape (sections 375, 376, 376A, 376DA, 376B, 376C, 376D, 376AB and 376E);

(ii) Attempt to Commit Rape (*sections 376*/*511 IPC*)

(iii) Kidnapping and abduction of women for different purposes (sections 363, 364A, 365 to 369 and 373 of *IPC*);

(iv) Murder for dowry; dowry death, or their attempts (*sections 302*, *304-B* and *307* of *IPC*);

(v) Torture—both mental and physical (*section 498A of IPC*);

(vi) Molestation (*section 354 of IPC*);

(vi) Sexual harassment and Insults to the modesty of women [eve teasing] (*section 509 of IPC*); and

(vii) Importation of girls (up to 21 years of age) (*section 366B of IPC*).

9.2.2 Crimes under Special Laws

Provisions of law relating to women have been reviewed periodically and amendments carried out to keep pace with the emerging needs. Some of the Acts which have special provisions to safeguard women and their interests are:

(1) *Commission of Sati (Prevention) Act 1987*;

(2) *Dowry (Prohibition) Act 1961*;

(3) *Immoral Traffic (Prevention) Act 1956*;

(4) *Indecent Representation of Women (Prohibition) Act 1986*;

(5) Child Marriage Restraint (Amendment) Act 1929 (Repealed).

(6) *Protection of Women from Domestic Violence Act 2005*.[4]

9.2.3 Reported Incidents of Crimes against Women

An idea about the magnitude of crime against women can be accessed from the All India figure for 7 years period starting from 2009 to 2015 published in the National Record Bureau. A total of 3,77,394 crimes against women were reported in the country during 2015 as compared to 3,37,922 and head-wise incidents of crime against women in 2009 to 2016 has been given in below table of Crime in India, 2016. Delhi and Bangalore are at the top 13,803 and 5,128 respectively.

Table 1

Proportion of crime against women (*IPC*) towards total *IPC* crimes

Sl. No.	Year	Total *IPC* crimes	Crime Against women (*IPC* cases)	Percentage to total *IPC* crimes
1.	2009	21,21,345	2,03,804	9.2
2.	2010	22,24,831	2,13,585	9.6
3.	2011	23,25,575	2,19,142	9.4
4.	2012	23,87,188	2,44,270	10.2
5.	2013	26,47,722	2,95,896	11.2
6.	2014*	28,51,563	3,25,327	11.4%
7.	2015*	29,49,400	3,14,575	10.7%
8.	2016*	29,75,711	3,38,954	9.5%

Table 2

Crime head-wise incidents of crime against women during 2009-2016 and percentage variation in 2016 over 2015[5]

9.2 Crimes against Women—Legal Provisions

Sl. No.	Crime Head	Year								Percentage variation in 2015 over 2014
		2009	2010	2011	2012	2013	2014	2015	2016	
1.	Rape (*s 376 IPC*)	21,397	22,172	24,206	24,923	33,707	36,735	34651	38947	-5.7
2	Kidnapping and Abduction	25,741	29,795	35,565	38,268	51,881	57,311	59,277	88008	3.4
3.	Abetment to suicide of women						3734	4060	4466	8.7
4.	Dowry Death (section 302/304)	8,383	8,391	8,618	8,233	8,083	8,455	7.634	7628	1.2
5.	Cruelty by husband or his relative (section 498-A)	89,546	94,041	99,135	1,06,527	1,18,866	1,22,877	1,13,403	1,10,378	-7.7
6.	Assault on women with intent to outrage her modesty's (*section 354 IPC*)	38,711	40,613	42,968	45,351	70,739	82,235	82,422	84,746	0.2
7.	Insult to the modesty of women (*section 509 IPC*)	11,009	9,961	8,570	9,173	12,589	9,735	8,685	36767 cases for trial	-10.8
8.	Importation of girl from foreign country (*section 366-*	48	36	80	59	31	13	6		-53.8

9.2 Crimes against Women—Legal Provisions

Sl. No.	Crime Head	Year								Percentage variation in 2015 over 2014
	B IPC)									
A.	Total *IPC* crime against women	1,94,832	2,05,009	2,19,142	2,32,528	2,95,896	3,25,327	3,14,575		-3.3
9.	*Protection of children from sexual offences Act 2012*								36,022	Uttar Pradesh 4,954 Maharashtra 4815 Madhya Pradesh 4717
10	Immoral Traffic Act 1956	2,474	2,499	2,435	2,563	2,579	2,070#	2,424	38122 cases trial	17.1
11	Indecent Representation of Women (P) Act 1986	845	895	435	141	362	47	40	759 cases for trial	-14.9
12	*Dowry prohibition Act 1961*	5,650	5,182	6,619	9,038	10,709	10,050	9,894	38122 cases for trial	
13	Kidnapping Abduction								64519	
B.	Total SLL crime against women	8,969	8,576	9,507	11,742	13,650	12,593	12,819		1.8
	Total (A+B)	2,03,804	2,13,585	2,28,649	2,44,270	3,09,546	3,37,922	3,27,394	1342060	-3.1

Out of 19 Metropolitan cities, Delhi being capital of the country has topped the list of crimes against woman. Delhi has reported 13,260 in 2014 and 13,803 cases in 2016. Mumbai comes next to Delhi 3,974 in 2014, 4,819 in 2015 and 5,128 in 2016. Bengaluru bags 3,100 in 2014, 3,109 in 2015 and 3,412 in 2016, respectively.

Reported incidents of crime - 3,27,394 for the year 2015. All India incidents of crime against women are given in enclosed table and map for ready reference. Andhra Pradesh reported maximum number of 32,809 crimes against women and Nagaland with eight is the lowest. In Union Territories, Delhi stands at the top with 12,888 crimes as against Lakshadweep Islands with only three reported cases.

A total of 3,09,546 cases of crime against women (both under *IPC* & SLL) were reported in the year 2015 in the country as compared to 3,37,922 in 2014, thus showing increase of 10,528 during 2014. These crimes are continuously increased in reporting since 2009 to 2014 with 2,03,804 cases in 2009 and 3,37922 cases in 2014 and 2203804 cases in 2009 and 3,37922 cases in 2014.

It may be noted that crime against women is rapidly increasing every year as indicated in Crime Record Bureau it has gone upto 3,38,954. Crime rate from 56.6 in 2014, 54.2 and 55.2 and crime variation in 2014-2015 at 3.% and in 2015-2016 at 2.9.

Table 3

A glimpse of rate of crime against women in states during 2015

States-29, All India – 53.9 and Union Territories 7 - Map is enclosed.

Sl. No.	Name of States	Incidence of crime	Sl. No.	Name of State	Incidence of crime
1.	Andhra Pradesh	62.3%	15.	Punjab	39.7
2.	Assam	148.2	16.	Rajasthan	81.5
3.	Bihar	27.9	17.	Uttar Pradesh	34.8
4.	Jharkhand	40.2	18.	West Bengal	73.4
5.	Goa	39.9	19.	Uttarakhand	28.2
6.	Gujarat	28.5	20.	Jammu and Kashmir	57
7.	Haryana	75.7	21.	Nagaland	8.0
8.	Kerala	53.4	22.	Himachal Pradesh	37.4
9.	Madhya Pradesh	65.5	23	Manipur	20.8
10.	Chhattisgarh	44.8	24	Tripura	68.2
11.	Tamil Nadu	17.0	25	Mizoram	30.9
12.	Maharashtra	54.8	26	Meghalaya	24.5
13.	Karnataka	41.6	27	Arunachal Pradesh	62.1
14.	Odisha	81.9	28	Sikkim	17.8
			29	Telangana	83.1

Union Territories-7

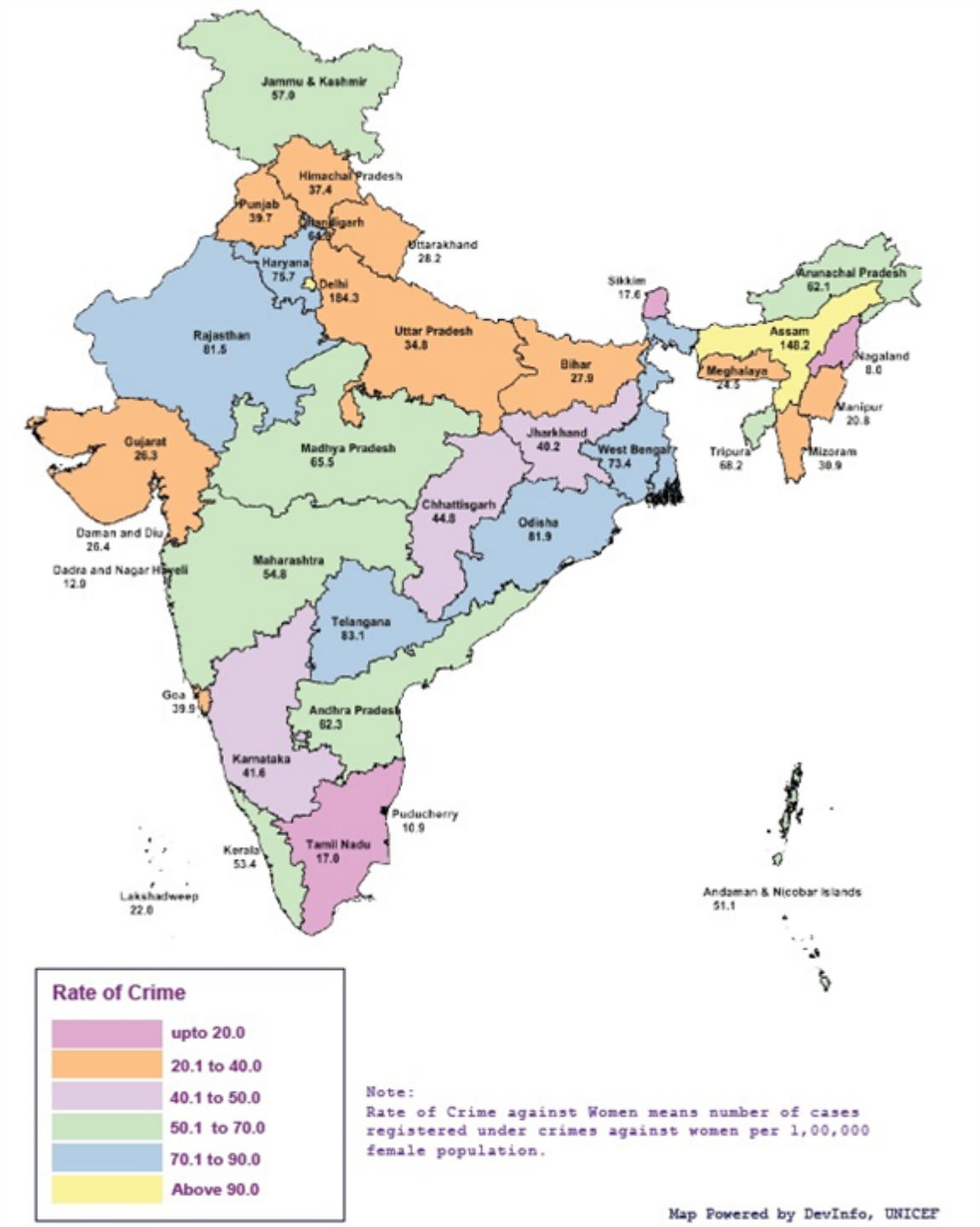
9.2 Crimes against Women—Legal Provisions

Sl. No.	Territory	Incidence of crime	Sl. No.	Territory	Incidence of crime
1.	Delhi	184.3	5.	Daman and Diu	26.4
2.	Lakshadweep	22.0	6.	Puducherry	10.9
3.	Dadar and Nagar Haveli	12.9	7.	Chandigarh	64.8
4.	Andaman and Nicobar	51.1			

RATE OF CRIME AGAINST WOMEN DURING 2015

(All India 53.9)

9.2 Crimes against Women—Legal Provisions



A consolidated statement of Crime Against Woman (*IPC* + SLL) for the years 2014, 2015 and 2016 have been given in Table 3A.1 given below.

9.2 Crimes against Women—Legal Provisions

S. No.	State/UT	2014	2015	2016	Percentage State Share To All-India (2016)	Rank Based on Incidence / % share (2016)	Mid-Year Projected Female Population (in Lakhs) (2016)+	Rate of Total Cognizable Crimes (2016) + +	Rank Based on Crime Rate (2016)
1	2	3	4	5	6	7	8	9	10
STATES:									
1	Andhra Pradesh	16526	15967	16362	4.8	8	257.8	63.5	9
2	Arunachal Pradesh	351	384	367	0.1	27	6.3	58.7	10
3	Assam	19169	23365	20869	6.2	6	158.9	131.3	2
4	Bihar	15393	13904	13400	4.0	12	504.3	26.6	29
5	Chhattisgarh	6301	5783	5947	1.8	16	129.5	45.9	18
6	Goa	508	392	371	0.1	26	9.2	40.5	20
7	Gujarat	10854	7777	8532	2.5	15	297.9	28.7	27
8	Haryana	9010	9511	9839	2.9	14	126.5	77.8	6
9	Himachal Pradesh	1529	1295	1222	0.4	22	34.7	35.2	24
10	Jammu & Kashmir	3327	3366	2850	0.8	20	59.6	47.8	16
11	Jharkhand	6086	6568	5453	1.6	17	164.2	33.2	25
12	Karnataka	14004	12775	14131	4.2	11	308.6	45.8	19
13	Kerala	11451	9767	10034	3.0	13	182.7	54.9	12
14	Madhya Pradesh	28756	24231	26604	7.8	5	373.9	71.1	8
15	Maharashtra	26818	31216	31388	9.3	3	574.5	54.6	13
16	Manipur	337	266	253	0.1	28	12.9	19.6	32

9.2 Crimes against Women—Legal Provisions

S. No.	State/UT	2014	2015	2016	Percentage State Share To All-India (2016)	Rank Based on Incidence / % share (2016)	Mid-Year Projected Female Population (in Lakhs) (2016)+	Rate of Total Cognizable Crimes (2016) + +	Rank Based on Crime Rate (2016)
17	Meghalaya	390	337	372	0.1	25	13.8	27.0	28
18	Mizoram	258	158	120	0.0	30	5.2	23.2	30
19	Nagaland	68	91	105	0.0	32	11.4	9.2	36
20	Odisha	14651	17200	17837	5.3	7	211.0	84.5	3
21	Punjab	5481	5340	5105	1.5	18	134.3	38.0	22
22	Rajasthan	31216	28224	27422	8.1	4	350.1	78.3	5
23	Sikkim	111	53	153	0.0	29	3.0	50.3	15
24	Tamil Nadu	6354	5919	4463	1.3	19	346.7	12.9	34
25	Telangana	14147	15425	15374	4.5	9	183.6	83.7	4
26	Tripura	1618	1267	1013	0.3	23	18.8	53.9	14
27	Uttar Pradesh	38918	35908	49262	14.5	1	1037.3	47.5	17
28	Uttarakhand	1413	1465	1588	0.5	21	52.2	30.4	26
29	West Bengal	38424	33318	32513	9.6	2	456.8	71.2	7
	TOTAL STATE (S)	**323469**	**311272**	**322949**	**95.3**		**6025.6**	**53.6**	
UNION TERRITORIES:									
30	A & N Islands	117	136	108	0.0	31	2.7	40.1	21
31	Chandigarh	434	468	414	0.1	24	7.3	56.7	11
32	D&N Haveli	21	25	28	0.0	35	2.0	14.4	33
33	Daman & Diu	16	29	41	0.0	34	1.1	37.3	23

9.2 Crimes against Women—Legal Provisions

S. No.	State/UT	2014	2015	2016	Percentage State Share To All-India (2016)	Rank Based on Incidence / % share (2016)	Mid-Year Projected Female Population (in Lakhs) (2016)+	Rate of Total Cognizable Crimes (2016) + +	Rank Based on Crime Rate (2016)
34	Delhi UT	15319	17222	15310	4.5	10	95.5	160.4	1
35	Lakshadweep	4	9	9	0.0	36	0.4	21.4	31
36	Puducherry	77	82	95	0.0	33	7.4	12.8	35
	TOTAL UT (S)	**15988**	**17971**	**16005**	**4.7**		**116.4**	**137.6**	
	TOTAL ALL INDIA	**339457**	**329243**	**338954**	**100.0**		**6142.0**	**55.2**	

Note : (i) ++ Crime Rate is calculated as Crime per one lakh of population.

(ii) + Population Source: Registrar General of India estimated population of 2016 based on 2001 Census.

(iii) Rank is based on Incidence (Col. 7) as well as on the Crime Rate (Col. 10). Both should be considered simultaneously.

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2 *"Crime in India: 2005"*, National Crimes Record Bureau, p 241.

3 Specific provisions have been made in statutes to protect and safeguard the interest of women in various spheres so as to provide them economic independence and equality in various walks of life. These include: (i) *Code of Criminal Procedure 1973, section 125*, maintenance of wives, etc; (ii) *Employees State Insurance Act 1948*; (iii) Plantation Labour Act 1951; (iv) *Family Courts Act 1984*; (v) *Special Marriage Act 1954*; (vi) *Hindu Marriage Act 1955*; (vii) *Hindu Succession Act 1956*; (viii) *Contract Labour (Regulation and Abolition) Act 1970*; (ix) *Maternity Benefit Act 1961* (Amended in 1995); (x) *Medical Termination of Pregnancy Act 1971*; (xi) *Equal Remuneration Act 1976*; (xii) Child Marriage Restraint (Amendment) Act 1979; (xiii) *Criminal Law (Amendment) Act 1983*; (xiv) Factories (Amendment) Act 1986.

4 *Protection of Women from Domestic Violence Act 2005*, received the assent of the President of India on 19 September 2005. See KD Gaur, *Textbook on Indian Penal Code*, 6th Edn, 2016 for Commentary on domestic violence pp 1112, 1113.

5 Crime in India, 2016, pp. xix and 83, 163.

9.3 Sexual Harassment at Workplace

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

9 CRIME AGAINST WOMEN

9.3 Sexual Harassment at Workplace

9.3.1 Introduction

Sexual harassment may be defined as sexual misconduct by a supervisor, i.e., superior officer, irrespective of the employer's knowledge of any loss or adverse effects for refusing superior's unwelcome advances.[6] As early as 1993, at the International Labour Organization seminar held at Manila, it was recognised that sexual harassment of women at work place was a form of "gender discrimination" against women. The Supreme Court, in *Vishaka*,[7] has defined sexual harassment as a form of sex discrimination projected:

(i) through unwelcome sexual advances;

(ii) request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implications, particularly when the submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee;

(iii) unreasonably interfering with her work performance; and

(iv) had the effect of creating an intimidating or hostile working environment.

In other words, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

(a) physical contact and advances;

(b) a demand or request for sexual favours;

(c) sexually coloured remarks;

(d) showing pornography;

(e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

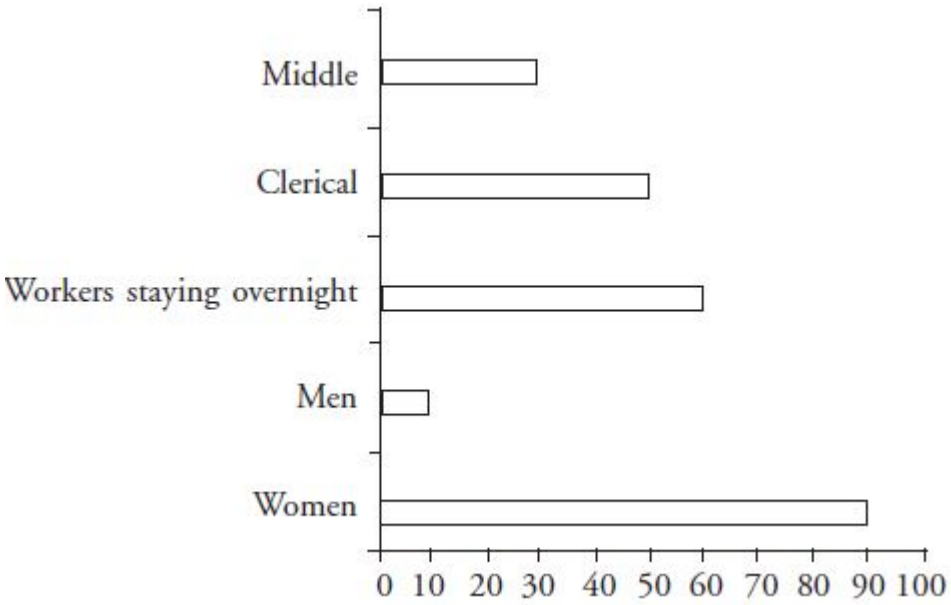
It was further said that sexual harassment of a woman employee at workplace, amounts to violation of the "right to gender equality", and also the "right to life and liberty" —the two most precious fundamental rights guaranteed by *Articles 14*, *19* and *21* of the *Constitution*.

It is found that due to rapid industrialisation, opening of markets and influx of multinationals in the country, a large number of women have entered into the job market. A survey conducted by the Mode Market Research Agency[8] revealed that 90 million women constitute the organised workforce, besides those working in unorganised sectors. Of 335 citizens interviewed in the four major metros — Kolkata, Mumbai, Chennai and Delhi, 63% and 53% respectively felt that discussing sex in the workplace was the most offensive forms of sexual harassment, 49% felt that dirty jokes and putting up "indecent" posters in the office constituted sexual harassment.

The bulk of victims of sexual harassment are women. The survey further reveals that women, particularly those travelling out of town on work, were most vulnerable. It is startling to note that 74% of men in superior positions take

advantage of their status and harass women subordinates. An idea of the gravity of the problem of victims of sexual harassment can be had by the chart given below.

Percentage Most Likely to be Harassed at Work



It may be noted that besides the incidents of sexual harassment, crime against women in general,[9] and eve-teasing etc, are on the increase. A case of eve-teasing at Chennai in which a young 20-year old college student lost her life in 1998 is an eye opener, and indicates the extent to which such crimes are prevalent in our cities.[10]

9.3.2 Eve teasing violates womens' right to live with dignity

Pawan Kumar v State of HP[11]

Pained by the sorrowful fate of a young girl who committed suicide as an outcome of the psychological harassment and continuous eve-teasing by the accused, the Court said that in a civilized society male chauvinism has no room. The right to live with dignity as guaranteed under *Article 21 of the Constitution* cannot be violated by indulging in obnoxious act of eve-teasing.

Eve-teasing is causing harassment to women in educational institutional, public places, parks, railway stations and other public places which only go to show that requisite sense of respect for women has not been socially cultivated, the three-judge bench of Dipak Misra, AM Khanwilkar and MM Shantanagouda, JJ posed that why the women in this country cannot be allowed to live in peace and lead a life that is empowered with a dignity and freedom.

9.3.3 Guidelines to Curb Sexual Harassment

With increasing gender diversity in our workforce and greater proximity of men and women working together, one needs to have a firm policy in the workplace, and since sexual harassment by its very nature is a sensitive issue, it needs to be handled expeditiously. In this connection, the Supreme Court's directive in *Vishaka,*[12] to set up an appropriate complaint mechanism for reprisal of grievances of the employees at workplace and a provision for taking preventive and corrective steps including disciplinary action, transfer of erring employees and criminal prosecution, where conduct of such employees amounts to a specific offence, is important. The employer and other responsible persons at the workplace are under an obligation to prevent and deter sexual harassment.

The Government of India, in pursuance of the Supreme Court's directive in *Vishaka,* has made specific provision in Central Civil Services (Conduct) Rules 1998 prohibiting sexual harassment of the women by the government servants, and issued circulars to ministries/departments to take appropriate action against the delinquent government servants.[13] It is learnt that State Governments and private establishments have also taken necessary steps in this regard. It is a welcome development, and will go a long way in creating a healthy work environment.

Guidelines and Norms Laid Down by the Supreme Court to curb sexual harassment—1997

Vishaka v State of Rajasthan,

AIR 1997 SC 3011 : *(1997) 6 SCC 241*

Per JS Verma, CJI:

The present petition has been brought as a class action by certain social activists and NGOs with the aim of focussing attention towards this societal aberration, and assisting in finding suitable methods for realisation of the true concept of gender equality, and to prevent sexual harassment of working women in all work places through judicial process. The immediate cause to the filing of this writ petition is an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. That incident is the subject-matter of a separate criminal action. The incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate, and the urgency for safeguards by an alternative mechanism in the absence of legislative measures.

Each such incident results in violation of the fundamental rights of “gender equality” and the “right to life and liberty”. It is a clear violation of the rights under *Articles 14*, *15* and *21* of the *Constitution*. One of the logical consequences of such an incident is also the violation of the victim’s fundamental right under *Article 19* (1)(g) to practice any profession or to carry out any occupation, trade or business. Such violations, therefore, attract the remedy under *Article 32* for the enforcement of these fundamental rights of women.

After making a comprehensive survey of the various international conventions and norms formulated to check the evils of sexual harassment at work place which the Government of India has ratified, certain guidelines and norms are laid down for due observance at all work places or other institutions, until a legislation is enacted of purpose for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment. These are as stated below:

1. Duty of the Employer

It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. Definition

Sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

(a) physical contact and advances;

(b) a demand or request for sexual favours;

(c) sexually coloured remarks;

(d) showing pornography;

(e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim’s employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise, such conduct can be humiliating and may constitute a health and safety problem.

3. Preventive Steps

All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment, as defined above at the work place should be notified, published and circulated in appropriate ways.

(b) The rules/regulations of government and public sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers, steps should be taken to include the aforesaid prohibitions in the standing orders under *Industrial Employment (Standing Orders) Act 1946*.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal Proceedings

Where such conduct amounts to a specific offence under the *Indian Penal Code, 1860* or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority, in particular, it should ensure that victims, or witnesses are not victimised or discriminated against while dealing with a complaint of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. Disciplinary Action

Where such conduct amounts to misconduct in employment as denned by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. Complaint Mechanism

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organisation for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee

The complaint mechanism, referred in sub point 6 above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its members should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body, who is familiar with the issue of sexual harassment. The Complaints Committee must make an annual report to the government department concerned of the complaints and action taken by them.

8. Workers' Initiative

Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in employer-employee meetings.

9. Awareness

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines.

10. Third Party Harassment

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

The above guidelines and norms would be strictly observed in all work places both private and public, for the preservation and enforcement of right to gender equality of working women.

Order accordingly.

Sexual harassment violates rights to gender equality—Supreme Court—1999

Apparel Export Promotion Council v AK Chopra[14]

Facts: X, a woman employee of Apparel Export Promotion Council lodged a complaint against the respondent AK Chopra, secretary to the company's chairman, to the director of the company, alleging sexual harassment. A departmental inquiry was set up to investigate the matter. The inquiry officer, after considering the documentary and oral evidence and circumstances of the case, arrived at the conclusion that the respondent had acted against moral sanctions and found that *X* was molested by the respondent. The disciplinary authority, agreeing with the report of the inquiry officer imposed the penalty of removing him from service with immediate effect.

AK Chopra moved the Delhi High Court against the dismissal order, which, while entertaining the petition noted that the petitioner "tried to molest" and "not that the petitioner had in fact molested the complainant". The High Court disposed of the petition with a direction to reinstate him without the benefits of back wages.

The Apex Court reversed the Delhi High Court order and criticised it for ignoring the ground realities and the fact that the conduct of the respondent towards his junior female employee was against moral sanctions and decency. The Bench held that "the evidence on record clearly established that the respondent caused sexual harassment to *X* (aggrieved women-employee) taking advantage of his superior position in the appellant council".

Reduction of punishment in a case like this is bound to have a demoralising effect on the women employees. It found no justification for the High Court to interfere with the punishment imposed by the departmental authorities. The court said that the observation made by the High Court to the effect that since the respondent did not "actually molest" *X* but only "tried to molest" her and, therefore, his removal from service was not warranted, rebel against realism and lose their sanctity and credibility.

The Supreme Court held that there was no justification for the High Court to interfere with the punishment imposed by the departmental authorities. The act of the respondent was unbecoming of good conduct and behaviour expected from a superior officer and undoubtedly amounted to sexual harassment. As held in the case of *Vishaka,*[15] their Lordships said:

> Sexual harassment is a form of sex discrimination projected through unwelcomed sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating the intimidating or hostile working environment for her.

The court further stated:

> …each incident of sexual harassment, at the place of work, results in violation of the fundamental right to life and liberty—the two most precious fundamental rights guaranteed by the *Constitution of India*. As early as in 1993 at the ILO Seminar held at Manila, it was recognised that sexual harassment of women at work place was a form of 'gender discrimination against woman.

With due respect, it is submitted that the verdict of the Apex court in the instant case perhaps is too harsh considering the fact that the respondent was ashamed of his behaviour and was willing to tender an unqualified apology to Miss "X". Taking job of a person in this age of economic hardship and unemployment is bound to have adverse effect not only on the respondent, but on the innocent family members who are in no way responsible for the behaviour of the accused. A lesser punishment of withholding a few increments and demoting in rank might have served the ends of justice. Justice should be commensurate with the crime and must have a reformative approach.

Nine out of ten sexual harassment cases reported has been proved true. As of mid October 2018, more than 100 people have been called out in India's unfolding #MeToo movement. In US, where the movement on twitter started last year, more than 900 people have been named till October 2018. While many have questioned whether the problem is as widespread as is being claimed, analysis of the data suggests that this could actually be the tip of the

iceberg, as claimed by proponents. On an average, in the past three years, every hour has witnessed three cases of sexual harassment reported to the police. It has been observed that because of the social stigma of victim-shaming, a large majority of cases often go unreported. A 2018 survey by Stop Street Harassment (SSH) a non-profit, organization shows that 81% of women and 43% of men reported experiencing some form of sexual harassment and/or assault in their lifetime. The National Sexual Violence Resource Centre (NSVRC), another American organisation, estimates that 63% of sexual assaults are never reported to police.[16]

Sexual harassment case reported during 2014, 2015 and 2016 are given below as reported in National Crime Record Bureau 21, 938, 24,041 and 27,344 respectively.

As stated 60 cases were reported every day in 2014, 66 cases in 2015 and 75 cases in 2016 respectively.

A study of eight US communities said that the prevalence of false reporting is between 2% and 10%. The data for India shows that false cases constituted 4% of sexual harassment cases disposed of by police in 2016. This indicates that nine out of every 10 complaints of sexual harassment are true.

False cases are a miniscule fraction

Year	Total disposed of by police	False Cases	False cases as % of total
2016	26,430	1053	4.0
2015	21,825	1011	4.6
2014	19,633	766	3.9

9.3.4 United States Supreme Court on Sexual Harassment

The United States Supreme Court's rulings in *Burlington Industries Inc v Ellerth*,[17] and *Faragher v City of Boca Raton*,[18] set at rest the controversy that had grown in 12 years since the justices first ruled that sexual harassment was a form of employment discrimination.[19]

The Civil Rights Act of 1964, title VII prohibits sex discrimination in workplaces. The court said:

(a) An employer can be held liable for sexual misconduct by supervisors, whether or not the employer knew about it; and whether or not the employee suffered adverse job consequences for refusing a supervisor's unwelcome advances.

(b) An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment.[20]

Sexual harassment in educational institutions: Private damage action lies against the school—US Supreme Court—1999

Davis v Monroe County Board of Education[21]

Per O'Connor, J:

The petitioner brought a suit against the Monroe County Board of Education and other defendants, alleging that her fifth-grade daughter had been the victim of sexual harassment by another student in her class. Among petitioner's claims was a claim for monetary and injunctive relief from school officials under Title IX of Education Amendments of 1972.[22]

Petitioner's minor daughter, LaShonda, was allegedly the victim of a prolonged pattern of sexual harassment by one of her fifth-grade classmates ... According to petitioner's complaint, the harassment began in December 1992, when the classmate, GF, attempted to touch LaShonda's breasts and genital area and made vulgar statements.

...Similar conduct allegedly occurred on or about 4 January and 20 January 1993. LaShonda reported each of these

incidents to her mother and her class teacher, Diane Fort. Petitioner, in turn, also contacted Fort, who allegedly assured petitioner that the school principal, Bill Querry, had been informed of the incidents.

The complaint alleged that the board is a recipient of federal funding for purposes of Title DC, that "the persistent sexual advances and harassment by the student GF upon LaShonda interfered with her ability to attend school and perform her studies and activities", and that "the deliberate indifference by the defendants to the unwelcome sexual advances of a student upon LaShondaa created an intimidating, hostile, offensive and abusive school environment in violation of Title IX."

Petitioner contends that, notwithstanding these reports, no disciplinary action was taken against the classmate.

The district court dismissed petitioner's Title IX claim on the ground that Title IX provided no basis for liability absent an allegation "that the board or an employee of the board had any role in the harassment". "Student-on-Student" or peer, harassment provides no ground for a private cause of action under the statute. The Court of Appeals for the 11 Circuits, sitting *en banc,* affirmed the same.

In appeal the question was confined as to whether a private damages action lies against the school board in cases of student-on-student harassment. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

...the action would lie, but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programmes or activities. And such an action lies only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.

Circuit Court Judgment reversed, case remanded for further proceeding consistent with this opinion.

9.3.5 France

In France, sexual harassment can be committed not only by a man but also by a woman against a man. For instance, *Articles 222-33* of French Criminal Code states as under

Sexual Harassment: The harassment of another person for the purpose of obtaining favours of a sexual nature is punished by one year's imprisonment and a fine of Euro 15,000.

In addition to sexual harassment, a person can also be liable for moral harassment as stated in *Articles 222-33* stated below:

"*Moral Harassment:* "Sexual harassment is the act of repeatedly subjecting a person to unwelcome verbal or physical conduct of a sexual nature when such conduct either compromises the victim's dignity through demeaning or humiliating words or actions, or creates an intimidating, hostile or offensive environment for the victim. Any form of intense pressure, even if not repeated, with the actual or perceived goal of obtaining sexual favours, whether for the offender or for a third party, is also considered sexual harassment. Sexual harassment is punishable by two years of imprisonment and a fine of Euro 30,000."

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6 *Apparel Export Promotion Council v AK Chopra,* AIR 1999 SC 625 : (1999) 1 SCC 759.

7 *Vishaka v State of Rajasthan,* AIR 1977 SC 3011 : (1997) 6 SCC 241. The petition was brought by as a class action by certain social activists with the aim of focusing attention towards the societal aberration with a view to find out solutions to prevent sexual harassment in the absence of legislative measures. The petition relates to an incident of an alleged brutal gang rape of a social worker in a village of Rajasthan.

8 Saturday Times, Lucknow Edition, 1 August 1998, p 1.

9 *Rupan Deol Bajaj v KPS Gill,* AIR 1996 SC 309 : (1995) 6 SCC 194; offences relating to modesty of women under *sections 354* and *509*, *IPC* not being trivial, *section 95, IPC* is not attracted. Alleged act of top most official of state police in slapping senior lady officer (IAS) on her posterior in the presence of gathering of elite of society amounts to outraging the modesty of the lady officer within *sections 354* and *509*, *IPC*.

10 The Sunday Times, 26 July 1998, p 1. A student of management course at Ethiraj College, Chennai was assaulted by an auto rickshaw-borne gang of eve-teasers on 16 July 1998, while she was on her way home from college. It was alleged that a gang of eve-teasers chased her in an auto and tried to grab her, due to which she lost her balance and fell on the road, sustaining head injuries and later succumbed to her injuries. The extent to which eve-teasing is prevalent in the city of Chennai alone came to light when police cracked down on such offenders arrested more than 160 men in one day alone, majority of whom were college students.

11 *AIR 2017 SC 2459* : *(2017) 7 SCC 780* : 2017 (5) Scale 443, decided on 28 April 2017.

12 *Vishaka v State of Rajasthan, AIR 1997 SC 3011* : *(1997) 6 SCC 241*; *Apparel Export Promotion Council v AK Chopra, AIR 1999 SC 625* : *(1999) 1 SCC 759*. See annexure for text of cases.

13 Department of Personnel and Training, Government of India, Circular No 11013/10/97-Estt (A) d, 13 February 1998.

14 *AIR 1999 SC 625* : *(1999) 1 SCC 759*, per Dr AS Anand CJ and VN Khare, JJ.

15 *Vishaka v State of Rajasthan, (1997) 6 SCC 241* : *AIR 1997 SC 3011*.

16 Times of India, Monday 22 October 2018 p 9. (Pune Edition) Source: NCRB; Research: Atul Thakur, Graphic: Karthic R Iyer.

17 *Burlington Industries Inc v Ellerth,* 524 US 742 (1998) : 141 L Ed 2d 633.

18 *Faragher v City of Boca Raton,* 524 US 775 (1998) : US Lexis 4216.

19 Linda Greenhouse, *"Court Spells out Rules for Finding Sex Harassment"*, New York Times, 27 June 1998, p 1.

20 For an analysis of *Burlington Industries Inc v Ellerth,* 524 US 742 (1998) : 141 L Ed 2d 633 and *Faragher v City of Boca Raton,* 524 US 742 (1998) : 141 L Ed 2d 633, see KD Gaur, *Criminal Law: Cases and Materials*, 4th Edn, LexisNexis Butterworths, 2005, p 553.

21 526 US 629 (1999), O'Connor, J delivered the opinion of the court, in which Stevens, Souter, Ginsburg, and Breyer, JJ joined. Justice Kennedy filed a dissenting opinion, in which Rehnquist, CJ and Scalia and Thomas, JJ joined.

22 Title IX provides that no person in the United States shall, on the basis of sex, be excluded from participation in or be denied the benefits of, or be subjected to discrimination under any education programme or activity receiving federal financial assistance, 20 US Code § 168 1 (a).

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9.4 Male Sexual Harassment

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

9 CRIME AGAINST WOMEN

9.4 Male Sexual Harassment

Men Harassment: In recent years it has been noticed that men are also harassed by girls/women. There are various cases of Rape which are false. When the adults get physical with consent, women still report for Rape Charges. Police would also first arrest men, and then later they would listen what he wants to say. Some of the cases are there when men refuse to marry her, women files false rape cases. Women also blackmail men for money. Supreme Court of late has cautioned the prosecuting agency to go slowly in case of harassment before taking action.

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10.1 Introduction to Chapter XX OF IPC

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

10 OFFENCES RELATING TO MARRIAGE

10.1 Introduction to Chapter XX OF IPC

The *Indian Penal Code, 1860* (*IPC*) in Chapter XX (sections 493 to 498), provides punishment for offences relating to marriage. These offences may be grouped into four categories:

(i) Mock marriages or deceitful marriages (sections 493, 496);

(ii) Bigamy (sections 494, 495);

(iii) Adultery (section 497); and

(iv) Enticing, taking away or detaining a married woman, with criminal intent (section 498).

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10.2 Fraudulent Conduct in Marriage

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

10 OFFENCES RELATING TO MARRIAGE

10.2 Fraudulent Conduct in Marriage

Section 493, IPC reads as under:

493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.—Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

This section is invoked when a man, either married or unmarried, induces a woman to become (as she thinks) his wife, but in reality, she is his concubine. This offence may be committed by a person falsely causing a woman to believe that he is of the same race, creed or religion as herself, and thus inducing her to contract a marriage, which in reality is unlawful, but which according to the law under which she lives, is valid. Suppose a person, half English, half Asiatic by blood, calls himself a Mohammedan or Hindu and by this deception, causes a Mohammedan or a Hindu woman to go through the ceremony of marriage, in a form which she deems valid, and to cohabit with him, he has committed this offence.[1]

10.2.1 Live-in Valid Marriage Relationship

Live—in or marriage like relationship is neither a crime nor a sin though socially unacceptable in India. The decision to marry in not to marry or to have a heterosexual relationship is entirely personal. All Live-in-relationships are not relationships in the nature of marriage.

Indra Sarma v VKV Sarma[2]

Per KS Radhakrishnan, J:

Appellant and respondent were working together in a private company. The respondent, who was working as a Personal Officer of the Company, was a married person having two children and the appellant, aged 33 years, was unmarried. Constant contacts between them developed intimacy and in 1992, appellant left the job from the above mentioned Company and started living with the respondent in a shared household. Appellant's family members, including her father, brother and sister, and also the wife of the respondent, opposed that live-in-relationship. She has also maintained the stand that the respondent, in fact, started a business in her name and that they were earning from that business. After some time, the respondent shifted the business to his residence and continued the business with the help of his son, thereby depriving her right of working and earning. Appellant stated that both of them lived together in a shared household and, due to their relationship, appellant became pregnant on three occasions, though all resulted in abortion. The respondent took a sum of Rs 1,00,000 from the appellant falsely stating that he would buy a land in her name; also took money to start a beauty parlour for his wife; and during the year 2006, took a loan of Rs 2,50,000 from her and had not returned. The respondent, all along, was harassing the appellant by not exposing her as his wife publicly, or permitting to suffix his name after the name of the appellant;

never used to take her anywhere, either to the houses of relatives or friends or functions or accompany her to the hospital or make joint Bank account, execute documents, etc. Respondent's family constantly opposed their live-in relationship and ultimately forced him to leave the company of the appellant and he left the company of the appellant without maintaining her. After being left by the respondent without maintaining the appellant, she filed a criminal case under *section 12 of Protection of Women from Domestic Violence Act 2005* for payment of compensation, damages and maintenance before Additional Chief Metropolitan Magistrate, Bangalore. After carefully examining the facts of the case.

Magistrate found proof that the parties had lived together for a considerable period of time, for about 18 years, and then the respondent left the company of the appellant without maintaining her, Magistrate took the view that the plea of domestic violence had been established, due to the non-maintenance of the appellant and passed the order dated 21 July 2009 directing the respondent to pay an amount of Rs 18,000 per month towards maintenance from the date petition, which was confirmed by the Sessions Court.

Respondent being aggrieved by the judgment of the Courts below awarding compensation to the appellant filed an appeal before the High Court which allowed the appeal and quashed the order of the Courts below. Appellant accordingly came before the Apex Court against the order of the High Court.

The question before the Apex Court was that whether a live-in relationship would amount to a relationship in the nature of marriage falling within the definition of domestic relationship under section 2 (f)[3] of *Protection of Women from Domestic Violence Act 2005* and the disruption of such a relationship by failure to maintain a woman involved in such a relationship amounts to domestic violence within the meaning of section 3[4] of *Domestic Violence Act* 2005.

While upholding the verdict of the High Court and quashing the judgments of the Courts below granting maintenance to the appellant, the Apex Court while dismissing the appeal said that:

> We are of the view that the appellant, having been fully aware of the fact that the respondent was a married person, could not have entered, into a live—in relationship in the nature of marriage. All live-in-relationships are not relationships in the nature of marriage. Appellant and the respondent relationship is, therefore, not a relationship in the nature of marriage because it has no inherent or essential characteristic of a marriage, but a relationship other than in the nature of marriage and the appellant status is lower than the status of a wife and that relationship would not fall within the definition of domestic relationship under *section 2 (f) of Domestic Violence Act* 2005. If we hold that the relationship between the appellant and the respondent is a relationship in the nature of a marriage, we will be doing an injustice to the legally wedded wife and children who opposed that relationship. Consequently, any act, omission or commission or conduct of the respondent in connection with that type of relationship; would not amount to domestic violence under section of *Domestic Violence Act*. (Para 65)

The court, based on the facts, found that the appellant's status was that of a mistress, who is in distress, a survivor of a live-in relationship which is of serious concern, especially when such persons are poor and illiterate, in the event of which vulnerability is more pronounced, which is a societal reality. Children born out of such relationship also suffer most which calls for bringing in remedial measures by the Parliament, through proper legislation. However, the Court restrained itself from giving any relief to the appellant.

With due respect to the Hon'ble Apex Court it is suggested that merely on the ground that payment of maintenance or monetary compensation to the appellant would be at the cost of legally wedded wife and children of the respondent is no ground for depriving the appellant for maintenance who lived together for long 18 years with her. No doubt, the appellant was aware that the respondent was a married person and having children but respondent was also aware of her situation and he intentionally entered into sexual relationship with her for 18 years that deserves protection. The Court suggested for amendment of the definition of *section 2 (f) of Domestic Violence Act* 2005, instead the Court should have interpreted the provisions liberally in view of suffering of woman in this particular case. The legislation must come forward to take care of such type of cases where women are exploited economically and emotionally by unscrupulous men.

10.2.2 Supreme Court - Couple living together will be presumed married

Where a man and woman are proved to have lived together as husband and wife, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of the valid marriage, and not in a state of concubinage – Supreme Court - 2015

Dhannulal v Ganeshram,

2015 (4) Scale 613

The Apex Court said that:

If the married couple is living together as husband and wife, then they would be presumed to be legally married and woman would be eligible to inherit after the death of her partner.

A bench of Justices MY Eqbal and Amitava Roy said continuous cohabitation of a couple would raise the presumption of valid marriage and it would be for the opposite party to prove that they were not legally married.

“It is well settled that the law presumes in favour of marriage and against concubinage, when a man and woman had cohabited together for a long time. However, the presumption can be rebutted by leading unimpeachable evidence. A heavy burden lies on the party who seeks to deprive the relationship of legal origin,” the bench said. The Supreme Court since 2010 has consistently ruled in favour of couples living together as husband and wife, giving the woman the right of wife.

The Supreme Court passed the order in a property dispute where family members contested that their grandfather, who was living with a woman for 20 years after his wife’s death, was not legally wedded to the woman and she was not entitled to inherit the property after the death. They considered that the woman was their grandfather’s mistress.

Despite the woman failing to prove she was legally wedded, the Supreme Court presumed that she was the legal wife after family members admitted that his grandfather had relationship with the woman who was living with them in the joint family.

“where a man and a woman are proved to have lived together as husband and wife, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of valid marriage, and not in state of concubinage”, it said.

In the fact of the case, there is strong presumption in favour of the validity of marriage and the legitimacy of its child for the reason that the relationship is recognized by all the persons concerned, it said.

The Apex Court said that continuous cohabitation as husband and wife and their treatment as such for a number of years might raise the presumption of marriage which could be rebutted only if there were circumstances which destroyed the presumption.

The court said that according to the facts of the case at hand there is strong presumption in favour of validity of marriage and the legitimacy of its child for the reason that the relationship of Chhatrapati and Phoolbasa Bai are recognized by all persons concerned.

The court in support of the contention referred the following cases:

A Dinohamy v WL Balahamy,

AIR 1927 PC 185

In this case, it was held that where a man and woman are proved to have lived together as husband and wife, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of valid marriage, and not in state of concubinage. The court observed as follows:

The parties lived together for twenty years in the same house, and eight children were born to them. The husband during his life recognized, by affectionate provisions, his wife, and children. The evidence of the Registrar of the District shows that for a long course of years the parties were recognized as married citizens and even the family functions and ceremonies, such as, in particular, the receptions of the relations and other guests in the family house by Don Andris and Balahamy as host and hostess-all such functions were conducted on the footing alone that they were man and wife. No evidence whatsoever is afforded of repudiation of this relation by husband or wife or anybody.

Thakur Gokalchand v Parvin Kumari,

AIR 1952 SC 231 : *1952 SCR 825*

The court observed that continuous cohabitation as husband and wife and their treatment as such for number of years may raise the presumption which may be drawn from long-cohabitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the court cannot ignore them.

It is well settled that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for long time. However, the presumption can be rebutted by leading unimpeachable evidence. A heavy burden lies on the party, who seeks to deprive the relationship of legal origin.

In the instant case, instead of adducing unimpeachable evidence by the plaintiff, a plea was taken that the defendant has failed to prove the fact that Phoolbasa Bai was the legally married wife of Chhatrapati. The High Court, therefore, came to a correct conclusion by recording a finding that Phoolbasa Bai was the legally married wife of Chattrapati.

Appeal Dismissed

10.2.3 Live in Partner entitled to maintenance - Apex Court - 2015

In a case, decided on 5 May 2015 the Apex Court held that if a live-in relationship breaks, the man is bound to pay maintenance to the woman and the children born from the relationship.

A bench of Justices Vikramjit Sen and AM Sapre dismissed the petition by a man who claimed that since he was already married before entering into the live-in relationship, his partner could not claim the status of a wife to be legally entitled to maintenance under *Hindu Marriage Act 1955*.

The petition was filed by “Z”, who works in Bollywood, challenging an order of the Bombay High Court, which had held that his live-in partner for nine years and the child were entitled to maintenance after their relationship ended. “Z” argued that he was legally married to another woman for another 49 years, hence his live-in partner was not entitled to maintenance as she was well aware of his marital status.

He said his live-in partner was a “call girl” and alleged that she had decided to stay with him on her own wish since 1986. They lived together for nine years and a child was born to them in 1988.

Justices Sen and Sapre slammed “Z” for referring to his erstwhile live-in partner as a “call girl” and said he was a philanderer/insincere as he was living with another woman despite being married.[5]

Essence of offence under section 493 of the Indian Penal Code, 1860 is deception by a man on a woman to let her believe that she is lawfully married to him, when in fact it is not so—Orissa High Court—1957

Raghunath Padhy v State,

AIR 1957 Ori 198 : (1956) 22 CLT 503 : *1957 Cr LJ 989*

Facts: The petitioner, who was already married, and the prosecutrix entered into some sort of marriage and the

woman was made to believe that they were legally married. However, after sometime time the accused deserted her, and started living with his first wife. This resulted in the initiations of proceedings under *section 493, IPC, 1860* for deceitfully inducing a belief of lawful marriage.

Chief Justice Narasimham held:

To prove deception, it must be conclusively established that the petitioner either dishonestly or fraudulently concealed certain facts, or made a false statement knowing it to be false. If for instance, it could be held that he knew that the ceremonies which the two underwent at Berhampur on 24 October 1951 did not constitute a valid marriage between a Brahmin male and a Brahmin widow, the necessary guilty intention may be inferred. But such an inference does not follow from the proved facts of the case. The petitioner is a youth of about 22 years. If he was going to marry a virgin of his caste it may be reasonably inferred that he must have known that *Homa* and *Saptapadi* are essential requisites for such a marriage. But he was marrying only a widow and, as pointed out in *Mulla's Hindu Law*, 11th Edn, 548, no religious ceremonies are necessary for the marriage of widows. Doubtless some sort of ceremony must be undergone to distinguish a valid marriage from mere concubinage as pointed out in *N Pandayachi v A Animal,* AIR 1938 Rang 59, but it will not be fair to assume that the petitioner must have known that the ceremonies performed at Berhampur did not constitute such a valid marriage. Consequently, the element of deception is wanting in this case.

His subsequent conduct in deserting her and in even repudiating the marriage, though, an important piece of evidence will not suffice by itself to show that at the time when he participated in the ceremonies on 24 October 1951 he intended to deceive her. It must be further established that deception was practised prior to the performance of the ceremonies leading to the marriage. It was, however, urged that after executing the bond the petitioner had promised the woman that he would get it registered and that he failed to fulfil this promise.

Hence, from the mere fact that he made a breach of his promise, it cannot be inferred that from the beginning he had no intention of marrying her at all and just wanted to practise fraud on her by undergoing some sort of bogus ceremony at Berhampur knowing fully well that such a ceremony would not constitute a valid marriage. On the other hand, his conduct in handing over to her a bond and another document (Ext 10) on the date of the marriage clearly admitting that he was taking her as his wedded wife and his participating in some sort of ceremony at Berhampur, would show that till the date of the so called marriage, at any rate, he acted in good faith. His subsequent act of desertion of a pregnant woman however censurable, it may be would not suffice to make him criminally liable.

The proceeding is quashed.

Section 496, IPC, 1860 reads as under:

496. Marriage ceremony fraudulently gone through without lawful marriage.—Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cheating established when the accused wrongly represented himself to be of a higher sub-caste—Calcutta High Court—1937

KC Chakraburty v Emperor,

AIR 1937 Cal 214 : 41 CWN 540 (FB)

Justice Guha stated:

There is no rule of Hindu law which prevents a man and a woman belonging to two sub-castes from entering into a lawful marriage. The shastras dealing with the Hindu law of marriage do not contain any injunction forbidding marriages between persons belonging to different divisions of the same Baruna. The charge against the appellant under *section 496, IPC, 1860* for fraudulently entering into marriage with the complainant's daughter representing himself to be a brahmin of high class or abetment of the same, was not maintainable.

The offence under *section 419, IPC, 1860* cheating by false personation, as charged against the appellants, was established... the accused represented to Surbala Debi that they were Barendra Brahmins although they were not so. They belonged to the sub-caste of Barna Brahmins and Surbala Debi would not have given her daughter in marriage to the appellant but for the representation. The marriage resulted in the ex-communication of Surbala Debi from her own caste... thus causing harm to her in mind and reputation.

To establish a charge under *section 496, IPC, 1860* it is not enough to show that the marriage may be set aside on the ground of fraud or declared a nullity, it is incumbent on the prosecution to go further and prove that the accused knew that there was no valid marriage and he had gone through a show of marriage with a fraudulent or ulterior object in view. There is no such evidence adduced by the prosecution in this case.

The conviction under section 109 read with section 496 and section 496 are set aside, while the convictions... under *section 419* read with *section 34*, *IPC* are affirmed.

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1 Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, 1998, pp 2335. *Morgan and Macpherson's Penal Code*, p 432. See *Bodhisattwa Gautam v Subhra Chakraborty,* *AIR 1996 SC 922* : *(1996) 1 SCC 490*.

2 Bench: KS Radhakrishnan, Pinaki Chandra Ghosh decided on 26 November 2013, *AIR 2014 SC 309* : 2013 (14) Scale 448.

3 Section 2 (1) Protection of Women for *Domestic Violence Act* 2005. "Domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a house hold when they are related by consanguinity, marriage or through a relationship in the nature of a marriage, adoption or members living together as joint family.

4 Section 3 of Protection of Women for *Domestic Violence Act* 2005 gives definition of domestic violence in clause (a), (b), (c) and (d) and in Explanation (i), (ii), (iii) and (iv) explains as to when the act of commission and omission on the part of respondent would amount to domestic violence.

5 Times of India dated 6 May 2015 at p 10 (Pune Edn).

10.3 Bigamy

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

10 OFFENCES RELATING TO MARRIAGE

10.3 Bigamy

Section 494, IPC, 1860 reads as under:

494. Marrying again during lifetime of husband or wife.—Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

495. Same offence with concealment of former marriage from person with whom subsequent marriage is contracted.—Whoever commits the offence defined in the last preceding section, having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

The scope of this section is comprehensive and it is applicable to members of all communities living in India, for instance, Hindus,[6] Christians,[7] Parsis,[8] and Muslim women, except Mohammedan males, who may marry and have up to four wives at a time according to the Muslim Personal Law.

To avoid the hardships in genuine cases, *section 494, IPC, 1860* has made two exceptions when bigamy is not punishable, *viz*;

(1) if a person marries after the first marriage has been declared void by a court;[9] or

(2) the former spouse has been continuously absent for seven years and has been unheard of by the other party; or

(3) a valid divorce has taken place between husband and wife according to the provision of law.

Section 495 is an aggravated form of the offence of bigamy. Where there is concealment of the fact of a former marriage from the person with whom the subsequent marriage is contracted, the punishment under section 495 may extend up to 10 years of imprisonment and fine.

To prove bigamy the marriage must have been celebrated with proper form to make it a valid marriage—Supreme Court—1965

Bhaurao Shankar Lokhande v State of Maharashtra,

AIR 1965 SC 1564 : [1965] 2 SCR 837

Justice Raghubar Dayal held:

Bhaurao Shankar Lokhande, appellant 1, was married to the complainant Indubai in about 1956. He married Kamlabai in February 1962, during the lifetime of Indubai. Deorao Shanker Lokhande, appellant 2, is the brother of the first appellant. Appellant 1 was convicted for bigamy under *section 494, IPC, 1860* and appellant 2 under *section 494* read with *section 114*, *IPC*. Their appeal to the sessions judge was dismissed. Revision to the High Court also failed. They have preferred this appeal.

The only contention raised for the appellants is that in law it was necessary for the prosecution to establish that the alleged second marriage of the appellant 1 with Kamlabai in 1962 had been duly performed in accordance with the religious rites applicable to the form of marriage gone through.

...*Section 5 of Hindu Marriage Act 1955* provides that a marriage may be solemnised between any two Hindus if the conditions mentioned in that section are fulfilled and one of the conditions is that neither party has a spouse living at the time of the marriage.

Section 17 of Hindu Marriage Act 1955 provides that any marriage between two Hindus solemnised after the commencement of the Act is void if at the date of such marriage either party had a husband or wife living, and that the provisions of *sections 494* and *495*, *IPC, 1860* shall apply accordingly.

The word “solemnise” means, in connection with a marriage, “to celebrate the marriage with proper ceremonies and in due form”, according to the *Shorter Oxford Dictionary.* It followed, therefore, that unless the marriage is celebrated or performed with proper ceremonies and in due form, it cannot be said to be “solemnised”. It is, therefore, essential for the purposes of section 17 of the Act, that the marriage to which *section 494, IPC* applies, on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make the marriage as one prescribed by law or approved by any established customs.

The essential ceremonies for a valid marriage are:

(1) invocation before the sacred fire; and

(2) *Saptapadi,* that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire.

Since these two essential ceremonies were not performed when appellant 1 married Kamlabai the marriage between the appellant and Kamlabai does not come within the expression “solemnised marriage occurring in section 17 of the Act” and consequently does not come within the mischief of *section 494, IPC* even though the first wife of appellant 1 was living when he married Kamlabai in February 1962.

The convictions of appellants 1 and 2 under *section 494, IPC, 1860* and *section 494* read with *section 114*, *IPC, 1860* are set aside.

The appeal is allowed.

Conversion of religion will not ipso facto dissolve marriage and exempt the convict from the charge of bigamy—section 494 of Indian Penal Code, 1860— Supreme Court—1995

Sarla Mudgal v UOI,

AIR 1995 SC 1531 : (1995) 3 SCC 635

Section 494, IPC, 1860: Second marriage of a Hindu husband after his conversion to Islam is a void marriage in terms of *section 494, IPC, 1860* and is also in violation of the principles of rules of natural justice.

The present four petitions under *Article 32 of the Constitution* related to the legality of contracting a second marriage by a Hindu husband after embracing Islam.[10] The common questions for consideration before the Supreme Court were:

(1) Can a Hindu husband, married under Hindu law, solemnise a second marriage by embracing Islam?

(2) Would such a marriage, without the first marriage being dissolved under law, be a valid marriage *qua* the first wife who continues to be a Hindu?

(3) Would the apostate (convert) husband be guilty of the offence under section 494, the *Indian Penal Code 1860*?

After examining a number of cases[11] in which one of the partners, either husband or wife, after renouncing their original religion, embraced another faith and contracted a second marriage, the court held:

> ...A marriage celebrated under a particular personal law cannot be dissolved by the application of another personal law to which one of the spouses converts and the other refuses to do so. Where a marriage takes place under Hindu Law, the parties acquire a status and certain rights by the marriage itself under the law governing the *Hindu marriage* and if one of the parties is allowed to dissolve the marriage by adopting and enforcing the new personal law, it would then amount to destroying the existing rights of the other spouse who continues to be Hindu. We therefore, hold that under Hindu personal law as it existed prior to its codification in 1955, a *Hindu marriage* continued to subsist even after one of the spouses converted to Islam. There was no automatic dissolution of the marriage.

As regards the plea that having embraced Islam, one can have four wives irrespective of the fact that his first wife continues to be Hindu, their Lordships rightly held that such an argument is untenable in a democracy. The court held:

> The modern Hindu law strictly enforces monogamy. A marriage performed under the *Hindu Marriage Act 1955* cannot be dissolved except on the grounds available under section 13[12] of the Act. In that situation, parties who have solemnised the marriage under the Act remain married even when the husband embraces Islam in pursuit of another wife. A second marriage by an apostate (convert) under the shelter of conversion to Islam would nevertheless be a marriage in violation of the provisions of the Act by which he would be continuing to be governed so far as his first marriage under the Act is concerned despite his conversion to Islam. The second marriage of an apostate would therefore, be illegal marriage *qua* his wife who married him under the act and continues to be a Hindu. Between the apostate and his Hindu wife, the second marriage is in violation of the provisions of the Act and as such would be *non est.*

The court further held:

> Conversion to Islam and marrying again would not, by itself, dissolve the *Hindu marriage* under the Act. The second marriage by a convert would therefore be in violation of the Act and as such void in terms of *section 494, IPC*. Any act which is in violation of the mandatory provisions of law is per se void. The real reason for the voidness of the second marriage is the subsisting of the first marriage, which is not dissolved even by the conversion of the husband. It would be giving a go-by to the substance of the matter and acting against the spirit of the statute if the second marriage of the convert is held to be legal.

As regards the contention that a convert to Islam is governed by Muslim personal law and not by Hindu personal law, the court observed:

> A matrimonial dispute between a convert to Islam and his or her non-Muslim spouse is obviously not a dispute 'where the parties are Muslims' and therefore, the rule of decisions in such a case was or is not required to be the Muslim personal law. In such cases the court shall act and the judge should decide according to Justice, equity and good conscience. The second marriage of a Hindu husband after embracing Islam being violative of justice, equity and good conscience would be void and attract the provisions of *section 494, IPC*.

With regard to the applicability of *section 494, IPC, 1860*, the court said that since all the ingredients[13] of the section are satisfied in case of a Hindu husband, who marries for the second time after conversion to Islam, the said marriage is void by reason of its taking place during the life time of the first wife, and so the accused is liable for bigamy under *section 494, IPC, 1860*.

The court, while allowing the petitions, asked the Government of India through the Prime Minister to have a fresh look at *Article 44 of the Constitution* and endeavour to secure for the citizens a uniform civil code throughout the territory of India *vide* constitutional mandate under *Article 44*.

The court's directive for a uniform civil code evoked a lot of resentment amongst the Muslims; and finally the government succumbed to the pressure of fundamentalists.

The petition was allowed.

A Hindu contracting a second marriage after embracing Islam is guilty of bigamy—section 494 of Indian Penal Code, 1860—Supreme Court—2000

Lily Thomas v UOI,

AIR 2000 SC 1650 : (2000) 6 SCC 224 : 2000 Cr LJ 2433 : 2000 (4) Scale 176

Justice Sethi observed:

The judgment in *Sarla Mudgal's* case,[14] was sought to be reviewed, set aside, modified and quashed by way of the present review petition and writ petitions filed by various persons, and Jamiat-Ulema Hind and another.[15] It was contended that the aforesaid judgment was contrary to the fundamental right to life and liberty and right to freedom of religion as enshrined in *Articles 20*, *21*, *25* and *26* of the *Constitution*.

However, the court refused to change its opinion and held that review petition was without any substance and was liable to be dismissed.

Affirming its earlier judgment, the court observed that the change of religion did not dissolve the marriage performed under *Hindu Marriage Act 1955*. A second marriage during the lifetime of the spouse would be void under sections 11[16] and 17[17] of *Hindu Marriage Act 1955* besides being an offence of bigamy under section 494, the *Indian Penal Code, 1860*.

The court held that the contention of the petitioner that the judgment in the *Sarla Mudgal* case, amounts to violation of the freedom of conscience and free profession, practice and propagation of religion as guaranteed under *Articles 25* and *26*[18] of the *Constitution*, was far-fetched and was artificially carved out by such persons who were alleged to have violated the law by attempting to cloak themselves under the protective fundamental right guaranteed under *Article 25 of the Constitution*. The court said:

> The second marriage solemnised by a Hindu during the subsistence of first marriage is an offence punishable under the penal law. Freedom guaranteed under *Article 25 of the Constitution* is such freedom which does not encroach upon a similar freedom of the other persons. Under the constitutional scheme, every person has a fundamental right not merely to entertain the religious belief of his choice but also to exhibit his belief and ideas in such a manner which does not infringe the religious right and personal freedom of others.[19]

As regard the pleas that making a convert Hindu to Islam liable for bigamy under *section 494, IPC, 1860* would be against Islam which permits polygamy, the Apex Court observed that such a plea demonstrates the ignorance of the petitioners about tenets of Islam and its teachings. The court said:

> The word "Islam" means "peace and submission". In its religious connotation it is understood as "submission to the will of God. Muslim law as traditionally interpreted and applied in India, permits more than one marriage during the subsistence of one and another though capacity to do justice between co-wives in law is condition precedent. Even under the Muslim law plurality of marriage is not unconditionally conferred upon the husband. It would, therefore be, doing injustice to Islamic law to urge that the convert is entitled to practice bigamy notwithstanding the continuance of his marriage under the law to which he belonged before conversion. The violators of law who have contracted the second marriage cannot be permitted to urge that such marriage should not be made the subject matter of prosecution under the general penal law prevalent in the country. The progressive outlook and winder approach of Islamic law cannot be permitted to be squeezed and narrowed by unscrupulous litigants apparently found to be guilty of the offence under the law to which they belonged before their alleged conversion... The Islam which is pious, progressive and respected religion cannot be given a narrow concept

> as has been tried to be done by the alleged violators of law.[20]

The court further held:

> If the first marriage was solemnised under *Hindu Marriage Act*, the "husband" or the "wife", by mere conversion to another religion, cannot bring to an end the marital ties already established on account of a valid marriage having being performed between them. So long as that marriage subsists, another marriage cannot be performed, not even under any other personal law, and on such marriage being performed, the person would be liable to be prosecuted for the offence under *section 494, IPC*.

Referring to the prayer made by the complainant Sushmita Ghosh that the direction may be issued restraining respondent no 3 GC Ghosh (now Mohd Karir Ghazi) from entering into any marriage with Vinita Gupta or any other woman during the subsistence of his marriage with the petitioner, the court said:

> Conversion to "Islam" was not the result of exercise of the right of freedom of conscience, but was feigned, subject to what is ultimately held by the trial court where GC Ghosh is facing the criminal trial to get rid of his first wife, Sushmita Ghosh and to marry a second wife. In order to avoid the clutches of *section 17 of Hindu Marriage Act 1955*[21], if a person renounces his "Hindu" religion and converts to another religion and marries a second time, what would be the effect on his criminal liability is the question, which may now be considered.

Since, under *Hindu Marriage Act*, a bigamous marriage is prohibited and has been constituted as an offence under section 17 of the Act, any marriage solemnised by the husband during the subsistence of that marriage, in spite of his conversion to another religion, would be an offence triable under *section 17 of Hindu Marriage Act*, read with *section 494, IPC*. Since taking of cognizance of the offence under section 494 is limited to the complaint made by the persons specified in *section 198 of the Code of Criminal Procedure*,[22] it is obvious that the person making the complaint would have to decide in terms of the personal law applicable to the complainant and the respondent (accused) as mere conversion does not dissolve the marriage automatically and they continue to be "husband and wife".

The position under the Mohammedan law would be different as, in spite of the first marriage, a second marriage can be contracted by the husband, subject to such religious restrictions. This is the vital difference between Mohammedan law and other personal laws. Prosecution under section 494 in respect of a second marriage under Mohammedan law can be avoided only if the first marriage was also under the Mohammedan law and not if the first marriage was under any other personal law where there was a prohibition on contracting a second marriage in the lifetime of the spouse. Conversion in the instant case is simply to re-marry and the person has no faith in Islam (changed religion).

Per Saghir Ahmad J:

...Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation, as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution. Under Hindu Law, marriage is a sacrament. Both have to be preserved.

The progressive outlook and wider approach of Islamic Law cannot be permitted to be squeezed and narrowed by unscrupulous litigants, apparently indulging in sensual lust sought to be quenched by illegal means, who apparently are found to be guilty of the commission of the offence under the law to which they belonged before their alleged conversion. It is nobody's case that any such convertee has been deprived of practising any other religious right of the attainment of spiritual goals. The Islam which is pious, progressive and respected religion with rational outlook cannot be given a narrow concept as has been tried to be done by the alleged violators of law.

What we are considering is the effect of second marriage *qua* the first marriage, which subsists inspite of conversion of the husband to Islam, for the limited purpose of ascertaining his criminal liability under *section 17 of the Hindu Marriage Act* read with *section 494, IPC, 1860*.

Rejecting the review petition as being without any substance the court affirmed its earlier judgment of *Sarla Mudgal*.

Comment: One wonders as to why the government has no political will even after seventy years of independence, despite constitutional mandate and the Supreme Court's specific direction to make a uniform civil code. Even small countries like Singapore and Hong Kong have enacted uniform laws where people belonging to different religious faiths including Muslims are living.

10.3.1 Case from Sri Lanka

Change of religion from Islam to Christianity will wipe out charge of bigamy— Appeal from Ceylon Privy Council—1965

Attorney General of Ceylon v Reid,

[1965] AC 720

The Privy Council was faced with a vexed question of law as to whether a person who contracts a second marriage during the lifetime of his or her former spouse after renunciation of his religion (Christianity) and embracing another religion (Islam) is liable for bigamy under section 362 of Ceylon *Penal Code* which is similar to (*section 494 IPC, 1860*).

The matter before the court came in an appeal by the Attorney General of Ceylon,[23] by special leave, from a judgment of the Supreme Court of the Island of Ceylon dated 11 July 1963, whereby the respondent's appeal against his conviction on 23 November 1961 by the district court of Colombo, of the offence of bigamy was allowed and the conviction was quashed.

The respondent married Edna Margaret according to Christian rites on 18 September 1933. Both were Christians at the time of the marriage and they lived together as man and wife until 1957.

On 13 June 1959 the respondent and a divorced lady by name Fatima Pansy converted to the Muslim faith. A month later on the 16 July 1959 they were duly married in the district of Colombo by the Registrar of Muslim Marriages under the provisions of Muslim Marriage and *Divorce Act* 1951, notwithstanding that the earlier marriage was subsisting.

Dismissing the appeal their Lordships of the Privy Council held:

> Whatever may be the situation in a purely Christian country they cannot agree that in a country such as Ceylon a Christian monogamous marriage prohibits for all time during the subsistence of that marriage a change of faith and of personal law on the part of a husband resident and domiciled there... In their Lordship's view in such countries there must be an inherent right in the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous marriage, if recognised by the laws of the country, notwithstanding an earlier marriage. If such inherent right is to be abrogated it must be done by statute. Admittedly there is none.[24]

Caste of a person born of inter-caste marriage eg, between a tribal and a non-tribal belonging to a forward caste is determined on the basis of facts adduced in each case. Not necessarily on the basis of caste of the father— Supreme Court—2012

Rameshbhai Dabhai Naika v State of Gujarat,

2012 (1) Scale 434 : *(2012) 3 SCC 400*

The important question involved in the case was whether a person, whose mother belonged to the scheduled tribe and the father belongs to the upper caste, is entitled for the benefit of affirmative action sanctioned by the *Constitution*?

In the present case, the tribal certificate obtained by the appellant was cancelled by the scrutiny committee on the sole ground that his father was a non-tribal belonging to the Hindu Kashatriya caste. The High Court of Gujarat upheld the cancellation proceeding on the basis that the issue raised was settled by the decisions of the Supreme Court in *Valsamma Paul v Cochin University*,[25] *Punit Rai v Dinesh Chaudhary*,[26] and *Anjan Kumar v UOI*.[27] The High Court did not consider the evidence of the fact that the mother of the appellant was undeniably a Nayak, one

of the scheduled tribes, and the appellant himself and his other siblings were also married to Nayaks. The High Court did not also consider the evidence adduced by the appellant on the question of his upbringing as a member of the said tribe. In view of the fact that his father was a non-tribal, the court considered everything else as of no relevance. The Apex Court while allowing the appeal, and setting aside the lower court and the High Court verdict, said:

> In an inter-caste marriage or a marriage between a tribal and a non-tribal the determination of the caste of the offspring is essentially a question of fact to be decided on the basis of the facts adduced in each case. The determination of caste of a person born of an inter-caste marriage or a marriage between a tribal and a non-tribal cannot be determined in complete disregard of attending facts of the case. In an inter-caste marriage or a marriage between a tribal and a non-tribal there may be a presumption that the child has the caste of the father. This presumption may be stronger in the case where husband belongs to a forward caste. But by no means the presumption is conclusive or irrebuttable and it is open to the child of such marriage to lead evidence to show that he/she was brought up by the mother who belonged to the scheduled caste/scheduled tribe. By virtue of being the son of a forward caste father he did not have any advantageous start in life but on the contrary suffered the deprivations, indignities, humilities and handicaps like any other member of the community to which his/her mother belonged. Additionally, that he was always treated a member of the community to which her mother belonged not only by that community but by people outside the community as well.

The decision of the Apex Court, apart from clearing the ambiguities, has crystallized the legal position on the question and has strengthened the idea of equality of status of men and women in marital relationship, which has not yet been fully recognized in practice. The idea that a woman, on marriage, becomes a member of the husband's family and thereby she becomes a member of the caste (in case of inter-caste marriage) to which her husband belongs to by losing all her identities and even the offspring of such marriage must also take his/her caste from father only is very much parochial. The decision of the court will go a long way in establishing equal status between men and women.

Change of sex will not validate a marriage: A person classified as a male in 1946 at birth could not become a person of opposite sex (i.e. female) for purpose of marriage, after having undergone gender reassignment treatment in 1981 vide section 11 (c) of UK Matrimonial Clauses Act of 1973

Bellinger v Bellinger,

(2003) All ER 593 (HL) : [2003] UKHL 21

While dismissing the appeal by Mrs Bellinger, who had been correctly classified as a male at birth in 1946, but dressed and lived as women since 1975 and underwent gender reassignment treatment culminating in surgery in 1981 and went through a ceremony of marriage with a man, for declaration that her marriage had been valid within section 11 (C) of Matrimonial Clauses Act 1973. The Court of Appeal while rejecting her contention held that in view of section 11 (C) of the Act, which says, a marriage is void unless the parties are respectively male and female; the court said a person's sex is determined by the chromosomal (a thread like body found in all living cells), gonadal, and genital tests, and could not subsequently be changed for the purpose of section 11 (C) by gender reassignment.

The court held that a conclusion to the contrary would require a major change in law having far reaching ramifications and which can be sorted out by Parliament alone and not by the court.

10.3.2 Same Sex Marriages Legally Recognized in Washington, (United States)—2012

A law legalizing same-sex matrimony took effect in Washington on 6 December 2012 and officials geared up for a flood of marriage-license applications from gay and lesbian couples, eager to tie the knot. Washington made history in November 2012 by becoming one of the three US States where marriage rights were extended to same sex couples by popular vote, joining Maryland and Maine in passing ballot initiatives on 6 November 2012 recognizing gay nuptials. Washington became the first State to put its law into effect and same-sex matrimony became legalized in Maine on 29 December and in Maryland on 1 January 2013.

Under Washington State law, all would be brides and grooms must submit their marriage certificates at least three days in advance. So the first wave of same-sex Washington weddings—"This is an historic occasion," said Thurston County Auditor Kim Wyman, a Republican.[28]

6 *Hindu Marriage Act 1955, section 17* states: Any marriage between two Hindus, solemnised after the commencement of this Act is void if at the date of such marriage, either party had a husband or wife living; and the provisions of *sections 494* and *495* of *Indian Penal Code, 1860* shall apply accordingly. Hindus include Sikhs, Jains and Buddhists *vide Article 25*, Explanation 2 to *Constitution of India 1950*. Polygamy is not an essential part of the Hindu religion and so it can be regulated by law. *State of Bombay v Narasu Appa Mali,* AIR 1952 Bom 84 : (1951) 53 Bom LR 779 : ILR 1951 Bom 775.

7 *Indian Christian Marriage Act 1872*. The German Criminal Code, in section 172 prohibits bigamy and makes it an offence. Section 172—Bigamy: Whoever contracts a marriage although he is already married, or whoever contracts a marriage with a married person, shall be punished with imprisonment for not more than three years or a fine.

8 *Parsi Marriage and Divorce Act 1936*.

9 *Gopal Lal v State of Rajasthan,* AIR 1979 SC 713 : (1979) 2 SCC 170—accused not liable if the second marriage is void because a void marriage is no marriage in the eyes of law. See KD Gaur, *A Textbook on Indian Penal Code,* 2007, Commentary under *sections 494* and *495 Indian Penal Code, 1860*.

10 Petitioner 1 was the president of Kalyani—a registered society, which is an organisation working for the welfare of needy families and women in distress. Petitioner 2—Meena Mathur was married to Jitendra Mathur on 27 February 1978. Three children were born of the wedlock. In early 1988, Jitendra solemnised a second marriage with one Sunita Narula alias Fatima after they converted to Islam. Petitioner 3—Geeta Rani was married to Pradeep Kumar according to Hindu rites on 13 November 1988. In December 1991, petitioner came to know that Pradeep Kumar had run away with one Deepa and after conversion to Islam, married her. Petitioner 4—Susmita Ghosh, was married to GC Ghosh on 10 May 1984. GC Ghosh on 20 April 1992 asked his wife for a divorce (mutual) and told her that he had embraced Islam and would soon marry one Vinita Gupta. The petitioner moved the court that her husband be restrained from entering into a second marriage. In all these petitions conversion to Islam was only for purpose of facilitating second marriage.

11 *Re Ram Kumari,* (1891) ILR 18 Cal 264; *Budansa v Fatima,* (1914) 22 IC 697; *Nandi alias Zainab v Crown,* AIR 1920 Lah 379; *Sayeda Khatoon alias AM Obadiah v M Obadiah,* (1945) 49 Cal WN 745.

12 *Hindu Marriage Act 1955, section 13* (1)(ii) provides that one of the grounds for a decree of divorce is that "the other party has ceased to be a Hindu by conversion to another religion".

13 The necessary ingredients of *section 494 of Indian Penal Code, 1860* are: "(1) having a husband or wife living; (2) marries in any case; (3) in which such marriage is void, (4) by reason of its taking place during the life of such husband or wife."

14 *Sarla Mudgal v UOI,* AIR 1995 SC 1531 : (1995) 3 SCC 635.

15 WP No 509 of 1992. Sushmita Ghosh, wife of GC Ghosh (Mohd Karim Ghazi) filed a writ petition [(WP (C) No 509 of 1992)] before the Supreme Court stating that she was married to GC Ghosh in accordance with the Hindu rites on 10 May 1984. Around 1 April 1992, respondent no 3 asked the petitioner for divorce by mutual consent as he had embraced Islam so that he may remarry and in fact he had already fixed to marry one Vinita Gupta respondent no 3. Petitioner further stated that respondent no 3 had converted to Islam solely for the purpose of re-marrying and had no real faith in Islam. He did not practice the Muslim rites as prescribed nor did he change his name or religion in official documents. That the petitioner asserts her fundamental rights guaranteed by *Article 15* (1) not to be discriminated against on the ground of religion and sex alone.

16 *Hindu Marriage Act 1955, section 11* reads: Any marriage solemnised after the commencement of this Act shall be null and void clauses (i), (iv) and (v) of section 5 if it contravenes any one of the conditions specified.

17 *Ibid*, section 17 reads: Any marriage between two Hindus is void if at the date of such marriage either party had a husband or wife living and the provisions of *sections 494* and *495* of *Indian Penal Code, 1860* shall apply.

18 *Articles 25* and *26* of the *Constitution of India 1950*, guarantee freedom of conscience and free profession, practice and propagation of religion and freedom to manage religious affairs.

19 *Lily Thomas v UOI,* AIR 2000 SC 1650 : (2000) 6 SCC 224 : 2000 Cr LJ 2433 : 2000 (4) Scale 176.

20 *Lily Thomas v UOI,* AIR 2000 SC 1650, p 1666 : (2000) 6 SCC 224.

21 *Hindu Marriage Act 1955, section 17* reads: "Any marriage between two Hindus solemnized after the commencement of this act is void if at the date of such marriage either party had husband or wife living; and the provisions of *sections 494* and *495* of *Indian Penal Code, 1860* shall apply accordingly."

22 *Code of Criminal Procedure 1973, section 198*, reads:

Prosecution for offences against marriage: The Court would take cognizance of an offence punishable under Chapter XX of the Code only upon a complaint made by any of the persons specified in clause (c) of the proviso to sub-section (a) to *section 198 CrPC 1973*. A complaint for the offence under section 494 or section 495 can be made by the wife or on her behalf by bet-father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister. Such complaint may also be filed with the leave of the court, by any other person related to the wife by blood, marriage or adoption.

23 Ceylon *Penal Code*, 1883, section 362 reads: Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

24 *[1965] AC 720*, p 735.

25 *Valsamma Paul v Cochin University,* *AIR 1996 SC 1011* : *(1996) 3 SCC 545* : *1996 (1) Scale 85*.

26 *Punit Rai* v *Dinesh Chaudhary*, *(2003) 8 SCC 204* : *AIR 2003 SC 4355*.

27 *Anjan Kumar* v *UOI*, *(2006) 3 SCC 257* : *AIR 2006 SC 1177*.

28 *The Times of India*, 7 December 2012 p 7 (Pune Edition).

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10.4 Adultery

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Part II Specific Offences

10 OFFENCES RELATING TO MARRIAGE

10.4 Adultery

Section 497, IPC deals with adultery. Adultery has been held unconstitutional *vide* Supreme Court's judgment in *Joseph v UOI,*[29] by a five-judge bench on 26 September 2018.

Section 497. Adultery.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

The scope of section 497 was limited to the act of a man alone. That is to say, adultery is committed only by a man who has sexual intercourse with the wife of another man without the other man's consent or connivance.

Writ Petition filed under Article 32 of Constitution of India challenging validity of section 497 IPC, 1860

Joseph v UOI,[30]

A constitutional Court consisting of Chief Justice Dipak Misra and Justices RF Nariman, AH Khanwilkar, DY Chandrachud and Indu Malhotra struck down as unconstitutional a 158 year old *section 497 IPC, 1860* that punished a married man for adultery if he had sexual relationship with a married woman "without the consent or connivance of her husband", but said adultery could continue to be a ground for divorce rebutting the argument that *section 497 IPC* worked as a deterrent against spouse going astray. Of course adultery could continue to be a ground for aggrieved spouses to seek divorce and if one of the spouses committed suicide because of the unfaithful nature of her/his partner, then the culprit could be proceeded against for his crime of abetting suicide under *section 306 IPC, 1860*. The Supreme Court tested section 497 on the touchstone of the constitutional provision dealing with right to equality under *Article 14* that guarantees against arbitrariness and discrimination, with Justices Chandrachud and Malhotra using privacy, individuals autonomy and precede choice as yardsticks of legality. The decision finally puts India as per with many European and Asian countries such as China, Japan, Australia and Brazil where adultery is not a criminal offence. Justice Misra writing the judgment for himself and Khanwilkar said section 497 violated right to equality discrimination on ground of sex and right to life under *Articles 14*, *15* and *21* of the *Constitution* here as it punishes only the married man, as woman could not be punished. There could not be husbands monopoly over wife, says CJI Mishra.

Dipak Misra, CJI (For himself and AM Khanwilkar, J,)

While delivering the judgment said:

> In case of adultery, law expects parties to remain loyal and maintain fidelity throughout and also makes adulterer the culprit. This expectation by law is a command which gets into core of privacy. Two individuals may part on said ground but to attach criminality to same is inapposite.

> When parties to a marriage lose their moral commitment of relationship, it creates a dent in marriage and it will depend upon the parties how they deal with the situation. Some may exonerate and live together and some may seek divorce. The theories of punishment, whether deterrent or reformative, would not save the situation. A punishment is unlikely to establish commitment, if punishment is meted out to either of them or a third party. Adultery, in certain situations, may not be the cause of an unhappy marriage. It is difficult to conceive of such situations in absolute terms. If act is treated as an offence and punishment is provided, it would tantamount to punishing people who are unhappy in marital relationships and any law that would make adultery a crime would have to punish indiscriminately both the persons whose marriages have been broken down as well as those persons whose marriages are not.

> As we have held that *section 497 IPC, 1860* is unconstitutional and adultery should not be treated as an offence, it is appropriate to declare *section 198 CrPC* which deals with the procedure for filing a complaint in relation to the offence of adultery as unconstitutional.

RF Nariman, J, Dr Dhananjaya Y Chandrachud, J and Indu Malhotra, J concurred held, section 497 is struck down as unconstitutional being violative of *Articles 14*, *15* and *21* of *Constitution*.

Section 198 (2) of CrPC, 1973 which contains the procedure for prosecution under Chapter XX of *IPC, 1860* shall be unconstitutional only to the extent that it is applicable to the offence of Adultery under section 497.

In Korea, unlike India (*section 497, IPC*), the offence of adultery can be committed both by husband and wife and both are equally punishable. For instance, *Article 241* of Korean Criminal Code[31] in section 1 states:

> Section (1) A married person who commits adultery shall be punished by Penal servitude for not more than two years. The same shall apply to the other participant.

However, if the spouse condones or pardons for the adultery complaint cannot be made *vide* section 2 of the *Article 241*.

Korean Criminal Code which is more progressive, as it makes the errant wife punishable also. Alternatively, section 497 (and section 498) may be deleted from the statute book as the underlying provisions are inconsistent with the modern notions of the status of women and of the natural rights and obligations under marriage. In fact, western countries and lately Malaysia and Singapore have abolished adultery from their Penal Codes.

(i) England and France

Adultery is not a criminal offence in the United Kingdom. It is punishable, though mildly, in some of the European countries. For instance, in France, a wife guilty of adultery is punishable for a period ranging from three months to two years of imprisonment. The husband however, may put an end to her sentence by agreeing to take her back. The adulterer is punishable similarly.

(ii) Germany

In Germany, if a marriage is dissolved as a result of adultery, the guilty spouse as well as the guilty partner, is punishable with imprisonment for a term of not less than six months, but prosecution has to be initiated by the aggrieved spouse by means of a petition.

(iii) Pakistan and Islamic countries

In Pakistan, adultery is viewed as a heinous offence and both the man and woman are subjected to punishment which may extend to death sentence. In 1987[32] a Pakistani Court of Session sentenced a couple to be buried up to their necks and stoned to death in public for committing adultery. In April 2002,[33] as stated earlier, Zafran Bibi was sentenced to death by stoning in North West Frontier province for adultery (*zina*). Perhaps such a severe sentence for adultery is awarded in Pakistan since Islamic Penal Law (Hudood Ordinance) was introduced in 1980. In some other Islamic countries, such as Saudi Arabia, Iran, Egypt, etc., also like Pakistan, adultery is punished severely.

(iv) Malaysia, Singapore and Hong Kong

Malaysia, which is predominantly a Muslim country, adultery is not an offence under the *Penal Code*. This may be because of the influences of Singapore and Hong Kong, where adultery is not punishable.

(v) Philippines

It is of interest to note that in the Philippines, which is a Catholic dominated Christian country, it is the married woman, and not her husband, who is liable for adultery.

Article 333 of Revised *Penal Code* Act No 3815 states:

> **Who are guilty of adultery.**—Adultery is committed by any married woman who shall have sexual intercourses with a man not her husband and by the man who has carnal knowledge of her, knowing her to be married, even if the marriage is subsequently declared void.

Adultery shall be punished by prison correctional in its medium and maximum periods.

However, in case a married man keeps a concubine, both man and concubine are liable to punishment. *Article 334* says:

> **Concubinage.**—Any husband who shall keep a mistress in the conjugal dwelling, or, shall have sexual intercourse, under scandalous circumstances, with a woman who is not his wife, or shall cohabit with her in any other place shall be punished by prison correctional in its minimum and medium periods.
>
> The concubine shall suffer the penalty of *destierro.*

(vi) Greece

In Greek *Penal Code*, both men and women are equally liable for punishment for adultery. A woman can't escape punishment like India. *Article 35* of Greek *Penal Code* states:

> A spouse who commits adultery and the offending partner shall be punished by imprisonment for not more than one year. Prosecution shall commence only upon the complaint of the injured party.

(vii) Argentina

Article 118 of Argentina *Penal Code* provides punishment for adultery which may extend from one month to one year. The Act makes following persons liable for adultery, *viz*;

(1) A married woman who commits adultery.

(2) The person who commits adultery with a married woman.

(3) A married man who keeps a concubine either in his matrimonial home or anywhere else.

(4) Such concubine of a marred man.

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29 *The Times of India*, 27 September 2018, pp 1, 11, 12 (Pune Edition).

30 Writ Petition: Times of India, 5 January 2018 pp 1, 12 (Pune Edition).

31 Korean Criminal Code came into force on 3 October, 1953.

32 Hindustan Times, (10 November 1987, p 11 Delhi Edition) Mohammuad Sarwar, aged 35, had eloped with Shahida, aged 26, a few years ago and the couple were later found to be living together in Lahore. Police, on a report from Shahida's husband, Khushi Mohammad, arrested them and were prosecuted.

33 See Rape and adultery Distinction—See KD Gaur. Text Book on *IPC* 6th Edn, 2017, p 1056.

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10.5 Enticement with Criminal Intent

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Part II Specific Offences

10 OFFENCES RELATING TO MARRIAGE

10.5 Enticement with Criminal Intent

Section 498, the *Indian Penal Code, 1860* punishes a person who takes away, entices, conceals or detains a married woman with the intent that she may have illicit intercourse with any person. Consent of the woman as in case of adultery (section 497), is immaterial to the guilt of the accused.[34] Since the offences under sections 497 and 498 are meant to protect the interest of the husband, it is only the husband who can institute prosecution proceedings for offences committed under these sections as provided under sub-section (2) to *section 198 of Code of Criminal Procedure 1973*. *Section 498, IPC* reads:

498. Enticing or taking away or detaining with criminal intent a married woman.—Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

To constitute enticement, allurement or encouragement to accompany accused is sufficient—force not necessary—Supreme Court—1959

Alamgir v State of Bihar,

AIR 1959 SC 436 : 1959 Supp (1) SCR 464

This criminal appeal raises a question about the construction of the word “detains” occurring in *section 498, IPC, 1860*. The two appellants were charged and convicted under *section 498, IPC* for wrongfully detaining a woman when they knew or had reason to believe that she was the legally wedded wife of the complainant, and was under his protection, with intent to have illicit intercourse with her.

The appellants urged that the woman was dissatisfied with her husband and had left his house and sought protection voluntarily and of her free will. The appellants contended that she came to stay with them and they just allowed her to stay with them, therefore, it cannot be said that they had detained her within the meaning of section 498.

According to the appellant, the word “detains” used in section 498 necessarily implied that the woman detained was unwilling to stay with the accused and had been compelled so to stay with him against her will and desire.

Justice PB Gajendragadkar held:

That is not the plain grammatical meaning of the word “detains”. Section 498 occurs in Chapter XX of the Code, which deals with offences relating to marriage. The provisions of section 498, like those of section 497, are intended to protect the rights of the husband and not those of the wife. The gist of the offence under section 498 appears to be the deprivation of the husband of his custody and his proper control over his wife with the object of having illicit intercourse with her.

In this connection, it would be material to compare and contrast the provisions of section 498 with those of section 366,[35] of the Code. Section 366 deals with cases where the woman kidnapped or abducted is an unwilling party and does not respond to the criminal intention of the accused. In these cases, the accused intends to compel the victim afterwards to marry any person against her will or to force or seduce her to illicit intercourse.

In other words, section 366 is intended to protect women from such abduction or kidnapping. If it is shown that the woman who is alleged to have been abducted or kidnapped is a major and gave her free consent to such abduction or kidnapping, it may prima facie be a good defence to a charge under section 366.

On the other hand, section 498 is intended to protect not the rights of the wife but those of her husband; and so prima facie the consent of the wife to deprive her husband of his proper control over her would not be material. It is the infringement of the rights of the husband coupled with the intention of illicit intercourse that is the essential ingredient of the offence under section 498. Incidentally it may be pointed out that the offence under *section 498, IPC, 1860* is a minor offence as compared with the offence under *section 366, IPC, 1860*.

There are three ingredients of section 498:

(i) the offender must take or entice away or conceal or detain the wife of another person from such person or from any other person having the care of her on behalf of the said person;

(ii) he must know or had reason to believe that the woman is the wife of another person; and

(iii) the taking, enticing, concealing or detaining of the woman must be with the intent that she may have illicit intercourse with any person.

If the intention of illicit intercourse is not proved the presence of the first two ingredients would not be enough to sustain the charge under section 498.

The section contemplates four different kinds of cases. A woman may be (i) taken away, or (ii) enticed away, or (iii) concealed, or (iv) detained.

When the latter part of the section refers to any such woman, it does not mean any woman who is taken or enticed away as described in the first part, but it refers to any woman who is and whom the offender knows or has reason to believe to be the wife of any other man.

In the first three classes of cases, the consent of the woman would not matter if it is shown that the said consent is induced or encouraged by the offender by words or acts or otherwise. Whether or not any influence proceeding from the offender has operated on the mind of the woman or has co-operated with or encouraged her inclinations would always be a question of fact. If, on evidence, the court is satisfied that the act of the woman in leaving her husband was caused either by the influence of allurement or blandishments proceeding from the offender, that may be enough to bring his case within either of the three classes of cases mentioned by section 498. Since the object of the section is to protect the rights of the husband, it cannot be any defence to the charge to say that, though the husband has been deprived of his rights, the wife is willing to injure the said rights and so the person who is responsible for her willingness has not detained her.

Detention in the context must mean keeping back a wife from her husband or any other person having the care of her on behalf of her husband with the requisite intention. Such keeping back may be by force; but it need not be by force. It can be the result of persuasion, allurement or blandishments, which may either have caused the willingness of the woman, or may have encouraged, or co-operated with her initial inclination to leave her husband. The High Court was right in holding that the charge of detention has been proved against appellant 1 in as much as both the courts of facts have found that he had offered to marry Mst Rahmatia and, thereby; either persuaded or encouraged her to leave her husband’s house.

The appeal is dismissed.

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34 See Ratanlal and Dhirajlal, *The Law of Crime,* 24rth Edn, vol II, 1998, p 2397.

35 *Indian Penal Code*, 1960, section 366 reads: Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing, it to be likely that she will be forced or seduced to illicit intercourse….shall be punished with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

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11.1 Introduction to Chapter XXA of IPC

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Part II Specific Offences

11 CRUELTY BY HUSBAND OR RELATIVES OF HUSBAND

11.1 Introduction to Chapter XXA of IPC

In 1983, a Chapter XXA titled "Of Cruelty by Husband or Relatives of Husband",[1] was added in *Indian Penal Code, 1860*, in order to make cruelty against women punishable. The object of this chapter is to punish the husband and his relatives who tortures and harasses women with a view to coerce her or any person related to her to meet any unlawful demands[2] or drive the woman to commit suicide. It consists of only section 498A, which prescribes a sentence of three years of imprisonment and also a fine.

(Incidence: 1,13,403 Rate: 18.7) The cases of cruelty by husband or his relatives in the country have decreased by 7.7% during 2015 over the previous year (1,22,877 cases). Most of these cases were reported in West Bengal (20,163 cases) followed by Rajasthan (14,383 cases), Assam (11,255 cases) and Uttar Pradesh (8,660 cases), these four States together accounted for 48.0% of total such cases (54,461 out of 1,13,403 cases). The highest crime rate (71.5) was reported from Assam as compared to the national rate at 18.7.[3]

498A. Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.—For the purpose of this section, "cruelty" means —

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

"Mental cruelty" as envisaged under *section 13 (1)(ia) of Hindu Marriage Act 1955*, as a ground for seeking divorce by either party to the marriage, broadly means, when either party causes mental pain, agony or suffering of such a magnitude that it severs the bond between the wife and husband, and as a result of which it becomes impossible for the party who has suffered, to live with the other party. In *Hanumantha Rao,*[4] the Supreme Court held that the removal of *mangalsutra* by the wife at the instance of her husband does not constitute mental agony. The party who has committed wrong is not expected to live with the other party.

However, "cruelty" for the purpose of *section 498A, IPC, 1860* as stated in Explanation, clause (a) means any wilful conduct, which is of such a nature as is likely to drive the woman to commit suicide or to cause a grave injury or danger to life, limb or mental or physical health of the woman.

Cruelty also means harassment of the woman with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security.[5]

The cruelty by husband or his relatives have constantly increased from 2009 to 2014 from 89,546 to 1,22,877

except 2015 and 2016 when it has declined to 1,13,403 with a percentage variation of 77 from 2014 to 2015.[6] And 1,10,378 and 1,10,434, percentage ration to 18.0%.

These figures on one hand, indicate that women are becoming conscious about their rights against torture and cruelty, whereas, on the other hand, it also indicates that in some cases, the provisions are being used to harass the husband and his relatives.[7]

Taking note of misuse of *section 498A IPC*, a bench of CJI Dipak Mishra and Justices AH Khanwilkar and DY Chandradhud said on 14 September 2018[8] that perception of prosecution under section 498A because of "super sensitivity" and over zealousness by police to arrest husbands could bring about social disaster with the "potential to vertically divide society."

The Supreme Court said it was obligatory on the part of the legislature to enact protective measures against misuse of section 498A and for courts to carefully scrutinize genuineness of complaints while establishing from evidence the requirement of keeping those arrested in custody rather than enlarging them on bail.

Writing the judgment for the bench, CJI Misra said the Supreme Court could not lose sight of growing abuse of the provision.

> When implementation of the law (arrest) is abused by law enforcing agency, the legislature introduces a protective provision as regards arrest. Needless to say, the Courts have ample power to grant pre-arrest bail, popularly called anticipatory bail, and even to quash criminal proceedings totally to stabilize lawful bail. In cause no Court of law remotely conceives a war between two sexes, the bench said.

The judgment removed a few safeguards against arrest of husbands and their relatives introduced by a two-judge Supreme Court bench last year in its decision in the *Rajesh Sharma v State of UP, AIR 2017 SC 3869* : 2017 (8) Scale 313. The Supreme Court did away with the stipulation that genuineness of section 498A complaints would first be verified by a district level committee and that no arrest would be made till it gave its final report.

While removing the safeguard, which was hailed by "harassed husbands", the bench showed that it was alive to concerns over immediate arrest after lodging of an FIR under section 498A. Parliament had introduced section 498A in *IPC* in 1983 to deal with increasing number of dowry deaths while categorising the offence as cognizable and non-bailable.

CJI Misra blamed the present situation, where husbands and their relatives get picked up even when they do not stay with the warring couple, to the police's keenness to show their "super sensitivity" towards crimes against women. In such a situation, it is obligatory on the part of the legislature to bring in protective adjective law and the duty of the constitutional courts to scrutinize the protective measures so that the social menace is curbed, the CJI said.

The bench cited *Sushil Kumar Sharma v UOI*[9] judgment of 2005, in which the Supreme Court upheld constitutional validity of section 498A saying mere misuse could not invalidate the law. However, it had said,

> Many cases have come to light where the complaints are not *bona fide* and have been filed with oblique motives. In such cases, the accused does not in all cases wipe out the ignominy suffered during and prior to trial.

Murder, causing disappearance of evidence and Cruelty—Appeal against conviction accused husband alleged to have killed his wife by strangulation. Relationship between appellant and deceased was not cordial because of illicit relationship between accused and another. Death of deceased was homicidal in nature caused due to asphyxia. Evidence of witnesses that on date of incident accused asked deceased to come to field where he would pay money to her. Sometime later deceased was found dead under a tree. Evidence found credible on all material aspects of prosecution case. Conviction of accused under section 302 and section 201, proper.

Eshwarappa v State of Karnataka,[10]

Per TS Thakur, J:

This appeal arises out of a judgment and order passed by the High Court of Karnataka at Bengaluru, whereby the High Court has dismissed appeal by the appellant affirming his conviction for offences punishable under *sections 302*, *498A* and *201* of the *Indian Penal Code, 1860*.

The deceased, Latha, and the appellant got married to each other. The marital relationship, soured when the appellant developed illicit relations with one Sarpina and the appellant was neglecting the deceased and was residing with Sarpina, accused No 2. The appellant to get rid of the deceased strangulated her and the body was lying dead under a tamarind tree near the land of the appellant in his village.

The death of the deceased was homicidal in nature caused due to asphyxia. The ligature marks found around the neck of the deceased proved that there was constriction of the neck of the deceased because of exertion of force.

The appellant had piled a heap of stones and tied a rope to the branch of the tamarind tree, only to support a false plea in defence that the deceased had committed suicide.

The High Court dismissed the appeal *in toto* although on the finding recorded by it the High Court could and indeed should have set aside the conviction of the appellant under *section 498A, IPC, 1860*.

Apex Court dismissing the appeal held:

> In totality of the circumstances and having regard to the nature of the evidence which the Courts below have found credible on all material aspects of the prosecution case, we do not see any compelling reason to interfere with the view taken by the Trial Court as affirmed by the High Court. The only modification no matter inconsequential in the facts and circumstances of the case that we may make is the setting aside of the conviction of the appellant for the offence punishable under *section 498A IPC*.

Appeal dismissed.

Cruelty and abetment of suicide—Sentence—Accused convicted under sections 498A and 306 for ill-treating his wife who committed suicide by hanging.

OM Cherian alias Thankachan v State of Kerala,[11]

Per Banumathi, J:

This appeal arises out of the judgment by which the High Court of Kerala confirmed the conviction of the appellant/1st accused under *sections 498A* and *306*, *IPC* and also the sentence of imprisonment imposed on him, by the Session's Court.

Briefly stated, case of the prosecution is that the 1st accused married Lillikutty and their marriage was solemnized on 11 February 1988 and they continued their stay in the house along with other accused, who are the father, mother and brother of the appellant. The allegation levelled is that in the matrimonial house, the appellant/1st accused and other accused ill-treated and tortured Lillikutty, compelling her to take the extreme step of putting an end to her life by committing suicide.

Upon consideration of evidence, the trial court convicted the appellant/1st accused under *section 498A, IPC, 1860*. For the offence punishable under *section 306, IPC*, the trial court sentenced him to undergo rigorous imprisonment for seven years and to pay a fine of Rs 50,000. While allowing the appeal partly Apex Court said:

Keeping in view the totality of the facts and circumstances of the case, the sentences imposed on the appellant for the offences punishable under *sections 498A* and *306*, *IPC, 1860* are ordered to run concurrently and the appeal is disposed of with the above modification.

The Apex Court said:

The trial court directed the sentences imposed on the appellant/accused under *sections 498A* and *306*, *IPC, 1860* to run consecutively, which was affirmed by the High Court. When the trial court declines to exercise its discretion under *section 31, CrPC, 1973*[12] in issuing direction for concurrent running of sentences, normally the appellate

court will not interfere, unless the refusal to exercise such discretion is shown to be arbitrary or unreasonable. When the trial court as well as the appellant court declined to exercise their discretion, normally we would have refrained from interfering with such direction of the Courts for consecutive running of sentences imposed on the appellant could be ordered to be run concurrently. At the time of marriage, the appellant was employed as a Painter at Delhi and after marriage, it is stated that the appellant had secured an employment in Gulf countries and used to visit India once in two years only. It is brought on evidence that in a period of eight years from 1988-1996, he came on leave to India for four times only and finally he visited India while he was on leave during January-February, 1996. The appellant also appears to have taken efforts for mediation to settle the differences and the mediation was scheduled to take place on 23 February 1996; but Lillikutty committed suicide on the same day.

Mental Cruelty by Wife is sufficient ground for Divorce by Husband the attempt to commit suicide by the wife was without any basis and amounted to mental cruelty and only this was sufficient to get the decree of divorce. Further, the demand of the wife to get separated from husband's family only for monetary consideration was observed as unjustified by the Court as the family was virtually maintained from the income of the husband.—Supreme Court—2016

Narendra v K Meena,

(2016) 9 SCC 455

The appellant husband had married the respondent wife on 26 February 1992. Out of the wedlock, a female child named Ranjitha was born on 13 November 1993. The husband filed the divorce petition on grounds of cruelty stating that the wife was of highly suspicious nature and she used to level absolutely frivolous but serious allegations against him regarding his character and more particularly about his extra-marital relationship. Further, the wife wanted the husband to leave his parents and other family members and to get separated from them so that they can live independently. Another important allegation was that the wife very often threatened the husband that she would commit suicide and once she also made an attempt to commit suicide by pouring kerosene, however she was prevented by family members and some neighbours.

The aforestated facts were found to be sufficient by the Family Court for granting the husband a decree of divorce on 17 November 2001 after considering the evidence adduced by both the parties. Being aggrieved by the above judgment the wife filed a first appeal which was allowed by the Karnataka High Court on 8 March 2006 whereby the decree of divorce dated 17 November 2001 was set aside. Hence, the husband approached the Supreme Court challenging the order of the High Court.

The issue in the case was whether the behaviour of the wife amounted to cruelty as a ground to divorce?

Supreme Court did not agree with the observations of the High Court as the High Court failed to give any importance to the false allegations made by wife, the constant persuasion by her for getting separated from the family members of the husband and further, no importance was given to the incident where wife made an attempt to commit suicide. On the contrary, the High Court found some justification in the request made by the wife to live separately from the family of the husband.

Allowing the appeal and setting aside verdict of High Court.

Supreme Court was in agreement with the finding of the trial court and observed that as per the customs a Hindu brought up and given education by his parents, has a moral and legal obligation to take care and maintain the parents, when they become old and when they have either no income or have a meager income. If a wife makes an attempt to deviate from the normal practice and normal custom of the society, she must have some justifiable reason for that and in this case only monetary consideration was not considered as a justified reason.

After carefully gone through the evidence the Court held that there was no reliable evidence to show that the husband had an extra-marital affair with someone. Relying on the ratio of *Vijaykumar Ramchandra Bhate v Neela Vijaykumar Bhate, 2003 (6) SCC 334*, the Court held that that the unsubstantiated allegations levelled by the wife and the threats and attempt to commit suicide by her amounted to mental cruelty and therefore, the marriage deserves to be dissolved by a decree of divorce on the ground stated in *section 13 (1)(ia) of Hindu Marriage Act 1955*. GC Cheshire observed,

> Divorce, since it disintegrates the family unity is, of course, a social evil in itself, but it is a necessary evil. It is better to wreck the unity of family than to wreck the future happiness of the parties by binding them to a companionship that has

become odious. Membership of a family founded on antagonism can bring little profit even to the children.

Appeal allowed, divorce granted.

Cruelty includes both physical and mental torture—-Court must adopt construction which "suppresses the mischief and advances the remedy"—Husband liable for causing Dowry Death—-Supreme Court—1998

Pawan Kumar v State of Haryana,[13]

Per AP Mishra, J:

Facts: The deceased and the appellant were married in 1985. After a few days of the marriage, there was a demand for scooter and fridge. The deceased was repeatedly taunted and maltreated. In the meanwhile, her maternal uncle died, and she, along with her husband, went there and the deceased instead of returning to her husband's place, came to her sister's house. She remained there for a few days. Both her sister and brother-in-law deposed that she told them that her husband was ill-treating her due to dowry demands, and that on not being satisfied, was harassing her. When her husband came to take her back, she was reluctant, but her sister brought her down and sent her with the husband. On the very next day, the deceased committed suicide.

The ingredients necessary for the application of *section 304B, IPC, 1860* are:

(a) when the death of a woman is caused by burns or bodily injury; or

(b) occurs otherwise than under normal circumstance;

(c) and the aforesaid two facts spring within seven years of the girl's marriage;

(d) and soon before her death, she was subjected to cruelty or harassment by her husband or his relatives;

(e) this cruelty is in connection with the demand of dowry.

If these conditions exist, it would constitute a dowry death. It is not disputed that the deceased died of burn injuries, that she died otherwise than under normal circumstances, and that the death was within a period of seven years of marriage. The only consideration has to be, whether she was subjected to any cruelty or harassment by the appellants soon before her death, and whether the same was for or in connection with any demand of dowry.

Since the cause of death of the married woman occurred in unnatural circumstances as a "dowry death", for which evidence is not so easily available, as it is mostly confined within the four walls of a house, namely the husband's—house, where all likely accused reside. The amendments by *Criminal Law (Second Amendment) Act 1983* brought in the concept of deemed "dowry death" caused by the husband or the relatives, as the case may be. This deeming clause has a role to play and cannot be taken lightly and ignored to shield the accused, otherwise, the very purpose of the amendment will be lost. In cases of dowry deaths and suicides, circumstantial evidence plays an important role and inferences can be drawn on the basis of such evidence. That could be either direct or indirect.

Demand for dowry neither conceives nor would conceive of any agreement. The word "agreement" referred to in *section 2 of Dowry Prohibition Act 1961*, has to be inferred on the facts and circumstances of each case. When persistent demands for TV and scooter are made from the bride after marriage or from her parents, it would construe to be in connection with the marriage and it would be a case of demand of dowry falling within the definition of "dowry"under *section 2 of Dowry Prohibition Act 1961* Act and *section 304B, IPC*.

Cruelty or harassment need not be physical. Even mental torture in a given case would be a case of cruelty and harassment within the meaning of *sections 304B* and *498A*, *IPC*. Explanation (a) to section 498A itself refers to both mental and physical cruelty. Again, wilful conduct means, conduct wilfully done, this may be inferred by direct or indirect evidence, which could be construed to be such... They had quarrelled a day before her death. This by itself, would constitute, to be a wilful act to be a cruelty, both within the meaning of *section 498A* and *section 304B*, *IPC, 1860*.

The court must adopt that construction which "suppresses the mischief and advances the remedy". The earlier law was not sufficient to check dowry deaths... Hence, stringent provisions were brought in by shifting the burden to the accused, by bringing in the deemed clause.

Similarly, under explanation to *section 113B of Indian Evidence Act 1872*,[14] there is presumption that such death is on account of dowry death. Thus the burden, if at all, was on the accused to prove otherwise. The evidence would, on the facts and circumstances of the present case, bring to an inescapable conclusion that the quarrel between the deceased and her husband, a day before the actual death of the deceased, cumulatively with other evidence, constitutes cruelty and harassment in connection with marriage... within the meaning of section 498A, Explanation (b), as she was repeatedly abused for not meeting the demands, leading to her mental torture and agony which ultimately led her to commit suicide.

Accordingly, the appellant is sentenced to seven years rigorous imprisonment with a fine of Rs 500, under *section 304B, IPC*, and for two years rigorous imprisonment and fine of Rs 200, under *section 498A, IPC*.

Appeal partly allowed.

Pressurising and harassing the deceased (wife) to part with her stridhan (land received in marriage) and driving her out of the house on refusal, amounts to cruel treatment (498A, IPC, 1860) that led her to commit suicide (section 306, IPC, 1860)—Supreme Court—2003

K Prema S Rao v Yadla Srinivasa Rao[15]

The deceased Krishna Kumari, second daughter of PW 1 was married to Yadla Srinivasa Rao (accused No 1), 26 June 1988, who was employed as Branch Post Master in the village where the spouses live jointly with the parents of the accused.

The accused, husband pressurized and harassed the deceased to part with the land received by her from her father as *"Stridhana"*. As a method adopted for harassment, the husband, who was in a position to do so being a branch post master in the village, suppressed the postal mail of her relatives sent to her. When the wife discovered the letters and she handed them over to her father (PW 1) she was driven out of the house. This cruel conduct of the husband led the wife of commit suicide. On basis of such evidence the conviction of the accused for the offence of "cruelty" under section 498A by trial court and High Court was found to be proper.

Dismissing the appeal, the Apex Court held that under the facts and circumstance of the cases the offence under *section 306 IPC, 1860* and *section 498A IPC* would be clearly made out against the accused. The conviction was confirmed.

In the case of *Ram Singh v State of Haryana,* AIR 2012 SC 925 : (2011) 3 Scale 534, the Supreme Court held that, merely on the allegation that father-in-law and mother-in-law could misappropriate property and practice "cruelty" on the newly wedded daughter–in–law, they cannot be held liable under *section 498A IPC, 1860* for cruelty.

Sections 306, 498A of Indian Penal Code, 1860: In the absence of evidence of cruelty and abetment of suicide the charge that the appellant husband ill treated the deceased wife as a result of which she committed suicide, is liable to be set aside—Supreme Court—2012

Sharadbhai Jivanlal Vaniya v State of Gujarat,

AIR 2012 SC 925 : 2012 Cr LJ 1575

Per Chandramauli Kr Prasad and Harjit Singh Bedi, JJ:

Setting aside the convictions under sections 498A, and 306 of the *Indian Penal Code, 1860* against the appellant husband for ill treating the deceased wife as a result of which she committed suicide, the Apex Court held that in the absence of proof of cruelty and harassment in connection with the demand of dowry, the appellant was entitled to be acquitted.

Section 498A, IPC, 1860: Cruelty by husband or relative of husband—Foster sister is not "relative" within the meaning of section 498A, IPC to fix liability for causing cruelty against the complainant wife by the foster sister of husband—Supreme Court—2010

Vijeta Gajra v State of NCT Delhi,

AIR 2010 SC 2712 : (2010) 11 SCC 618 : 2010 Cr LJ 3841

Per VS Sirpurkar and Cyriac Joseph, JJ:

While holding that the appellant-wife has no valid reason to lodge FIR against the foster sister of husband alleging cruelty under *section 498A, IPC* for non-fulfillment of the demand of dowry in marriage, the Apex Court held that since foster sister is not a "relative" of husband by blood, marriage or adoption, she cannot be tried for offences under *section 498A, IPC*.

Harassment and coercion of the wife for dowry that forced her to commit suicide, and hurriedly cremating her body without any autopsy and informing the parents about the death, amounts to causing cruelty within the meaning of section 498A of IPC, 1860

Undavali Narayana Rao v State of AP,

AIR 2010 SC 3708 : (2009) 14 SCC 588 : 2009 (3) Crimes 265 : JT 2009 (9) SC 573

Per Dr BS Chauhan and Dr Mukundakam Sharma, JJ:

Dismissing the appeal and upholding the conviction under *section 498A, IPC, 1860* for causing cruelty, the Apex Court held that the appellant killed his wife on 5 June 1999 and stage managed a hanging to show that the deceased committed suicide. Her dead body was hurriedly cremated without informing her parents and without conducting any autopsy.

Taking into consideration various other circumstances, particularly the agreement dated 14 March 1990, between the appellant-husband and his wife restraining the appellant from alienating the properties mentioned in the agreement, the Apex Court held that the trial court rightly came to the conclusion that relations between the husband and the wife were not cordial, and that she had been harassed to meet the unlawful demand of the appellant as he wanted to dispose of the immovable property in the name of the deceased and compel the deceased to fetch more money from her parents. The execution of the deed dated 15 June 1999 (Ext P 1) was enough to show that it had been executed in order to restrain the family members of the deceased to launch criminal prosecution against the appellant. The court also took other circumstances into account that the death of the deceased was in the house of the appellant. Neither the appellant nor his mother made any attempt to inform the family members of the deceased about the death; her dead body was cremated hurriedly without any autopsy having been conducted to discover the cause of death.

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1 This Chapter has been inserted by the *Criminal Law (Second Amendment) Act 1983*, w.e.f. 25 December 1983.

2 *LV Jadhav v SA Pawar,* 1983 AIR 1219 : 1983 Cr LJ 150.

3 Crime in India 2015 p 90.

4 *S Hanumantha Rao v S Ramani,* AIR 1999 SC 1318 : (1999) 3 SCC 620.

5 *Indian Penal Code, 1860, section 498A* Explanation to clause (b) *Shobha Rani v Madhuka Reddi,* AIR 1988 SC 121 : (1988) 1 SCC 105, held—demand of dowry amounts to cruelty. See also *State of Maharashtra v Ashok Chotelal Shukla,* AIR 1997 SC 3111 : (1997) 11 SCC 26, wherein it was held that in the absence of positive proof of any ill treatment or harassment by the respondents or her in-laws, *section 498A, Indian Penal Code, 1860* is not attracted.

6 See *"National Crimes Record Bureau Report"*, 2016, pp 83 and 115 respectively.

7 See *State of Punjab v Iqbal Singh,* AIR 1991 SC 1532 : (1991) 1 SCC 1, discussed under *section 306, Indian Penal Code, 1860* and *Shanti v State of Haryana,* AIR 1991 SC 1226 : (1991) 1 SCC 371 under *section 304B, IPC, 1860* for comparison between *sections 306*, *304B* and *498A*, *IPC, 1860*.

8 Times of India, dated 15 September 2018 p 14, Dhananjay.Mahapatra@timesgroup.com

9 (2005) 6 SCC 281 : AIR 2005 SC 3100.

10 AIR 2015 SC 3037 : (2015) 12 SCC 436 : 2015 (6) JT 462 : 2015 (8) Scale 159, TS Thakur and Adarsh Kumar Goel, JJ, delivered the judgment.

11 AIR 2005 SC 303, TS Thakur, Adarsh Kumar Goel and R Banumati, JJ.

12 *Section 31 CrPC* provides punishment in case of conviction of several offences pp 34-41.

13 *(1998) 3 SCC 309* : 1996 SCC (4) 17 : JT 1996 (5) 155 : *AIR 1998 SC 958*, MM Punchhi, CJ, Misra, J.

14 Ins. by *Criminal Law (Second Amendment) Act 1983*, wef 25 December 1983.

15 *AIR 2003 SC 11* : *(2003) 1 SCC 217*. MB Shah, KG Bala Krishnan and DM Dharmadhikari, JJ.

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11.2 Protection of Women from Domestic Violence

Part II Specific Offences

11 CRUELTY BY HUSBAND OR RELATIVES OF HUSBAND

11.2 Protection of Women from Domestic Violence

Domestic violence may be defined as any act, omission or conduct which is of such a nature as to harm or injure or has the potential of harming or injuring the health, safety or well-being of the woman or any child in domestic relationship.[16]

Retrospective Operation of the Protection of Women from Domestic Violence Act 2005

VD Bhanot v Savita Bhanot,

AIR 2012 SC 965 : *(2012) 3 SCC 183* : 2012 (2) Scale 367

The retrospective operation of *Protection of Women from Domestic Violence Act 2005* was challenged in *VD Bhanot v Savita Bhanot*[17]. The petitioner sought a restraint order under *section 12 of Protection of Women from Domestic Violence Act 2005* alleging that she was forced to leave her shared household through an eviction order filed by her husband. The trial court refused to grant relief on the ground that since the petitioner had left the matrimonial home before *Protection of Women from Domestic Violence Act 2005*, came into operation, the claim of a women living in domestic relationship or living together prior to 2006 was not maintainable and the court need not adjudicate upon the case.

The important question which came up for determination by the court was whether a petition under the provisions of the Act is maintainable by a woman, who had stopped living with the respondent, or by a woman, who alleges to have been subjected to any act of domestic violence, prior to coming into force of *Protection of Women from Domestic Violence Act 2005*. Considering the legislative intention to grant reliefs to the victims of violence, the Delhi High Court held that the retrospective operation cannot be advanced to deny reliefs to a woman under *Protection of Women from Domestic Violence Act* and clarified that neither the dates on which the act of violence was committed nor the fact that parties were not living together when the Act came into force is relevant for the purpose of granting reliefs.

While declining to interfere with the order of the High Court, the Apex Court held that the instance comes within the ambit of *section 3 of Protection of Women from Domestic Violence Act 2005* which defines “domestic violence” in wide terms, and modified the order passed by the High Court by directing the respondent to provide residential accommodation to the petitioner along with a monthly maintenance of Rs 10,000/- for day-to-day expenses. Even after the existence of plethora of legislation on women’s rights, violence against women in different forms is rampant across the country. The *Protection of Women from Domestic Violence Act 2005* is a path breaking legislation, which provided various civil law remedies to the victims of domestic violence. Time and again, the proactive approach of the Indian judiciary provided effective protection to the rights of the women guaranteed under the legislation, who are victims of domestic violence.

16 *Law of Domestic Violence*, edited by Indira Jaising, 2001 Edn (Universal Law Publishing Co), p 6.

17 *VD Bhanot v Savita Bhanot*, *AIR 2012 SC 965* : *(2012) 3 SCC 183* : 2012 (2) JT 647 : 2012 (2) Scale 367.

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12.1 Defamation

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

12 DEFAMATION

12.1 Defamation

A person needs to protect his reputation, honour, integrity and character as much as he needs the right to enjoyment of property, health, personal liberty and a number of other privileges.

Defamation,[1] (libel) an injury to a person's reputation, is both a crime and a civil wrong. An aggrieved person may file a criminal prosecution as well as a civil suit for damages for defamation. Withdrawal of a criminal complaint on tender of apology is no bar to a civil action for libel unless there is a specific agreement barring a civil action.[2]

The law of civil defamation, as in England and other common law countries, is also in India; it is largely based on case law. The law of criminal defamation on the other hand is codified in *sections 499* to *502* of the *Indian Penal Code, 1860*. In England, the publication of a (criminal) libel is punishable to the extent of one year imprisonment and fine; and if the publication is with the knowledge of its untruth is two years *vide* section 5 of Libel Act 1843.[3]

In a civil action for defamation in tort, truth is a defence, but in a criminal action, the accused must prove both the truth of the matter and that its publication was for the public good. The defence of truth is not satisfied merely by proving that the publisher honestly believed the statement to be true, he must prove that the statement was in fact true.

Section 499 defines offence of defamation. Analysis of section 499 reveals that to constitute offence of defamation it requires a person to make some imputation concerning any other persons;

(i) Such imputation must be made either (a) with intention, or (b) knowledge, or (c) having reason to believe that such imputation will harm reputation of person against whom imputation is made.

(ii) Imputation could be, by – (a) words, either spoken or written, or (b) by making signs, or (c) visible representations.

(iii) Imputation could be either made or published. Difference between making of imputation and publishing same is: If *"X"* tells *"Y"* that *"Y"* is criminal— *"X"* makes imputation. If *'"X"* tells *"Z"* that *"Y"* is criminal— *"X"* publishes imputation.

Essence of publication in context of section 499 is communication of defamatory imputation to persons other than persons against whom imputation is made. Committing any act which constitutes defamation under section 499 is punishable offence under section 500.[4]

The Supreme Court in *Deepak Balraj Bajaj v State of Maharshtra,*[5] went to the extent of holding that reputation of a person was part and parcel of his "right to life" guaranteed under *Article 19 of the constitution*. Justice Katju, while writing the judgment of the court aptly quoted the celebrated British Judge Lord Denning's remark that:

> A man's liberty is regarded highly by the law of England, that it is not to be hindered or prevented except on the surest grounds.

These are some of the assets valued by individuals and are protected in every civilised society. The *Indian Penal Code, 1860* has dealt with these matters in Chapter XXI (sections 499 to 502).

Section 499 states as to when an act of imputation amounts to defamation. It contains ten exceptions and four explanations and section 500 prescribes punishment in such cases. Sections 501 and 502 punish the act of printing or engraving matters known to be defamatory, and sale of printed or engraved substance containing defamatory matters.

Subramanian Swamy: Supreme Court upheld validity of criminal defamation.

Subramanian Swamy v UOI (Ministry of Law)[6]

Supreme Court upholding the constitutional validity of criminal defamation provision in *sections 499* to *502* of the *Penal Code of India*, 1860 drafted during the colonial era said that "please do not muzzle free speech and asked politicians Rahul Gandhi, Subramanian Swamy, Arvind Kejriwal and other politicians for alleged statements harming others reputation. Bigger the stature of a person making the defamatory statements the graver the offence" the Court said

> Position of persons making the imputation would regulate the standard of care and caution, as it favoured retention of criminal defamation as an option to redress hurt caused to the reputation of a complainant. Right to free speeches cannot mean that a citizen can defame the other.

"Protection of reputation is a fundamental right, it is also a human right", the Court said. Cumulatively, it (defamation laws) serves social interest. Each man is entitled to dignity of person and of reputation. Nobody has a right to degenerate others right to person or reputations rejecting the argument that criminal defamation was meant to silence a free speech.

Writing the judgment for the bench, elucidating on concepts of free speech, democracy, dignity and reputation of individuals and referring to foreign case laws, Justice Misra said,

"It is extremely difficult to subscribe to the view that criminal defamation has a chilling effect on the freedom of speech and expression."

The Court said, reputation of a person was intrinsic to most precious right to life guaranteed under *Article 21* and for its protection Parliament has kept intact *sections 499* and *500* of *IPC, 1860*. Cumulatively, it (the defamation laws) serves social interest… Each person is entitled to dignity of person and of reputation. Nobody has a right to denigrate others' right to person or reputation, a bench of Justices Dipak Misra and PC Pant said in its 267-page judgment rejecting arguments that criminal defamation was a legal tool to silence free speech.

In brief, the facts and judgment delivered by the Court is being discussed below:

> The present batch of writ petitions have been preferred under *Article 32 of Constitution of India* challenging the constitutional validity of *sections 499* and *500* of *Indian Penal Code, 1860* and sections 199 (1) to 199 (4) of *Code of Criminal Procedure 1973*.

The assertion by the Union of India and the complainants is that the reasonable restrictions are based on the paradigms and parameters of the *Constitution* that are structured and pedestalled on the doctrine of non-absoluteness of any fundamental right, cultural and social ethos, need and feel of the time, for every right engulfs and incorporates duty to respect other's right and ensure mutual compatibility and conviviality good company of the individuals based on collective harmony and conceptual grace of eventual social order; and the asseveration (declaration) on the part of the petitioners is that freedom of thought and expression cannot be scuttled or abridged on the threat of criminal prosecution and made paraplegic (suffering) on the mercurial (changeable) stance of individual reputation and of societal harmony, for the said aspects are to be treated as things of the past, a symbol of colonial era where the ruler ruled over the subjects and vanquished concepts of resistance; and, in any case, the individual grievances pertaining to reputation can be agitated in civil courts and thus, there is a remedy and viewed from a prismatic perspective, there is no justification to keep the provision of defamation in criminal law alive as it

creates a concavity and unreasonable restriction in individual freedom and further progressively mars voice of criticism and dissent which are necessitous for the growth of genuine advancement and a matured democracy.

While disposing of the petitions the court upheld the constitutional validity of *section 499 IPC, 1860*.

The court addressing at length on the concept of reasonable restriction made an effort to pertaining to the meaning of the term “defamation” as used in *Article 19* (2). In this regard, four aspects, were highlighted namely,

(i) defamation, however extensively stretched, can only include a civil action but not a criminal proceeding,

(ii) even if defamation is conceived of to include a criminal offence, regard being to its placement in *Article 19* (2), it has to be understood in association of the words, “incitement to an offence”, for the principle of *noscitur a sociis* has to be made applicable, then only the cherished and natural right of freedom of speech and expression which has been recognized under *Article 19* (1)(a) would be saved from peril,

(iii) the intention of clause (2) of *Article 19* is to include a public law remedy in respect of a grievance that has a collective impact but not to take in its ambit an actionable claim under the common law by an individual and

(iv) defamation of a person is mostly relatable to assault on reputation by another individual and such an individual cavil cannot be thought of being pedestalled as fundamental right and, therefore, the criminal defamation cannot claim to have its source in the word “defamation” used in *Article 19 (2) of the Constitution*.

To appreciate the said facets of the submission, it is necessary to appreciate ambit and purport of the word “defamation”. To elaborate, whether the word “defamation” includes both civil and criminal defamation. Only after the Court answered the said question, it proceeded to advert to the aspect of reasonable restriction on the right of freedom of speech and expression as engrafted under *Article 19* (1)(a).[7]

For detail discussion of the provisions of different countries see KD Gaur, Text Book on the *Indian Penal Code*, 6th Edn 2015 pp 1066 to 1104.

499. Defamation.—Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person’s reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Illustrations

(a) *A* says—“*Z* is an honest man; he never stole *B*’s watch:” intending to cause it to be believed that *Z* did steal *B*’s watch. This is defamation, unless it falls within one of the exceptions.

(b) *A* is asked who stole *B*’s watch. *A* points to *Z*, intending to cause it to be believed that *Z* stole *B*’s watch. This is defamation, unless it falls within one of the exceptions.

(c) *A* draws a picture of *Z* running away with *B*’s watch, intending it to be believed that *Z* stole *B*’s watch. This is defamation, unless it falls within one of the exceptions.

First Exception.—**Imputation of truth which public good requires to be made or published.**—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

*Second Exception***.—Public conduct of public servants.**—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

*Third Exception***.—Conduct of any person touching any public question.**—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustrations

It is not defamation in *A* to express in good faith any opinion whatever respecting *Z*'s conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties in which the public is interested.

Fourth Exception.—**Publication of reports of proceedings of courts.**—It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Explanation.—A Justice of the Peace or other officer holding an inquiry in open court preliminary to a trial in a court of Justice, is a Court within the meaning of the above section.

*Fifth Exception.***—Merits of case decided in Court or conduct of witnesses and others concerned.**—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Illustrations

(a) *A* says—"I think *Z*'s evidence on that trial is so contradictory that he must be stupid or dishonest". *A* is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects *Z*'s character as it appears in *Z*'s conduct as a witness, and no further.

(b) But if *A* says—"I do not believe what *Z* asserted at that trial because I know him to be a man without veracity;" *A* is not within this exception, inasmuch as the opinion which he expresses of *Z*'s character is an opinion not founded on *Z*'s conduct as a witness.

*Sixth Exception***.—Merits of public performance**.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation.—A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations

(a) A person who publishes a book, submits that book to the judgment of the public.

(b) A person who makes a speech in public, submits that speech to the judgment of the public.

(c) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(d) *A* says of a book published by *Z*—"*Z*'s book is foolish; *Z* must be a weak man. *Z*'s book is indecent; *Z* must be a man of impure mind". *A* is within this exception, if he says this in good faith, inasmuch as the opinion which he expresses of *Z* respects *Z*'s character only so far as it appears in *Z*'s book, and no further.

(e) But if *A* says—"I am not surprised that *Z*'s book is foolish and indecent, for he is a weak man and a libertine". *A* is not within this exception, inasmuch as the opinion which he expresses of *Z*'s character is an opinion not founded on *Z*'s book.

*Seventh Exception***.—Censure passed in good faith by person having lawful authority over another.**—It is not defamation if a person having over another any authority, either conferred by law or arising out of lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustrations

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

*Eighth Exception***.—Accusation preferred in good faith to authorised person.**— It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of the accusation.

Illustrations

If *A* in good faith accuses *Z* before a Magistrate; if *A* in good faith complains of the conduct of *Z*, a servant, to *Z*'s master; if *A* in good faith complains of the conduct of *Z*, a child, to *Z*'s father—*A* is within this exception.

*Ninth Exception***.—Imputation made in good faith by person for protection of his or other's interests.**—It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

Illustrations

(a) *A*, a shopkeeper, says to *B*, who manages his business—"Sell nothing to *Z* unless he pays you ready money, for I have no opinion of his honesty". *A* is within the exception, if he has made this imputation on *Z* in good faith for the protection of his own interests.

(b) *A*, a Magistrate, in making a report to his own superior officer, casts an imputation on the character of *Z*. Here, if the imputation is made in good faith, and for the public good, *A* is within the exception.

*Tenth Exception***.—Caution intended for good of person to whom conveyed or for public good.**—It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

500. Punishment for Defamation.—Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

501. Printing or engraving matter known to be defamatory.—Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Comment: Printing or engraving any defamatory material's altogether a different offence under *section 501, Indian Penal Code, 1860*.

502. Sale of printed or engraved substance containing defamatory matter.—Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Comment: Offering for sale or selling any such printed or engraved defamatory material is yet another distinct offence.

Good faith and public good will exonerate charge of defamation vide ninth exception to section 499 of the Indian Penal Code, 1860—Appeal Allowed, Conviction set aside—Supreme Court—1966

Harbhajan Singh v State of Punjab,

AIR 1966 SC 97 : *[1965] 3 SCR 235*

The criminal proceedings against the appellant were started on a complaint filed by Surinder Singh Kairon, son of S Pratap Singh Kairon, then Chief Minister of the State of Punjab for publishing in the press a statement against him which was highly defamatory. The extracts from it were given publicity in the "The Times of India" and certain other newspapers. According to the complaint, the defamatory statement being absolutely untrue the appellant was liable to be punished under *section 500, IPC, 1860*.

The Punjab Government denied the allegation. In response to the press note, the appellant published the impugned statement which reads:

> ...As one of those who have been naming that son of the minister as one of the leaders of the smugglers from public platform, I hereby name that son as S Surinder Singh Kairon, son of S Pratap Singh Kairon, Chief Minister. I further allege that the son of our chief minister is not only a leader of smugglers but is responsible for a large number of crimes being committed in Punjab. But because the culprit happens to be the chief minister's son the cases are always shelved up.
>
> If the Punjab Government accepts this challenge, it should do so by appointing an independent committee of impartial judges from outside Punjab and then let us see who has to face the consequences. If the Punjab Government dare not do so, I would not mind serving a term in jail for having had the courage to come out with the truth. Chief Minister's son is being discussed in almost every Punjabi house, but people are afraid of talking about him in public lest they be punished for that.

The appellant alleged that the allegations made by him in his impugned statement were true and he had published the said allegation in the interest of public good (*First Exception* to *section 499, IPC, 1860*) and that the imputation had been made in good faith and for public good (*Ninth Exception* to *section 499, IPC, 1860*).

The trial judge rejected the appellant's contentions and convicted the appellant. The High Court in appeal confirmed the order.

Allowing the appeal and setting aside the conviction, the Supreme Court held that exception 9 to section 499 provides, that it is not defamation to make an imputation on the character of another, provided the imputation be made in good faith for the protection of the interest of the person making it or for any other person or for the public good. In the present case, the ingredient of public good was satisfied and the only question which arose for decision was whether the imputation can be said to have been made in good faith.

Chief Justice Gajendragadkar held:

…"Good faith" is defined by section 52 of the Code, as stated below:

> Section 52. Good Faith.—Nothing is said to be done or believed in good faith which is done or believed without due care and attention.

So, in considering the question as to whether the appellant acted in good faith in publishing his impugned statement, we have to inquire whether he acted with due care and attention.

To decide whether an accused acted in good faith under the ninth exception, it is not possible to lay down any rigid rule or test. It would be a question to be considered on the facts and circumstances of each case—what is the nature of the imputation made; under what circumstances did it come to be made; what is the status of the person who makes the imputation; was there any malice in his mind when he made the said imputation; did he make any

inquiry before he made it; and are there reasons to accept his story that he acted with due care and attention and was satisfied that the imputation was true?

The question for decision is—has the appellant shown that he acted in good faith when he made an imputation against the complainant that he was the leader of smugglers, and was responsible for a large number of crimes being committed in Punjab?

In dealing with this question, we made a broad survey of the evidence led by the appellant and the background in which the impugned statement came to be made. It appears that before the impugned statement was made, newspapers had been publishing reports against a minister's son without naming him. Some members of the Punjab Legislative Assembly had also made similar statements on the floor of the House.

The fact that the appellant knew about the complainants friendship and active association with these two gold smugglers—Hazara Singh and Kulwant Rai, and in response to the challenge issued by the Punjab Government, came up with the impugned statement and sent it for publication in the press indicates that he acted in good faith.

In regard to the other allegation that the complainant was concerned with the commission of offences, the confidential report of the Principal of Punjab University College about the complainant, who was a student of the college between June 1952 to April 1953, is relevant. This report unambiguously indicates that the complainant threatened several students with a stick, and it speaks of two or three incidents that took place and created considerable excitement and commotion among the student community in the college. In his report, the principal, in fact, describes the situation as very ugly, and he refers to the fact that the students went on strike and passed resolutions, demanding the rustication of the complainant from the University and also protesting against inaction and partiality of the principal himself.

As the impugned statement was for the public good the appellant is entitled to claim the protection of the ninth exception.

Conviction set aside.

Remarks of taking bribe per se defamatory if not made in good faith—Appeal dismissed—Supreme Court—1965

Sahib Singh Mehra v State of UP,

AIR 1965 SC 1451 : [1965] 2 SCR 823

The appellant was prosecuted under *section 500, IPC, 1860* for publishing an article entitled *Ulta Chor Kotwal Ko Dante* (meaning "Reprimand of police officer by a thief") in his paper *Kaliyug* dated 22 September 1960 at Aligarh. The article read as under:

> ...The justice stands at a distance as a helpless spectator of the show as to the manner in which the illicit bribe money from plaintiffs and defendants enter into the pockets of the public prosecutors and assistant public prosecutors and the extent to which it reaches and to which use it is put.

It was held that the impugned remarks were per se defamatory of the group of persons referred to. There is nothing on record to establish that the defamatory remarks were made in good faith after taking due care and attention, or that the statements were made for the protection of the interest of the person making it, or of any other person, or for public good to attract the provisions of *Third Exception* or *Ninth Exception* of section 499 of the Code.

To invoke eighth exception to section 499 of IPC, 1860, accusation against complainant should be made to authorised person only—Accused held liable —Supreme Court—1992

Kanwal Lal v State of Punjab,

AIR 1963 SC 1317 : 1963 Supp (1) SCR 479

The accused, a police officer, was prosecuted under *section 500, IPC, 1860* for making a defamatory statement against his neighbour, to the District Panchayat Officer, in which he stated that *R* was a woman of bad character

and was having illicit connection with undesirable persons, who visited her at all hours of the night and that her immoral activities reflected badly on the residents of the locality. He requested the *Panchayat* to take appropriate action to get the house, occupied by her, vacated and thus end the prostitution centre.

It was held that the appellant was not protected under *Eight Exception* or *Ninth Exception* of *section 499, IPC, 1860*. To invoke the benefit of *Eight Exception*, the imputation must be made to a person in lawful authority over the person (against whom the statement is made) with respect to the subject matter of the accusation.

Since the *Panchayat* or the Panchayat Officer had no such lawful authority over the woman defamed, the case was not covered under *Eight Exception*.

Likewise, *Ninth Exception* could not be invoked because there was no common interest in the subject matter of the communication between the accused and the Panchayat Officer to whom the accusation was made.

Character assassination by husband against wife amounts to defamation— Husband held liable—case compounded on unqualified apology and on payment of fine—Supreme Court—1992

Mukund Martand Chitnis v Madhuri Mukund Chitnis,

AIR 1992 SC 1804 : 1991 Supp (2) SCC 359

The marriage of the appellant and the first respondent at Pune on 15 July 1983 opened a sad and unfortunate chapter in their life. On the wedding night itself, the husband suspected the chastity of the wife. The bitterness that commenced soon culminated in a separation within a month's time. Allegations and counter-allegations made. The husband resorted to mud-slinging and character assassination. A complaint of theft was also lodged against the wife. A search warrant was taken out. The wife's residence was searched for ornaments alleged to have been stolen by her and an inventory was prepared. All this added to the bitterness that led to the filing of two separate complaints of defamation under *section 500, IPC, 1860* by the wife. A complaint was also lodged under *section 498A, IPC* that ended in a conviction. In the two complaints lodged under section 500, the husband was acquitted by the trial court but on appeal he came to be convicted by the High Court and was sentenced to suffer simple imprisonment for two months and to pay a fine of Rs 3000.

It was against the said order of conviction and sentence that the present two appeals had been filed.

On the appellant-husband filing an unqualified apology as indicated earlier and on his brother filing an undertaking and on the appellant-husband depositing the fine amount in the proceedings under *section 498A, IPC*, and on his further depositing a sum of rupees one lakh, the two appeals stood compounded by and between the parties and the order of conviction and sentence in each case, were set aside and the appellant was acquitted.

The court appreciated that the High Court took a serious view of the husband's conduct. But for that the respondent-wife would not have been able to vindicate her honour and receive compensation for the defamatory statement. This should prove to be an eye-opener to those who believe that they can get away by casting aspersions on a woman to serve their ends and to silence her.

Appeal Dismissed

12.1.1 Case from Singapore

When allegation is per se defamatory, actual harm not necessary for conviction Appeal dismissed—Singapore High Court—1973

Harbans Singh Sidhu v Public Prosecutor,

(1973) 1 MLJ 41 (Singapore HC)

Per Wee Chong Jin CJ:

The appellant, Harbans Singh Sidhu, challenged the correctness of his conviction for an offence under *section 500 of Penal Code* of Singapore (which is the same as under *section 500 IPC, 1860*). The criminal proceedings against

the appellant were started on a complaint filed by the Attorney General of Singapore, who in his complaint alleged that the appellant defamed Lee Kuan Yew, the then Prime Minister of Singapore by spoken words.

In August 1972, the appellant Harbans Singh Sidhu was an opposition candidate for election to Parliament. In the course of an election campaign speech he described the then Prime Minister of Singapore, Lee Kuan Yew as "one of the biggest scoundrels in the world" "doing worse than Lim Yew Hock", "gangster of Singapore" and "kidnapper No 1 in Singapore".

It was not disputed that these statements were per se defamatory. The court held that none of the exceptions to section 499 of Singapore *Penal Code* applied (same as *section 499 IPC*).

Section 499 of the Singapore *Penal Code* does not require that actual harm be caused. It is sufficient to show that the accused intended to harm, or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant.

A defamatory statement may be grossly exaggerated to the point of being ridiculous. Nevertheless, the person is liable for defamation as stated by Dr Hari Singh Gour in *the Penal Law of India.*

In fact, the accused, may then and there be discredited, the reputation of the complainant which may be too well established to be shaken by his scurrility. But the law protects one by punishing the other on account of his depraved intention and its tendency to cause harm. It is one of those cases in which the law punishes the archer as soon as the arrow is shot no matter if it fails to hit the target.[8]

Appeal dismissed.

12.1.2 English Case

Words that offend religious feelings punishable, irrespective of intention— Appeal dismissed—House of Lords—1979

R v Lemon; R v Gay News Ltd,

[1979] 1 All ER 898 (HL)

The appellants, the editor and publishers of a newspaper "Gay News", were convicted of blasphemous libel. They published, with illustrations, a poem by Professor James Kirkup entitled "The Love that Dares to Speak its Name". This described in explicit detail acts of sodomy and fellatio and promiscuous homosexual activities. The trial judge ruled inadmissible any evidence as to the intention with which the poem was published.

The Court of Appeal dismissed the appeal but certified the following point of law whether:

(1) it was sufficient if the jury took the view that the publication complained of vilified Christ in his life and crucifixion, and

(2) it was not necessary for the Crown to establish any further intention on the part of the appellants beyond an intention to publish that which in the jury's view was a blasphemous libel.

Per Lord Scarman:

The issue is one of legal policy in today's society. People who know what they are doing, will be criminally liable if the words they choose to publish are such as to cause grave offence to the religious feelings of some of their fellow citizens or are such as to tend to deprave and corrupt persons who are likely to read.

Appeals dismissed.

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1 Winfield and Jolowics on Tort, 17th Edn by WVH Roger (2006), p 515. "Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right thinking members of society

generally or tends to make them shun or avoid him." See *Ashok Kumar v Radha Kanta,* AIR 1967 Cal 178 : 1967 Cr LJ 455.

2 *Govinda Charyulu v Sheshagiri Rao,* AIR 1941 Mad 860 (861).

3 Smith and Hogan, Criminal Law, 10th Edn, 733-739. See *Desmond v Thorne,* (1982) 3 All ER 268. Harris's Criminal Law, 22nd Edn, reprint 2000, p. 207.

4 *Mohammed Abdulla Khan* v *Prakash K,* AIR 2017 SC 5608, J Chelameswar and S Abdul Nazeer, JJ, delivered the judgment.

5 Judgment was delivered by Justices Altamas Kabir and Markandey Katju Dhanajaya Mahapatra, Post-1980 the Supreme Court has virtually been on an over drive to maintain the sanctity of right to life guaranteed to all citizens and for foreigners under *Article 21 of Constitution*, The Times of India, Pune, Monday, 17 November 2008, p 7.

6 AIR 2016 SC 2728 : 2016 (5) Scale 379 : 2016 (5) SCJ 643 : (2016) 7 SCC 221, decided on 13 May 2016, Dipak Misra and Prafulla C Pant, JJ.

7 *Article 19 (1)(a) of the Constitution* stated … All citizens shall have the right (a) to freedom of speech and expression. Otherwise sub-section (2) puts reasonable restrictions in the interest of sovereignty of India, security, public order, recovery etc.

8 Hari Singh Gour, *Penal Law of India,* vol IV, 11th Edn, 2000 p 4858.

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13.1 Introduction to Chapter XXII of IPC

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Part II Specific Offences

13 CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE

13.1 Introduction to Chapter XXII of IPC

The *Indian Penal Code, 1860*, Chapter XXII, sections 503-510, deal with the offences of “criminal intimidation”, “insult” and “annoyance” as discussed below:

(i) Criminal Intimidation (*sections 503*, *506*, *507* and *508 IPC*);

(ii) Insult (*sections 504* and *509 IPC*);

(iii) Annoyance (*section 510 IPC*).

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13.2 Criminal Intimidation

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Part II Specific Offences

13 CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE

13.2 Criminal Intimidation

Section 503 defines “criminal intimidation”, and section 506 prescribes punishment which may extend to two years, fine or both, and sections 507 and 508 are applicable where criminal intimidation is caused by anonymous communication or by inducing a person to believe that he will be rendered an object of divine displeasure. In criminal intimidation, a person is threatened to do, or to abstain from doing something which he was not legally bound to do, or to omit to do any act which that person is legally entitled to do.

The offence becomes aggravated, if the threat is to cause the death of the person threatened, or grievous hurt, or destruction of any property by fire, or the threat is to impute unchastity to a woman. In such a case, the punishment may extend upto seven years of imprisonment, or fine; or both.

503. Criminal intimidation.—Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

Illustration

A, for the purpose of inducing *B* to desist from prosecuting a civil suit, threatens to burn *B's* house. *A* is guilty of criminal intimidation.

506. Punishment for criminal intimidation.—Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

If threat be to cause death or grievous hurt, etc.—And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

507. Criminal Intimidation by an anonymous communication.— Whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.

508. Act caused by inducing person to believe that he will be rendered an object of divine displeasure.— Whoever voluntarily causes or attempts to cause any person to do anything which that person is not legally bound

to do, or to omit to do anything which he is legally entitled to do, by inducing or attempting to induce that person to believe that he or any person in whom he is interested will become or will be rendered by some act of the offender an object of divine displeasure if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is the object of the offender to cause him to omit, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Illustrations

(a) *A* sits on dharna at *Z*'s door with the intention of causing it to be believed that, by so sitting, he renders *Z* an object of divine displeasure. A has committed the offence defined in this section.

(b) *A* threatens *Z* that, unless *Z* performs a certain act, *A* will kill one of *A*'s own children, under such circumstances that the killing would be believed to render *Z* an object of Divine displeasure. *A* has committed the offence defined in this section.

Conviction for criminal intimidation legal even though on same facts extortion is also established—no prejudice is caused by defect in framing charge—Appeal Dismissed, Conviction upheld—Supreme Court (1960)

Romesh Chandra Arora v State of Punjab,

AIR 1960 SC 154 : [1960] 1 SCR 924 : 1960 Cr LJ 177

The appellant was convicted for "criminal intimidation" under section 506 on the ground that he took indecent photographs of a girl by pretending to love her, and threatened her father, in letters written to him, with the publication of the photographs with intent to extort money from him. The appellant's conviction for the offence of criminal intimidation under *section 506, IPC, 1860* was bad. The appellant could have been convicted of extortion under *section 384* read with *section 511*, *IPC, 1860* instead.

Dismissing the appeal, the Supreme Court held that the offence of criminal intimidation was committed by threatening *X* and his daughter with injury to their reputation by having the indecent photographs published, the intent mentioned was to cause alarm to *X* and his daughter. The real intention, as disclosed by the evidence was to force *X* to pay "hush money".

Per SK Das, J, stated:

Section 506 is the penal section which states the punishment for the offence of criminal intimidation; the offence itself is defined in section 503. The section last mentioned is in two parts:

(i) the first part refers to the act of threatening another with injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested; and

(ii) second part refers to the intent with which the threatening is done and it is of two categories, one is intent to cause alarm to the person threatened, and the second is to cause that person to do any act which he is not legally bound to do or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat.

On the findings arrived at against the appellant, the first part of the section is clearly fulfilled; and as to the intent, it comes more properly under the second category, that is, to cause *X* to do any act (in other words, to pay hush money) which he was not legally bound to do, as a means of avoiding threat. The real intention of the appellant appears to have been not so much as to cause alarm only as to make *X* pay "hush money" to him. It is not often that a particular act in some of its aspects comes within the definition of a particular offence in the *Indian Penal Code*, while in other aspects, or taken as a whole, it comes within another definition. There are obvious differences between the offence of extortion (section 383) and the offence of criminal intimidation (section 503). The appellant was clearly guilty of the offence of criminal intimidation. Appeal dismissed.

13.3 Insult

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Part II Specific Offences

13 CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE

13.3 Insult

Section 504 of Indian Penal Code, 1860 reads as under:

504. Intentional insult with intent to provoke breach of the peace.— Whoever, intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with **both.**

Mere use of abusive language that may lead to a breach of peace does not make it ipso facto an offence—Appeal Allowed, Conviction set aside—Bombay High Court—1932

Philip Rangel v Emperor,

AIR 1932 Bom 193 : 137 Ind Cas 186

In a meeting held by the shareholders of a company, it was proposed that the persons who had requisitioned the meeting, be expelled from the company. Consequently the accused, one of the requisitioners, got angry and left the room. While doing so, he muttered the words “bloody bastards and cads” under his breath, which were heard by some members present there. The accused was convicted for causing intentional insult to provoke breach of peace under *section 504, IPC, 1860*.

Per Beaumont CJ:

> If *A* calls *B* a bastard in circumstances which suggest that he means what he says, that no doubt does reflect on the chastity of *B's* mother, and nobody would suggest that it was not an insult to *B*. But when you find that the accused described all the members present at this meeting (about 40) of whose antecedents the accused presumably knew nothing at all, as bastards, it seems to me quite impossible to suppose that he meant literally that they were all persons born out of wedlock. It is much more probable that he was using a mere term of vulgar abuse. And when you find that he qualifies the description bastard by the adjective “bloody”, although there is no suggestion that there was bloodshed at the meeting, it seems to me abundantly clear that this expression was not intended to be taken literally but was intended as a mere abuse.

Allowing the appeal and setting aside the conviction the High Court said section 504 does not make it an offence to use abusive language that may lead to a breach of the public peace. There must be an intentional insult. Words must amount to something more than “mere vulgar abuse”.

Section 509, IPC, 1860 reads as under:

509. Word, gesture or act intended to insult the modesty of a woman.— Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to three years, and also with fine.

Amendment of section 509.—*Section 509 of Indian Penal Code, 1860* has been amended by *Criminal Law Amendment Act* 2013 which provides that in *section 509 of the Penal Code*, for the words “shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both”, the words “shall be punished with simple imprisonment for a term which may extend to three years, and also with fine” shall be substituted.

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13.4 Annoyance

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Part II Specific Offences

13 CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE

13.4 Annoyance

Section 510 makes provision for punishment in the case of a person causing annoyance to any person in a public place.

510. Misconduct in public by a drunken person.—Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both.

A similar provision is contained in *section 34 (vi) of Police Act 1861*, which punishes

> “any person who is found drunk, or riotous, or who is incapable of taking care of himself”.

14.1 Introduction to Chapter XVII of IPC

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

14 OFFENCES AGAINST PROPERTY

14.1 Introduction to Chapter XVII of IPC

Chapter XVII of *Indian Penal Code, 1860* (*IPC*), sections 378 to 462, deal with "Of Offences Against Property". These provisions protect, preserve and conserve one's right to property[1] against violations,[2] and may be grouped into three categories; the first consisting of provisions dealing with eight offences; the second and the third consisting of provisions dealing with one offence each. These are as follows:

(1) Offences against property:

(i) Theft (sections 378 to 382);

(ii) Extortion (sections 383 to 389);

(iii) Robbery and Dacoity (sections 390 to 402);

(iv) Criminal Misappropriation of Property (sections 403, 404);

(v) Criminal Breach of Trust (sections 405 to 409);

(vi) Receiving of Stolen Property (sections 410 to 414);

(vii) Cheating (sections 415 to 420);

(viii) Fraudulent Deeds and Disposition of Property (sections 421 to 424).

(2) Offences of injury to property:

(ix) Mischief (sections 425 to 440).

(3) Offences of violation of right to property:

(x) Criminal Trespass (sections 441 to 462).

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1 A property may be either movable or immovable. See *General Clauses Act 1897, section 3* (36) and Indian *Registration Act 1908, section 3* for the definition of "movable property", and *General Clauses Act 1897, section 3* (26) and *Transfer of Property Act 1882, section 3* for the definition of "movable property".

2 Gour Hari Singh, *Penal Law of India,* vol IV, 11th Edn, (2000), p 3684.

14.2 Offences against Property

KD Gaur: Criminal Law-Cases and Materials, 9th ed

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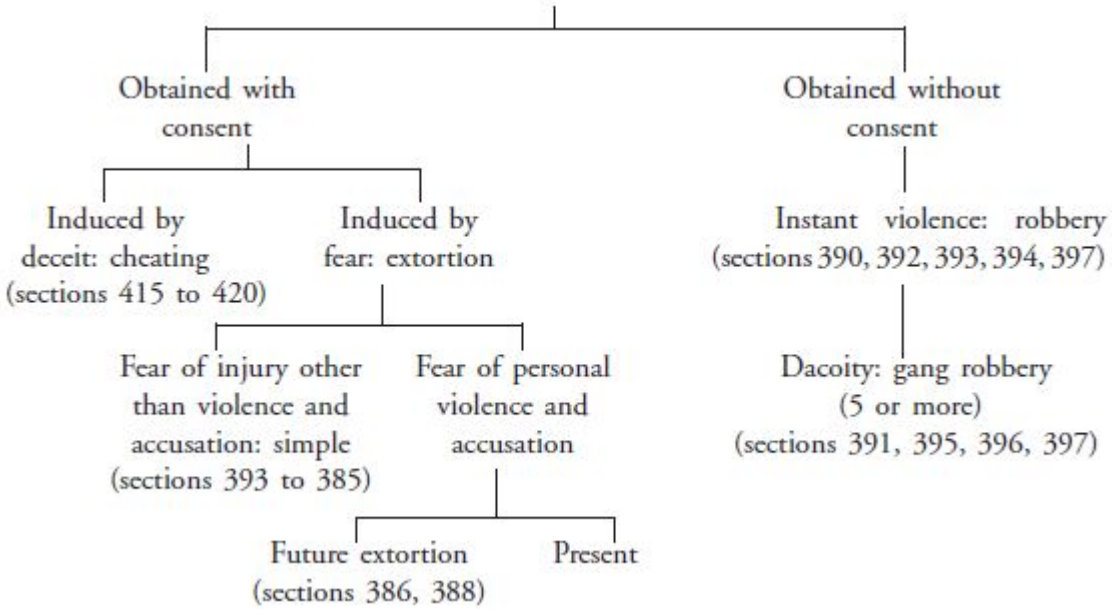
Part II Specific Offences

14 OFFENCES AGAINST PROPERTY

14.2 Offences against Property

Offences against property consist of those kinds of offences in which a person is deprived of his valuables illegally. The *Penal Code of India*, 1860 makes a distinction amongst these offences, based on the manner in which a person is deprived of his belongings. The following chart shows a broad distinction in some of the offences discussed in this section.

Delivery of Property[3]



3 Hari Singh Gour, *Penal Law of India*, vol II, p 3075.

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14.3 Theft

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Part II Specific Offences

14 OFFENCES AGAINST PROPERTY

14.3 Theft

Section 378, IPC, 1860 reads as under:

378. Theft.—Whoever, intending to take dishonestly any moveable property[4] out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

Explanation 1.—A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.—A moving effected by the same act which effects the severance may be a theft.

Explanation 3.—A person is said to cause a thing to move by removing an obstacle which prevented from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.—A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

Illustrations

(a) *A* cuts down a tree on *Z's* ground, with the intention of dishonestly taking the tree out of *Z's* possession without *Z's* consent. Here, as soon as *A* has severed the tree in order to such taking, he has committed theft.

...

(c) *A* meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, *A* has committed theft of the treasure.

...

379. Punishment for theft.—Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 378 defines the offence of theft and section 379 prescribes punishment for theft. Theft, as defined in section 378, is the dishonest removal and taking of movable property out of the possession of any person without his

consent. It is thus an offence against possession and not against ownership.[5] There are five explanations attached to section 378 to explain when an act amounts to theft.

To constitute theft, the following ingredients[6] are required:

(a) The accused must have a dishonest intention to take the property;

(b) The property must be movable;

(c) The property must be taken out of the possession of another person, resulting in wrongful gain by one and wrongful loss to another;

(d) The property must be moved in order to such taking, i.e. obtaining property by deception; and

(e) Taking must be without that person's consent (express or implied).

Theft of electricity is not a theft of movable property within *section 378 of IPC, 1860*.[7] However, it is punishable under *section 135 of Electricity Act 2003*. On the other hand, cooking gas or water passing through pipeline can be a subject of theft, when the accused fixed a pipe in the main line just before the meter, to avoid payment.[8] Idols from the temples, paintings from museums and other public or private places are subject to theft. The human body, whether living or dead (except mummified or dead bodies preserved in scientific institution or medical colleges), is not subject to theft.

14.3.1 Theft under English Law

Theft is an indictable offence punishable with imprisonment for 10 years under section 7 of Theft Act 1968. Section 1 (1) of the Act states that "a person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it". Unlike India, theft consists of four ingredients, viz:

(a) dishonestly;

(b) appropriation;

(c) of property which is capable of being stolen, belonging to another;

(d) with intention to deprive permanently.

According to section 30 of the Act, husband or wife is liable for theft by one spouse against the property of another, as if they were not married. In India also under Hindu Law, husband and wife can be liable for theft against each other. For instance, a husband is liable for theft, if he takes away the *stridhan* of his wife, which is her exclusive property. Likewise, if the exclusive property of one is taken away or misappropriated and the marriage breaks down, the other will be liable for theft. There is no presumption that husband and wife are one for the purpose of criminal law. Similarly, under Muslim law, wife may be convicted of theft for stealing husband's property and vice versa.

Even temporary deprivation of another's property amounts to theft—Appeal Dismissed, conviction upheld—Supreme Court—1957

KN Mehra v State of Rajasthan,

AIR 1957 SC 369 : [1957] 1 SCR 623

The appellant, KN Mehra, and one MZ Phillips were convicted under *section 379, IPC, 1860* for theft of an aircraft. Both the accused persons were cadets on training in the Indian Air Force Academy at Jodhpur. Phillips had been discharged from the Academy on the grounds of misconduct. Mehra was a cadet receiving training as a navigator and was due for a flight in a Dakota as part of his training. However, on the scheduled day, Mehra along with Phillips took off, not in a Dakota, but a Harvard HT 822, before the prescribed time, without authorisation, and without observing any of the formalities which were the pre-requisites for an air-craft flight. They landed at a place in Pakistan about 100 miles away from the Indo-Pakistan border. Both of them were sent back to Delhi and arrested enroute in Jodhpur and prosecuted and convicted for theft.

The appellant contended that in the circumstances of this case there was implied consent to the moving of the aircraft inasmuch as the appellant was a cadet who, in the normal course, would be allowed to fly in an aircraft for purposes of training.

Rejecting the contention, the court said the taking out of the aircraft in the present case had no relation to any such training. It was an aircraft different from that intended for the appellant's training course, for the day. The flight was persisted in, despite of signals to return when the unauthorised nature of the flight was discovered. It is impossible to infer consent in such a situation.

Another contention of the appellant was that, there was no proof in this case of any dishonest intention much less of such an intention, at the time when the flight started. It is accordingly necessary to consider what, "dishonest" intention and "wrongful gain" and "wrongful loss" consist of under *Indian Penal Code, 1860*. *Section 24 of IPC* says "whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly."

And, *Section 23 of IPC, 1860* reads as follows:

23. "Wrongful gain".—"Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.

"Wrongful loss".—"Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

Gaining wrongfully, losing wrongfully.—A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

The taking out of the Harvard aircraft by the appellant for the unauthorised flight did give the appellant the temporary use of the aircraft, for his own purpose and temporarily deprived the owner of the aircraft, namely, the government, of its legitimate use of its purposes. Such use being unauthorised and against all the regulations of aircraft flying, was clearly a gain or loss by unlawful means. Further, the unlawful aspect is emphasised by the fact that it was for flight to a place in Pakistan. Thus, there has been both wrongful gain to the accused, and wrongful loss to the government. The appeal was dismissed, and the conviction upheld.

Indian Penal Code, 1860, sections 380, 457 and 460: Theft in dwelling house, trespass and house breaking by night. If the view taken by the High Court while reversing the judgment of the Trial Court appears to be just and reasonable which is also supported by cogent reasoning then this Court would not re-appreciate the evidence again especially when the appear arises out of the order of acquittal.—Supreme Court—2016. State appeal dismissed. Acquitted upheld.

State of Haryana v Hussain[9]

Per Abhay Manohar Sapre, J:

Trial Court convicted respondent for commission of offences under sections 380, 457 and 460 of Code 1860 (theft in dwelling house, trespass and house breaking by night) – Single judgment of High Court allowed appeal filed by respondent and set aside conviction order while dismissing the state appeal Apex Court held:

(i) The view taken by the High Court was based on appreciation of evidence and the same was taken within its jurisdiction. The High Court had given its reasoning as for reversing the finding of the Trial Court. It was one of the possible views, which the High Court was capable to take on appreciation of evidence and it had so taken. It is a settled principle of law that if the view taken by the High Court while reversing the judgment of the Trial Court appears to be just and reasonable which is also supported by cogent reasoning then this Court would not re-appreciate the evidence again especially when the appeal arises out of the order of acquittal. It is only when the High Court while reversing the judgment of the Trial Court fails to record any reason or fails to appreciate the evidence or when the High Court records any material finding which is wholly perverse or against any provision of law, present Court may consider it proper to examine the issues arising in the case and in appropriate case interfere in such finding. Such was not the case here. [16], [17] and [18]

(ii) The High Court gave cogent reasons in support of its view and there was no infirmity or perversity in the reasoning of the High Court. [19]

Appeal dismissed, acquittal upheld.

A temporary removal of an office file out of the office of the Chief Engineer and making it available to private person for a day or two amounts to the offence of theft.[10]

Obtaining property by deception is theft—Court of Appeal—1982

R v Davie,

[1982] All ER 513 (CA)

D, who was employed to manage an old people's home, got two residents in the home, who had received cheques made out to them to endorse their respective cheques by signing their names on the back of them and to hand over the endorsed cheques to *D*. He was charged with theft and convicted for obtaining property by deception.

Upholding the conviction, Court of Appeal held that:

> …where a person does not know that he is endorsing a cheque and thinks he is merely signing a piece of paper which he then gives to the accused, the property in the cheque does not pass to the accused by reason of the endorsement, but remains in the donor, because in the circumstances, the donor does not intend to hand over an endorsed cheque. By presenting the cheques as endorsed for payment into his account, the defendant had obtained a payment of the cheque by deception because he falsely represented thereby that the payee had authorised payment of the cheque to him.

Exchanging price tags with intent to pay less amount to appropriation of property—Theft DC—1980

Anderton v Wish,

[1980] Cr LR 319 (DC)

D took a label from a cheaper brush and stuck it over the label on the brush she intended to buy, thus intending to pay less than the true price. She paid the lower price and was arrested outside the shop.

Allowing the prosecutor's appeal against *D's* acquittal, the court held *D* had assumed the rights of an owner within section 3 of Theft Act 1968 when she interfered with the price tag. She had, therefore, appropriated the brush and was guilty of theft at that stage.

Theft—Unlawful appropriation of "gifted" money amounts to theft—Appeal dismissed conviction upheld—House of Lords—2000

R v Hinks,

[2000] 4 All ER 833 (HL) : [2000] UKHL 53 :

[2000] 3 WLR 1590 : [2001] Cr LR 162

The appellant, Mrs Hinks, was friendly with a 53-year old man, John Dolphin. Over a six-month period the man withdrew sums totalling about USD 60,000 from his building society accounts and deposited it in the appellant's account. The appellant was charged under section (1) of Theft Act 1968,[11] with six count of theft for influencing and coercing the complainant to withdraw the moneys from his building society accounts.

The appellant contended that the money was a gift from the man to her and consequently, the title in the money had passed to her and, therefore, there was no theft. The judge rejected the submission, and held that gift was capable of amounting to an appropriation amounting to theft which was confirmed by the Court of Appeal. The accused appealed to House of Lords.

The question before the court was whether a person could "appropriate" property belonging to another where the other person made him an indefeasible gift of property, retaining no proprietary interest in the property.

Dismissing the appeals, the House of Lords by a majority of three to two,[12] held that:

For the purposes of section 1 (1) of the 1968 Act, a person could appropriate property belonging to another even though that other person had made him an indefeasible (unjustifiable) gift of property, retaining no proprietary interest or any right to resume or recovery any proprietary interest in the property.

The relevant question in relation to any gift would be whether Dolphin was so mentally incapable that the defendant herself realized that ordinary and decent people would regard it as dishonest to accept that gift from him.

A distinction in relation to theft between the two quite separate ingredients of appropriation and dishonesty must be made. Belief or lack of belief that the owner consented to the appropriation is relevant to dishonesty. However, appropriation may occur even though the owner has consented to the property being taken.

Money Transfer by Deception—In case of Transfer of money from one account into another account by ATM (Automated Teller Machine) identification of the account is not necessary for deception

Re Holmes,

[2005] 1 All ER 490 : *[2005] 1 WLR 1857*

The German government sought the extradition of the applicant to face charges arising out of events in which the applicant had allegedly procured without authorisation the automated transfer of funds from bank C in Germany, where he worked at the time, to an account with bank A. The funds so transferred could not initially be disposed of freely, since the transfer to bank A was originally subject to confirmation. However, the applicant confirmed the transaction in three messages to bank A, and the reservation on the funds was removed. The conduct with which the applicant was accused was specified under the authority to proceed as conduct which if it had occurred in the United Kingdom would have constituted, inter alia, obtaining a money transfer by deception, contrary to section 15A of Theft Act 1968, which provided that a person was guilty of an offence if by any deception he dishonestly obtained a money transfer. A money transfer occurred when “(a) a debit is made to one account, (b) a credit is made to another, and (c) the credit results from the debit or the debit results from the credit”.

Upholding the convictions, the Court of Appeal said, credited for the purpose of section 15A of Theft Act of 1968 meant credited unconditionally. It followed that human beings had been deceived by the messages confirming the transactions. Provided that there had been a debiting of an account, and the debit was causally connected with the credit it was not essential for the purposes of section 15A to identify which account had been debited as the concomitant to the credit, or whether the account that had been debited was overdrawn or in credit. Accordingly the charge of obtaining a money transfer by deception had been made out

To prove the charge of money laundering under section 49 (2)(b) of UK Criminal Justice Act 1988, the prosecution must prove property as proceeds of Drug Trafficking— House of Lords—2004

R v Montila,

(2005) 1 All ER 113 : [2005] Cr LR 479 : *[2004] 1 WLR 3141*

The defendants were charged and convicted for money laundering under section 49 (2) of Drug Trafficking Act 1994 and section 93C (2) of Criminal Justice Act 1988.

Those two sub-sections related to the proceeds of drug trafficking and the proceeds of crime. Each subsection provided that a person was guilty of an offence if “knowing or having reasonable grounds to suspect” that any property was, or in whole or in part directly or indirectly represented, “another person’s proceeds” of drug trafficking or of crime respectively, he concealed or disguised that property, or converted or transferred it or removed it from the jurisdiction, for the purpose of assisting any person to avoid it or remove it from the jurisdiction for the purpose of assisting any person to avoid prosecution for a drug trafficking offence, or an offence under, the relevant part of 1988 Act (respectively) or the making or enforcement of a confiscation order. Section 49 (1) of 1994 Act and section 93C (1) of 1988 Act created offences where the person’s conduct related to his own proceeds of drug trafficking of crime. Allowing the appeal and setting aside the conviction the court said:

In a prosecution under section 93C (2) of the 1988 Act or under section 49 (2) of the 1994 Act, it was necessary for the Crown to prove that the property being converted was, in the case of the 1988 Act, the proceeds of crime and, in the case of the 1994 Act, the proceeds of drug trafficking. The opening words of the subsections, 'knowing or having reasonable grounds to suspect', provided a strong indication that they were directed to activities in relation to property which was in fact 'another person's proceeds of drug trafficking' or 'another person's proceeds of criminal conduct'. A person could have reasonable grounds to suspect that property was one thing (A), when in fact it was something different (B). But that was not so when the question was what a person knew. A person could not know that something was A when in fact it was B. A further indication was found in the absence of any defence if the property which a defendant was alleged to have known or had reasonable grounds to suspect to be 'another person's proceeds' turned out to be something different. Furthermore, in the context of sections 49 (1) of the 1994 Act and 93C of the 1988 Act there was no doubt that the Crown had to prove that the property in question was the proceeds of drug trafficking or of criminal conduct. Moreover, such indications as could be gathered from the headings and sidenotes to the 1994 and 1988 Acts were that the mischief that Parliament had been seeking to address was the concealment, conversion or transfer of actual proceeds for the purpose of avoiding prosecution for the conduct that gave rise to them or the making or enforcement of a confiscation order calculated with reference to the value of those proceeds, or, in other words, that the fact that the property in question had its origin in drug trafficking or criminal conduct was an essential part of the actus reus of the offence

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4 *Indian Penal Code, 1860, section 22*: The words "moveable property" are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth. See Estate Duty Act 1953, section 2 (15) for the definition of "property".

5 See KD Gaur, *Indian Penal Code*, 4th Edn, 2008, Commentary on theft *section 378, IPC, 1860*.

6 *KN Mehra v State of Rajasthan*, *AIR 1957 SC 369* : *[1957] 1 SCR 623*; *AN Parthi v Emperor,* AIR 1920 Pat 582. In England, Theft Act 1968 punishes theft, robbery, burglary, etc.

7 *Avtar Singh v State of Punjab, AIR 1965 SC 666* : *[1965] 1 SCR 103* : 1965 Cr LJ 605.

8 *R v White,* (1853) 6 Cox CC 213; *R v Firth,* (1869) LR 1 CCR 172.

9 2016 (3) RCR (Crime) 523 : 2016 (6) Scale 192, Abhay Manohar Sapre and Ashok Bhushan, JJ, delivered the judgment.

10 *Pyare Lal Bhargava v State of Rajasthan, AIR 1963 SC 1094* : 1963 Supp (1) SCR 689.

11 A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "theft" and "steal" shall be construed accordingly.

12 The majority constituted Lord Slynn of Handley, Lord Jauncey of Tullichettle and Lord Steyn; and minority included Lord Hutton and Lord Hobhouse of Wood-borough.

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14.4 Extortion

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Part II Specific Offences

14 OFFENCES AGAINST PROPERTY

14.4 Extortion

The law of extortion is found in *sections 383* to *389* of the *Indian Penal Code,1860*. Section 383 defines extortion, and section 384 provides for its punishment. Sections 386 to 389 state the situations under which the offence of extortion is aggravated.

383. Extortion.—Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property, or valuable security, or anything signed or sealed which may be converted into a valuable security, commits “extortion”.

Illustrations

(a) *A* threatens to publish a defamatory libel concerning *Z* unless *Z* gives him money. He thus induced *Z* to give him money. *A* has committed extortion.

...

(d) *A*, by putting *Z* in fear of grievous hurt, dishonestly induces *Z* to sign or affix his seal to a blank paper and deliver it to *A*. *Z* signs and delivers the paper to *A*. Here, as the paper so signed may be converted into a valuable security. *A* has committed extortion.

384. Punishment for extortion.—Whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

385. Putting person in fear of injury, in order to commit extortion.— Whoever, in order to committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

To constitute the offence of extortion there must be fear of injury and delivery of property—mere “forcible” taking of thumb impression does not amount to extortion—Appeal Allowed: Conviction quashed—Patna High Court—1941

Jadunandan Singh v Emperor,

AIR 1941 Pat 129

Narain Dusadh and Sheonandan Singh, were returning after the inspection of some fields when the two petitioners and others assaulted them. The petitioner gave a blow to Narain on the right leg, and then other people assaulted Sheonandan. Jadunandan, after this, forcibly took the thumb impression of Narain on one piece of blank paper, and of Sheonandan on three blank papers. On these findings, the two petitioners and two others were convicted for extortion under *section 384 of IPC*.

Referring the definition of “extortion” in *section 383 IPC, 1860*, it was contended on behalf of Jadunandan Singh that no offence under section 384 has been brought home to him.

Allowing the appeal Patna High Court held that:

> To convict a person for extortion it must be proved that the victims were put in fear of injury to themselves or to others, and further, were thereby dishonestly induced to deliver papers containing their thumb impressions. The prosecution story in the present case goes no further than that thumb impressions were ‘forcibly taken’ from them. The lower courts only speak of the forcibly taking of the thumb impressions of the victim; and this does not necessarily involve inducing the victim to deliver papers with his thumb impressions (papers which could no doubt be converted into valuable securities). The offence of extortion is not established. On the findings, the offence is no more than the use of criminal force of an assault punishable under *section 352, IPC*.

Mere threat of divine displeasure does not amount to extortion—Appeal Allowed: Conviction quashed—Sind High Court- Pakistan—1944

Tanumal Udha Singh v Emperor,

AIR 1944 Sind 203

Mere threat at large that divine displeasure will fall upon debtor if debt is not paid does not fall within sections 383,[13] 385[14] or 508[15] of the *IPC*. The harm threatened, or caused to be threatened must be from something illegally done.

According to section 43, “illegal” applies to anything which is an offence, or which is prohibited by law, or which furnishes ground for civil action. No injury can be caused or threatened to be caused within the meaning of section 383 or section 385, unless the act done is either an offence (as might fall under section 385 or section 508 or any other section of *IPC, 1860*), or such as may properly be made the basis of a civil action.[16]

Extortion (section 383, IPC, 1860): Attempting to compel a person to recommend that an employer approving an investment does not constitute the “obtaining of property from another” under Hobbs Act, 18 USCA section 1951 (b)(2).

Sekhar v US,

133 S Ct 2720 (2013) : 186 L Ed 2d 794 : 2013 US Lexis 4920

Background: Defendant was convicted in the United States District Court for the Northern District of New York, of attempted extortion of the General Counsel of the New York State Comptroller’s Office, in violation of Hobbs Act. Defendant appealed.[17] The United States Court of Appeals for the Second Circuit, Dennis Jacobs Chief Judge, affirmed, and certiorari was granted.

Holding: The Supreme Court, Justice Scalia, held that attempting to compel a person to recommend that his employer approve an investment does not constitute the “obtaining of property from another” under Hobbs Act. Reversed.

Scalia J delivered the opinion of the Court:

[1] We consider whether attempting to compel a person to recommend that his employer approve an investment constitutes “the obtaining of property from another” under 18 USC section 1951 (b)(2).

New York’s Common Retirement Fund is an employee pension fund for the State of New York and its local governments. As sole trustee of the Fund, the State Comptroller chooses Fund investments.

When the Comptroller decides to approve an investment he issues a “Commitment”. A Commitment, however, does not actually bind the Fund. For that to happen, the Fund and the recipient of the investment must enter into a limited partnership agreement.

Petitioner Giridhar Sekhar was a managing partner of FA Technology Ventures. In October 2009, the Comptroller's office was considering whether to invest in a fund managed by that firm. The office's general counsel made a written recommendation to the Comptroller not to invest in the fund, after learning that the Office of the New York Attorney-General was investigating another fund managed by the firm. The Comptroller decided not to issue a Commitment and notified a partner of FA Technology Ventures. That partner had previously heard rumors that the general counsel was having an extra-marital affair.

The general counsel then received a series of anonymous e-mails demanding that he recommend moving forward with the investment and threatening, if he did not, to disclose information about his alleged affair to his wife, government officials, and the media. The general counsel contacted law enforcement, which traced some of the e-mails to petitioner's home computer and other e-mails to offices of FA Technology Ventures.

Petitioner was indicted for, and a jury convicted him of, attempted extortion, in violation of the Hobbs Act, 18 USC section 1951 (a). That Act subjects a person to criminal liability if he "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." Section 1951 (a).

The Act defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." [Section 1951 (b)(2)]. On the verdict from the jury was asked to specify the property that petitioner attempted to extort: (1) "the Commitment"; (2) "the Comptroller's approval of the Commitment"; or (3) "the General Counsel's recommendation to approve the Commitment." The jury chose only the third option.

The Court of Appeals for the Second Circuit affirmed the conviction. The court held that the general counsel "had a propriety right in rendering sound legal advice to the Comptroller and, specifically, to recommend- free from threats- whether the Comptroller should issue a Commitment for [the funds]." The court concluded that petitioner not only attempted to deprive the general counsel of his "property right," but that petitioner also "attempted to exercise that right by forcing the General Counsel to make a recommendation determined by [petitioner]."

Certiorari granted.

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13 *Indian Penal Code, 1860, section 383*, deals with extortion.

14 Ibid, section 385 deals with the offence of putting person in fear of injury in order to commit extortion.

15 Ibid, section 508 deals with act caused by inducing person to believe that, he will be rendered an object of divine displeasure.

16 See *Romesh Chandra Arora v State of Punjab,* *AIR 1960 SC 154* : *[1960] 1 SCR 924*, discussed in chapter 13.

17 Petitioner was also convicted of several counts of inter-State transmission of extortionate threats, in violation of 18 USC section 875 (d). Under section 875 (d), a person is criminally liable if he, "with intent to extort from any person, firm, association, or corporation, any money) or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee." In this case, both parties concede that the definition of "extortion" under Hobbs Act also applies which punishes extortion.

14.5 Robbery and Dacoity (Gang Robbery)

Part II Specific Offences

14 OFFENCES AGAINST PROPERTY

14.5 Robbery and Dacoity (Gang Robbery)

The law relating to robbery is contained in sections 390, 392, 393, 394, 397, 398 and of dacoity in *sections 391*, *395*, *397*, *398*, *399*, *400* and *402* of the *Indian Penal Code, 1860*.

390. Robbery.—In all robbery there is either theft or extortion.

When theft is robbery.—Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery.—Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, or instant hurt, or of instant wrongful restraint to that person, or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, or of instant hurt, or of instant wrongful restraint.

Illustrations

(a) *A* holds *Z* down, and fraudulently takes *Z's* money and jewels from *Z's* clothes, without *Z's* consent. Here *A* has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to *Z. A* has therefore committed robbery.

(b) *A* meets *Z* on the high road, shows a pistol, and demands *Z's* purse. *Z*, in consequence, surrenders his purse. Here, *A* has extorted the purse from *Z*, by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. *A* has therefore committed robbery.

...

392. Punishment for robbery.—Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

391. Dacoity.—When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit 'dacoity'.

395. Punishment for dacoity.—Whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

396. Dacoity with murder.—If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Dacoity with murder depends upon the facts and circumstances of the case— Appeal Dismissed: conviction upheld—Supreme Court—1957

Shyam Behari v State of UP,

AIR 1957 SC 320 : 1957 Cr LJ 416

Facts: In an attempt to commit robbery, the appellant (robber) killed one of the victims, who had caught hold of the appellant's associate. The appellant was convicted under section 396 for the offence of dacoity with murder. The appellant contended that he could not be convicted under *section 396, IPC* because any murder committed by the dacoits during their fight when they were running away without any booty could not be treated as murder committed in the commission of the dacoity.

The High Court negatived this contention and held that section 396 would be attracted even where an attempt had been made to commit dacoity, and a murder was committed when the dacoits were trying to make a safe retreat and confirmed the sentence of death passed by the session's judge.

The appeal of the accused was similarly dismissed by the Supreme Court.

14.6 Criminal Misappropriation

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

14 OFFENCES AGAINST PROPERTY

14.6 Criminal Misappropriation

Criminal misappropriation of property is an offence punishable under *section 403, IPC, 1860* to the extent of two years of imprisonment or fine or both; and dishonest misappropriation of the property of the deceased person at the time of his death is punishable under *section 404, IPC*. In view of the special protection needed in case of deceased's property, the gravity of the offence is enhanced and accordingly, punishment may vary from three years to seven years' of imprisonment, if the accused happens to be the deceased's servant and clerk.[18]

403. Dishonest misappropriation of property.—Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations

(a) *A* takes property belonging to *Z* out of *Z's* possession, in good faith, believing, at the time when he takes it, that the property belongs to himself. *A* is not guilty of theft; but if *A*, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

...

Explanation 1.—A dishonest misappropriation for a time only, is a misappropriation within the meaning of this section.

Illustrations

A finds a government promissory note belonging to *Z*, bearing a blank endorsement. *A*, knowing that the note belongs to *Z*, pledges it with a banker as a security for a loan, intending at a future time to restore it to *Z. A* has committed an offence under this section.

Explanation 2.—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and had kept the property for a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believes that the real owner cannot be found.

Illustrations

…

(d) *A* sees *Z* drop his purse with money in it. *A* picks up the purse with the intention of restoring it to *Z*, but afterwards appropriates it to his own use. *A* has committed an offence under this section.

…

(f) *A* finds a valuable ring, not knowing to whom it belongs. *A* sells it immediately without attempting to discover the owner. *A* is guilty of an offence under this section.

404. Dishonest misappropriation of property possessed by deceased person at the time of his death.—Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offender at the time of such person decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustrations

Z dies in possession of furniture and money. His servant *A*, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. *A* has committed the offence defined in this section.

Misappropriation or conversion of property to one's use is the essence of the offence under section 403, IPC, 1860—criminal misappropriation—Appeal Allowed: conviction quashed—Supreme Court—1958

Ramaswamy Nadar v State of Madras,

AIR 1958 SC 56 : *[1958] 1 SCR 739*

The appellant carried on prize-competitions as a proprietor of a firm. Certain persons, who had paid money in connection with prize-competition no 92, complained that they had not received their prize money though it had been announced that they had competed for the prizes offered. The accused, in his capacity as the proprietor dishonestly induced prosecution witnesses 1 to 3 to compete in his "Bumper Competition" no 92 by paying entry fees to the tune of Rs 2,640 on the representation that the prize winners would get a sum of Rs 3,10,000 and that on that representation, he had collected Rs 1,15,000 from the public, out of which he had spent Rs 19,000 towards expenses of advertising and holding the competition. It was alleged that he was actuated by a dishonest intention when he collected Rs 1,15,000 by way of entry fees, and did not utilise any part of the collected amount towards payment of the prizes offered. The High Court convicted the appellant under *section 403, IPC*.

The question was whether the High Court was justified in coming to the conclusion that "misappropriation" is clearly established.

Allowing the appeal, the Supreme Court said that the High Court has erred in coming to that conclusion. To prove an offence under *section 403 of IPC*, the prosecution has to prove (1) that the property, in this case, the net amount Rs 96,000 was the property of the prosecution witnesses 1 to 3 and others, and (2) that the accused misappropriated that sum or converted it to his own use, and (3) that he did so dishonestly.

Per Sinha, J:

None of these constituent elements of the offence can be categorically asserted to have been made out.

The entry fees rightly came into the coffers of the accused. No doubt, he had promised to award prizes of the total value of Rs 3,10,000, but there was no further obligation that the prize money had to come either wholly or in part,

from out of the sum collected by him by way of entry fees. He was carrying on the business, and was found by the courts below to have disbursed lakhs of rupees to winners of prizes in the previous competitions. There was no such entrustment, nor was there any rule laid down for appropriation of the sum collected in a particular way. There being no duty to make appropriation in a particular way, the appellant could not be held guilty of having misappropriated Rs 96,000 which was the total net collection in competition no 92. Appeal allowed. Conviction quashed.

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18 See KD Gaur, *A Textbook on Indian Penal Code,* 3rd Edn, 2004, pp 641-644, for detailed commentary on criminal misappropriation.

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14.7 Criminal Breach of Trust

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

14 OFFENCES AGAINST PROPERTY

14.7 Criminal Breach of Trust

Section 405 of IPC, 1860 defines criminal breach of trust, and states that in order to constitute the offence, it must be established that the accused was entrusted with the property or with dominion or power over the property of another, and that he dishonestly misappropriated it or converted it to his own use. A relationship is created between the transferor and transferee, where under the transferor remains the legal owner of the property, and the transferee has only the custody of the property for the benefit of the transferor himself or someone else. At best, the transferee obtains in the property only a limited interest to a claim for his charges in respect of its safe retention, and under no circumstances does he acquire a right to dispose of that property in contravention of the conditions of the entrustment.[19] *Section 406 of IPC, 1860* prescribes punishment for breach of trust.

405. Criminal Breach of Trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits “criminal breach of trust”.

Explanation 1.—A person, being an employer of an establishment whether exempted under *section 17 of Employees Provident Fund* and Miscellaneous Provisions Act 1952 (19 of 1952) or not, who deducts the employee’s contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Explanation 2.—A person, being an employer, who deducts the employee’s contribution from the wages payable to the employee for credit to the Employee’s State Insurance Fund held and administered by Employees’ State Insurance Corporation established under Employees’ State *Insurance Act* 1948, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Illustrations

(a) *A*, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. *A* has committed criminal breach of trust.

(b) *A* is a warehouse-keeper. *Z* going on a journey, entrusts his furniture to *A*, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. *A* dishonestly sells the goods. *A* has committed criminal breach of **trust.**

...

406. Punishment for criminal breach of trust.—Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Sections 407 to 409 deal with aggravated forms of criminal breach of trust. For instance, in cases of criminal breach of trust by carrier, wharfinger or warehouse-keeper (section 407), or by a clerk or servant (section 408), or by a public servant, banker, merchant or agent etc (section 409), punishment may extend up to seven years and 10 years of imprisonment, with or without fine.

Pledging of securities of a third party without the knowledge of the owner amounts to criminal breach of trust—punishable under section 409 IPC, 1860— Appeal Dismissed, conviction upheld—Supreme Court—1956

Jaswantrai Manilal Akhaney v State of Bombay,

AIR 1956 SC 575 : *[1956] 1 SCR 483* : (1956) 58 Bom LR 1026

The accused, the managing director of a bank, was charged and convicted under section 409.[20] A party had, under a written agreement, pledged with the bank certain securities for the express purpose of covering an overdraft account. The accused, in contravention of the said agreement, pledged the said securities without the knowledge or consent of the owners with a third party for the purposes of obtaining a loan for the use of his bank.

It was held that the action of the accused in pledging those securities with a third party, even for a temporary period, in clear contravention of the terms of the agreement under which they were deposited in his custody, established his dishonest intention, because his conduct deprived the pledger bank of the benefits of those securities to which they were entitled during the period when they were re-pledged by the accused, and thus his conduct amounted to "intentional causing of wrongful loss" of that property to its rightful owners. It is immaterial whether the wrongful deprivation of property to its rightful owners is permanent, or only temporary.

Misappropriation of property by making false entries is punishable under section 409 of IPC, 1860—Supreme Court—1974

Superintendent and Remembrancer of Legal Affairs, WB v SK Roy,

AIR 1974 SC 794 : *(1974) 4 SCC 230* : 1974 SCR (3) 348

A public servant in his capacity as superintendent of Pakistan Unit of Hindustan Co-operative Insurance Society in Calcutta (a Unit of LIC), although not authorised to do so, directly realised premiums in cash from some Pakistani policy holders, and misappropriated the amounts after making false entries in the relevant registers.

It was held that he was guilty of an offence punishable under section 409, of the *Indian Penal Code, 1860*. Section 409 covers dishonest misappropriation in cases where the receipt of property is itself fraudulent or improper, and also those cases where the public servant misappropriates what may have been quite properly and innocently received. All that is required is what may be described as "entrustment" or acquisition of dominion over property in the capacity of a public servant.

Mere failure or omission to return property is not sufficient to constitute offence of criminal breach of trust by public servant under section 409 of IPC, 1860—Appeal allowed, conviction set aside — Supreme Court—1977

Sardar Singh v State of Haryana,

1977 Cr LJ 1158

The accused who was a *patwari* was entrusted with the receipt book or in any event with domination over it, but there was no evidence to establish that he dishonestly misappropriated the receipt book, or converted it to his own use or dishonestly used or disposed of the receipt book.

It was held that it was quite possible that the accused might have lost or missed the receipt book, and hence he might have been unable to return it to the superior authorities. What the section required was something much more than mere failure or omission to return the receipt book. The prosecution had to go further, and show that the appellant dishonestly misappropriated or converted the receipt-book to his own use or dishonestly used or disposed it of. “The prosecution had not been able to do so in the present case and, therefore, the accused was wrongly convicted under *section 409 IPC*.”

The appeal was allowed.

Misconduct in public office amounts to abuse of public trust—A public officer while acting in his capacity as such, when truly neglects his duty or truly misconducts himself to such degree so as to amount to an abuse of public trust, without any reasonable excuse or justification is guilty of the offence of misconduct—Court of Appeal Criminal Division—2004

Attorney General’s Reference No 3 of 2003,

(2005) 4 All ER 303 : [2004] EWCA Cr 868 : [2005] QB 73

While answering the Attorney General’s Reference as to the ingredients of the common law offence of misconduct in a public office to perform one’s duty and/or wilful misconduct to such a degree so as to amount to an abuse of the public trust without reasonable excuse or justification amounts to the offence of misconduct. The officer has to have an awareness of the duty to act or be subjectively reckless as the existence of the duty, the question of bad faith as an ingredient of the offence of misconduct on the part of the accused is ruled out.

A man was assaulted and fell to the ground hitting his head. He was taken to hospital where police officers attended with a view to investigating the assault. They arrested him there on the ground of an apprehended breach of the peace. They were told by a doctor, in answer to their specific inquiry, that the man was fit to be detained, and took him to the police station in a police van. On arrival, though still seated in the position in which he had been placed, he did not respond to the police officers. He was placed on the floor of the custody suite in a semi face-down position, not the recovery position. His breathing was audibly obstructed and several minutes later he stopped breathing. Attempts at resuscitation (hope of renewal of life) failed. The police officers were charged with manslaughter by conduct amounting to gross negligence and misconduct in a public office.

The relevant allegations against the officers were that they had failed to put the man in a better position, failed to ensure that his airway was clear and failed to obtain medical assistance. At the close of the prosecution case the judge ruled that there was no case to answer on the manslaughter charge and that there was no evidence on which to found a conviction for misconduct in public office on the basis of recklessness. He accordingly directed the officer’s acquittal.

Mere exercise of the “power to allot” petrol outlets is not “property” within section 405 of IPC, 1860 to fix criminal liability for breach of trust on minister—1996 judgment reversed in review petition—Held Minister not liable—Supreme Court, 1999

Common Cause, A Registered Society v UOI,

AIR 1999 SC 2979 : *(1999) 6 SCC 667*

The Supreme Court in 1999 while allowing review petition in *Common Cause A Registered Society* reversed the judgment of 1996[21] delivered by Kuldip Singh and Faizan Uddin, JJ holding Captain Satish Sharma personally liable for arbitrary allotment of petrol pumps etc, and criminal breach of trust.

The three judge Bench of the court held that the “doctrine of trust” could not be invoked in fixing the criminal liability, and the whole matter would have to be decided on the principles of criminal jurisprudence, one of which was that the criminal liability had to be strictly construed and an offence could be said to have been committed only when all the ingredients of that offence as defined in the statute were found to have been satisfied.

The court held that the mere exercise of “power to allot” petrol outlets by the minister could not be treated as “property”, within the meaning of section 405, of *IPC, 1860*, capable of being misutilised or misappropriated, even

though allotment of petrol outlets by the minister was found to be arbitrary and illegal, no offence of criminal breach of trust under *section 405* or *section 409 IPC*, could be made out.

According to the court, on being elected as a member of the Parliament, the petitioner was inducted as minister of State. The department of Petroleum and Natural Gas was allocated to him. This allocation of business under the *Constitution* is done for smooth and better administration, and for more convenient transaction of business of Government of India. In this way, neither a "trust", as ordinarily understood or as defined under Trust Act, was created in favour of the petitioner, nor did he become a "trustee" in that sense. Thus, the person does not, on becoming the Minister of State for Petroleum and Natural Gas, assume the role of a "trustee" in the real sense, nor does a "trust" come into existence in respect of the government properties.

Since no case was made out against the minister, no direction for an investigation by the CBI could be given in such case and the amount of fine Rs 50 lakh paid by Captain Satish Sharma be refunded to him.

Commentary on Common Cause: A Registered Society

As discussed above, a three member Bench of the Supreme Court consisting of Saghir Ahmad, Venkataswami and Rajendra Babu, JJ on 3 August 1999 turned down its earlier decision of November 1996 delivered by two member Bench of Kuldeep Singh and Faiuddin, JJ.

While endorsing the findings of 1996 that the allotment of petrol pumps by the minister to member of the oil selection board or their sons etc, was atrocious and wholly unjustified, the court said the minister is neither liable for pecuniary damages, nor for criminal beach of trust because of following reasons, viz,

(1) The petitioner "Common Cause" not being an applicant for this allotment, it could not claim to have suffered any "damage or loss" on account of the conduct of the minister. There has to be an identifiable plaintiff or claimant whose interest was damaged by the public officer (tortfeaser) maliciously or with the knowledge that the impugned action was likely to injure the interest of that person.

(2) Pecuniary damages against the minister are not tenable, because "The State cannot derive for itself the right of being compensated by its officers on the ground that they had contravened or violated the fundamental right of citizen, directing the minister to pay, a sum of Rs 50 lakh to the government, would amount to asking the government to pay exemplary damages to itself, is not tenable under law."

(3) The principle of the "doctrine of trust" is not applicable in case of ministers in discharging their duties.

The court said:

> ...(T) he person does not, on becoming the Minister of State for Petroleum and Natural Gas, assume the role of a 'trustee' in real sense nor does a 'trust' come into existence in respect of Government properties... The 'doctrine of trust' cannot be invoked in fixing the criminal liability...Mere existence of 'power to allot' petrol outlets by the Minister cannot, be treated as 'property' within the meaning of *section 405 of the IPC*, capable of being misappropriated.

It is submitted with due respect that the 1996 verdict *Common Cases, A Registered Society v UOI,* AIR 1996 SCW 3696, was a path setting judgment in fixing public accountability on ministers and bureaucrats discharging public duties. But the judgment of the Supreme Court in *Common Cause, A Registered Society v UOI,* *AIR 1999 SC 2979* : *(1999) 6 SCC 667*, in 1999, in reversing its verdict of 1996 in the case of *Common Cause* has come as a blow to the concept of accountability in discharging public duties. To deny the relief to the petitioner on the ground of no *locus standi*, since the petitioner was not an applicant for the allotment of petrol pumps, he has not suffered because of illegal allotment goes against the very concept of PIL.

The PIL is a weapon in the hands of public spirited men to seek relief against the illegal, arbitrary and malicious action of the State functionaries and not for the benefit of a particular individual. The very principle of *ubi jus ibi remedium,* "where there is a wrong, there is a remedy" enunciates the principle that a court cannot shirk from its obligation to provide appropriate remedy against the wrong doer once it is established that allotment of petrol pumps have been done ignoring all established norms just to benefit a few high ups in the establishment.

The petitioner has approached the Hon'ble court and drawn its attention against the very system and the process of the allotment of petrol pumps highlighting the cases of favoritism, nepotism while discharging public duties by

persons holding high offices in the government, and is not seeking any personal advantage or gain for himself. The cause is laudable, and needs to be remedied and not brushed aside on technical grounds.

Another assumption of the Hon'ble court that "the Minister does not assume the role of a "trustee" in real sense, nor does a "trust" comes into existence, is perhaps not a sound proposition as stated by the Hon'ble Court in its earlier verdict of 1996:

> The Executive power of the Government is distributed department wise and one minister is made the head of the department. He becomes principally accountable and answerable to the people. The law of the land regulates his powers and duties. The legal and moral responsibility or liability for the acts or omissions rests solely on the minister. He cannot be absolved of this responsibility by taking the plea of State action.

The Supreme Court in the *Lucknow Development Authority,*[22] case approved misfeasance in public offices as a part of the law of tort, and held that public servants may be liable in damages for malicious, deliberate or injurious wrongdoing. With the change in socio-economic outlook, public servants are being entrusted with more and more discretionary powers even in the field of distribution of government wealth in various forms. If a public servant abuses his office either by an act of omission or commission, and the consequence of that is injury to an individual or loss of public property, an action may be maintained against such public servant. No public servant can say "you may set aside an order on the grounds of it being mala fide but you cannot hold me personally liable."

No public servant can arrogate to himself the power to act in a manner, which is arbitrary.[23]

Misfeasance in public office includes malicious abuse of power by public official, which is actionable. The fact that there is no injury to a third person in the present case is not enough to make the principle of accountability inapplicable in as much as there was injury to the high principle of public law; that a public functionary has to use its power for the bona fide purpose, and in a transparent manner. Moreover, there was loss to exchequer as allotments were made without calling tenders, which might have yielded revenue to the government.

It may be pointed out that in similar situations in a number of countries the heads of the concerned departments have been held guilty of "misfeasance" and "wrongful exercise of power" and made personally accountable. For instance,

(i) The Supreme Court of Canada in *Carelli*,[24] awarded damages against the Prime Minister of the province of Quebec for wrongful cancellation of license of liquor shop, and was asked to pay damages personally.

(ii) The Supreme Court of Bahamas in *Tynes*,[25] awarded damages for arbitrary, oppressive and unconstitutional action of the State officials, who were held personally accountable.

(iii) The Supreme Court of Jamaica in *Samulla*,[26] awarded exemplary damages of Rs 1,00,000 for assault, battery and malicious prosecution.

Thus, the assumption that "asking the Minister to pay exemplary damages of Rs 50 lakh was nothing more than asking the government to pay exemplary damages to itself," is unfounded and wrong.[27] A nine member *Constitution* Bench of the Supreme Court in 1967 in *Superintendent and Remembrancer of Legal Affairs, West Bengal*,[28] by a majority of eight to one has held that when fine is imposed on a functionary of the State, or a department, the recipient is not the same, it might be two departments of the government.

It is, therefore, suggested that a larger *Constitution* Bench of the Supreme Court be constituted to review these cases and restore the 1996 verdict and make the State functionaries, such as ministers, bureaucrats and heads of the departments personally accountable for their arbitrary and illegal misfeasance in discharging their public duties in a democracy ruled by law.

This further becomes important in view of the Parliament passing *Right to Information Act* in May 2005.

Housing scam—arbitrary allotment of shops/stalls by urban development minister illegal—Supreme Court 1996 judgment set aside by Supreme Court— in 2002

Shiva Sagar Tiwari v UOI[29]

The petitioner, an advocate of the Supreme Court brought to the notice of the Supreme Court that the respondent

Mrs Shiela Kaul while serving as Union Minister for Urban Development in 1992 and 1994 allotted two shops to her two grandsons; one shop to the maidservant of her son, one shop to the handloom manager of the firm owned by her son-in-law, another to a close friend and one to the nephew of the Minister of State, PK Thungon; and stalls to the relatives and friends of her personal staff and officials of the Directorate of Estate.

The court after being convinced that the shops/stalls allotted by the Minister of Urban Development to own relatives/employees/domestic servants were made without following any policy or norms, held that it amounted to misuse of power. That minister becomes responsible for the actions, acts and policies of his department. He becomes principally accountable and answerable to the people. The law of the land regulates his power and duties. The legal and moral responsibility or liability for the acts or omissions rest solely on the minister.

The Supreme Court held that a public servant is liable for exemplary damages for his acts which are oppressive, arbitrary or unconstitutional. Accordingly, the court levied a fine of Rs 60 lakhs on Mrs Kaul, quashed the allotment of shops and a regular case under *sections 120B*, *420*, *468*/*41 IPC, 1860* read with sections 13 (2) and 13 (1)(d) of *Prevention of Corruption Act 1988* was registered against Mrs Kaul.

However, the Supreme Court in 2002 in a review petition set aside the judgment of 1996 and quashed the fine on compassionate ground, “having regard to the peculiar facts and circumstances of Mrs Kaul who is stated to be old, ailing and because of great hardship of the case”.

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19 *Jaswantrai Manilal Akhney v State of Bombay,* AIR 1956 SC 575 : [1956] 1 SCR 483. See also *Common Cause v UOI,* (1996) 6 SCC 530 : AIR 1996 SC 3538.

20 See KD Gaur, *Textbook on Indian Penal Code*, 4th Edn, 2009, pp 717-718.

21 *Common Cause, A Registered Society v UOI,* AIR 1996 SCW 3696 : (1996) 6 SCC 530. This case has been discussed in 8th edition of KD Gaur- Criminal: Cases and Materials at pp 1014 and 1015.

22 *Lucknow Development Authority v MK Gupta,* AIR 1994 SC 787 : (1994) 1 SCC 2437.

23 *Common Cause, A Registered Society v UOI,* (1996) 6 SCC 530 : AIR 1996 SC 3538.

24 *Pon Carelli v Dupliejis,* (1959) VR 280.

25 *Tynes v Ban,* (1996) 1 Commonwealth Human Rights Law Digest, pp 117-120.

26 *Samulls v AG of Jamaica,* (1996) 1 Commonwealth Human Rights Law Digest, pp 120-122; *Deshpriya v Municipal Council, Eliva,* (1996) 1 Commonwealth Human Rights Law Digest, p 115 (Sri Lanka Supreme Court) where political discrimination was the motive for restricting freedom of expression, aggravated award was ordered.

27 Semour Martin Lipset, *Encylopedia of Democracy*, vol I, p 310.

28 *Superintendent and Remembrancer of Legal Affairs, West Bengal v Corpn of Calcutta,* AIR 1967 SC 997 : [1967] 2 SCR 170.

29 (1996) 6 SCC 599 : AIR 1997 SC 483. A regular case under *sections 120B*, *420*, *468* and *471* of *Indian Penal Code, 1860* and section 13 (2) read with *section 13 (1)(d) of Prevention of Corruption Act 1988*, has been registered against Shiela Kaul and her Additional Private Secretary Rajan S Lala and others. Judgment was delivered by Kuldip Singh and Hansaria, JJ.

14.8 Receiving of Stolen Property

Part II Specific Offences

14 OFFENCES AGAINST PROPERTY

14.8 Receiving of Stolen Property

410. Stolen Property.—Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as "stolen property", whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without India. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

Section 410 defines stolen property. It gives a wide definition of the term to include any property received by theft, extortion, robbery, misappropriation and criminal breach of trust.[30]

Section 411 prescribes punishment which may extend to three years, fine or both for dishonestly receiving stolen property; section 412 prescribes severe punishment in case the property happens to be stolen in the commission of a dacoity (life imprisonment, or ten years and fine); section 413 makes habitual offenders in dealing with stolen property liable upto 10 years of imprisonment and fine; and section 414 punishes those who assist in the concealment of stolen property for three years, fine or both.

Knowledge and possession of stolen goods necessary for offence—Appeal Allowed: Conviction quashed—Supreme Court—1954

Trimbak v State of MP,

AIR 1954 SC 39

When the field from which the ornaments were recovered is an open one and accessible to all and sundry, it is difficult to hold positively that the accused was in possession of those articles. The fact of recovery by the accused was compatible with circumstances of somebody else having placed the articles there, and of the accused somehow acquiring knowledge about their whereabouts. That being so, the fact of discovery could not be regarded as conclusive proof that the accused was in possession of those articles.

To bring home the guilt of a person under section 411, the prosecution must prove that—

(1) the stolen property was in the possession of the accused;

(2) some person other than the accused had possession of the property before the accused got possession of it; and

(3) the accused had knowledge that the property was stolen property. Appeal was allowed. Conviction was quashed.

Circumstantial evidence sufficient to establish assistance in concealment of stolen property under section 410 IPC, 1860—Appeal Dismissed: conviction upheld—Supreme Court—1964

Ajendra Nath v State of MP,

AIR 1964 SC 170 : *[1964] 3 SCR 289*

Five bales, containing woolen shawls and mufflers, despatched from Kanpur, and another bale despatched from Haimanpur to Kanpur, were loaded at the Itarsi railway station. The lock of the wagon was found broken open at Pandhuma Railway Station. On checking at Nagpur, the aforesaid bales were found missing.

The police found the appellant and a few other persons coming out of the house of the appellant's grandfather whose front door was locked. The police recovered from different places of that house, woolen shawls, mufflers, bedsheets and certain house-breaking implements. The appellant was convicted under *section 414, IPC, 1860*.

Justice Raghubar Dayal held:

It is not necessary for a person to be convicted under *section 414, IPC* that another person must be traced out and convicted of an offence of committing theft. The prosecution has simply to establish that the property recovered is stolen property, and that the appellant provided help in its concealment and disposal. The circumstances of the recovery sufficiently make out that the property was deliberately divided into different packets, and was separately kept.

The appellant also knew the whereabouts of the property inside the house of his maternal grandfather. He attempted to sell a few mufflers a day before the recoveries were made. He was seen arriving at the house, during the night, in a car with some persons and then removing property which looked like bales from the car to the house. All these circumstances go to support the finding that he had assisted in the concealment of the stolen property and had thus committed the offence under *section 414, IPC*.

Appeal dismissed.

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30 *Chandmal v State of Rajasthan*, AIR 1976 SC 917 : (1976) 1 SCC 621 : 1976 Cr LJ 679.

14.9 Cheating

KD Gaur: Criminal Law-Cases and Materials, 9th ed

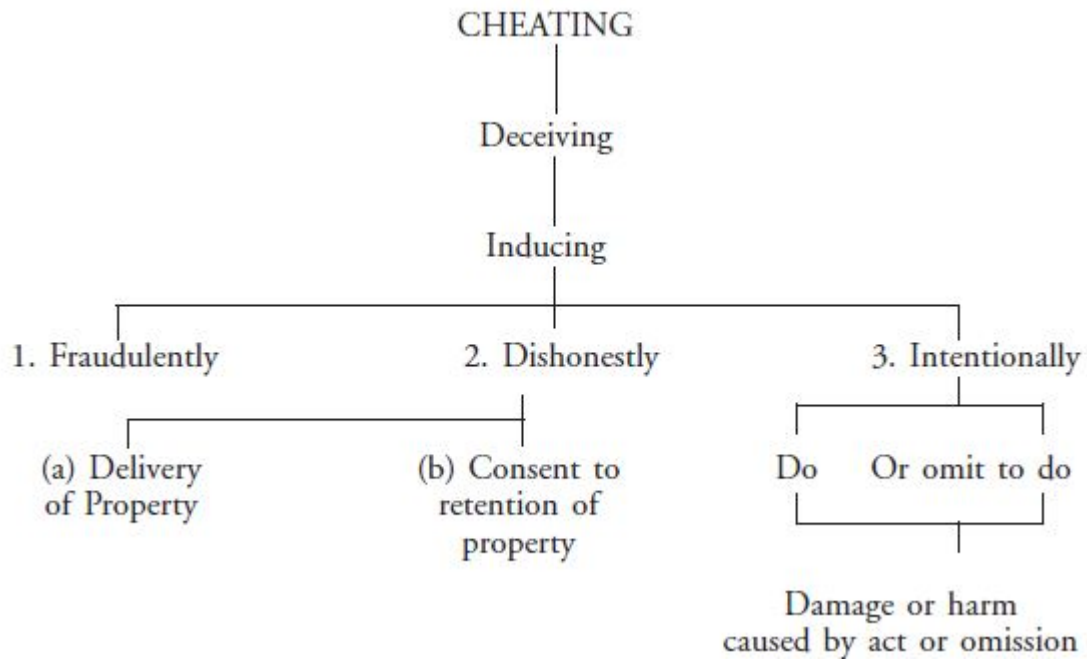
K D Gaur

Part II Specific Offences

14 OFFENCES AGAINST PROPERTY

14.9 Cheating

Section 415 of the Indian Penal Code, 1860 deals with three types of cheating summarised below:



As mentioned in the chart, cheating can be committed in three ways, viz:

(1) by fraudulently deceiving and inducing the person so deceived to (a) deliver any property, or (b) consent to the retention of any property by any person;

(2) by dishonestly inducing the person to deliver any property or to give consent to the retention of any property; and

(3) by intentionally inducing the person deceived to do or to omit to do anything which he would not have done if he was not so deceived and such act of his, caused or was likely to cause damage, or harm in body, mind, reputation or property.

The word “fraudulently” or “dishonestly” does not cover the whole of the definition of cheating, but only the first part. The person deceived must have acted under the influence of deceit, and the damage must not be too remote.

In short, the following are the ingredients for the offence of cheating, viz:

(1) Deception of any person;

(2) Fraudulently or dishonestly inducing that person; and

(3) To deliver any property to any person.

This section covers only simple cases of cheating. When there is delivery of any property or destruction of any valuable security, section 420 is attracted.

415. Cheating.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

Illustrations

(a) *A*, by falsely pretending to be in the civil service, intentionally deceives *Z*, and thus dishonestly induces *Z* to let him have on credit goods for which he does not mean to pay. *A* cheats.

...

(h) *A* intentionally deceives *Z* into a belief that *A* has performed *A's* part of a contract made with *Z*, which he has not performed, and thereby dishonestly induces *Z* to pay money. *A* cheats...

416. Cheating by personation.—A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offence is committed whether the individual personated is a real or imaginary person.

Illustrations

(a) *A* cheats by pretending to be a certain rich banker of the same name. *A* cheats by personation.

(b) *A* cheats by pretending to be *B*, a person who is deceased. *A* cheats by personation.

417. Punishment for cheating.—Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

418. Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.—Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound, either by law, or by legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

419. Punishment for cheating by personation.—Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

420. Cheating and dishonestly inducing delivery of property.—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

False statement as to the name and qualifications to the Service Commission and Government to secure a job is deception under section 419, IPC, 1860— Appeal Dismissed: conviction upheld—Supreme Court (1965)

14.9 Cheating

Kanumukkala Krishna Murthy v State of AP,

AIR 1965 SC 333 : *[1964] 7 SCR 410*

Facts: The appellant, who was a civil assistant surgeon in the Madras Medical Service on a temporary basis, applied for the permanent appointment to the post. In his application he made the following representations, which were found to be false, by the courts below:

(i) that his name was Kaza Krishnamurthy;

(ii) that his place of birth was Bezwada, Krishna district;

(iii) that his father was KR Rao of Bezwada; and

(iv) that he held the degree of MBBS, II Class, from the Andhra Pradesh Medical College, Vizagapatam, Andhra University.

On these facts, the appellant was convicted under *section 419, IPC, 1860* for having cheated the Madras Public Service Commission by personating as Kaza Krishnamurthy, and misrepresenting that he had the necessary qualifications for the post advertised in as much as he held the degree of MBBS, and that this deception of the commission was likely to have caused damage to its reputation. The appellant's conviction was confirmed by the sessions judge, and the revision against that order was dismissed by the High Court.

The appellant contended that on the facts established in the case, no offence under *section 419, IPC, 1860* was made out against him, as the appellant's efficiency as a surgeon was not in dispute, he having secured good reports from his superiors during the period of his service, there could be no question of the service commission suffering damage in its reputation.

Per Raghubar Dayal, J:

Dismissing the appeal the court said, cheating can be committed in either of the two ways described in *section 415, IPC* namely:

(i) A person deceived may be fraudulently or dishonestly induced to deliver any property or to consent to the retention of any property by any person.

(ii) The person deceived may also be intentionally induced to do or to omit to do anything which he would not have done if not deceived, and which act of his caused or was likely to cause damage or harm in body, mind, reputation or property.

"Deceiving a person" is common in both the ways of cheating. The evidence shows that for about 10 years between his appointment and the institution of this case, he served efficiently and obtained good reports from the departmental superiors. His incompetency for the post was due to him having not obtained the minimum academic qualification prescribed for the post and not because of his inefficiency. Hence the only other question to determine is whether the appellant deceived the Government of Madras, and dishonestly induced it to deliver something in the form of salary to the appellant.

In the present case, when the recommendation of the Service Commission was sent to the government, the qualifications of the recommended candidates, including the fact that the appellant had passed the MBBS examination were mentioned. The government, therefore, believed that the appellant possessed the degree of MBBS, that the Service Commission had scrutinised the application in that regard, and had satisfied itself that the appellant possessed that degree. The consequence is that the government was led to believe that fact, which thus became a false representation.

The appellant's misrepresentation to the Service Commission continued and persisted till the final stage of the government passing an order of appointment, and that, therefore, the government itself was deceived by the misrepresentation he had made in his application presented to the commission.

The government appointed the appellant to a post in its medical service on being induced by deception that he was fully qualified for the appointment. In consequence of the appointment, government had to pay him the salaries that fell due. It is clear, therefore, that the appellant, by deceiving the government, dishonestly induced it to deliver

property to him and thus, committed the offence of cheating under *section 415, IPC, 1860* as he pretended to be Kaza Krishnamurthy, which he was not. The offence really committed by him was cheating by personation, punishable under *section 419, IPC, 1860*. The conviction of the appellant for this offence is, therefore, correct.

False claim to secure payment amounts to cheating—Under section 420 IPC, 1860 Appeal Dismissed: conviction upheld—Supreme Court—1957

Bakhshish Singh Dhaliwal v State of Punjab[31]

The appellant submitted a number of false claims to the Government of Burma in exile located at Simla in 1942, in respect of various works which he claimed he had executed (and for supply of materials) under the instructions of various units of the army. It was held that the very fact that the claims were bogus and did not accord with the true facts, leads to the inference that the appellant knew that the representations which he was making in these claims were false, and so the appellant was guilty of cheating under *section 420, IPC, 1860*.

Fraudulent representation to have divine healing power to cure dumbness amounts to cheating under section 420 IPC, 1860—Appeal Dismissed, conviction upheld—Supreme Court—1999

Sri Bhagawan Samardhan Sreepada Vallabha Venkata

Vishwandadha Maharaj v State of AP,

AIR 1999 SC 2332 : (1999) 5 SCC 740

Facts: The accused represented to have divine healing powers through his touches, particularly of chronic diseases. The complainant approached him for healing his fifteen year old daughter who was a congenitally dumb child. The accused assured the complainant that the girl would be cured of her impairment through his divine powers. He demanded a sum of rupees one lakh as consideration to be paid in installments. The complainant paid the amount, but in vain. The complainant on realising the fraud committed by the accused lodged a complaint with the police for cheating.

Per Thomas, J:

> If somebody offers his prayers to God for healing the sick, there cannot normally be any element of fraud. But if he represents to another that he has divine powers and either directly or indirectly makes that another persons believe that he has such divine powers, it is inducement referred to *section 415 of IPC, 1860*. Anybody who responds to such inducement pursuant to it, and gives the inducer money or any other article, and does not get the desired result is a victim of the fraudulent representation. Court can in such a situation presume that the offence of cheating falling within the ambit of *section 420 of IPC* has been committed. It is for accused, in such situation, to rebut the presumption. Appeal dismissed. Accused liable.

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31 AIR 1967 SC 752 : [1967] 1 SCR 211. See also *Abhayanandan Mishra v State of Bihar*, AIR 1961 SC 1698 : [1962] 2 SCR 241 and *Mobarak Ali v State of Bombay*, AIR 1957 SC 857 : [1958] 1 SCR 328.

14.10 Fraudulent Deeds and Disposition of Property

Part II Specific Offences

14 OFFENCES AGAINST PROPERTY

14.10 Fraudulent Deeds and Disposition of Property

Sections 421 to 424 are designed to punish the fraudulent transfer of property for the purpose of defeating or delaying creditor's claim and interest in any property, and thereby causing wrongful loss to the creditors.

421. Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors.—Whoever dishonestly or fraudulently removes, conceals, or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

422. Dishonestly or fraudulently preventing debt being available for creditors.—Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

423. Dishonest or fraudulent execution of deed of transfer containing false statement of consideration.—Whoever dishonestly or fraudulently signs, executes or becomes party to any deed or instrument which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

424. Dishonest or fraudulent removal or concealment of property.— Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Property attached by the court under legal order, if forcefully removed by the owner liable for dishonest removal of property under section 424 of IPC, 1860—Appeal Dismissed: conviction upheld—Supreme Court—1961

Teeka v State of UP,

AIR 1961 SC 803 : [1962] 1 SCR 75

In execution of a warrant of attachment issued by a civil court, the bailiff of the court had attached five cattle of the judgment debtor, and had kept them in the enclosure of the decree holder. The appellants forcibly entered the

enclosure the next day and took away two of the cattle. They were convicted under sections 424 and 447, fraudulent removal of property (cattle) and criminal trespass, read with *section 149, IPC, 1860*.

The question was whether the offence under *section 424, IPC* was established. It was held that:

The legal effect of a valid attachment of movable property in execution of a decree of a civil court is as follows:

> Attachment by actual seizure involves a change of possession from the owner of the property to the court. Whether the bailiff keeps the attached property in his own possession or entrusts it to another for safe custody, the possession is in law the possession of the court, and so long as the attachment is not raised, the possession of the court continues to subsist. In such a case, even if the attaching officer of the court keeps the attached property with a third party, in law the third party is only a bailee of the court. In the present case, the two buffaloes were kept by the bailiff with the decree holder, but that would not make any difference, and the decree holder's possession was only as a bailee of the officer of the court.

The necessary condition of the offence under section 424 is that the removal must be made with the intention of causing either wrongful loss to another, or wrongful gain to himself within the meaning of *section 23 of the IPC*. When an attachment is made, the legal possession of the thing attached becomes vested in the court and so long as the attachment lasts, the owner of that thing is not legally entitled to have the possession of the thing attached. If the owner removes that thing from the possession of the court, he certainly causes wrongful loss to the court and makes a wrongful gain to himself within the meaning of section 23, and thus acts dishonestly within the meaning of *section 24, IPC*.

Even if the owner feels that he has a right to the property, which is under legal attachment, he cannot take the law in his own hands, and resort to force to get back his property. All that he is entitled to do is to file a claim petition in the court to enforce his right or to get the attachment raised by legal process. If the owner forcibly takes away the property (buffaloes in this case) from the possession of the court or its agent, he is guilty, as he could not act dishonestly in retrieving what belonged to him.

Appeal dismissed.

End of Document

14.11 Mischief

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

14 OFFENCES AGAINST PROPERTY

14.11 Mischief

Section 425 defines “mischief” in general, and prescribes punishment in *section 426, IPC, 1860* which may extend to three months of imprisonment, fine or both.

425. Mischief.—Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects in injuriously, commits “mischief”.

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations

(a) *A* voluntarily burns a valuable security belonging to *Z* intending to cause wrongful loss to *Z*. *A* has committed mischief.

(b) *A* introduces water into an ice-house belonging to *Z* and thus causes the ice to melt, intending wrongful loss to *Z. A* has committed mischief.

...

426. Punishment for mischief.—Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

To constitute mischief, there must be destruction of property belonging to someone—in case the property does not belong to anyone—offence not committed—Appeal Allowed: Conviction quashed—Assam High Court—1961

Nabin Chandra Gogoi v State,

AIR 1961 Ass 18 : 1961 Cr LJ 226

The petitioner was convicted by the trial court for mischief under *section 429, IPC, 1860* for having shot dead a rhinoceros with a gun. The petitioner contended that the conviction under section 429 (mischief by killing or maiming cattle etc of any value or any animal of the value of fifty rupees) could not be sustained as the section had no application to the killing of wild animals like rhinoceros. Section 429 reads:

> Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

It is clear from the language of the section that the various animals enumerated therein are all domestic animals. A rhinoceros cannot in any sense of the term be described as a domestic animal. The words “or any other animal” in the section should refer to animals of the same kind or class, ejusdem generis, that is to say to domestic animals, and not to wild animals.

Destruction of property is essential in the case of a mischief. Where, therefore, no one has any property or right in an animal, the killing of that animal does not come within the meaning of *section 425 of IPC*, and thus the provisions of *section 429 of IPC* will not be attracted. In *Romesh Chunder Sanyal v Hiru Mondal*,[32] it was held that the killing of a bull dedicated and set at large which was *res nullius* and in which no one had any property, would not constitute an offence within the meaning of *section 425 of IPC*. The appeal was allowed. The conviction was quashed.

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32 ILR 17 Cal 852.

14.12 Criminal Trespass

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

14 OFFENCES AGAINST PROPERTY

14.12 Criminal Trespass

The *IPC* deals with the offence of criminal trespass under sections 441 to 462.[33]

33 See KD Gaur, *A Textbook of Indian Penal Code*, 6th Edn, 2016, under sections 441 to 462.

15.1 Introduction to Chapter XVIII of IPC

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

15 OFFENCES RELATING TO DOCUMENTS AND PROPERTY MARKS

15.1 Introduction to Chapter XVIII of IPC

Chapter XVIII of *Indian Penal Code, 1860* (*IPC*), in sections 463 to 489E, deals with offences relating to Documents and Property Marks. The offences may broadly be divided into two categories, *viz,* (1) forgery, and (2) fraudulent use of property marks.

15.2 Forgery

KD Gaur: Criminal Law-Cases and Materials, 9th ed

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Part II Specific Offences

15 OFFENCES RELATING TO DOCUMENTS AND PROPERTY MARKS

15.2 Forgery

Forgery is an offence which traces its origin to the invention of writing and the custom of preserving written documents and materials. The forging of the state seal was made an offence for the first time in common law. It has been rightly stated: “Forgery at common law denotes a false making [which includes every alteration of or addition to a true instrument], a making *malo animo,* of any written instrument for the purpose of fraud and deceit.”[1]

Sections 463 to *477A* of the *Indian Penal Code, 1860* deal with offences relating to forgery, forged documents, making or possession of counterfeit seals, etc, with intent to commit forgery, fraudulent cancellation or destruction of Will and falsification of accounts, etc. Sections 463 and 464 define forgery as “the making of a false document in order that it may be used as genuine”. Section 465 prescribes punishment for forgery. Sections 466 to 469 state the situations in which the offence is aggravated. For instance, in the case of forgery of the record of a court, or of public register, forgery of a valuable security, Will, etc, and forgery for purpose of cheating and harming the reputation of another, etc, punishment may extend to three years, seven years or 10 years of imprisonment and fine. Section 470 defines a “forged document” and section 471 prescribes punishment in cases of using as genuine, a forged document. Sections 472 to 477A provide for punishment in cases of making or possessing a counterfeit seal, plate, etc, possession of a valuable security or Will, known to be forged, counterfeiting a device or mark used for authenticating any document, fraudulent cancellation, destruction, defacement or screening of a Will, or a valuable security and falsification of accounts by a clerk or an officer or a servant with intent to defraud.

463. Forgery.—Whoever makes any false document or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

464. Making a false document.—A person is said to make a false document or false electronic record—

First.—Who dishonestly or fraudulently—

(a) makes, signs, seals or executes a document or part of a document;

(b) makes or transmits any electronic record or part of any electronic record;

(c) affixes any electronic signature on any electronic record;

(d) makes any mark denoting the execution of a document or the authenticity of electronic signature,

with the intention of causing it to be believed that such document or part of a document, electronic record or electronic signature was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or

Secondly.—Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or electronic record in any material part thereof, after it has been made, executed or affixed with

electronic signature either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly.—Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his electronic signature on any electronic record, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practiced upon him, he does not know the contents of the document or electronic record or the nature of the alteration.

Illustrations

(a) *A* has a letter of credit upon *B* for rupees 10,000 written by *Z*. *A* in order to defraud *B,* adds a cipher to the 10,000 and makes the sum 1,00,000 intending that it may be believed by *B* that *Z* so wrote the letter. A has committed forgery.

(b) ...

(c) *A* picks up a cheque on a banker signed by *B*, payable to bearer, but without any sum having been inserted in the cheque. A fraudulently fills up the cheque by inserting the sum of ten thousand rupees. A commits forgery.

...

Explanation 1.—A man's signature of his own name may amount to forgery.

Illustration

(a) *A* signs his own name to a bill of exchange, intending that it may be believed that the bill was drawn by another person of the same name. *A* has committed forgery.

...

Explanation 2.—The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

Illustration

A draws a bill of exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. *A* commits forgery.

Explanation 3.—For the purposes of this section, the expression "affixing electronic signature" shall have the meaning assigned to it in clause (d) of sub-section (1) of *section 2 of Information Technology Act 2000*.

465. **Punishment for Forgery.**—Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

To constitute fraud there must be "deceit" or injury to the deceived or advantage to the deceiver or both—Appeal Allowed: Conviction set aside— Supreme Court—1963

Vimla v Delhi Administration,

AIR 1963 SC 1572 : 1963 Supp (2) SCR 585

The appellant purchased an Austin 10 HP car in the name of her minor daughter Nalini and got the insurance policy transferred in Nalini's name. Subsequently, the car met with accidents on two occasions and therefore, the appellant filed two claims against the insurance company. In connection with these claims, the appellant signed the claim forms as Nalini and also the receipts acknowledging the payments of the compensation money as Nalini. On these facts the appellant was prosecuted under section 467 on a complaint made by the insurance company

alleging fraud on the appellant's part. The trial court acquitted her, but on appeal, the High Court set aside the order of acquittal and convicted her of forgery under *section 467, IPC*. The appellant filed a appeal to the Supreme Court.

Justice Subba Rao held:

The definition of "false document" is a part of the definition of "forger". Both must be read together. If so read, the ingredients of the offence of forgery relevant to the present enquiry are as follows:

(1) fraudulently signing a document or a part of a document with an intention of causing it to be believed that such document or part of a document was signed by another or under his authority;

(2) making of such a document with an intention to commit fraud or that fraud may be committed.

In the two definitions, both mens rea described in section 464, namely, "fraudulently" and "the intention to commit fraud" in section 463 have the same meaning. This redundancy has perhaps become necessary, as the element of fraud is not the ingredient of other intentions mentioned in section 463.

The idea of deceit is a necessary ingredient of fraud, but it does not exhaust it, an additional element is implicit in the expression ... the second thing to be noticed is that in section 464, two adverbs, "dishonestly" and "fraudulently" are used alternatively indicating, thereby; that one excludes the other, and must be given different meanings. *Section 24 of IPC, 1860* defines "dishonestly" thus:

Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

Fraudulently' is defined in section 25 thus:

> A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

The word "defraud" includes an element of deceit. Deceit is not an ingredient of the definition of the word "dishonestly" while it is an important ingredient of the definition of the word "fraudulently". The former involves a pecuniary or economic gain or loss while the latter, by construction, excludes that element. Further, the juxtaposition of the two expressions "dishonestly" and "fraudulently" used in the various sections of the Code indicate their close affinity and therefore, the definition of one may give colour to the other.

...The expression "defraud" involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others.

Certainly, Dr Vimla was guilty of deceit, for though her name was Vimla, she signed in all the relevant papers as Nalini and made the insurance company believe that her name was Nalini, but the said deceit did not either secure to her advantage or cause any non-economic loss or injury to the insurance company ... the entire transaction was that of Dr Vimla and it was only put through in the name of her minor daughter for reasons best known to herself.

In the result, we allow the appeal and hold that the appellant was not guilty of the offence under *sections 467* and *468* of *IPC, 1860*. The conviction and sentence passed on her are set aside.

Section 477A of the Indian Penal Code, 1860—falsification of accounts means "intentionally or deliberately" making an entry with Intent to defraud— Mere fact that the entries were made "willfully" does not necessarily mean that it was made to defraud. Appeal Allowed: conviction quashed—Supreme Court—1976

Harnam Singh v State (Delhi Administration),

AIR 1976 SC 2140 : *(1976) 2 SCC 819*

The appellant, a goods loading clerk, was convicted under *section 477A, IPC*, for falsifying certain entries in the marketing cum loading register by showing the receipt of certain goods on 10 January 1967, i.e. a day before the date they had actually arrived. This was done to circumvent certain order of the divisional superintendent with respect to the booking of goods from 11 January 1967.

The appellant contended that he acted innocently and had no intent to defraud. He contended that in making the wrong entries in the marking-cum-loading register and the endorsements on the forwarding notes, the appellant could not, be said to have the mens rea requisite for an offence of falsification of accounts under *section 477A, IPC, 1860* on the ground that he had been informed by the gate clerk who came into duty before the appellant that the goods had arrived on 10 January 1967, believing that representation to be true, the appellant made the entries in question showing the receipt of the goods on 10 January 1967.

Justice RS Sarkaria held:

The Code does not contain any precise and specific definition of the words “intent to defraud”. However, the expression “intent to defraud” contains two elements viz, deceit and injury. A person is said to deceive another when by practising *suggestio falsi* or *suppressio veri* (suppression of truth is suggestion of false) or both, he intentionally induces another to believe a thing to be true, which he knows to be false or does not believe to be true. Injury has been defined in section 44 of the Code:

> as denoting any harm whatever illegally caused to any person in body, mind, reputation or property.

Section 477A falsification of accounts of *Indian Penal Code*[2] reads thus:

> Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, electric record, paper, writing, valuable security or account which belongs to or is in the possession of his employer; or has been received by him for or on behalf of his employer, or willfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such valuable security or account,[3] shall be punished with imprisonment of either description for a term which may extend to seven years or with fine, or with both.
>
> *Explanation*.—It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed.

An analysis of this section, would show that in order to bring home an offence under this provision, the prosecution has to establish (1) that at the relevant time, the accused was a clerk, officer or servant; and (2) that acting in that capacity he destroyed, altered, mutilated or falsified any book, paper, [electric record] writing, valuable security or account which belonged to or is in the possession of his employer or has been received by him for and on behalf of his employer etc, (3) that he did so wilfully and with intent to defraud.

The existence of the third ingredient has been the subject of serious controversy. The question is: Did the appellant make these entries “wilfully and with intent to defraud”?

Wilfully as used in section 477A means intentionally or deliberately. There can be no difficulty in holding that these entries were made by the appellant wilfully. The appellant must have been aware that the divisional superintendent had by an order prohibited the booking of this class of goods from 11 January 1967—but from the mere fact that these entries were made “wilfully”, it does not necessarily follow that he did so with intent to defraud within the meaning of *section 477A, Indian Penal Code, 1860* to make him liable for the offence.

Appeal allowed.

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1 See East, *A Treatise of the Pleas of the Crown*, vol II, 1803, pp 852-853.

2 Added by Act 3 of 1895, *section 4 of Indian Penal Code, 1860*.

3 For electronic records see *Information Technology Act 2000*.

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16.1 Offences against the State

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

16 OFFENCES AGAINST THE STATE AND THE ARMY, NAVY AND AIR FORCE

16.1 Offences against the State

All crimes are treated as offences against the State, or government, insofar as these acts/actions disturb the public tranquility, national integration and public order. But there are some criminal activities that are directed against the existence of the State itself viz. treason, sedition and rebellion. The cases reported under *sections 121*, *121A*, *122*, *123*, *124A*, *153A* and *153B* of *Indian Penal Code, 1860*.

A total of 571 cases of offences against the State (under *sections 121*, *121A*, *122*, *123*, *124A*, *153A* and *153B* of *IPC, 1860*) were registered during 2015, showing an increase of 11.5% over previous year 2014 (512 cases) [Table 21.1] given below.[1]

The offences against the State discussed in Chapter VI of *IPC, 1860* comprises of twelve sections commencing from sections 121, 121A, 122 to 124 and 124A to 130. These offences can broadly be classified into five categories:

(i) Waging or attempting or conspiring to wage or collecting men or ammunition to wage war against the Government of India (*sections 121*, *121A*, *122*, *123*, *IPC*).

(ii) Assaulting the President of India or governor of any State with intent to compel or restrain the exercise of any lawful authority (*section 124, IPC*).

(iii) Waging war against a State [power] at peace with the Government of India (*section 125, IPC*) or committing depredations on territories of such State (*sections 125*, *126*, *IPC*).

(iv) Permitting or aiding the escape of a State prisoner or a prisoner of war (*sections 128*, *129*, *130*, *IPC*).

(v) Sedition (*section 124A, IPC*).

(vi) Promoting enmity between different groups.

121. Waging, or attempting to wage war, or abetting waging of war, against the Government of India.—Whoever, wages war against the *[Government of India], or attempts to wage such war, or abets the waging of such war, shall be punished with death, or **[imprisonment for life] ***[and shall also be liable to fine].

Comments

1. **Principle.—**Every State has the right of self-preservation similar to that of subjects. Accordingly, laws have been enacted to safeguard and preserve states since time immemorial. In monarchial forms of government, the right of preservation of the State was exalted into a sacred right, and so the violence against the States was considered lese majestic-lese majestic human, an offence against the dignity and majesty of invisible God.

   The *Penal Code* has incorporated the common law concept of preservation of State and has provided for the most severe punishment of the death sentence, life imprisonment and fine in case of offence

against the State under *section 121 of Indian Penal Code, 1860*.

2. **Ingredients of section 121.—**To constitute the offence under section 121 the *Indian Penal Code, 1860* the following ingredients must exist:

   - (i) accused must wage War, or
   - (ii) attempt to wage such war, or
   - (iii) abet the waging of such war,
   - (iv) against the Government of India.

3. **Whoever -** This section applies to everyone, whether an Indian citizen or foreigner. Everyone who wages a war against the Government of India is subject to prosecution and punishment under this section. Foreigners are liable on the principle of *de jure gentium* (allegiance and protection are reciprocally due from subject and sovereign) which admits the right of foreigners to enter the country only upon the tacit condition that as they rely upon its protection, they are also subject to its laws.
4. **Waging war -** In view of the gravity of the offence contemplated under this section, the act of waging war, attempting to wage war and abetting the waging of war against the Government of India is treated on equal footing and the same punishment of death or imprisonment for life is prescribed in all the cases. In other words, the section deals with three stages of complicity in waging war against the Government of India, *viz*., abetment, attempt and actual war.

Indian Penal Code, 1860 - Section 302 read with sections 120B, 109, 121 A and 34 and sections 307, 397, 324, 341, 342, and 364 Mumbai Terrorist Attack Case of 20 November 2008 was the offence of waging war against the Government of India that left Mumbai scarred and traumatised and the entire country shocked killing 166 people, injuring 238 and resulting in loss of property worth Rs 150 crore is a crime of unprecedented enormity on all scales since the birth of the Republic that attracts death penalty to the sole surviving terrorist captured alive out of the ten (nine others were killed in encounter with the police) - Supreme Court, 2012

Mohd Ajmal Amir Kasab v State of Maharashtra,

AIR 2012 SC 3565 : (2012) 9 SCC 1 : 2012 Cr LJ 4770 : 2012 (7) Scale 553 : 2012 (8) JT 4

Per Aftab Alam and Chandramauli Prasad, JJ:

Justice Altamas Kabir said the trial court has awarded death sentence on five counts to TA-1 (terrorist accused) for the offences punishable under (1) *section 120B*, 1860 *IPC* for waging war against conspiracy to commit murder; (2) *section 121 IPC* for waging war against India; (3) *section 16 of Unlawful Activities (Prevention) Act 1967*; (4) *section 302 IPC* for committing murder of 7 persons; (5) section 302 read with section 34 read with *section 109* and *120B IPC*.

The High Court confirmed the death sentence on five counts given to TA-1 by the trial court in a comprehensive judgment running into 361 pages with lll Schedules in the course of hearing of the case spread over 13 weeks examined in great details, every aspects of the complicated case of its own type in independent India confirmed the convictions and sentences of the appellant passed by the trial court. The Apex Court while concluding the judgment said, “We are left with no option but to hold that in the facts of the case the death penalty is the only sentence that can be given to the appellant accused”.

The case of the prosecution is based on the confession of the accused, which may be divided into two parts (i) one relating to conspiracy, preparation and planning for the attack; and (ii) the other relating to actual attack on Mumbai in execution of the conspiracy of which the appellant along with his *buddhia* (accomplice), the accomplice Abu Ismail was a part. A sinister conspiracy was hatched in Pakistan and in furtherance of that conspiracy a savage attack was unleashed on Mumbai by a team of ten terrorists, including Kasab, who landed on the city’s shore via the Arabian Sea. The attack began on 26 November 2008 at about 9.15 pm and it ended when the last of attackers, who was held up in Hotel Taj Mahal Palace, was killed by Indian Security Forces at about 9.00 am on 29 November 2008. Brutal assault left Mumbai scarred and traumatized and the entire country shocked. The terrorists killed one hundred and sixty-six (166) people and injured, often grievously, two hundred and thirty-eight (238) people. The

loss of property resulting from the terrorist attack was assessed at over Rupees one hundred and fifty crores (Rs 150 crore). The dead included eighteen policemen and other security personnel and twenty-six foreign nationals. The injured included thirty seven policemen and other security personnel and twenty one foreign nationals. Of those dead, at least seven were killed by the appellant personally, seventy-two were killed by him in furtherance of the common intention he shared with one Abu Ismail (deceased accused No 1) and the rest were victims of the conspiracy to which he was a party along with the nine dead accused and 35 other accused who remain to be apprehended and brought before the court.

The appellant was convicted and sentence to death *vide* judgment and order dated 3 June 2010 passed by the Add Session Judge, Greater Mumbai which was confirmed by the High Court *vide* its judgment and order dated 21 February 2011.

The appellant, tried as accused 1, TA-1 along with nine deceased associates having been trained and indoctrinated by *Lashkar-e-Taiba (LeT)* in Pakistan, illegally transgressed into Indian territories from the sea at Mumbai by hijacking an Indian fishing boat and killing its navigator. These 10 terrorists entered Mumbai at a strategic location (i.e. Badhwar Park, a fishing village in the heart of city) where they would not be suspected and from where they could easily move to their target locations for mass killing of Indians and foreigners on Indian soil. The map on the basis of which their operation was planned and executed had allegedly been prepared by TA-2 and TA-3 (who has been caught by Indian Police much prior to the alleged attack). The 10 terrorists equipped with sophisticated gadgets and armed with highly lethal weapons and ammunition divided themselves into five pairs. In their whole operation, the ten terrorists killed a total of 166 persons, injured 238 others and destroyed property estimated at Rs 150 crore. TA-1 (who has paired with DA-1) was caught alive but the rest of his nine associates who had come to India died in the encounter. The inflatable rubber dinghy in which the A10 terrorists [the appellant, Kasab (TA-1 or tried accused 1) and DA-1 to DA-9 (deceased - accused 1 to 9)] came to Mumbai landed at a place called Badhwar Park (the fishermen's colony). Out of the total of 166 persons killed and 238 injured by the terrorists, TA-1, personally and jointly with DA-1 was directly responsible for killing at least 72 people and causing injuries of various kinds to 130 people.

TA-1 confessed that he committed the first murder on the hijacked Indian fishing boat, Kuber where TA-1 himself slit the throat of the navigator by asking the others to hold the legs of the deceased. As per the prosecution story TA-1 and DA-1 killed a total number of 72 persons starting with the said navigator and ending at Vinoli Chowpaty, in Mumbai (where they were finally caught). As per prosecution evidence, others i.e., DA-2 to DA-9 killed 94 persons and injured 108 others at various places like Leopold Cafe, Mazegaon Blast, Hotel Taj, Nariman House and Hotel Oberoi by taking positions there.

The case presents the element of previous planning and preparation as no other case. For execution of the conspiracy, TA-1 and 9 other dead accused, his accomplices, where given rigorous and extensive training in Pakistan as combatants. The planning for the attack was meticulous and greatly detailed. The route from Karachi to Mumbai, the landing site at Mumbai, the different targets at Mumbai were all predetermined. The nature of the attack by the different teams of terrorist was planned and everyone was given even clear instructions as to what they were supposed to do at their respective targets. All the terrorists, including TA-1, actually acted according to the previous planning. A channel of communication between the attacking terrorists and their handlers and collaborators from across the border in Pakistan, based on advanced computer technology and procured through deception, was already arranged and put in place before the attack was launched. This case has the element of waging war against the Government of India and the magnitude of the war is of a degree as in no other case. And TA-1 is convicted on the charge, among 4 other, of waging war against the Government of India.

The appellant, as also the other nine terrorists, his co-conspirators, used highly lethal weapons such as AK 47 rifles, 9 mm pistols, and Grenades and RDX bombs.

As to the personality of the victims, all the persons killed/ injured at CST, Badruddin Tayabji Marg and Cama Hospital were harmless, defenseless persons. What is more, they did not even know the appellant and the appellant too had no personal animus them. He killed/ injured them simply because they happened to be Indians.

Against all this, the only mitigating factor is TA-1's young age, but that is completely offset by the absence of any remorse on his part, and the resultant finding that in his case there is no possibility of any reformation or rehabilitation.

While dismissing the appeal and confirming the death sentence awarded to the accused by the courts below, Justice Aftab Alam speaking on behalf of the Apex Court said:

If we examine the present case in light of the *Machhi Singh,*[2] decision, it would not only satisfy all the conditions laid down in that decision for imposition of death sentence but also present several other features that could not have been conceived of by the court in *Machhi Singh*. We can even say that every single reason that this court might have assigned for confirming a death sentence in the past is to be found in this case in a more magnified way.

This case has element of conspiracy as no other case. The appellant was part of a conspiracy hatched across the border to wage war against the Government of India and lethal arms and explosives were collected with the intention of waging war against the Government of India. The conspiracy was to launch a murderous attack on Mumbai regarding it as the financial centre of the country; to kill as many Indians and foreign nationals as possible; to take Indians and foreign nationals as hostages for using them as bargaining chips in regard to the terrorists' demands; and to try to incite communal strife and insurgency; all with the intent to weaken the country from within.

The number of policemen and members of security forces killed and injured in course of their duty by the appellant and his accomplice Abu Ismail and the eight other co-conspirator would hardly find a match in any other cases. Tukaram Ombale killed by the appellant personally at Vinoli Chowapty. Durgude, Hemant Karkare, Ashok Kamte, Vijay Salaskar and the other policemen in the police van were jointly killed by the appellant and Abu Ismail. The policemen at Cama Hospital were injured, several of them grievously, jointly by the appellant and Abu Ismail. The rest of the policemen and law enforcement officers, including the NSG Commando Major Sandeep Unnikrishnan, were killed as part of the larger conspiracy to which the appellant was a party.

It is already seen above that the appellant never showed any repentance or remorse, which is the first sign of any possibility of reforms and rehabilitation.

In terms of loss of life and property, and more importantly in its traumatising effects, the case stands alone, or atleast the very rarest of rare case to come before the Apex Court, since the birth of the republic. Therefore, it attracts the rarest of rare punishment. Kasab was finally executed in 2012 December in Pune jail under tight security.

Terrorism - Disseminating terrorist publications by uploading videos showing attacks by insurgents on coalition forces in Iraq and Afghanistan - And attacks by those engaged in armed struggle against government on internet is an act of terrorism.

Regina v Gul (Mohammed),

(2012) EWCA Crim 280

The defendant, a British citizen was burnt on 24 February 1998 in Libya and it was uploaded onto the internet videos, glorifying and encouraging attacks on forces of Her Majesty then serving in Iraq and Afghanistan, which showed attacks on soldiers by insurgents on coalition forces in Iraq and Afghanistan. He was charged with six counts of disseminating terrorist publications. In 2008 and 2009, contrary to section 2 of Terrorism Act 2006, with the intent to encourage the commission of terrorist acts. The defendant's case was that he believed that the insurgents were rightly resisting the invasion of their countries and that he was encouraging self-defence, not terrorism. After retiring to consider their verdicts, the jury asked the judge whether the attacks seen on the videos came within the definition of terrorism under section 1 of Terrorism Act 2000. The judge told the jury that the attacks did come within that definition. The defendant was convicted on five of the six counts.

The defendant applied for leave to appeal against conviction on the ground that the definition of terrorism in international law excluded those engaged in an armed struggle against a government who attacked the armed forces of that government. It was a common ground on the appeal that the conflicts in Iraq and Afghanistan had been non-international armed conflicts at the relevant time and that the criminal liability of the insurgents was a matter of domestic law.

Dismissing the appeal, that on the face of section 1 of Terrorism Act 2000, acts by insurgents against the armed forces of a State anywhere in the world which sought to influence a government and were made for political purposes fell within the definition of "terrorism", and there was no exemption for those engaged in an armed struggle against a government.

1 Crime in India, 2015, p 182.

2 *Machhi Singh v State of Punjab,* AIR 1983 SC 957 : (1983) 3 SCC 470 : 1983 Cr LJ 1457.

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16.2 Sedition

KD Gaur: Criminal Law-Cases and Materials, 9th ed

K D Gaur

Part II Specific Offences

16 OFFENCES AGAINST THE STATE AND THE ARMY, NAVY AND AIR FORCE

16.2 Sedition

The law of sedition has assumed controversial importance nowadays in view of the various changes that have taken place during the last five decades. Sedition in common language means a stirring up of rebellion against the government.

The word “sedition” under *section 124A, IPC, 1860* is used to designate those activities which, either by words, deeds or writings, are calculated to disturb the tranquility of the State, and lead people to subvert the government established by law.[3] The provisions of section 124A and section 505[4] (Offences against public mischief) apply only to speeches and writing having intention or tendency to incite others to create public disorder or to violence. Criticism of government, however strongly worded, does not fall within the ambit of these sections. So long as there is no intention or tendency to incite others to public disorder, the provisions of these sections are within the ambit of clause 2 of *Article 19 of Constitution of India* and are not void as being in violation of the right to freedom of speech and expression guaranteed in *Article 19 (1)(a) of the Constitution*.

124A. Sedition.—Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1.—The expression “disaffection” includes disloyalty and all feelings of enmity.

Explanation 2.—Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3.—Comments expressing disapprobation of the administrative or other action of the government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

505. Statements conducing to public mischief.—(1) Whoever makes, publishes or circulates any statement, rumour or report,—

(a) with intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Army, Navy or Air Force of India to mutiny or otherwise disregard or fail in his duty as such; or

(b) with intent to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility; or

(c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community;

shall be punished with imprisonment which may extend to three years or with fine, or with both.

(2) *Statements creating or promoting enmity, hatred or ill-will between classes*.—Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feeling of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(3) *Offence under sub-section (2) committed in place of worship, etc*.—Whoever commits an offence specified in sub-section (2) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

Exception.—It does not amount to an offence, within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report, has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it in good faith and without any such intent as aforesaid.

Sedition: Sections 124A and 505 IPC, 1860 are not void in view of the proviso to Article 19 (1)(a) of the Constitution of India, Criticism of the Government howsoever strongly worded is not punishable Supreme Court — 1962

Kedar Nath Singh v State of Bihar,

AIR 1962 SC 955 : 1962 Supp (2) SCR 769

State of UP v Ishaq Ilimi[5]

Per Sinha CJ:

In these appeals, the main question in controversy is whether *sections 124A* and *505* of *Indian Penal Code, 1860* have become void in view of the provision of *Article 19 (1)(a) of the constitution*. The constitutionality of the provisions of section 124A is common to all the appeals, the facts of which may shortly be stated separately.

In Criminal Appeal 169 of 1957, the appellant is one Kedar Nath Singh, who was prosecuted before a magistrate...under sections 124A and 505 (b). His appeal to Patna High Court was dismissed.

In Criminal Appeals 124-126 of 1958, the State of Uttar Pradesh is the appellant though the respondents are different while the respondent Paras Nath (Cr App No 126 of 1958) was placed on trial he filed a writ of habeas corpus in the Allahabad High Court challenging his detention on the ground that it was illegal in as much as the provisions of *section 124A IPC, 1860* were void as being in contravention of his freedom of speech and expression guaranteed under *Article 19 (1)(a) of the Constitution* which was allowed by the High Court.

The Apex Court gave a detailed account of the various decisions of the federal court and the Privy Council relating of *section 124A IPC* starting from 1892 in *Bangobasi's case (Queen Empress v Jogendra Chunder Bose),* (1892) ILR 19 Cal 35; *celebrated case of Bal Gangadhar Tilak,* (1898) ILR 22 Bom 112; *Queen Empress v Amba Prasad,* ILR 20 All (FB) 55; *Niharendu Dutt,* AIR 1942 FRC 22 and *Emperor v Sadashiv Narain case, (1947)* till the enactment of the *Constitution of India* on 26 January 1950.[6]

The question for decision in these cases is:[7] how far is the offence, as defined in *section 124A IPC*, consistent with the fundamental right guaranteed by *Article 19 (1)(a) of Constitution of India* which states:

19. (1) All citizens shall have the right—

(a) to freedom of speech and expression;

(b) This guaranteed right is subject to the right of the legislature to impose reasonable restrictions, the ambit of which is indicated by clause (2), which, in its amended form, reads as follows:

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing laws/, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

...The right is subject to such reasonable restrictions as would come within the purview of clause (2) which comprises:

(a) security of the State

(b) friendly relations with foreign States

(c) public order and

(d) decency or morality, etc.

Hence, any acts within the meaning of section 124A which have the effect of subverting the government by bringing that government into contempt or hatred, or creating disaffection against it, would be within the penal statute because the feeling of disloyalty to the government established by law or enmity to it imports the idea or tendency to public disorder by the use of actual violence or incitement to violence. In other words, any written or spoken words, etc., which have implicit in them the idea of subverting the government by violent means, which are compendiously included in the term “revolution”, have been made penal by the section in question.

... [T] the section has taken care to indicate clearly that strong words used to express disapprobation of the measures of the government with a view to their improvement or alteration by lawful means would not come within the section. Similarly, comments, however strongly worded, expressing disapprobation of actions of the government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal.

In other words, disloyalty to the government established by law is not the same thing as commenting in strong terms upon the measures or acts of the government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply incitement to public disorder or the use of violence.

The expression “in the interest of... public order” of clause 2 to *Article 19* are words of great amplitude and are much more comprehensive than the expression for the maintenance of as observed by this court in the case of *Virendra v State of Punjab,* AIR 1957 SC 896 : [1958] 1 SCR 308. Any law which is enacted in the interest of public order may be saved from the vice of constitutional invalidity.

Penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence.

The explanations to the section make it clear that criticism of public measures or comments on government action, however; strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, etc. have the pernicious tendency or intention of creating public disorder or disturbance of law and order, that the law steps in to prevent such activities in the interest of public order. The section strikes the correct balance between the individual fundamental rights and the interest of public order.

...With reference to each of the three clauses of section 505, (see text, statements conducing to public mischief) it will be found that the gravamen of the offence is making, publishing or circulating any statement, rumour or report:

(a) with intent to cause or which is likely to cause any member of the army, navy or air force to mutiny or otherwise disregard or fail in his duty as such; or

(b) to cause fear or alarm to the public or a section of the public which may induce the commission of an offence against the State or against public tranquility; or

(c) to incite or which is likely to incite one class or community of persons to commit an offence against any other class or community.

It is manifest that each one of the constituent elements of the offence under section 505 has reference to, and a direct effect on, the security of the State or public order. Hence, these provisions would not exceed the bounds of reasonable restrictions on the right of freedom of speech and expression. It is therefore clear that clause (2) of *Article 19* clearly saves the section from the vice of unconstitutionality.

The Criminal Appeal No 169 of 1957 is dismissed. Criminal Appeal Nos 24-126 of 1958 are remanded to the High Court for order in the light of the interpretation given by us.

Ordered accordingly.

Section 124A, IPC, 1860—"Disaffection" defined in section 124A, IPC, 1860 includes disloyalty and all feelings of enmity and is equivalent to excite political hatred

Emperor v Mohandas Karamchand Gandhi[8]

***Section 124A, IPC*—Sedition: Mohandas Karamchand Gandhi,** being the editor of the paper "Young India" and Shri Shankarlal Ghelabhai Sanker printer and publisher were charged on 11 March 1922 by LN Brown, Additional District Magistrate, Ahmedabad under *section 124A, IPC*, for bringing or attempting to bring into hatred or contempt or exciting or attempting to excite disaffection towards, His Majesty's Government established by law in British India, by means of the written words contained in the articles "Tampering with Loyalty"[9], "The Puzzle and its Solution"[10], and "Shaking the Manes"[11] published at Ahmedabad as contained in the appendix.

The words "hatred" or "contempt" are words the meaning of which is sufficiently obvious. The word "disaffection" as defined in *section 124A, IPC, 1860* includes disloyalty and all feeling of enmity and the word as used in the section means political alienation or discontent — a spirit of disloyalty to the Government is equivalent to an attempt to excite political hatred towards the Government as established by Law, to excite Political discontent and alienate the people from their allegiance.

Guilty Pleaded: Gandhiji instead of contesting the charge pleaded guilty. In his written statement Gandhiji explained the reason that compelled him to promote "disaffection" towards the Government established by law in British India.

Written Statement: The written statement submitted by Gandhiji in the court which gives in brief, an account of the State of affairs prevailing in India during the British rule that prompted Gandhiji to undertake such steps of disobedience and disaffection, is printed below:

> I owe it perhaps to the Indian public and to the public in England, to explain why from a staunch loyalist and co-operator, I have become an uncompromising disaffectionist and non-cooperator. To the court too I should say why I plead guilty to the charge of promoting disaffection towards the Government established by law in India.
>
> My public life began in 1893 in South Africa in troubled weather. My first contact with British authority in that country was not of a happy character. I discovered that as a man and an Indian, I had no rights. More correctly, I discovered that I had no right as a man because I was an Indian.
>
> But I was not baffled (confused). I thought that this treatment of Indians was an excrescence (abnormal) upon a system that was intrinsically and mainly good. I gave the Government my voluntary and hearty co-operation, criticizing it freely where I felt it was faulty but never wishing its destruction.
>
> Consequently, when the existence of the Empire was threatened in 1899 by the Boer challenge, I offered my services to it, raised a volunteer ambulance corps and served at several actions that took place for the relief of Ladysmith. Similarly in 1906, at the time of the Zulu 'revolt', I raised a stretcher bearer party and served till the end of the 'rebellion.' On both the occasions I received medals and was even mentioned in dispatches. For my work in South Africa I was given by Lord Hardinge, a *Kaisar-i-Hind* gold medal. When the war broke out in 1914 between England and Germany, I raised a volunteer ambulance corps in London, consisting of the then-resident Indians in London, chiefly students. Its work was acknowledged by the authorities to be valuable. Lastly, in India when a special appeal was made at the war Conference in Delhi in 1918 by Lord Chelmsford for recruits, I struggled at the cost of my health to raise a corps in Kheda, and the response was being made when the hostilities ceased and orders were received that no more recruits were wanted. In all these efforts at

service, I was actuated by the belief that it was possible by such services to gain a status of full equality in the Empire for my countrymen.

The first shock came in the shape of the Rowlatt Act—a law designed to rob the people of all real freedom. I felt called upon to lead an intensive agitation against it. Then followed the Punjab horrors beginning with the massacre at Jallianwala Bagh and culminating in crawling orders, public floggings and other indescribable humiliations. I discovered too that the plighted word of the Prime Minister to the Musalmans of India regarding the integrity of Turkey and the holy places of Islam was not likely to be fulfilled. But in spite of the forebodings and the grave warnings of friends, at the Amritsar Congress in 1919, I fought for co-operation and working of the Montagu-Chelmsford reforms, hoping that the Prime Minister would redeem his promise to the Indian Musalmans, that the Punjab wound would be healed, and that the reforms, inadequate and unsatisfactory though they were, marked a new era of hope in the life of India.

But all that hope was shattered. The Khilafat promise was not to be redeemed. The Punjab crime was whitewashed and most culprits went not only unpunished but remained in service, and some continued to draw pensions from the Indian revenue and in some cases were even rewarded. I saw too that not only did the reforms not mark a change of heart, but they were only a method of further robbing India of her wealth and of prolonging her servitude,

I came reluctantly to the conclusion that the British connection had made India more helpless than she ever was before, politically and economically. A disarmed India has no power of resistance against any aggressor if she wanted to engage in an armed conflict with him. So much is this the case that some of our best men consider that India must take generations before she can achieve Dominion Status. She has become so poor that she has little power of resisting famines. Before the British advent, India spun and wove in her millions of cottages, just the supplement she needed for adding to her meagre agricultural resources. This cottage industry, so vital for India's existence, has been ruined by incredibly heartless and inhuman processes as described by English witnesses. Little do town-dwellers know how the semi-starved masses of India are slowly sinking to lifelessness. Little do they know that their miserable comfort represents the brokerage they get for their work they do for the foreign exploiter, that the profits and the brokerage are sucked from the masses. Little do they realize that the Government established by law in British India is carried on for this exploitation of the masses. No sophistry, no jugglery in figures, can explain away the evidence that the skeletons in many villages present to the naked eye. I have no doubt whatsoever that both England and the town-dweller of India will have to answer, if there is a God above, for this crime against humanity, which is perhaps unequalled in history. The law itself in this country has been used to serve the foreign exploiter. My unbiased examination of the Punjab Martial Law cases has led me to believe that at least ninety-five per cent of convictions were wholly bad. My experience of political cases in India leads me to the conclusion, in nine out of every ten, the condemned men were totally innocent. Their crime consisted in the love of their country. In ninety-nine cases out of hundred, justice has been denied to Indians as against Europeans in the courts of India. This is not an exaggerated picture. It is the experience of almost every Indian who has had anything to do with such cases. In my opinion, the administration of the law is thus prostituted, consciously or unconsciously, for the benefit of the exploiter.

The greatest misfortune is that the Englishmen and their Indian associates in the administration of the country do not know that they are engaged in the crime I have attempted to describe. I am satisfied that many Englishmen and Indian officials honestly believe that they are administering one of the best systems devised in the world and that India is making steady though slow progress. They do not know that a subtle but effective system of terrorism and an organized display of force on the one hand, and the deprivation of all powers of retaliation or self-defence on the other, has emasculated the people and induced in them the habit of simulation. This awful habit has added to the ignorance and the self-deception of the administrators.

Section 124A, under which I am happily charged, is perhaps the prince among the political sections of *Indian Penal Code, 1860* designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by law. If one has no affection for a person or system, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote, or incite to violence. But the section under which mere promotion of disaffection is a crime: I have studied some of the cases tried under it; I know that some of the most loved of India's patriots have been convicted under it. I consider it a privilege, therefore, to be charged under that section. I have endeavoured to give in their briefest outline the reasons for my disaffection. I have no personal ill-will against any single administrator, much less can I have any

disaffection towards the King's person.

But I hold it to be a virtue to be disaffected towards a Government which in its totality has done more harm to India than any previous system. India is less manly under the British rule than she ever was before. Holding such a belief, I consider it to be a sin to have affection for the system. And it has been a precious privilege for me to be able to write what I have in the various articles tendered in evidence against me.

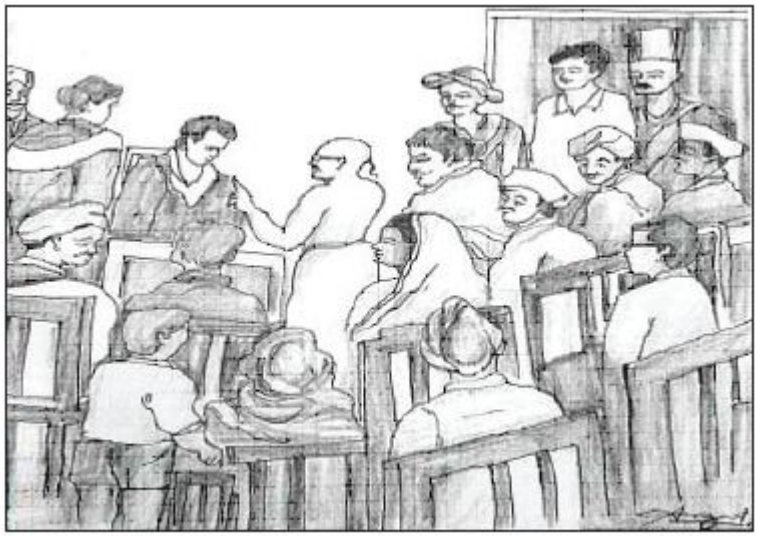
In fact, I believe that I have rendered a service to India and England by showing in non-co-operation the way out of the unnatural state in which both are living. In my opinion, non-co-operation with evil is as much a duty as is co-operation with good. But in the past, non-co-operation has been deliberately expressed in violence to the evil-doer. I am endeavoring to show to my countrymen that violent non-co-operation only multiplies evil, and that as evil can only be sustained by violence, withdrawal of support of evil requires complete abstention from violence. Non-violence implies voluntary submission to the penalty for non-co-operation with evil.

I am here, therefore, to invite and submit cheerfully to the highest penalty that can be inflicted upon me for what in law is deliberate crime, and what appears to me to be the highest duty of a citizen. The only course open to you, the Judge and the assessors, is either to resign your posts and thus dissociate yourselves from evil, if you feel that the law you are called upon to administer is an evil, and that in reality I am innocent, or to inflict on me the severest penalty, if you believe that the system and the law you are assisting to administer are good for the people of this country, and that my activity is, therefore, injurious to the common weal (well being).

Judgment by the Sessions Judge in the case of Mohandas Karamchand Gandhi

SESSIONS COURT AHMEDABAD—1922

Where trial of Mohandas Karamchand Gandhi was conducted in 1922 And the judgment was delivered on 18 March 1922



The full text of the judgment delivered by the Session Judge Ahmedabad, against Mohandas Karamchand Gandhi is given below:

Mr. Gandhi, you have made my task easy in one way by pleading guilty to the charge. Nevertheless what remains, namely, the determination of a just sentence, is perhaps as difficult a proposition as a judge in this country could have to face. The law is no respecter of persons. Nevertheless, it will be impossible to ignore the fact that, in the eyes of millions of your countrymen, you are a great patriot and a great leader. Even those who differ from you in politics look upon you as a man of ideals and of noble and of even saintly life. I have to deal with you in one character only. It is not my duty and I do not

presume to judge or criticize you in any other character."

It is my duty to judge you as a man subject to the law, who has by his own admission broken the law and committed what to an ordinary man must appear to be grave offences against the State. I do not forget that you have constantly preached against violence and that you have on many occasions, as I am willing to believe, done much to prevent violence, but having regard to the nature of your political teaching and the nature of many of those to whom it is addressed, how you could have continued to believe that violence would not be the inevitable consequence it passes my capacity to understand.

There are probably few people in India who do not sincerely regret that you should have made it impossible for any government to leave you at liberty. But it is so. I am trying to balance what is due to you against what appears to me to be necessary in the interests of the public, and I propose, in passing sentence, to follow the precedent of a case, in many respects similar to this case, that was decided some 12 years ago against Mr Bal Gangadhar Tilak under *section 124A, IPC*. The sentence that was passed upon him as it finally stood was a sentence of simple imprisonment for six years. You will not consider it unreasonable, I think, that you should be classed with Mr Tilak, and that is the sentence, two years simple imprisonment on each count of the three charges, i.e., six years in all, which I feel it my duty to pass upon you and I should like to say in doing so that, if the course of events in India should make it possible for the Government to reduce the period and release you, no one will be better pleased than I.

Gandhiji was sentenced to six years of simple imprisonment for sedition under *section 124A IPC, 1860* and was kept in Poona Jail.

Remission of sentence:

After almost a year of Gandhiji serving in Poona jail the Governor of the Bombay residency on 4 February 1924 in exercise of the powers conferred by *section 401 of Code of Criminal Procedure* 1898 remitted the unexpired portion of the six years of simple imprisonment passed upon him by the Session Court of Ahmedabad.

16.2.1 Appendix-I (Letters published by Gandhiji in "Young India")

Text of three letters written by Mohandas Karamchand Gandhi published in "Young India" was subject of charge under *section 124A, IPC, 1860* for sedition are reproduced below:

PUZZLE AND ITS SOLUTION,[12]

Letter 1:

Lord Reading is puzzled and perplexed. Speaking in reply to the addresses from the British Indian Association and the Bengal National Chamber of Commerce at Calcutta, His Excellency said:

I confess that when I contemplate the activities of a section of the community, I find myself still, notwithstanding persistent study ever since I have been in India, puzzled and perplexed. I ask myself what purpose is served by flagrant breaches of the law for the purpose of challenging the Government and in order to compel arrest.

The answer was partly given by Pandit Motilal Nehru when he said on being arrested that he was being taken to the house of freedom. We seek arrest because the so-called freedom is slavery. We are challenging the might of this Government because we consider its activity to be wholly evil. We want to overthrow the Government. We want to compel its submission to the people's will. We desire to show that the Government exists to serve the people, not the people the Government. Free life under the Government has become intolerable, for the price exacted for the retention of freedom is unconscionably great. Whether we are one or many, we must refuse to purchase freedom at the cost of our self-respect or our cherished convictions. I have known even little children become unbending when an attempt has been made to cross their declared purpose, be it ever so flimsy in the estimation of their parents.

Lord Reading must clearly understand that the non-co-operators are at war with the Government. They have declared rebellion against it inasmuch as it has committed a breach of faith with the Musalmans, it has humiliated

the Punjab and it insists upon imposing its will upon the people and refuses to repair the breach and repent of the wrong done in the Punjab.

There were two ways open to the people, the way of armed rebellion and the way of peaceful revolt. Non-co-operators have chosen, some out of weakness, some out of strength, the way of peace, i.e. voluntary suffering.

If the people are behind the sufferers, the Government must yield or be overthrown. If the people are not with them they have at least the satisfaction of not having sold their freedom. In an armed conflict, the more violent is generally the victor. The way of peace and suffering is the quickest method of cultivating public opinion, and, therefore, when victory is attained, it is for what the world regards as Truth. Bred in the atmosphere of law-courts, Lord Reading finds it difficult to appreciate the peaceful resistance to authority. His Excellency will learn by the time the conflict is over that there is a higher court than courts of justice, and that is the court of conscience. It supersedes all other courts.

Lord Reading is welcome to treat all the sufferers as lunatics, who do not know their own interest. He is entitled, therefore, to put them out of harm's way. It is an arrangement that entirely suits the lunatics and it is an ideal situation if it also suits the Government. He will have cause to complain if, having courted imprisonment, non-co-operators fret and fume or "whine for favours" as Lalaji puts it. The strength of a non-co-operator lies in his going to jail uncomplainingly. He loses his case if, having courted imprisonment, he begins to grumble, immediately his courtship is rewarded. The threats used by His Excellency are unbecoming. This is a fight to the finish. It is a conflict between the reign of violence and of public opinion. Those who are fighting for the latter are determined to submit to any violence rather than surrender their opinion.

Letter-II

TAMPERING WITH LOYALTY,[13]

His Excellency the Governor of Bombay had warned the public some time ago, that he "meant businesses", that he was no longer going to tolerate the speeches that were being made. In his note on the Ali Brothers and others he has made clear his meaning. The Ali Brothers are to be charged with having tampered with the loyalty of the sepoy and with having uttered sedition. I must confess that I was not prepared for the revelation of such hopeless ignorance on the part of Governor of Bombay. It is evident that he has not followed the course of Indian history during the past twelve months. He evidently does not know, that the National Congress began to tamper with the loyalty of the sepoy in September last year, that the Central Khilafat Committee began it earlier and that I began it earlier still, for I must be permitted to take the credit or the odium of suggesting, that India had a right openly to tell the sepoy and everyone who served the Government in any capacity whatsoever, that he participated in the wrongs done by the Government. The Conference at Karachi merely repeated the Congress declaration in terms of Islam. Only a Musalman divine can speak for Islam, but speaking for Hinduism and speaking for nationalism, I have no hesitation in saying, that it is sinful for anyone, either as soldier or civilian, to serve this Government which has proved treacherous to the Musalmans of India and which has been guilty of the inhumanities of the Punjab. I have said this from many a platform in the presence of sepoys. And if I have not asked individual sepoys to come out, it has not been due to want of will but of ability to support them. I have not hesitated to tell the sepoy, that if he could leave the service and support himself without the Congress or the Khilafat aid, he should leave at once. And I promise, that as soon as the spinning-wheel finds an abiding place in every home and Indians begin to feel that weaving gives anybody any day an honourable livelihood, I shall not hesitate, at the peril of being shot, to ask the Indian sepoy individually to leave his service and become a weaver. For, has not the sepoy been used to hold India under subjection, has he not been used to murder innocent people at Jallianwala Bagh, has he not been used to drive away innocent men, women and children during that dreadful night at Chandpur, has he not been used to subjugate the proud Arab of Mesopotamia, has he not been utilized to crush the Egyptian? How can any Indian having a spark of humanity in him and any Mussulman having any pride in his religion feel otherwise than as the Ali Brothers have done? The sepoy has been used more often as a hired assassin than as a soldier defending the liberty or the honour of the week and the helpless. The Governor has pandered to the basest in us by telling us what would happened in Malabar but for the British soldier or sepoy. I venture to inform His Excellency, that Malabar Hindus would have fared better without the British bayonets, that Hindus and Musalmans would have jointly appeased the Moplahs, that possibly there being no Khilafat question there would have been no Moplah riot at all, that at the worst supposing that Musalmans had made common cause with the Moplahs, Hinduism would have relied upon its creed of non-violence and turned every Musalman into a friend, or Hindu valour would have been tested and tried. The Governor of Bombay has done a disservice to himself and his cause (whatever it might be), by fomenting Hindu-Muslim disunion, and has insulted the Hindus, by letting them infer from his note, that Hindus are helpless creatures unable to die for or defend their earth, home or religion. If however the Governor is

right in his assumptions, the sooner the Hindus die out, the better for humanity. But let me remind His Excellency, that he has pronounced the greatest condemnation upon British rule, in that it finds Indians today devoid of enough manliness to defend themselves against looters, whether they are Moplah Musalmans or infuriated Hindus of Arrah.

His Excellency's reference to the sedition of the Ali Brothers is only less pardonable than his reference to the tampering. For he must know, that sedition has become the creed of the Congress. Every non-co-operator is pledged to preach disaffection towards the Government established by law. Non-co-operation, though a religious and strictly moral movement, deliberately aims at the overthrow of the Government, and is therefore legally seditious in terms of the *Indian Penal Code*. But this is no new discovery. Lord Chelmsford knew it. Lord Reading knows it. It is unthinkable that the Governor of Bombay does not know it. It was common cause that so long as the movement remained non-violent nothing would be done to interfere with it.

But it may be urged, that the Government has a right to change its policy when it finds, that the movement is really threatening its very existence as a system. I do not deny its right. I object to the Governor's note, because it is so worded as to let the unknowing public think, that tampering with the loyalty of the sepoy and sedition were fresh crimes committed by the Ali Brothers and brought for the first time to His Excellency's notice.

However the duty of the Congress and Khilafat workers is clear. We ask for no quarter; we expect none from the Government. We did not solicit the promise of immunity from prison so long as we remained non-violent. We may not now complain, if we are imprisoned for sedition. Therefore our self-respect and our pledge require us to remain calm, unperturbed and non-violent. We have our appointed course to follow. We must reiterate from a thousand platforms the formula of the Ali Brothers regarding the sepoys, and we must spread disaffection openly and systematically till it please the Government to arrest us. And this we do, not by way of angry retaliation, but because it is our dharma. We must wear khadi even as the Brothers have worn it, and spread the gospel of swadeshi. The Musalmans must collect for Smyrna relief and the Angora Government. We must spread like the Ali Brothers the gospel of Hindu-Muslim unity and of non-violence for the purpose of attaining swaraj and the redress of the Khilafat and the Punjab wrongs.

We have almost reached the crisis. It is well with a patient who survives a crisis. If on the one hand we remain firm as a rock in the presence of danger, and on the other observe the greatest self-restraint, we shall certainly attain our end this very year.

Letter-III

SHAKING THE MANES,[14]

How can there be any compromise whilst the British Lion continues to shake his gory (bloody) claws in our faces? Lord Birkenhead reminds us that Britain has lost none of her hard fibre. Mr Montagu tells us in the plainest language that the British are the most determined nation in the world, who will brook no interference with their purpose. Let me quote the exact words telegraphed by Reuter:

> If the existence of our Empire were challenged, the discharge of responsibilities of the British Government to India prevented and demands were made in the very mistaken belief that we contemplated retreat from India—then India would not challenge with success the most determined people in the world who would once again answer the challenge with all the vigour and determination at its command.

Both Lord Birkenhead and Mr Montagu little know that India is prepared for all "the hard fibre" that can be transported across the seas and that her challenge was issued in the September of 1920 at Calcutta that India would be satisfied with nothing less than swaraj and full redress of the Khilafat and the Punjab wrongs. This does involve the existence of the "Empire", and if the present custodians of the British Empire are not satisfied with its quiet transformation into a true Commonwealth of free nations, each with equal rights and each having the power to secede at will from an honourable and friendly partnership, all the determination and vigour of "the most determined people in the world" and the "hard fibre" will have to be spent in India in a vain effort to crush the spirit that has risen and that will neither bend nor break. It is true that we have no "hard fibre". The rice-eating, puny (weak) millions of India seem to have resolved upon achieving their own destiny without any further tutelage (protection) and without arms. In the Lokamanya's language it is their "birthright", and they will have it in spite of the "hard fibre" and in spite of the vigour and determination with which it may be administered. India cannot and will not answer this insolence (disrespect) with insolence, but if she remains true to her pledge, her prayer to God to be delivered from such a scourge (suffering) will certainly not go in vain. No empire intoxicated with the red wine of power and plunder of

weaker races has yet lived long in this world, and this “British Empire”, which is based upon organized exploitation of physically weaker races of the earth and upon a continuous exhibition of brute force, cannot live if there is a just God ruling the universe. Little do these so-called representatives of the British nation realize that India has already given many of her best men to be dealt with by the British “hard fibre”. Had Chauri Chaura not interrupted the even course of the national sacrifice, there would have been still greater and more delectable offerings placed before the Lion, but God had willed it otherwise. There is nothing, however, to prevent all those representatives in Downing Street and Whitehall from doing their worst. I am aware that I have written strongly about the insolent threat that has come from across the seas, but it is high time that the British people were made to realize that the fight that was commenced in 1920 is a fight to the finish, whether it lasts one month or one year or many months or many years and whether the representatives of Britain reenact all the indescribable orgies of the Mutiny days with redoubled force or whether they do not. I shall only hope and pray that God will give India sufficient humility and sufficient strength to remain non-violent to the end. Submission to the insolent challenges that are cabled out on due occasions is now an utter impossibility.

Terrorism : Possession of articles giving rise to reasonable suspicion that possession being for purposes connected with commission, preparation or investigation of act of terrorism falls within the purview of terrorist offences— Act of 2000 sections 57 and 58

R v Rowe,

[2007] QB 975 : *[2007] 3 WLR 177* : *(2007) 3 All ER 36*

Per Lord Phillips, CJ and Loham LJ, Cresswell, Holland and Burton, JJ

Dismissing the appeal against conviction of the appellant on two counts under section 57 of Terrorism Act 2000 for possessing articles which gave rise to a reasonable suspicious that his possession was for a purpose connected with the commission, preparation or instigation of an act of terrorism, the court held there is no ground for allowing appeal that would entitled acquittal of the defendant. One count under section 57 related to a note book which contained notes in the accused’s handwriting including instructions on how to assemble and operate a motor (gun). The second count under section 57 related to a code in the defendants, handwriting which encoded components of explosive, the type of venues susceptible to terrorist bombing and a list of countries.

In brief section 57 dealt with possessing article for the purpose of terrorists, and section 58 dealt with collecting or holding information that was of a kind likely to be useful to those involved in the act of terrorism. In other words section 57 included a specific intention while section 58 did not. The object of both sections combined together included prohibition of different types of support for, and involvement, both direct and indirect, in terrorism.

Section 1 of 2000 Act defines terrorism as follows:

1. In this Act “terrorism” means the use or threat of action where – (a) the action falls within sub-section (2); (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
2. Action falls within this subsections if it (a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person’s life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
3. The use or threat of actions falling within sub-section (2) which involves the use of firearms or explosives is terrorism whether or not sub-section (1)(b) is satisfied.
4. In this section – (a) “action” includes action outside the United Kingdom.

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3 Ratanlal and Dhirajlal, *The Law of Crimes,* 24th Edn 1997, pp 491-520. See also *Essays on the Indian Penal Code,* Indian Law Institute, 1962, pp 135-143.

4 *Indian Penal Code, 1860, section 505*, punishes persons making statements conducive to public mischief. See also section 153A (promoting enmity between different classes) and *section 295A of Indian Penal Code, 1860* (deliberate and malicious acts intended to outrage religious beliefs) which are related to sedition.

5 (i) Cr App No 124 of 1958 Mohd Ishaq was prosecuted under *section 124A IPC* for having delivered a speech at Aligarh as Chairman of Reception committee on 30 October 1953 which was considered to be seditious;

(ii) Cr App No 125 of 1958. Respondent Ramanad was convicted under *section 124A IPC* for delivering an objectionable speech on 29 May 1954 in a meeting of Bolshevik party in a village in Hanumantganj, district Basti inciting the audience to an open armed rebellion against the government established by law;

(iii) Cr.App. No. 126 of 1958 Respondent Paras Nath is said to have exhorted the audience in a meeting in a village in Faizabad, on 26 September 1955 to organize a volunteer army and resist the government and its servants by violent means. While he was on trial he filed a writ of habeas corpus in the Allahabad High Court challenging the provisions of *section 124A IPC* void being in contravention of the freedom of speech guaranteed under *Article 19 (1)(a) of the Constitution* which was allowed by the High Court. *Section 168 IPC* Public servant unlawfully engaging in trade: Whoever, being a public servant, and being legally bound as such public servant not to engage in trade, engages in trade, shall be punished. . ."

6 See KD Gaur, *Criminal Law; Cases and Materials*, 5th Edn, pp 735 to 737 and KD Gaur, *Text Book on Indian Penal Code*, 4th Edn (2009), pp 266 to 235 for detail discussion on *section 124A IPC*.

7 *"The sovereignty and integrity of India"* was inserted by the *Constitution* (Sixteenth Amendment) Act 1963, section 2.

8 *Emperor v Mohandas Karamchand Gandhi and Shankarlal Ghelabhai Sankar,* Session case No 45/1922 Ahmedabad; Author expresses deep sense of gratitude to Mr DC Verma, former Vice-Chairman Central Administrative Tribunal, Ahmedabad for making available the text of the judgment from the original court records kept in the Ahmedabad archives.

9 Young India, dated 29 September 1921.

10 Young India, dated 15 December 1921.

11 Young India, dated 22 February 1922.

12 Young India, Ahmedabad, dated 15 December 1921.

13 Young India, Ahmedabad, dated 29 September 1921.

14 Young India, Ahmedabad, dated 23 February 1922.