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Re. Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India[1]

1. We have heard very lengthy submissions from the Amicus Curie Ms. Aparna Bhat, Ms. Indira Jaising, ASG, Mr. Paras Kuhad, ASG.

2. It has been brought to our notice that inspite of the emphatic directions that have been issued by this Court on 3rd January, 2013 directing all the States and the Union Territories to implement the protective provisions contained in the Protection of Rights of Children from Sexual Offences Act, 2012, the Right of Children to Free and Compulsory Education Act, 2009 and the Commission for Protection of Child Rights Act, 2005, many States and Union Territories have not complied with the same. By order dated 3rd January, 2013, we had also directed the States to file an affidavit indicating the time frame within which the State Commission for the protection of children would be established. By a subsequent order dated 7th February, 2013, further directions were issued to all the States and the Union Territories to comply with the obligations under the aforesaid three Acts, with regard to the establishment of protection institutions/implementation institutions, together with necessary Rules and Regulations. The aforesaid order was to be complied with within a period of three months from the date of receipt of the certified copy of the order. Sadly, we have to notice that inspite of the concern shown not only by this Court but also by the learned Counsel appearing for the parties, little or no progress has been made in this regard. Although the affidavits have been filed indicating that the State Commissions have been established yet we find that such establishment is only on paper. In many States, Chairman of the Commission has not been appointed and in some other States even Members have not been appointed. This apart, necessary rules and Regulations have also not been framed. This, in our opinion, would be sufficient justification for this Court to take a serious view and initiate appropriate proceedings for contempt of court against the defaulting States and the Union Territories.

3. Given the lackadaisical manner in which the States and the Union Territories have responded to the concern shown by this Court in relation to the wholly unacceptable situation prevailing and to stamp out any further exploitation of children, it has become necessary to re-emphasize that it is the bounden duty of the States under Articles 21, 21A, 23, 24, 45 and 51A(k) to create and maintain a protective and healthy environment in which children who are the future of this country can bloom and subsequently become mature and responsible citizen of this country. We have been pained to notice the utterly callous attitude adopted by the States as well as the Union Territories. We, therefore, have no option at this stage but to issue some further mandatory directions to ensure that the exploitation of the children in all spheres of life is brought to an end with utmost expedition.

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[1] S.S. Nijjar and F.M. Ibrahim Kalifulla, JJ.; I(2014)CCR378(SC), JT2014(1)SC168, 2013(15)SCALE430, (2014) 2SCC180, 2014 (3) SCJ 32, 2014(2)SCT609(SC), 2015(1)SLJ294(SC), MANU/SC/1304/2013; Decided On: 16.12.2013;

4. We may notice at this stage that pursuant to our earlier directions Tripura, Dadar and Nagar Haveli, Lakshadweep, Chandigarh, Andaman and Nicobar, Pondicherry and Daman and Diu have still not constituted State Commissions under Section 17 of the Commission for Protection of Child Rights Act, 2005. Some of the States which have established the State Commissions for the protection of children but have not completely constituted the same by either not appointing a Chairperson or Members are as under:

Andhra Pradesh: The Commission exists only on paper as no Chairman/Member has been appointed.

Chhattisgarh is partially constituted as only Chairman has been appointed and the members have not been appointed.

Gujarat: Although Chairman has been appointed yet no member or Secretary of the Commission has been appointed.

Haryana: The situation is exactly the same as Gujarat, i.e. neither any Member nor Secretary has been appointed although the Chairman has been selected and appointed.

Himachal Pradesh: Only a Member Secretary has been appointed. No Chairperson or Member has been appointed.

Kerala: Again only a Secretary has been appointed but there is no Chairperson or Member appointed.

Tamil Nadu has appointed a Chairperson but no Member has been appointed.

Nagaland: Nothing has been done, i.e. no Chairperson or Member has been appointed.

Similarly, in U.P., nothing has been done as neither the Chairperson nor any Member has been appointed.

5. This inaction of the States is in the teeth of the directions issued by this Court on 3rd January, 2013 and 7th February, 2013. We make it clear that this Court had taken notice of the exploitation of children and the deplorable conditions of children in various orphanages on the basis of the letter received, way back in the year 2007. Surely, the States and the Union Territories must realize that they have to operate under the Constitution and have to be duty bound to act in accordance with the provisions of the Constitution. Furthermore, each and every field which concerns the welfare and the protection of the children is covered by relevant legislation. The three prominent Acts have already been listed hereinabove.
6. Keeping in view the aforesaid attitude of the States and the Union Territories, we direct that the Chief Secretaries of all the States to which notices have been issued in this matter shall file an affidavit within a period of eight weeks from the date of this order disclosing full details with regard to the implementation of the obligations specified under the three Acts. The affidavit shall contain all the relevant information with regard to the following:

a. Whether the State Commissions have been set up under Section 17 of the Commissions for Protection of Child Rights Act, 2005?
b. Whether the appointment of the Chairperson and six Members has been made indicating the names of such Chairpersons and members?

c. Whether Rules have been framed by the State Governments under the said Act?

d. Whether the said Commissions are functional and if not what are the constraints. The appointment and the remuneration structure of the Chairperson, Members and supports staff including Member Secretary of the State Commissions?

e. The Chief Secretaries of the States in their affidavits to also indicate whether Special Courts have been designated under Section 28 of the Protection of Children from Sexual Offences Act, 2012?
f. Whether Special Public Prosecutors have been appointed under Section 32 of the said Act?
g. Whether Rules have been framed under the Right to Education Act, 2009?

h. Whether all Institutions run by the State Governments or by Voluntary Organisations for Children in need care and protection have been registered under the provisions of Section 34 of the Juvenile Justice (Care and Protection of Children) Act, 2000, read with Rule 71 of the said Act?
i. Whether any unregistered institutions for children in need of care and protection are being run and if so have they been shut down or taken over by the State Governments?

7. It is further directed that in the unlikely event of there being a non-compliance of any part of the directions issued by this Court, an officer of the rank of Principal Secretary of State Government shall remain present in person in the Court to clarify the issues with respect to the failure to implement the directions of the Court. If for any reason, the affidavit, as directed for, is not filed by the Chief Secretary before the next date of hearing, then also, the officer of the rank referred above shall remain present in person to explain the reasons for the State's failure to submit the affidavit.

8. The concerned State Governments shall also submit the required information in the format annexed hereto as part of the affidavit to be filed by them.

ANNEXURE

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

S.No.	**Obligation of the States**	**Current Status of Implementation (Carried out/not carried out) with details as to the date of order**	**Detailed reasons for failure including** (a) Steps taken towards implementation	(b) Circumstances which rendered implementation impossible	(c) Person who was responsible for implementation	(d) Dates on which the matter was monitored by the Chief secretary towards ensuring implementation	**Received date by which the implementation would stand** carried out
1.	Constitution of Special Court (section 28)						
2.	Appointment of Special Public Prosecutor (section 32)						
3.	Framing of Guidelines for use of NGOs, experts etc. to be associated with the pretrial & trial stage to assist the child (section 39)						
4.	Public Awareness about the Act & any Periodic Training imparted to the officers of the Govt. etc. (section 43)						

In The High Court of Delhi at New Delhi

Center for Child Rights through its Co-Director v. Union of India[1]

O R D E R

The petitioner is the Co-Director of HAQ, Centre for Child Rights, a registered Child Rights Organization founded in 1998. Keeping in tune with the object for which the NGO was set up, the petitioner approached this Court for the following reliefs:

(a) Pass an order constituting a Committee to draft guidelines for prevention of sexual abuse of children. Such Committee may consist of (1) Representative of Department of Women and Child Development, (2) Representative of Delhi State Legal Services Authority, (3) Representative of Delhi Commission for Protection of Child Rights, (4) One Chairperson of Child Welfare Committee, (5) One Principal Magistrate from Juvenile Justice Board, (6) Two Representatives from Non Governmental Organizations working on child sexual abuse related issues, (7) One member from Delhi Commission for Women and the Ld. Member Secretary of Delhi Legal Services Authority may kindly be given the mandate to chair and coordinate the entire process of framing such guidelines;

(b) Pass an order directing respondents to adopt and issue such guidelines as may be drafted by the Committee suggested in prayer (a);

(c) Pass an order to respondents to widely publicise these guidelines in English and vernacular languages;

(d) Pass an order directing respondents to organize periodic training programmes about such guidelines, in order to ensure better implementation of these guidelines by the duty holders (Officials of State Governments responsible for child protection issues, schools, educational institutions, Institutions under JJ Act, Institutions under any other law keeping children, Juvenile Justice Board, Child Welfare Committees, other competent authorities and agencies i.e. police, hospitals, etc.) for a period of one year from the date of issuance of such guidelines;

(e) Pass any other order or direction(s) that this Court may deem fit and proper as per the facts and circumstances of the case.

2. The relief sought for in the petition is two-fold, firstly for constitution of a committee and secondly for a direction to the said committee to draft the guidelines for prevention

[1] V.K. JAIN, J. (Chief Justice), W.P.(C) 6612/2012; Order dated: 13.02.2013; HC of Delhi,

of sexual abuse of children. In response to the petition, the Delhi Commission for Protection of Child Rights has constituted a Core-Group by its Office Order dated 30th January, 2013 for developing guidelines on Prevention of Sexual Abuse / Exploitation of Children, consisting of as many as 15 members, as mentioned in paragraph 8 of the counter affidavit. It appears that the role of the Committee is only to formulate the guidelines for effective implementation of Rule 31 of the Juvenile Justice (Care and Protection of Children) Rules, 2007.

3. In view of the above, the first portion of the relief already stands addressed. As regards the second portion for framing guidelines, we direct the said Committee to frame such guidelines before 31st July, 2013 and submit those guidelines to the Government of NCT of Delhi for approval and necessary action. On the guidelines being so submitted by the Committee, a decision thereon shall be taken by the Government of NCT of Delhi, within a period of three months.

4. With these directions, the writ petition stands disposed of.

Dharam Deo Yadav v. State of U.P.[1]

A Supreme Court Bench of Justices K.S. Radhakrishnan and A.K. Sikri in Criminal Appeal N0. 369 of 2006 in Dharam Deo Yadav vs. State of U.P. while modifying the death sentence awarded to Dharam Deo Yadav, who murdered Diana Clare Routley, a 22-year-old girl from New Zealand who visited Varanasi in 1997. The court in the judgement has emphasised the need to adopt scientific methods in crime detection to save the judicial system from low conviction rates. ... The Apex Court Bench stated that hardened criminals get away from the control of the law as reliable and sincere witnesses to the crime rarely come forward to depose before the court. Therefore, the Court was of the opinion that investigating agency has to find other ways and means to improve the quality of investigation, which can only be through the collection of scientific evidence. Writing the judgment, Justice Radhakrishnan said there was a need to strengthen forensic science for crime detection and the judiciary needed to be equipped to understand and deal with such scientific materials. It said as far as the present case was concerned, the DNA sample from the skeleton matched with the blood sample of the father of the deceased. All the sampling and testing was done by experts whose scientific knowledge and experience were not doubted in these proceedings. It was of the opinion that therefore, the prosecution succeeded in showing that the skeleton recovered from the house of the accused was that of Diana, daughter of Allen Jack Routley and it was none other than the accused who had strangled Diana to death and buried the dead body in his house.[2]

K.S. Panicker Radhakrishnan, J.

1. We are, in this case, concerned with the gruesome murder of a 22 year old girl by name Diana Clare Routley (hereinafter referred to as "Diana"), a New Zealander, for which the trial Court awarded death sentence to the Appellant, which was affirmed by the High Court.

2. Diana came to India as a visitor in the year 1997. After visiting Agra, she reached Varanasi on 7.8.1997 and stayed in room No. 103 of the Old Vishnu Guest House, Varanasi. She left the guest house on 10.8.1997 at about 7.00 a.m. for Darjeeling by train from Varanasi Cantt. Railway Station. Later, she was found missing and her father Allan Jack Routley, having got no information about his daughter, informed the authorities about the missing of Diana.

[1] K.S. Panicker Radhakrishnan and A.K. Sikri, JJ. (DB), MANU/SC/0298/2014; 2014CriLJ2371, 2014(4)SCALE730, (2014)5SCC509, decided on: 11.04.2014, Criminal Appeal No. 369 of 2006.

[2] Reported by Rituparna Duttaa in www.livelaw.in, available at : http://www.livelaw.in/supreme-court-says-crime-detection-forensic-science-need-strengthened/; last visited on 20-08-2015.

Raghvendra Singh, SHO, Police Station, Laksa, along with a team of police officials, made inquiries, but she could not be traced. Later, it was revealed that one Dharam Deo Yadav, a tourist guide, accused herein, had some contacts with Diana and the police team then submitted its report to the Superintendent of Police (City), Varanasi on 24.4.1998, which reads as follows:

> Dear Sir,
>
> Re: Re Diana Clare Routley, aged 25 years I write in connection with the disappearance of my daughter, Diana Clare Routley last seen in Varanasi on Aug. 10th, 1997. She had arrived in Varanasi on the morning of Aug. 7th, 1997. She was staying at Old Vishnu Guest House. She last had contact with her family on Aug. 8th, 1997 when I rang her at Old Vishnu Guest House and she wrote a letter to me. Since then her family and friends have had no contact.
> The person we suspect that could be involved in her disappearance is DharamDev Yadav who is a local guide in Varanasi and work for Old Vishnu Guest House. If he is not involved in her disappearance he certainly knows something of her movements on the day she disappeared.

3. Allan Jack Routley later came to India and lodged a written first information report (Exh. Ka-34) naming the accused Dharam Deo Yadav as suspect on 28.07.1998 at about 4.45 pm at P.S. Bhelupur, District Varanasi. Crime No. 254/98 was then registered Under Section 366 Indian Penal Code. PW14, Anil Kumar Rai, SHO, P.S. Shivapur, Varanasi got an information that the accused, on 19.8.1998, would reach Shivpur railway station at Varanasi. PW14 found out the accused at the railway station and interrogated him. Accused confessed that he had committed the murder of Diana and also named the co-associates Kali Charan Yadav, Sindhu Harijan and Ram Karan Chauhan. The accused, accompanied by PWs14 and 15, PS Bahariyabad, Ghazipur (Indra Kumar Mandal, Sub-Inspector), went to his house situated at Village Brindaban, District Ghazipur and he, with his key, opened the lock of his house and pointed out the place where the dead body of Diana was buried after causing her death by way of strangulation. Accused was asked to dig the spot and excavate the dead body of Diana, which he did by spade and the body remains (Skeleton) was found. PW14 then arrested him on 19.08.1998 and, on his disclosure, other three persons, said to have been involved in the incident, were also arrested by PW14 on 19.08.1998. Inquest on the skeleton was prepared by PW15 on the direction given by PW16 Rajendra Pratap Singh, SDM, Tehsil Jakhaniya, District Ghazipur. After completing the investigation, police arrested Kali Charan Yadav, Sindhu Harijan, Ram Karan Chauhan, Kesar Yadav and Mahesh Chandra Mishra on 19.08.1998 and submitted charge-sheets Ex. Ka40 and Ka41 for the offences Under Sections 366, 302, 201, 394 of the Indian Penal Code. Post-mortem examination of the skeleton was done by a team of Doctors, consisting of Dr. R.B. Singh, Dr. S.K. Tripathi and Dr. V.K. Gupta on 20.08.1998, the report of which is Exh. Ka-18.

4. After committal of the case, the Court of Sessions framed charge Under Section 411 Indian Penal Code against Kali Charan, Kesar Yadav and Mahesh Chandra Mishra. Charges Under Sections 302/34, 201 and394 Indian Penal Code were framed against the Appellant, Kali Charan Yadav, Sindhu Harijan and Ram Karan Chauhan and the Appellant was also further charged Under Section 364 Indian Penal Code.
5. The prosecution, in order to bring home the charges, examined 27 witnesses. No person was examined as a witness on the said of the defence.

6. The trial Court acquitted Kali Charan Yadav, Sindhu Harijan and Ram Karan Chauhan, but the Appellant was found guilty for the commission of the offences punishable Under Section 302 read with Section 34Indian Penal Code and Section 201 Indian Penal Code, but was acquitted of the charges for the offences Under Sections 364 and 394 Indian Penal Code. The trial Court also found that the case falls under the category of rarest of rare case, since the accused had strangulated a young girl of a foreign country who had visited India and awarded him death sentence.

7. Aggrieved by the same, the accused filed Criminal Appeal No. 1000 of 2003 before the High Court of Judicature at Allahabad and the State filed Government Appeal No. 2726 of 2003 against the order of acquittal passed against rest of the accused persons. Both the appeals were heard along with Criminal Reference No. 21 of 2003. The High Court dismissed both the appeals and confirmed the death sentence awarded by the trial Court, holding that the case in question falls under the rarest of rare category, against which this appeal has been preferred.
…

The Court observed as under:

Crime Scene Management

25. Crime scene has to be scientifically dealt with without any error. In criminal cases, especially based on circumstantial evidence, forensic science plays a pivotal role, which may assist in establishing the element of crime, identifying the suspect, ascertaining the guilt or innocence of the accused. One of the major activities of the Investigating officer at the crime scene is to make thorough search for potential evidence that have probative value in the crime. Investigating Officer may be guarded against potential contamination of physical evidence which can grow at the crime scene during collection, packing and forwarding. Proper precaution has to be taken to preserve evidence and also against any attempt to tamper with the material or causing any contamination or damage.

26. PW14 has stated that the accused led him and others to a room stating that he buried the dead body of Diana in that room. PW14 asked the accused to dig the spot he had pointed out and the accused started digging the floor of the room. After digging 6 feet wide, 3 feet long and 2 feet deep, a human skeleton was seen. The mud around the beach was cleared. The

skeleton had teeth in mouth and hair at head. PW14 took the skeleton in his possession and, while doing so, he noticed that the bones were intact. There was no skin found on the skeleton and some tea red cloths were stuck on the skeleton and those cloths were sealed.

27. PW15, SHO, Ghazipur Police Station, started the procedure of Panchnama following the laid down procedure. Photograph of the skeleton was also taken. Later, the skeleton was sealed after following all procedures, which is reflected in Exts. A-14 and A-15, the skeleton of the dead body was then given to the custody of PW17, who had brought it for post-mortem and was entrusted to PW19. No procedural error is seen committed by the above-mentioned witnesses in recovering the skeleton, packing it and forwarding the same to PW19.

Expert Scientific Evidence

28. Criminal Judicial System is this country is at crossroads, many a times, reliable, trustworthy, credible witnesses to the crime seldom come forward to depose before the court and even the hardened criminals get away from the clutches of law. Even the reliable witnesses for the prosecution turn hostile due to intimidation, fear and host of other reasons. Investigating agency has, therefore, to look for other ways and means to improve the quality of investigation, which can only be through the collection of scientific evidence. In this age of science, we have to build legal foundations that are sound in science as well as in law. Practices and principles that served in the past, now people think, must give way to innovative and creative methods, if we want to save our criminal justice system. Emerging new types of crimes and their level of sophistication, the traditional methods and tools have become outdated, hence the necessity to strengthen the forensic science for crime detection. Oral evidence depends on several facts, like power of observation, humiliation, external influence, forgetfulness etc., whereas forensic evidence is free from those infirmities. Judiciary should also be equipped to understand and deal with such scientific materials. Constant interaction of Judges with scientists, engineers would promote and widen their knowledge to deal with such scientific evidence and to effectively deal with criminal cases based on scientific evidence. We are not advocating that, in all cases, the scientific evidence is the sure test, but only emphasizing the necessity of promoting scientific evidence also to detect and prove crimes over and above the other evidence.

29. Scientific evidence encompasses the so-called hard science, such as physics, chemistry, mathematics, biology and soft science, such as economics, psychology and sociology. Opinions are gathered from persons with scientific, technical or other specialized knowledge, whose skill, experience, training or education may assist the Court to understand the evidence or determine the fact in issue. Many a times, the Court has to deal with circumstantial evidence and scientific and technical evidence often plays a pivotal role. Sir Francis Bacon, Lord Chancellor of England, in his Magnum Opus put forth the first theory of scientific method. Bacon's view was that a scientist should be disinterested observer of nature,

collecting observations with a mind cleansed of harmful preconceptions that might cause error to creep into the scientific record. Distancing themselves from the theory of Bacon, the US Supreme Court in ***Daubert v. Merrell Dow Pharmaceuticals*** Inc. 509 U.S. 579 (1993) held as follows:

> Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a process for proposing and refining theoretical explanations about the world that are subject to further testing and refinement.

30. ***Daubert*** gives much emphasis on Sir Karl Popper (an Austrian philosopher), who unlike Bacon believed that all science begins with a prejudice, theory or hypothesis and formulating the theory is the creative part of science, which cannot be analyzed within the realm of philosophy. Later, Thomas Kunh, a Physicist, who popularized the word 'paradigm' expressed the view that scientific work comprises an agreed upon set of assumptions, methods, language, etc. Neither Bacon, Popper nor Kunh, it is generally believed, gave a prefect description of what science is and how it works, but the US Supreme Court in ***Daubert*** identified four non-definitive factors that were thought to be illustrative of characteristics of scientific knowledge, testability or falsifiability, peer review, a known or potential error rate and general acceptance within the scientific community. Few additional factors were also subsequently noticed that if the relationship of the technique to methods that have been established to be reliable, the qualifications of the expert witness testifying based on the methodology, the non-judicial uses of the method, logical or internal consistency of the hypothesis, consistency of the hypothesis with accepted authorities and presumption of the hypothesis or theory.

DNA and Identity of Skeleton

31. We have already referred to the evidence of PW20, who conducted the post-mortem examination. PW 21, Dr. G.V. Rao, Chief of the DNA Fingerprinting Laboratory, conducted the DNA isolation on the basis of samples of blood of Allan Jack Routley and femur and humerus bones of skeleton. PW21 deposed that he was satisfied regarding authenticity of the seal and its intactness. PW21 adopted the test known as Short Tandem Space Repeats (S.T.R.) analysis, which is stated to be a conclusive test, produces results even on degraded biological samples. Fingerprinting analysis was carried out by STR analysis and on perusal of STR profile of the source (Allan Jack Routley) with the sources of femur and humerus bones of Diana, it was concluded that the source of Allan Jack Routley is biologically related to the sources of femur and humerus bones.

Investigation in Rape Cases: Need for Proactive Approach[1]

Dr.Mukesh Yadav[*]

In India heinous crime against woman are on the rise in-spite of post Nirbhya amendment in criminal law in 2013. Seeing the NCRB statics about 'Rape Cases' it appears that desired deterrent effect of stricter and harsh prolonged punishment is not percolated in the society at gross root level. There is need for not only creating awareness about these new provisions of law but also about improving infrastructure leading to use of modern investigation tools and techniques, training of forensic medicine practitioners and investigating officers and prosecuting agencies, etc. Obsolete and traumatic tests like 'Two Finger Test' should not be allowed to be practiced in view of pain and suffering of rape survivors, international guidelines and court directions in this regard. There is also need to take strict action against those who are violating new provisions of the law and in doing any negligence in handling of medicolegal cases of rape and like offences.

Case Law Referred:

As held in *Santosh Kumar Singh vs. State*, (2010)[2], that the conclusions of the DNA report cannot be doubted and must be accepted as scientifically accurate as DNA finger printing is an exact science. In *Santosh* the trial Court had not relied on the DNA report and held that the vaginal swabs and slides and the blood sample of the accused had been tampered with, and had relied on some text books for this purpose. The High Court and the Supreme Court however held that there was no reliable evidence for suggesting that the sample had been tampered with, and even criticized the trial Court for relying on text books which were not put to the expert. Recently the same position regarding the value of the DNA profiling has been reiterated in *Dharam Deo Yadav vs. State of U.P.,(*2014)[3], wherein, modern forensic techniques for criminal investigations such as DNA profiling have been lauded, because of reliable witnesses failing to give testimony, or turning hostile due to intimidation, though it is conceded that the DNA testing may in a particular case not be cent percent accurate, as that would depend on the quality of the analysis and whether the sample collected was kept free from contamination. Thus the law report observes in paragraph 30:

> "30. The criminal justice system in this country is at crossroads. Many a times, reliable, trustworthy, credible witnesses to the crime seldom come forward to depose before the court and even the hardened criminals get away from the clutches of law. Even the reliable witnesses for the prosecution turn hostile due to intimidation, fear and host of

[1]Journal of Indian Acad Forensic Med. July-September 2014, Vol. 36, No. 3. ISSN 0971-0973; Available at: http://medind.nic.in/jal/t14/i3/jalt14i3p226.pdf Last visited on 18-08-2015.

[*] Editor, JIAFM.

[2] (2010)9SCC747.

[3] (2014)5SCC509.

other reasons. The investigating agency has, therefore, to look for other ways and means to improve the quality of investigation, which can only be through the collection of scientific evidence. In this age of science, we have to build legal foundations that are sound in science as well as in law.

Practices and principles that served in the past, now people think, must give way to innovative and creative methods, if we want to save our criminal justice system. Emerging new types of crimes and their level of sophistication, the traditional methods and tools have become outdated, hence the necessity to strengthen the forensic science for crime detection. Oral evidence depends on several facts, like power of observation, humiliation, external influence, forgetfulness, etc. whereas forensic evidence is free from those infirmities.

Judiciary should also be equipped to understand and deal with such scientific materials. Constant interaction of Judges with scientists, engineers would promote and widen their knowledge to deal with such scientific evidence and to effectively deal with criminal cases based on scientific evidence. We are not advocating that, in all cases, the scientific evidence is the sure test, but only emphasising the necessity of promoting scientific evidence also to detect and prove crimes over and above the other evidence."

In the aforesaid law report where the skeleton of the deceased a female from New Zealand was exhumed from the house of the appellant after a year of its burial there on the pointing out of the appellant and all the skin had even disappeared by then, it was observed that as the humerus and femur bones corresponded biologically with the blood sample of her father, it was held sufficient for establishing the identity of the deceased, looking to the specialized skill of the DNA analysts and the laboratory (CDFD, Hyderabad), which had carried out the DNA analysis in that case. In the present case also the DNA analysis was carried out by the same CDFD, Hyderabad on our orders, and no reasons were suggested by the learned counsel for the appellant for showing why the report could not be relied upon.

With this DNA affirmation that the hair of the appellant was the same as the hair found between the fingers of the deceased, this identify cannot be explained on the contradictory stances on this aspect in the defence suggestions to witnesses and in his answers given to the questions put under section 313 Cr.P.C. statements before the lower Court and this Court.

It has been rightly observed in *State of U.P. vs. Krishna Master and others*, (2010)[4] and *State of U.P. vs. Anil Singh*, (1988)[5] that if the evidence read as a whole has a ring of truth, then discrepancies, inconsistencies, infirmities or deficiencies of a minor nature not touching the core of the case cannot be a ground for rejecting the evidence.

[4] [2010]9SCR563; (2010)12SCC324.
[5] [1988]Supp2SCR611; AIR1988SC1998.

Adverse Comments on Manner of Investigation and Trial

Before parting however Division Bench expressed their unease with the casual manner in which the investigation and trial in this case has been conducted. Bench observed that no doubt this Court relying on the observations in *Zahira Habibullah Sheikh vs. State of Gujarat*, (2006)[6], recommending to Courts not to act as mute spectators and mere recording machines, this Court had in the interest of justice for the accused, victim and society acted proactively and called for and examined the samples of hair of the deceased and appellant and other materials collected in this case on 29.10.13 which were thereafter sent to the C.D.F.D., Hyderabad for DNA analysis.

As mentioned above, according to the DNA report the hair of the deceased, which was cut by the doctor conducting the post mortem examination, was of the same person whose hair was found in the room and bed in possession of the appellant Also the hair, which was taken from between the fingers of the deceased matched with the hair of the appellant, which has been cut in jail on the orders of this Court. The said material as we have shown above has gone a long way for establishing the complicity of the appellant in this offence.

However, Division Bench found gross negligence in the I.O. and ineptitude on part of the trial Court in not themselves sending the hair samples, which were collected at the place of occurrence and from the deceased, for D.N.A. examination which were crucial for establishing the complicity of the appellant in this offence. We also see negligence on part of the I.O. in not examining Dr. R.K. Singh, who had initially taken the hair samples and blood sample of the appellant and also in not keeping the sample in a proper condition causing us to find that the seal and bottle of the sample were damaged. We had therefore directed that fresh sample of hair of the appellants be cut and collected in the jail where he was lodged by the order dated 29.10.13. It is also a source of anxiety to us that in a case of such gravity as the present case, the Investigating Officer has only examined two witnesses of fact viz. P.W. 1 Baise Ali and P.W. 2 Afzal and only three other witnesses P.W. 3 Dr. Amit Kumar, P.W. 4 Constable Parul Yadav and himself PW 5 S.I. Ashok Kumar Singh.

Division Bench stated categorically that this is not the manner to prove a charge of rape and murder of a 12 year old girl, and actually if we had not ourselves sent the samples of hair of the deceased and the hair found at the place of incident which had been collected and got a fresh sample of the hair of the appellant cut and got the same sent for DNA matching to the CDFD, Hyderabad, the order of conviction may have suffered from some infirmities in view of the improbabilities alluded to by the learned counsel for the appellant, and there was a risk that such a grave case of rape and murder a 12 year old girl may have resulted in undeserved acquittal, eroding the confidence of the victim and the public in our system of justice.

[6] (2006) 3 SCC 374.

Unwarranted Acquittal and Remedy for Prevention:

It may be noted that Allahabad High Court has earlier also adversely commented against negligent investigations in cases of rape and murder of minor girls, viz. *Bhairo vs. State of U.P.* (2011) and *Chhotu @ Ajay vs. State of U.P.*, (2013)[7] which had ended in unwarranted acquittals because D.N.A. samples were not collected or the accused not subjected to medical examination or where witnesses did not appear or support the accused after being won over, and other grave lacunae were inadvertently or designedly left by inept or dishonest investigations.

Allahabad High Court had issued directions in those cases to the Director General of Police, U.P. to improve the process of investigations, especially in cases of rape and murder of minor girls. Which have been reiterated in the on-going PIL, *Qasim vs. State of U.P.*[8], where this Court has been taking steps and issuing directions for improving the techniques and procedure for investigations in the State of U.P.

Division Bench mentioned that in the case of *Dayal Singh vs. State of Uttaranchal*, 2012[9], where the deceased and injured were said to have been assaulted with lathies, but it appeared that the doctor conducting the post mortem examination and the Investigating Officer had colluded with the accused and no blunt object injury had been shown on the deceased in the postmortem report. Also although the viscera of the deceased were preserved for sending to the Forensic Science Laboratory, it deliberately appeared not to have been sent.

The Apex Court noted with approval that **the trial Court and High Court relying on the evidence of the eyewitnesses in preference to the medical report had held the accused guilty**.

The trial Court had even recommended action against the doctor and the police officer to the Director General (Health) and DGP. The Apex Court even initiated contempt proceedings against the Director General Health Services of U.P. / Uttarakhand and Director General of Police, U.P./ Uttarakhand under the provisions of the Contempt of Court Act for not complying with the directions of the trial Court and in failing to take action against the errant Medical Officer and Investigating Officer for dereliction of their duties and also directed that disciplinary proceedings be initiated against them.

It was further clarified that in case the I.O. and the Medical officer had retired, action could be taken against them even by withdrawal of their pensions. It was further observed in *Dayal Singh* (2012) that "if primacy is given to such designed or negligent investigations, omission and lapse by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the enforcement agency, but also in the administration of justice."

[7] Capital Case No. 863 of 2011, Allahabad High Court.
[8] 2013 (82) ALLCC 633; MANU/UP/2142/2013.
[9] (2012)8SCC263.

Court shown his anguish in following words that we are also disturbed by the manner, in which the trial Judge has recorded the 313 Cr.P.C. statement, which only consisted of six questions compositely putting the case, the witnesses and documents to the accused and simply questioning him as to why he was prosecuted and whether he had anything else to say or defence to lead, instead of seeking the explanation of the accused on each of the incriminating circumstances which appeared against him in the evidence on record, which is the requirement of law.

Court was therefore constrained to re-framed detailed questions against the accused with the assistance of the learned G.A. on all the existing incriminating circumstances on the record, in addition to the further specific questions which were framed regarding the DNA analysis and other co-related material when the accused was re-examined under section 313 Cr.P.C by this Court on 27.1.14.

In a recent case before the Division Bench of the Allahabad High Court directions were issued to concerned authorities for improving investigations and trials in rape and murder cases. Division Bench of Allahabad High Court after finding it imperative issued the following directions:

Collection of Circumstantial Evidence:

That in cases of rape and murder of minor girls, which are based on circumstantial evidence, as far as possible, material which is collected from the deceased or the accused for example hair or blood of the victim or the accused, which is found on the persons or clothes of the victim or the accused or at the spot, seminal stains of the accused on the clothes or body of the victim, Seminal swabs which may be collected from the vaginal or other orifices of the victim and the blood and other materials extracted from the accused which constitutes the control sample should be sent for D.N.A. Analysis, for ensuring that forensic evidence for establishing the participation of the accused in the crime, is available.

Mandatory Examination of Accused, Collection of Evidence, Training to Examining Forensic Medical Practitioners:

Court also directed the Director General Medical Health U.P., Principal Secretary Health, U.P., and D.G.P., U.P. to mandate sending the accused for medical examination in each case for ascertaining whether he has any injuries caused by the resisting victim, or when he attempts to cause harm to her as is provided under section 53 A of the Code of Criminal Procedure Code, which was introduced by Act 25 of 2005, (w.e.f. 23.6.2006).

Court further noted that in particular if the rape suspect is apprehended at an early date after the crime, it should be made compulsory to take both dry and wet swabs from the penis, urinary tract, skin of scrotum or other hidden or visible regions, after thorough examination for ascertaining the presence of vaginal epithelia or other female discharges which are also a good source for isolating the victim's DNA and necessary specialized trainings be imparted to the examining forensic medical practitioners for this purpose.

Prohibition of Finger Test on Rape Survivors:

Division Bench of Allahabad High Court further directed the Principal Secretary (Health), U.P., Director General (Health and Medical Services) U.P. to prohibit conducting the finger insertion test on rape survivors, and to employ modern gadget based or other techniques for ascertaining whether the victim has been subjected to forcible or normal intercourse. These finger insertion tests in female orifices without the victim's consent have been held to be degrading, violative of her mental and physical integrity and dignity and right to privacy and are re-traumatizing for the rape victim. Relying on the International Covenant on Economic, Social, and Cultural Rights, 1966 and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 it was further held in *Lillu vs. State of Haryana*, (2013)[10] that no presumption of consent could be drawn ipso facto on the strength of an affirmative report based on the unwarranted two fingers test.

Establishment of Modern Forensic Sciences Laboratory:

We find that there is absence of an adequately equipped D.N.A. Laboratory in U.P. which has advanced mitochondrial DNA analysis facilities, comparable to the CDFD, Hyderabad, (from where we were able to obtain positive results in this case, after unsuccessful DNA matching in an earlier case, *Bhairo vs. State of U.P.* where this Court had sent the sample of vaginal smear slides and swabs and appellant's underwear to the U.P. DNA laboratory, viz. Forensic Science Laboratory, Agra), and we direct that such a DNA centre comparable to the CDFD be established in the State of U.P. at the earliest so that Courts and investigating agencies are not compelled to send DNA samples at high costs to the specialized facility of the CDFD at Hyderabad.

Thorough Investigation by Efficient Investigation Officers:

The Director General of Prosecution, U.P., the Director General of Police U.P. and Director General Medical Health should ensure that blind cases of rape and murder of minor girls or other complicated cases are thoroughly investigated by efficient Investigating Officers. Effective steps should be taken for forensic investigations by collecting and promptly sending for DNA analysis all possible incriminating material collected from the deceased, victim, accused, and at the scene of the crime etc. which may give information about the identity of the accused and his involvement in the crime, after taking precautions for preventing the contamination of the material.

Protection of Witnesses:

Court observed that this is necessary to prevent Courts being rendered helpless because the prosecution and investigating agency are lax in producing witnesses or because witnesses have been won over or are reluctant to depose in Court. Steps should also be taken for preventing witnesses from turning hostile, by prosecuting such witnesses, and even by cancelling bails of

[10] (2013)14SCC643.

accused where they have secured bails where it is apparent that efforts are being made to win over witnesses and by providing witnesses with protection where ever necessary so that they can give evidence in Court without fear or pressure.

Strict Action against Investigating Officers, Medical Officers and Other:

Court observed that in case there is reason to think that the Investigating Officers or medical officers or others have colluded with the accused, strict action be initiated against the colluding officials as was recommended in the case of *Dayal Singh vs. State of Uttaranchal* (2012).

Development of Policies and Protocols:

Court further observed that It is necessary that policies and protocols be developed by the DGP, U.P., Principal Secretary Health, Director Medical Health U.P., Director of Prosecutions, U.P., for the aforesaid purposes.

Proper Training is given to Judicial Officers:

The Judicial Training and Research Institute (JTRI), Lucknow must ensure that proper training is given to Judicial Officers on framing proper questions for 313 Cr. P. C. examinations, so that the entire circumstances of the case are put to the accused and they cannot claim the benefit of being inadequately questioned about the incriminating circumstances of the case.

There is need for proactive approach to investigate rape cases by using modern tools and techniques in the letter and spirit of these court directions by all the stake holders to bring these cases to final conclusion and thus, help in serving the ends of justice in larger public interest.

The Psychology of Trial Judging[1]

Neil Vidmar[*]

Abstract

Trial court judges play a crucial role in the administration of justice for both criminal and civil matters. Although psychologists have studied juries for many decades they have given relatively little attention to judges. Recent writings, however, suggest increasing interest in the psychology of judicial decision making. This essay reviews several selected topics where judicial discretion appears to be influenced by psychological dispositions, but cautions that a mature psychology of judging field will need to consider the influence of the bureaucratic court setting in which judges are embedded, their legal training, and the constraints of legal precedent.

Trial judges are on the front line of civil and criminal disputes. At early stages of litigation they make rulings about relevant law bearing on the dispute: e.g., about whether a plea bargain is acceptable; about who has standing to sue; whether the court has jurisdiction; whether the litigation is "ripe" for further attention by the court; whether the claims have merit; or whether a statute of limitations is or is not applicable. Trial judges also manage settlement conferences, approve plea bargains and preside over jury trials.

Often they serve as the primary fact finder instead of a jury. Trial judges also render sentences in criminal cases and review civil jury verdicts, including adjusting damage awards through *remittitur* or *additur*.

These various decision making activities are potentially subject to influence by the judge's personality, attitudes, past experiences or other factors that have been shown to operate in other areas of human behavior. While a recent book discussing the psychology of judicial decision making indicates increasing interest in the subject (Klein and Mitchell, 2010), to date the existing body of empirical research on trial judges is very small. In this essay I review several selected topics with the goal of engendering broader interest in trial judge decision making.

First, however, I draw attention to the fact that a mature field of the psychology of judging must take into consideration some unique considerations, namely (a) the training and experience that

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ostensibly make judges different than laypersons and (b) legal and organizational constraints on judicial behavior.

Legal Training, Legal Precedent and Role Constraints

In their professional training lawyers are taught to look at facts and to reason by analogy, applying facts by placing them in categories, just as is true in scientific disciplines. However, as Schauer (2008) has cogently written, legal decision making also requires heavy deference to precedent. The judge's role formally requires an understanding that personal beliefs about the most just outcome of a particular dispute must often be subjugated in deference to consistency with the relevant body of law.[2]

Judges know that if they deviate too far from prior case law or statutory guidelines their ruling will be appealed—and likely overturned by an appellate court. In short, precedent and statutory requirements often constrain psychological dispositions.

A second problem is that, unlike continental European systems that allow the judge investigative powers, under the American adversary system the judge is primarily dependent on the evidence provided by the litigating parties (see, e.g. Damaska, 1986). If one or both of the opposing parties present deficient or incomplete evidence the quality of the judge's decision will be affected.

A third problem is that much of the daily work of the trial judge is embedded in the court's bureaucracy. Cases are decided in chambers and in written orders (see, e.g., Levi and Gulati, 2008). In consequence, many judicial decisions are made in a context that imposes major constraints on investigating how those decisions are made.

I will return to these issues at the end of the essay.

Does Legal Training and Experience Insulate Judges From Common Cognitive Errors?

In a seminal study Landsman and Rakos (1994) created an experiment involving judges and laypersons who were asked to decide a hypothetical products liability case. In one condition the participants in the study learned facts that could not legally be considered; in another they learned those facts with an instruction that the information was inadmissible and should be disregarded; a control condition did not contain the inadmissible information. Compared to the control condition, the inadmissible information had a negative impact on both judge and juror

[2] Among a number of examples, Schauer drew attention to Supreme Court Justice Potter Stewart's dissent in Griswold v, Connecticut, the 1965 case involving the right to purchase contraceptives. While the majority opinion articulated a right to privacy as the basis for allowing the purchase of contraceptives, Stewart dissented, arguing that there was no right to privacy mentioned in the Constitution. However, in the subsequent case of *Roe.v. Wade* in 1973, also invoking a right to privacy, he voted with the majority because Griswold had set a precedent, namely that there was now a right to privacy. Trial judges too ar bound by precedents in case law, by statutes, or by other constraints such as rules of evidence or sentencing guidelines.

decisions. Strikingly, the instruction that the evidence was inadmissible failed to have an effect on judges as well as jurors, suggesting that legal training did not inoculate judges from ordinary human error.

Wistrich, Guthrie and Rachlinski (2005) conducted a series of experiments similar to the Landsman and Rakos study. Their experiments included cases involving a plaintiff with prior criminal convictions; conversations protected by attorney-client privilege; the sexual history of an alleged rape victim; prior demands disclosed during a settlement conference; and a government promise not to rely on certain background information during a sentencing hearing. The researchers found that judges were unable to disregard inadmissible evidence, although with important exceptions. When faced with a fact pattern involving an inadmissible search or an inadmissible confession the judges were able to put that information aside. In still another set of experiments in their program Rachlinski et al. (2009) found that on an "implicit associations test" judges were as prone as other persons to exhibit stereotypes of Black Americans; and in a series of vignettes that subtly primed racial issues the judges were prone to impose harsher penalties on Black defendants than on White defendants. However, in a vignette where the defendant's race was made explicit White judges did not show bias against Black defendants (albeit Black judges in the experiment were significantly more prone to convict a White defendant than a Black defendant).

What can we make of these findings? One interpretation is that despite their legal training judges are no different than laypersons in being prone to cognitive biases. On the other hand, the lack of real world context in simulation experiments may artificially inflate the effects of biases. In actual trials judges weigh inadmissible evidence along with many other pieces of evidence, including arguments by opposing legal counsel, so any effects of implicit biases may be nugatory. The Rachlinski et al. study hints that when judges have more detailed information and more time to consider and deliberate, their training allows them to process information differently than laypersons. However, research on sentencing decisions implicating race gives reason to pause.

Sentencing Decisions: Deviations from the Ideal Norm

Mustard (2001) obtained a sample of 77,235 offenders sentenced under the federal Sentencing Reform Act of 1984. The Act's purpose was to reduce sentence disparity between races, ethnic backgrounds and gender. The Act, however, permits judges to deviate from the guidelines by considering specific aggravating or mitigating circumstances. After controlling for a large number of variables associated with the cases, Mustard found differences associated with race, ethnicity and gender. The disparities were associated primarily with downward departures from the guidelines rather than differential sentencing within the prescribed ranges. Whites received an average sentence of 32.1 months, Hispanics received an average sentence of 54.1 months, and African Americans an average of 64.1 months. Being African American accounted for about

fifty-five percent of the variance. Black defendants were less likely to receive a downward departure from the guidelines and more likely to receive an upward adjustment.[3]

The potential effects of race on sentencing may be subtle and invidious. Blair, Judd and Chapleau (2004) obtained a random sample of 100 Black and 116 White inmates incarcerated in the Florida Department of Corrections. Blair et al. coded the seriousness of the defendants' primary offense but also took into consideration prior offenses. Photographs of each of the incarcerated persons were obtained and rated on the degree to which each convict had features typical of African Americans as well as some other potentially confounding features like "attractiveness." Seriousness of the crime accounted for the majority of the variance and race of the offender accounted for only an insignificant percentage of the variance. However, the striking finding involved the variance *within* the African American sample. African Americans who were rated as having the most Afrocentric features had received significantly longer sentences even after other factors were controlled in the equations. This intriguing finding is generally consistent with other research (e.g. Eberhardt et al., 2006) indicating that physical appearance affects sentencing decisions. The Blair et al. research suggests that there may be human error effects that are difficult to eradicate even with sentencing guidelines.

But are there alternative explanations for the Blair et al. results? A largely unstudied issue has been the effects of the defendant's demeanor and language in the courtroom. Many African Americans and other minorities have distinctive demeanors and ways of speaking that could influence the decisions of judges. Speech styles and demeanors of African American defendants, compared to White defendants, might provide a partial explanation of the differential sentencing patterns. As noted earlier, judges depend on others to provide the facts on which they make their decisions. Might some of the bias be attributed to probation officers who prepare pre-sentencing reports for the judges? Could the chain of causality be traced even further back? Bail conditions imply degrees of dangerousness or likelihood of flight and some research has indicated that magistrates, who determine bail conditions at the time of arrest, were more inclined to require monetary bail for Blacks compared to Whites, and set the amounts at higher levels. Do Blacks have poorer legal representation than Whites? In short, while we should not eliminate implicit racial biases in judicial sentencing, other plausible causes need to be considered.

Intellectual, Attitudinal and Political and Context Effects On Judicial Gate Keeping Decisions

One gate-keeping role of the judge is to decide whether scientific or other evidence espoused by a proffered expert meets sufficient standards of reliability to be admitted as evidence. In *Daubert v. Merrell Dow Pharmaceuticals* (1993) and subsequent cases, the Supreme Court enunciated

[3] Yet, the data also showed that Blacks and males were also less likely to receive no prison term when that option was available. The type of crime also affected the length of sentence. For example, persons convicted of drug trafficking and firearm possession associated with drug trafficking were more likely to receive harsher sentences. The Mustard findings show complexity in the sentencing behavior of judges that requires additional investigation.

criteria the judge should use to make decisions on admissibility: (a)the theory or technique must be falsifiable and testable; (b)the research has been subjected to peer review (c) the known or potential error rate; and (d)the degree of acceptance in the scientific community. Admissibility of expert testimony raises interesting issues.

Gatowski et al. (2001) surveyed a sample of 400 state court trial judges. Although the judges overwhelmingly supported the idea of *Daubert* standards, the survey revealed that only five percent of the judges could articulate the meaning of the "falsifiability" criterion and only four percent demonstrated a clear understanding of error rate.

Kovera and McAuliff (2000) conducted an experiment with a sample of 380 Florida circuit court judges, who were provided a general description of expert testimony bearing on sexual harassment and asked the judges to decide on its admissibility. There were several experimental conditions affecting the validity of the testimony. The judges' decisions to admit or exclude the evidence were not sensitive to factors that confounded internal validity (see also, Groscup, 2004).

Empirical researchers from the field of political science have long asked if political leanings affect the gate-keeping decisions of appellate court. Rowland and Todd (1991) asked a similar question about federal trial court judges by comparing gatekeeping decisions made by judges appointed during the Nixon/Ford, Carter and Regan administrations. There were no major overall differences between the respective presidential appointees in terms of permitting or denying parties standing to sue, but the data also showed that there were differences in who was granted and who was denied standing. Carter judicial appointees were more likely to grant standing to "underdog" plaintiffs such as unions, employees, minorities, aliens, individuals and criminals. In contrast Regan and Nixon appointees tended to favor "upperdog" plaintiffs such as corporations and governmental litigants. Kulik, Perry and Pepper (2003) found no effects of judges' gender or race, in sexual harassment litigation, but judges appointed by Democrat presidents were more likely to decide in favor of plaintiffs. Thus, political leanings appear to have affected judges' gate keeping activities.

Guthrie, Rachlinski and Wistrich (2001) conducted an experiment in which judges were asked to award damages in a personal injury suit in a federal court. Personal injury cases are allowed in federal court if they exceed $75,000. Half of the judges were first asked to rule on a defense challenge that the damages in the case did not meet the $75,000 minimum limit; the limit issue was not raised for the control condition judges. Most of the judges asked to decide whether the case could proceed in federal court ruled that it could, but in comparison to the control judges, their compensatory awards were significantly lower. Guthrie et al. concluded that deciding the dispute over whether the damages met the minimum limit for federal court served as a psychological anchor inclining the judges toward lower awards.

Judicial Concerns with Distributive versus Procedural Justice

Over the past several decades much attention has been given to the topic of procedural justice in a wide range of settings (see Tyler, 2006). Literally hundreds of studies have shown that people's perceptions of whether they have been treated fairly matter a great deal, sometimes more than the actual outcome of a dispute. Heuer, Penrod and Kattan (2007) conducted two experiments, the first with 70 state appellate judges and the second with 75 trial court judges, that assessed the degree to which judges focused on procedural justice. The judges were sent a questionnaire containing a hypothetical scenario involving an airline passenger who was stopped, questioned and had his luggage searched. Four versions of the scenario involved respectful versus very disrespectful treatment by the security officers crossed with information on whether the luggage contained a weapon or marijuana (high benefit versus low benefit of the search). The person was subsequently arrested and convicted in all four scenarios. The judges were asked to decide whether the conviction should be upheld plus a number of other questions about the fairness of the procedures under which the arrest took place. The only variables that uniquely affected the judges' decisions were whether the search yielded a weapon (high benefit) or marijuana (low benefit) and the degree to which the treatment infringed upon the airline passenger's freedom. The important implication of the Heuer et al. study is that judges apparently used different criteria than those typically discussed in the procedural justice literature. The experiment raises many interesting and important questions requiring further research.

Judges as Alternatives to Juries

Beginning with Kalven and Zeisel's classic empirical work on the American jury system a number of studies have used the opinions or decisions of judges as a standard to compare the performance of juries. The various studies continuously find that judges and juries have an approximately 80 percent agreement rate regarding the proper verdict in both criminal and civil trials. In the 20 percent of criminal cases where there is disagreement the judges are more inclined to convict than the jury. Among several likely explanations for the disagreement is the fact that the judges often have more information about the defendant's prior criminal record (not usually disclosed to the jury) and other knowledge and experience that causes them to side with the prosecution's evidence. It is also possible that judges have a different interpretation of "proof beyond a reasonable doubt" than layperson jurors.

While juries decide the bulk of damage awards in civil trials, sometimes judges fulfill this role. Wissler, Hart and Saks (1999) investigated how samples of judges, lawyers who primarily defended civil cases and laypersons decided compensatory damages. The awards made by the laypersons were generally higher and more variable than those made by the judges. Laypersons also tended to see the injuries as more severe.

However, judges were generally similar to laypersons in their assessments of the characteristics of the injuries.

Future Research Topics

While research on judges' susceptibility to common cognitive errors is important, more data are needed to determine the influence they have in the context of a real trial or hearing which typically involves many pieces of evidence plus arguments from lawyers on both sides about the meaning of that evidence and its relevance under legal precedents. My proposed alternative explanations for racial discrimination in sentencing would suggest the need for systematic qualitative work to complement archival and experimental research in order to understand judicial behavior. Psychologists have been hesitant to engage in qualitative research, but qualitative research has an especially important role to play in a mature field of the psychology of judging.

The number of persons who file and pursue or defend their legal claims without a lawyer has been growing and *pro se* litigants have become a major topic of discussion in both federal and state courts (see, Landsman, 2009). There has been concern that some judges deal with these litigants in a cursory manner because the litigants often do not know the legal rules and procedural steps that courts require. To what extent do judges make exceptions for these litigants and to what degree do they focus only on substantive justice outcomes versus providing litigants with a sense of procedural justice? The Heuer et al. (2007) study, discussed above, indicated that judges appeared to be more influenced by outcome than by procedural justice concerns. To what degree might such factors affect both distributive and procedural outcomes in pro se litigation?

Finally, Schauer's (2008) critique of the psychological literature assuming that legal reasoning is primarily reasoning only by analogy raises very basic and interesting scientific questions. As he pointed out, there exists no clear articulation of a theory of judicial psychology taking into account the critical role of precedent in legal decisions. Moreover, issues of precedent apply to many areas beyond the legal context, such as organizational decisions. A substantial effort to explore the effects of precedent in judicial decision making could open a much broader field of inquiry.

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Dharam Deo Yadav v. State of U.P.[1]

K.S. Panicker Radhakrishnan, J.

1. We are, in this case, concerned with the gruesome murder of a 22 year old girl by name Diana Clare Routley (hereinafter referred to as "Diana"), a New Zealander, for which the trial Court awarded death sentence to the Appellant, which was affirmed by the High Court.

2. Diana came to India as a visitor in the year 1997. After visiting Agra, she reached Varanasi on 7.8.1997 and stayed in room No. 103 of the Old Vishnu Guest House, Varanasi. She left the guest house on 10.8.1997 at about 7.00 a.m. for Darjeeling by train from Varanasi Cantt. Railway Station. Later, she was found missing and her father Allan Jack Routley, having got no information about his daughter, informed the authorities about the missing of Diana. Raghvendra Singh, SHO, Police Station, Laksa, along with a team of police officials, made inquiries, but she could not be traced. Later, it was revealed that one Dharam Deo Yadav, a tourist guide, accused herein, had some contacts with Diana and the police team then submitted its report to the Superintendent of Police (City), Varanasi on 24.4.1998, which reads as follows:

> Dear Sir,
>
> Re: Re Diana Clare Routley, aged 25 years I write in connection with the disappearance of my daughter, Diana Clare Routley last seen in Varanasi on Aug. 10th, 1997. She had arrived in Varanasi on the morning of Aug. 7th, 1997. She was staying at Old Vishnu Guest House. She last had contact with her family on Aug. 8th, 1997 when I rang her at Old Vishnu Guest House and she wrote a letter to me. Since then her family and friends have had no contact.
> The person we suspect that could be involved in her disappearance is DharamDev Yadav who is a local guide in Varanasi and work for Old Vishnu Guest House. If he is not involved in her disappearance he certainly knows something of her movements on the day she disappeared.

3. Allan Jack Routley later came to India and lodged a written first information report (Exh. Ka-34) naming the accused Dharam Deo Yadav as suspect on 28.07.1998 at about 4.45 pm at P.S. Bhelupur, District Varanasi. Crime No. 254/98 was then registered Under Section 366 Indian Penal Code. PW14, Anil Kumar Rai, SHO, P.S. Shivapur, Varanasi got an information that the accused, on 19.8.1998, would reach Shivpur railway station at Varanasi. PW14 found out the accused at the railway station and interrogated him. Accused confessed that he had committed the murder of Diana and also named the co-associates Kali Charan Yadav, Sindhu Harijan and Ram Karan Chauhan. The accused, accompanied by PWs14 and 15, PS Bahariyabad, Ghazipur (Indra Kumar Mandal, Sub-Inspector), went to his house situated at Village Brindaban, District Ghazipur and he, with his key, opened the lock of his house and pointed out the place where the dead body of Diana was buried after causing her

[1] K.S. Panicker Radhakrishnan and A.K. Sikri, JJ. (DB),; 2014CriLJ2371, 2014(4)SCALE730, (2014)5SCC509, decided on: 11.04.2014, Criminal Appeal No. 369 of 2006.

death by way of strangulation. Accused was asked to dig the spot and excavate the dead body of Diana, which he did by spade and the body remains (Skeleton) was found. PW14 then arrested him on 19.08.1998 and, on his disclosure, other three persons, said to have been involved in the incident, were also arrested by PW14 on 19.08.1998. Inquest on the skeleton was prepared by PW15 on the direction given by PW16 Rajendra Pratap Singh, SDM, Tehsil Jakhaniya, District Ghazipur. After completing the investigation, police arrested Kali Charan Yadav, Sindhu Harijan, Ram Karan Chauhan, Kesar Yadav and Mahesh Chandra Mishra on 19.08.1998 and submitted charge-sheets Ex. Ka40 and Ka41 for the offences Under Sections 366, 302, 201, 394 of the Indian Penal Code. Post-mortem examination of the skeleton was done by a team of Doctors, consisting of Dr. R.B. Singh, Dr. S.K. Tripathi and Dr. V.K. Gupta on 20.08.1998, the report of which is Exh. Ka-18.

4. After committal of the case, the Court of Sessions framed charge Under Section 411 Indian Penal Code against Kali Charan, Kesar Yadav and Mahesh Chandra Mishra. Charges Under Sections 302/34, 201 and394 Indian Penal Code were framed against the Appellant, Kali Charan Yadav, Sindhu Harijan and Ram Karan Chauhan and the Appellant was also further charged Under Section 364 Indian Penal Code.

5. The prosecution, in order to bring home the charges, examined 27 witnesses. No person was examined as a witness on the said of the defence.

6. The trial Court acquitted Kali Charan Yadav, Sindhu Harijan and Ram Karan Chauhan, but the Appellant was found guilty for the commission of the offences punishable Under Section 302 read with Section 34 Indian Penal Code and Section 201 Indian Penal Code, but was acquitted of the charges for the offences Under Sections 364 and 394 Indian Penal Code. The trial Court also found that the case falls under the category of rarest of rare case, since the accused had strangulated a young girl of a foreign country who had visited India and awarded him death sentence.

7. Aggrieved by the same, the accused filed Criminal Appeal No. 1000 of 2003 before the High Court of Judicature at Allahabad and the State filed Government Appeal No. 2726 of 2003 against the order of acquittal passed against rest of the accused persons. Both the appeals were heard along with Criminal Reference No. 21 of 2003. The High Court dismissed both the appeals and confirmed the death sentence awarded by the trial Court, holding that the case in question falls under the rarest of rare category, against which this appeal has been preferred.

8. Shri Sunil Kr. Singh, learned Counsel appearing on behalf of the Appellant, submitted that in a case which squarely rests on circumstantial evidence, 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 none else. Circumstances pointed out by the prosecution, in this case, according to the counsel, are inconclusive and inconsistent and no reliance could be placed on those circumstances so as to draw a conclusion that the accused had committed the crime. In support of his submissions, learned Counsel placed reliance on various judgments of this Court, including ***Padala Veera Reddy v. State of Andhra Pradesh and Ors.***: 1989 Supp (2) SCC 706 and***Mustkeem alias Sirajudeen v. State of Rajasthan*** : (2011) 11 SCC 724. Learned Counsel also pointed out that oral evidence of PWs 1, 2, 3, 5, 9 and 10 are totally unreliable to hold that the deceased was last seen with the accused on 10.08.1997. Learned Counsel pointed out that the witnesses had identified Diana only on the basis of the photograph (Exh.1), sans the negative. Learned

Counsel pointed out that, in any view, the mere fact that the Appellant was seen with the deceased, would not lead to the irresistible conclusion that the Appellant had committed the crime. In support of his contention, reliance was placed on the judgment of this Court in ***Lakhanpal v. State of Madhya Pradesh*** :1980 Supp (1) SCC 716, ***Eradu v. State of Hyderabad*** :AIR 1956 SC 316, ***Sahadevan v. State of Tamil Nadu*** :(2012) 6 SCC 403, ***Stateof U.P. v. Satish*** : (2005) 3 SCC 114.

9. Learned Counsel also submitted that the alleged confession and recovery made at the instance of the accused Under Section 27 of the Evidence Act, 1872 could not be taken as evidence, since the same was stated to have been made while in custody. Learned Counsel placed reliance on the judgments of this Court in ***State of U.P. v. Deoman Upadhyaya*** : (1961) 1 SCR 14 and ***State of Rajasthan v. Daulat Ram*** : (2005) 7 SCC 36 in support of his contention. Learned Counsel also submitted that the police had conducted the search and seizure qua the recovery without following the provisions of Sections 100(4) and (5) of the Code. Further, it was also pointed out that no independent witness was present during search and seizure. Learned Counsel pointed out that, going by the evidence of PW16 itself, the theory that the skeleton was recovered in the house of the accused, is highly doubtful and possibility of planting the skeleton in the house of the accused cannot be ruled out. Learned Counsel also submitted that the evidence of PW19, who conducted the post-mortem, as such, cannot be accepted in evidence since he had not followed the well accepted procedures. Referring to the oral evidence of PW21, learned Counsel pointed out that not much reliance could be placed on the DNA report, since the acceptance of DNA Profile evidence has raised considerable controversy and concerns even in countries from where it originated.

10. Learned Counsel also submitted that, in any view, this is not one of the rarest of rare case warranting award of death sentence. Learned Counsel pointed out that the cases rested purely on circumstantial evidence and, at the time of the commission of the offence, he was only 34 years of age and he later married, having wife, children and father. Further, it was also pointed out that he was originally a rickshaw puller, coming from very poor circumstances and hence could be reformed and rehabilitated.

11. Shri Ratnakar Dash, learned senior Counsel appearing for the State, submitted that the case rests upon circumstantial evidence and that the trial Court as well as the High Court are justified in drawing the inference of guilt, since all incriminating circumstances are found to be incompatible with the innocence of the accused. Learned senior counsel, placing reliance on the oral evidence of PWs 1, 2, 3, 5, 9 and 10, submitted that their evidence would categorically show that the deceased was last seen with the accused. PW3 has categorically stated that both the accused and Diana were last seen together at the Varanasi Cantt. Railway Station. Learned Counsel pointed out that the evidence of those eye-witnesses would clearly indicate that the accused, while acting as a guide to Diana, took her to his native village, lived there for few days and committed the murder and later buried the dead body in his own house. Learned senior Counsel extensively referred to the evidence of PWs 14 and 15 read with the statement of admission of the Appellant (Annexure P-5).

12. Learned senior counsel, referring to Section 27 of the Evidence Act, submitted that so much of information given by the accused in "custody", in consequence of which any fact is discovered, is admissible in evidence, whether such information amounts to a confession or

not. Learned senior Counsel submitted, assuming that the recovery was not in terms of Section 27 of the Evidence Act and was not in custody of the police by the time statement was made, still it would as well be admissible as "conduct" Under Section 8 of the Evidence Act. In support of his contention, reliance was placed on the judgment of this Court in ***Sandeep v. State of Uttar Pradesh*** : (2012) 6 SCC 107.

13. Learned senior Counsel also referred to the evidence of PWs 19 and 20 and also explained the procedure followed by PW19, who conducted the post-mortem examination on the skeleton of Diana. PW20 examined the body parts of Diana and preserved one femur bone and one humerus bone for DNA test, which was conducted by PW21 adopting the test - Short Tandem Space Repeats (STR) analysis. Learned senior Counsel pointed out that, on reading the evidence of PWs 13, 19, 20 and 21, it is proved beyond a shadow of doubt that the skeleton recovered from the house of the accused was that of Diana.

14. We have no eye-witness version in the instant case and the entire case rests upon the circumstantial evidence. Circumstantial evidence is evidence of relevant facts from which, one can, by process of reasoning, infer about the existence of facts in issue or factum probandum. In Hanumant, son of ***Govind Nargundkar v. State ofMadhya*** Pradesh MANU/SC/0037/1952 : AIR 1952 SC 343, this Court held as follows:

> It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance, be fully established and all the facts so established should be consistent only with the hypotheses of the guilt of the accused. Again, the circumstances would be of a conclusive nature and tendency and they should be such as to exclude but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.
>
> Each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. Even when there is no eye-witness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any reasonable hypothesis save of guilt sought to be proved, accused may be convicted on the basis of such circumstantial evidence.

15. Diana, the deceased, was a young girl of the age of 22-24 years, hailing from New Zealand, visited India in the year 1997. On 07.08.1997, she arrived Varanasi and stayed at the Old Vishnu Guest House and, on 10.08.1997 at 7.00 am, she left the guest house and since then she was found missing. PW4, the Manager of Old Vishnu Guest House, at the relevant point of time, deposed that from 07.08.1997 to 10.08.1997, Diana had stayed in room No. 103 of the guest house. Two other girls who had come with Diana left the hotel on 08.08.1997 at about 11.45 am. Further, it was stated that the accused and one Naseem were engaged as

guides for the persons staying in the guest house and that from 08.08.1997 to 10.08.1997, the Appellant was acting as the guide of Diana.

LAST SEEN:

16. PW2 was working in Old Vishnu Guest House at the relevant point of time and, from 07.08.1997 to 10.8.1997, he was on duty at the guest house. PW2 deposed that the accused used to come as a guide in the guest house and he had seen Diana roaming around with the accused. PW1 has also corroborated the evidence of PW2. PW1, who used to ply cycle rickshaw in the Varanasi city, stated that the accused himself was plying cycle rickshaw from 1993 to 1996, after that he left that job and started to work as a guide. PW1 deposed that he had seen the accused along with a foreign lady in a rickshaw and, looking at the photograph, he recognized that it was the deceased who was with the accused at the relevant point of time. PW3 also used to hire rickshaw for plying and the accused used to take rickshaw for plying from him. PW3 deposed that he had met the accused on 10.08.1997 at platform No. 1 at Varanasi Cantt. Railway Station with a foreign lady and he had recognized the photograph of Diana, as that lady. PW3 also stated that he had also boarded the train in which the accused as well as Diana had boarded. PW3 further stated that he had seen the accused and the lady alighting at Hurmujpur station, while he continued his journey.

17. PW9 is an independent witness, who also deposed that he had seen the accused with Diana when they came to their village and that Diana had stayed in the house of the accused. PW9 identified the photograph of Diana and stated that it was the same lady who had stayed with the accused.

18. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. Reference may be made to the judgment of this Court in ***Sahadevan Alias Sagadeven v. State represented by Inspector of Police, Chennai*** : (2003) 1 SCC 534. In such a situation, the proximity of time between the event of last seen together and the recovery of the dead body or the skeleton, as the case may be, may not be of much consequence. PWs 1, 2, 3, 5, 9 and 10 have all deposed that the accused was last seen with Diana. But, as already indicated, to record a conviction, that itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.

RECOVERY OF SKELETON

19. PW14 has categorically stated that he had got information that the Appellant would reach the Shivpur railway station and, hence, he rushed to the railway station with the informant and found out the accused at the platform. PW14 interrogated him and he disclosed his name and address. He admitted that he was the guide of Diana and since Diana wished to go to his village, he went along with her on 10.08.1997. The accused had also confessed to have committed the murder of Diana and buried her dead body in his house. PW14 then, accompanied by PW15, took the accused to his village and the accused with the key in his possession, opened the lock of his house and pointed out the place where the dead body of Diana had been buried. Accused himself dug the place with a spade and the skeleton was recovered. PW14 then arrested the accused and, on his disclosure about the involvement of the other accused persons, they were also arrested. Inquest on the skeleton was made in the presence of SDM, PW16. Contention was raised that the statement/admission of the accused (annexure Exh. P-5) was inadmissible Under Section27 of the Evidence Act, since the accused was not in the custody of PW14. The evidence of PWs 14 and 15 would indicate that they could recover the skeleton of Diana only on the basis of the disclosure statement made by the accused that he had buried the dead body in his house. Recovery of a dead body or incriminating material from the place pointed out by the accused, points out to three possibilities-(i) that the accused himself would have concealed; (ii) that he would have seen somebody else concealing it and (iii) he would have been told by another person that it was concealed there. Since the dead body was found in the house of the accused, it is for him to explain as to how the same was found concealed in his house.

20. Section 27 of the Evidence Act explains how much of information received from the accused may be proved. Section 27 reads as follows:

> **27. How much of information received from accused may be proved.**
>
> Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.
>
> The expression "custody" which appears in Section 27 did not mean formal custody, which includes any kind of surveillance, restriction or restraint by the police. Even if the accused was not formally arrested at the time when the accused gave the information, the accused was, for all practical purposes, in the custody of the police.
>
> This Court in ***State of Andhra Pradesh v. Gangula Satya Murthy***: (1997) 1 SCC 272 held that if the accused is within the ken of surveillance of the police during which his movements are restricted, then it can be regarded as custodial surveillance. Consequently, so much of information given by the accused in "custody", in consequence of which a fact is discovered, is admissible in evidence, whether such information amounts to a confession or not. Reference may also be made to the judgment of this Court in ***A.N. Venkatesh v. State of Karnataka***: (2005) 7 SCC 714. In ***Sandeep v. State of Uttar Pradesh*** : (2012) 6 SCC 107, this Court held that it is quite common that based on admissible portion of the statement of the accused, whenever and wherever recoveries are made, the same are admissible in evidence and

> it is for the accused in those situations to explain to the satisfaction of the Court as to nature of recoveries and as to how they came into the possession or for planting the same at the place from where they were recovered. Reference can also be made to the judgment of this Court in ***State of Maharashtra v. Suresh*** : (2000) 1 SCC 471, in support of the principle. Assuming that the recovery of skeleton was not in terms of Section 27 of the Evidence Act, on the premise that the accused was not in the custody of the police by the time he made the statement, the statement so made by him would be admissible as "conduct" Under Section 8 of the Evidence Act. In the instant case, there is absolutely no explanation by the accused as to how the skeleton of Diana was concealed in his house, especially when the statement made by him to PW14 is admissible in evidence.

21. PW16, SDM, Tehsil Jakhaniya, District Ghazipur received an order on 19.8.1998 of the District Magistrate through Police Station Bahariyabad to prepare the inquest memo of the recovered dead body (skeleton) in the village Vrindaban. PW16, consequently, reached Vrindaban at 3.30 pm on 19.8.1998 and noticed the skeleton lying in a pit in the eastern-northern corner of the room in the house of accused. PW16 started inquest proceedings at 4.00 pm and, on his direction, PW15 prepared the inquest memo and the skeleton was taken out from the pit and kept outside the house. PW16 kept the skeleton in a wooden box and sealed. PW17 stated that he had delivered the skeleton kept in a wooden box to Ghazipur headquarter mortuary. PW17 stated that the skeleton remained in the custody of Sunil Kumar Rai, bundled and sealed and nothing had cropped up, so as to dislodge creditworthiness of his testimony.
22. PW19, Dr. G.D. Tripathi, stated that on 20.8.1998 while he was posted as Senior Heart Specialist at District Hospital, Ghazipur, he, along with Dr. Ram Murti Singh and Dr. D.K. Gupta, had conducted the post-mortem examination of recovered remains of dead body (skeleton). PW19 stated that it was PW17, who had brought the skeleton sealed in a wooden box. PW19 noticed the following features in the external examination:

> On opening the sealed box by appearance it is a body (remains) of young human female body of average built. Hairs of scalp are golden brown in colour attached with the scalp.
>
> 1. Scalp bones with hairs.
> 2. Bones of the face, upper jaw and lower jaw.
> 3. Bones of the upper and lower extremities attached with muscles and soils.
> 4. Few ribs of the chest wall.
> 5. Lower part of the lumber vertebra and thoracic vertebra and sacrum.
> 6. Both pelvic bones.
> 7. Both scapula.
>
> Bones are not decomposed, bones of upper and lower extremities are attached with following and muscles.
> Membranes, head, spinal cord, pleura, both lungs, pericardium, heart, blood vessels were found absent.
> All the bones of skeleton are prepared for chemical analysis.

Position of lower jaw was found as under:
1. Central Incisor-Two
2. Lateral Incisor-Two
3. Canine - Two
4. Premolars - Four
5. Molar - Four
There is a space for IIIrd molar behind the IInd molar in both upper and lower jaws.
Cause of death could not be ascertained, hence bones with scalp, hair and soil were preserved for analysis.

23. PW20, Dr. C.B. Tripathi, Professor and Head of the Department of Forensic Medicines Department, Kashi Hindu Vishwavidyalaya, Varanasi, had again conducted the post-mortem on the body remains (skeleton) on 10.8.1998 at 12.30 pm and prepared Exh. Ka-28 result. The operative portion of the report reads as follows:

> Personal Identification or Uniqueness of Individual: Superimposition Technique: for personal identification sumporim position technique was done in this case, for which photograph of face of alleged individual Diana Clare Routley obtained from S.S.P. Varanasi (Ex.1) from which a black and white photograph (Ex.2) was made the skull and mandible was fixed in best position anatomical position and photograph of skull along with Mandible was taken (Ex.3) by minutely adjusting same angle and distance from which photograph of face (Ex.2) was taken. The negative of photograph (Ex.2) and negative of skull (Ex.3) was precisely adjusted in stand in dark room for registration marks then sumporim posed photograph was taken first partially exposing negative of photograph on photograph paper then exposing negative of skull on the same photograph thus the superimposed photograph (Ex.4) was obtained and registration marks and lines were compared and was found that they matched and coincided exactly establishing that the skull belonged to the photograph of the individual. (Annexure Ex. 1 to Ex. 4 for perusal). Personal Identification by comparison of Dental Records of alleged individual from Dental findings of bones;
>
> Dental records of Diana Clare Routley (Ex.5) the alleged individual was made available by S.S.P. Varanasi with the help of Interpol services (a) in the lower jaw there was evidence eruption of III Molar both sides, but the teeth were missing. The dental record shows that both the lower III Molar were extracted on 8.3.1993 (b) the upper III Molar both sides teeth was not present and no sign of eruption was seen. The X-ray (Dental) (Ex.6) of Diana Clare Routley shows that both upper III Molar were not erupted/impacted. (c) The examination of teeth and hair X-ray (taken in S.S.P.G. Hospital) (Report Ex. 6) shows that there are cavities and filling in the upper left II Molar, upper right 1st Molar, lower left Molar and lower right II Molar, also small cavity in the Ist Molar lower both sides. The dental chart (Ex.5) and Dental X-ray (Ex.7) of Diana also show presence of cavity and fillings in these teeth. Thus comparison of teeth and their X-ray with the dental and their X-ray records

> from New Zealand of Diana completely establishes the identity of skull and mandible of being Diana Clare Routley. (d) Blood group was detected from bones and was found Group-A. Medical report shows Blood Group-A.

24. PW20 has stated that one femur and one humerus bone were preserved for DNA analysis and composition with Diana's father blood sample. The examination report Exh. Ka-28 of PW20 also refers to the cause of death, which reads as follows:

> Cause of death: (1) There is a hole nearly circular 1.2cm x 0.9 cm. in the sternum bone of lower part (from the chest) photograph of sternum taken Ex. 8 enclosed.
>
> (2) There were two holes on the T-shirt (one front and on back) and one on the Gamchha. These were sent for gun powder residue testing. The reports have been obtained (Ex.9) which is negative for present of gun powder residue. The negative report may be either due to the fact that the clothes were highly contaminated and soiled or due to beyond the range of gun powder affects.
>
> (3) Head hairs, bones and soil samples were preserved and handed over to the Constable for chemical analysis of prisons. The report is still awaited. Hence opinion as to cause of death is deferred till report of chemical analyst.
>
> PW20 then took out femur and humerus bones of skeleton for DNA fingerprinting test to establish the relations between the deceased and the blood donor, that is the sample of blood of Allan Jack Routley, which was taken in accordance with the setup precept and procedure for DNA isolation test and the same was sent along with taken out femur and humerus bones of recovered skeleton to the Centre for DNA Fingerprinting and Diagnostics (CDFD), Ministry of Science and Technology, Government of India, Uppal Road, Hyderabad.

CRIME SCENE MANAGEMENT

25. Crime scene has to be scientifically dealt with without any error. In criminal cases, especially based on circumstantial evidence, forensic science plays a pivotal role, which may assist in establishing the element of crime, identifying the suspect, ascertaining the guilt or innocence of the accused. One of the major activities of the Investigating officer at the crime scene is to make thorough search for potential evidence that have probative value in the crime. Investigating Officer may be guarded against potential contamination of physical evidence which can grow at the crime scene during collection, packing and forwarding. Proper precaution has to be taken to preserve evidence and also against any attempt to tamper with the material or causing any contamination or damage.

26. PW14 has stated that the accused led him and others to a room stating that he buried the dead body of Diana in that room. PW14 asked the accused to dig the spot he had pointed out and the accused started digging the floor of the room. After digging 6 feet wide, 3 feet long and 2 feet deep, a human skeleton was seen. The mud around the beach was cleared. The skeleton had teeth in mouth and hair at head. PW14 took the skeleton in his possession and,

while doing so, he noticed that the bones were intact. There was no skin found on the skeleton and some tea red cloths were stuck on the skeleton and those cloths were sealed.

27. PW15, SHO, Ghazipur Police Station, started the procedure of Panchnama following the laid down procedure. Photograph of the skeleton was also taken. Later, the skeleton was sealed after following all procedures, which is reflected in Exts. A-14 and A-15, the skeleton of the dead body was then given to the custody of PW17, who had brought it for post-mortem and was entrusted to PW19. No procedural error is seen committed by the above-mentioned witnesses in recovering the skeleton, packing it and forwarding the same to PW19.

EXPERT SCIENTIFIC EVIDENCE

28. Criminal Judicial System is this country is at crossroads, many a times, reliable, trustworthy, credible witnesses to the crime seldom come forward to depose before the court and even the hardened criminals get away from the clutches of law. Even the reliable witnesses for the prosecution turn hostile due to intimidation, fear and host of other reasons. Investigating agency has, therefore, to look for other ways and means to improve the quality of investigation, which can only be through the collection of scientific evidence. In this age of science, we have to build legal foundations that are sound in science as well as in law. Practices and principles that served in the past, now people think, must give way to innovative and creative methods, if we want to save our criminal justice system. Emerging new types of crimes and their level of sophistication, the traditional methods and tools have become outdated, hence the necessity to strengthen the forensic science for crime detection. Oral evidence depends on several facts, like power of observation, humiliation, external influence, forgetfulness etc., whereas forensic evidence is free from those infirmities. Judiciary should also be equipped to understand and deal with such scientific materials. Constant interaction of Judges with scientists, engineers would promote and widen their knowledge to deal with such scientific evidence and to effectively deal with criminal cases based on scientific evidence. We are not advocating that, in all cases, the scientific evidence is the sure test, but only emphasizing the necessity of promoting scientific evidence also to detect and prove crimes over and above the other evidence.

29. Scientific evidence encompasses the so-called hard science, such as physics, chemistry, mathematics, biology and soft science, such as economics, psychology and sociology. Opinions are gathered from persons with scientific, technical or other specialized knowledge, whose skill, experience, training or education may assist the Court to understand the evidence or determine the fact in issue. Many a times, the Court has to deal with circumstantial evidence and scientific and technical evidence often plays a pivotal role. Sir Francis Bacon, Lord Chancellor of England, in his Magnum Opus put forth the first theory of scientific method. Bacon's view was that a scientist should be disinterested observer of nature, collecting observations with a mind cleansed of harmful preconceptions that might cause error to creep into the scientific record. Distancing themselves from the theory of Bacon, the US Supreme Court in ***Daubert v. Merrell Dow Pharmaceuticals*** Inc. 509 U.S. 579 (1993) held as follows:

> Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a process for proposing and refining theoretical explanations about the world that are subject to further testing and refinement.

30. ***Daubert*** gives much emphasis on Sir Karl Popper (an Austrian philosopher), who unlike Bacon believed that all science begins with a prejudice, theory or hypothesis and formulating the theory is the creative part of science, which cannot be analyzed within the realm of philosophy. Later, Thomas Kunh, a Physicist, who popularized the word 'paradigm' expressed the view that scientific work comprises an agreed upon set of assumptions, methods, language, etc. Neither Bacon, Popper nor Kunh, it is generally believed, gave a prefect description of what science is and how it works, but the US Supreme Court in ***Daubert*** identified four non-definitive factors that were thought to be illustrative of characteristics of scientific knowledge, testability or falsifiability, peer review, a known or potential error rate and general acceptance within the scientific community. Few additional factors were also subsequently noticed that if the relationship of the technique to methods that have been established to be reliable, the qualifications of the expert witness testifying based on the methodology, the non-judicial uses of the method, logical or internal consistency of the hypothesis, consistency of the hypothesis with accepted authorities and presumption of the hypothesis or theory.

DNA AND IDENTITY OF SKELETON

31. We have already referred to the evidence of PW20, who conducted the post-mortem examination. PW 21, Dr. G.V. Rao, Chief of the DNA Fingerprinting Laboratory, conducted the DNA isolation on the basis of samples of blood of Allan Jack Routley and femur and humerus bones of skeleton. PW21 deposed that he was satisfied regarding authenticity of the seal and its intactness. PW21 adopted the test known as Short Tandem Space Repeats (S.T.R.) analysis, which is stated to be a conclusive test, produces results even on degraded biological samples. Fingerprinting analysis was carried out by STR analysis and on perusal of STR profile of the source (Allan Jack Routley) with the sources of femur and humerus bones of Diana, it was concluded that the source of Allan Jack Routley is biologically related to the sources of femur and humerus bones.

32. Counsel appearing for the Appellant, as already indicated, questioned the reliability of DNA report and its admissibility in criminal investigation. It was pointed out that DNA is known for being susceptible to damage from moisture, heat, infrared radiation etc. and that may degrade the sample of DNA. Further, it was pointed out that during carriage, during its storage at police stations or laboratories, it is prone to contamination and, therefore, the extent of absoluteness can never be attributed to DNA results.

33. We are in this case concerned with the acceptability of the DNA report, the author of which (PW21) was the Chief of DNA Printing Lab, CDFD, Hyderabad. The qualifications or expertise of PW21 was never in doubt. The method he adopted for DNA testing was STR analysis. Post-mortem examination of the body remains (skeleton) of Diana was conducted by Dr. C.B. Tripathi, Professor and Head of Department of Forensic Medical I.M.S., B.H.U., Varanasi. For DNA analysis, one femur and one humerus bones were preserved so as to compare with blood samples of Allen Jack Routley. In cases where skeleton is left, the bones and teeth make a very important source of DNA. Teeth, as often noticed is an excellent source of DNA, as it forms a natural barrier against exogenous DNA contamination and are resistant to environmental assaults. The blood sample of the father of Diana was taken in accordance with the set up precept and procedure for DNA isolation test and the same was sent along with

taken out femur and humerus bones of recovered skeleton to the Centre for D.N.A. Fingerprinting and Diagnostics (CDFD), Ministry of Science and Technology, Government of India, Hyderabad. PW21, as already indicated, conducted the DNA Isolation test on the basis of samples of blood of Routley and femur and humerus bones of skeleton and submitted his report dated 28.10.1998. DNA Fingerprinting analysis was carried out by STR analysis and on comparison of STR profile of Routley. When DNA profile of sample found at the scene of crime matches with DNA profile of the father, it can be concluded that both the samples are biologically the same.

34. The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. The most important role of DNA profile is in the identification, such as an individual and his blood relations such as mother, father, brother, and so on. Successful identification of skeleton remains can also be performed by DNA profiling. DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory. Close relatives have more genes in common than individuals and various procedures have been proposed for dealing with a possibility that true source of forensic DNA is of close relative. So far as this case is concerned, the DNA sample got from the skeleton matched with the blood sample of the father of the deceased and all the sampling and testing have been done by experts whose scientific knowledge and experience have not been doubted in these proceedings. We have, therefore, no reason to discard the evidence of PW19, PW20 and PW21. Prosecution has, therefore, succeeded in showing that the skeleton recovered from the house of the accused was that of Diana daughter of Allen Jack Routley and it was none other than the accused, who had strangulated Diana to death and buried the dead body in his house.

35. The accused, in his examination Under Section 313 Code of Criminal Procedure, had denied the prosecution case completely, but the prosecution has succeeded in proving the guilt beyond reasonable doubt. Often, false answers given by the accused in the 313 Code of Criminal Procedure statement may offer an additional link in the chain of circumstances to complete the chain. See ***Anthony D'souza v.State of Karnataka*** : (2003) 1 SCC 259. We are, therefore, of the considered view that both the trial Court as well as the High Court have correctly appreciated the oral and documentary evidence in this case and correctly recorded the conviction and we are now on sentence.

36. We may now consider whether the case falls under the category of rarest of the rare case so as to award death sentence for which, as already held, in ***Shankar Kisanrao Khade v. State of Maharashtra***: (2013) 5 SCC 546 this Court laid down three tests, namely,

Crime Test, Criminal Test and RR Test. So far as the present case is concerned, both the Crime Test and Criminal Test have been satisfied as against the accused. Learned Counsel appearing for the accused, however, submitted that he had no previous criminal records and that apart from the circumstantial evidence, there is no eye-witness in the above case, and hence, the manner in which the crime was committed is not in evidence. Consequently, it was pointed out that it would not be possible for this Court to come to the conclusion that the crime was committed in a barbaric manner and, hence the instant case would not fall under the category of rarest of rare. We find some force in that contention. Taking in consideration all aspects of the matter, we are of the view that, due to lack of any evidence with regard to the manner in which the crime was committed, the case will not fall under the category of rarest of rare case. Consequently, we are inclined to commute the death sentence to life and award 20 years of rigorous imprisonment, over and above the period already undergone by the accused, without any remission, which, in our view, would meet the ends of justice.

37. The Appeal is disposed of as above, altering the death sentence to that of life for the term mentioned above.

Jitendra Singh @ Babboo Singh v. State of U.P.[1]

Madan B. Lokur, J.

Three principal issues arise for consideration in this appeal. The first is whether the Appellant was a juvenile or a child as defined by Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 on the date of occurrence of the offence he was charged with. On a consideration of the Report called for by this Court on this question, the issue must be answered in the affirmative.

The second is whether the conviction of the Appellant can be sustained on merits and, if so, the sentence to be awarded to the Appellant. In our opinion the conviction of the Appellant must be upheld and on the quantum of sentence, he ought to be dealt with in accordance with the provisions of Section20 of the Juvenile Justice (Care and Protection of Children) Act, 2000 read with Section 15 thereof.

The third question is whether any appropriate measures can be taken to prevent the recurrence of a situation, such as the present, where an accused is subjected to a trial by a regular Court having criminal jurisdiction but he or she is later found to be a juvenile. In this regard, we propose to give appropriate directions to all Magistrates which, we hope, will prevent such a situation from arising again.

The facts:

On the midnight of 23rd/24th May 1988 it is alleged that Asha Devi was set on fire by the Appellants and two other persons. A demand for dowry, which she was unable to meet, resulted in the unfortunate incident.

On 24th May 1988 at about 5 a.m., Asha Devi's uncle came to know of the incident and he lodged a complaint with the local police. In the meanwhile, Asha Devi had been taken to the District Hospital where she succumbed to the burns.

After completing the investigation, the local police filed a charge sheet on 10th July 1988 against the Appellants and two other persons. The charge sheet alleged offences committed Under Section 147, Section 302, Section 304-B and Section 498-A of the Indian Penal Code (for short the 'Indian Penal Code').

[1] T.S. Thakur and Madan B. Lokur, JJ. (DB), Criminal Appeal No. 763 of 2003, Decided On: 10.07.2013, MANU/SC/0679/2013; 2015VII AD (S.C.) 92, 2013 (83) ALLCC 651, 2013ALLMR(Cri)2984, 2013ALLMR(Cri)2984(SC), 2013(3)ALT(Cri)129, II(2013)DMC795, JT2013(11)SC152, 2013(3)RCR(Criminal)819, 2013(9)SCALE18, 2013(3)UC1643.

Thereafter the case proceeded to trial and the Sessions Judge, Rae Bareli in S.T. No. 186 of 1988 delivered judgment on 30th August 1990 convicting the Appellants and acquitting the other two persons. The Appellants were convicted Under Section 304-B of the Indian Penal Code (dowry death) and sentenced to undergo 7 years rigorous imprisonment. They were also convicted Under Section 498-A of the Indian Penal Code (husband or relative of husband of a woman subjecting her to cruelty) and sentenced to undergo 2 years rigorous imprisonment and to pay a fine of Rs. 100/- each.

Feeling aggrieved by their conviction and sentence, the Appellants preferred Criminal Appeal No. 464 of 1990 in the Lucknow Bench of the Allahabad High Court. By its judgment and order dated 23rd May 2003 the High Court dismissed the Criminal Appeal. This is reported as : 2003 (3) ACR 2431.

Against the judgment and order passed by the Allahabad High Court the Appellants came up in appeal to this Court. It may be mentioned that during the pendency of this appeal the second Appellant (father of the first Appellant) died and therefore only the appeal filed by the first Appellant, the husband of Asha Devi, survives.

During the pendency of these proceedings the Appellant filed Criminal Miscellaneous Petition No. 16974 of 2010 for raising additional grounds. He sought to contend that on the date of commission of the offence, he was a juvenile or child within the meaning of that expression as defined in Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the 'Act'). According to the Appellant his date of birth was 31st August 1974 and therefore, when the offence is alleged to have been committed, he was about 14 years of age.

The application for urging additional grounds was considered by this Court and by an order dated 19thNovember 2010 it was held, while relying upon ***Pawan v. State of Uttaranchal*** : (2009) 15 SCC 259 that *prima facie* there was material which necessitated an inquiry into the claim of the Appellant that he was a juvenile at the time of commission of the offence. Accordingly, the following direction was given:

> "In the result we allow the Appellant to urge the additional ground regarding juvenility of the Appellant on the date of the commission of the offence and direct the Trial Court to hold an enquiry into the said question and submit a report as expeditiously as possible, but not later than four months from today. We make it clear that the Trial Court shall be free to summon the concerned School, Panchayat or the Electoral office record or any other record from any other source which it considers necessary for a proper determination of the age of the Appellant. We also make it clear that in addition to the above, the Trial Court shall be free to constitute a Medical Board comprising at least three experts on the subject for determination of the age of the Appellant, based on medical tests and examination."

Report of the Additional Sessions Judge:

The Additional Sessions Judge, Rae Bareli acted on the order dated 19th November 2010 and registered the proceedings as Miscellaneous Case No. 1 of 2010. He then submitted his Report dated 18th February 2011 in which he accepted the claim of the Appellant that his date of birth was 31st August 1974. As such, the Appellant was a juvenile on the date of commission of the offence.

For the purposes of preparing his Report, the Additional Sessions Judge examined several witnesses including A.P.W. 1 Samar Bahadur Singh, Principal, Pre-Middle School, Sohai Bagh who produced the school admission register pertaining to the admission of the Appellant in the school. The register showed the date of birth of the Appellant as 31st August 1974 and the Additional Sessions Judge found that the register had not been tampered with.

The Additional Sessions Judge also examined A.P.W. 11 Dr. Birbal who was a member of the Medical Board constituted by him. The Medical Board examined the Appellant on 24th December 2010 and gave his age as about 40 years. Reference in this context was also made to an ossification test conducted on the Appellant while he was in judicial custody in the District Jail in Rae Bareli during investigation of the case. The ossification test was conducted on 8th July 1988 and that determined the Appellant's age as about 17 years.

At this stage, it may be mentioned that on the basis of the ossification test the Appellant had applied for bail before the Additional Sessions Judge in Rae Bareli being Bail Application No. 435 of 1988. The Additional Sessions Judge noted that while the age of the Appellant was determined at about 17 years by the Chief Medical Officer, there could be a difference of about 2 years either way and therefore by an order dated 13th July 1988 the application for bail was rejected.

The Appellant then moved the Lucknow Bench of the Allahabad High Court by filing a bail application which was registered as Criminal Miscellaneous Case No. 1859(B) of 1988. By an order dated 25thNovember 1988 the Allahabad High Court granted bail to the Appellant while holding, *inter alia*, that it was difficult to discard the opinion of the Chief Medical Officer regarding the Appellant's age.

Coming back to the Report, the Additional Sessions Judge also examined A.P.W. 5 Pankulata the younger sister of deceased Asha Devi. She stated that Asha Devi was about 4 or 5 years older than the Appellant and that it was not unknown, apparently in their community, for the wife to be older than the husband. The record of the case shows that Asha Devi died at the age of about 19 after having been married for about 41/2 years. This would mean that the Appellant was married to Asha Devi when he was about 9 years old and that on the date of the incident he was about 14 years old.

The Additional Sessions Judge also examined A.P.W. 8 Sanoj Singh, husband of Pankulata, who gave a statement in tune with that of his wife. The Additional Sessions Judge also examined A.P.W. 9 Narendra Bahadur Singh husband of A.P.W. 10 Kanti Singh. All these witnesses stated to the effect that apparently in their community the wife is normally older than the husband at the time of marriage. All these persons also produced proof of their age to show that the wife (A.P.W. 5 Pankulata and A.P.W. 10 Kanti Singh) was older than her husband at the time of their marriage.

On the basis of the material before him, the Additional Sessions Judge accepted the claim of the Appellant that he was younger than his wife at the time of marriage and that his date of birth was 31stAugust 1974.

Objections have been filed to this Report by the **State** of Uttar Pradesh, but the only objection taken is that the documents pertaining to the education of the Appellant were produced after a great delay and not immediately. It was also submitted that it is improbable that a girl of about 15 years of age would get married to a boy of about 9 years of age.

The Report given by the Additional Sessions Judge has been examined with the assistance of learned Counsel and there is no reason to reject it. While the circumstances are rather unusual, the fact remains that there is documentary evidence to show from the school admission register (which has not been tampered with) that the date of birth of the Appellant is 31st August 1974. That apart, the medical examination of the Appellant conducted on 8th July 1988 less than two months after the incident, also shows his age to be about 17 years. This was not doubted by the Additional Session Judge while rejecting the bail application of the Appellant and was also not doubted by the Allahabad High Court while granting bail to him. Therefore, it does appear that the Appellant was about 17 years of age when the incident had occurred and that he had set up a claim of being a juvenile or child soon after his arrest and before the charge sheet was filed. In other words, the Appellant was a juvenile or a child within the meaning of that expression as defined in Section 2(k) of the Act.

Should the conviction be upheld:

The next question that arises is whether the conviction of the Appellant is justified or not. Before examining the evidence on record, it is necessary to mention that both the Trial Court as well as the High Court have concurrently found that the Appellants had demanded dowry from Asha Devi and that she had been set on fire for not having complied with the demands for dowry.

Section 304-B of the Indian Penal Code which is the more serious offence for which the Appellant has been found guilty, reads as follows:

> **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 subjected 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 the 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.

A plain reading of this section, which explains a dowry death, makes it clear that its ingredients are (a) the death of a woman is caused by burns or a bodily injury or that it occurs otherwise than under normal circumstances; (b) the death takes place within seven years of her marriage; (c) the woman was subjected, soon before her death, to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry.

In the present case, both the Trial Court and the High Court have found that Asha Devi had died of burn injuries as per the medical evidence; she had been set on fire on the midnight of 23/24 May 1988 and taken to the hospital at about 4 a.m. On 24th May 1988 where she succumbed to the burn injuries at about 5.30 a.m.; she had been married to the Appellant for about 41/2 years before her death; and that the evidence of PW-1 Ram Bahadur (uncle of Asha Devi) and PW-3 Tej Bahadur Singh (father of Asha Devi) disclosed that demands were being made by the Appellants for dowry soon before her death. Apart from cash, a demand was made by the in-laws of Asha Devi for a gold chain and a horse. Since the demands were not complied with, Asha Devi was frequently beaten and harassed. She had brought this to the notice of her uncle as well as her father. In fact, before her demise, she had written a letter to her father about the beating and harassment given to her due to the inability to meet the dowry demands. The letter was proved by the prosecution and was relied on by the Trial Court as well as the High Court in accepting the version of the prosecution. Clearly, therefore, the ingredients of Section 304-B of the Indian Penal Code were made out.

However, the case put up by the Appellant was that Asha Devi had accidentally caught fire while she was cooking and therefore it was a case of accidental death. This was not accepted by both the Trial Court as well as the High Court since there was no explanation given for the delay of about 4 hours in taking Asha Devi to the hospital if the case was really one of accidental death. Moreover, there was nothing to suggest that the Appellant or anyone in the family had made any attempt to extinguish the fire.

There is no doubt, on the basis of the facts found by the Trial Court as well as the High Court from the evidence on record that a case of causing a dowry death had convincingly been made out against the Appellant. There is no apparent reason to disturb the concurrent findings of fact

arrived at by the Trial Court and the High Court and so the conviction of the Appellant must be upheld.

Sentence to be awarded:

On the sentence to be awarded to a convict who was a juvenile when he committed the offence, there is a dichotomy of views.

In the first category of cases, the conviction of the juvenile was upheld but the sentence quashed. In ***Jayendra v. State of Uttar Pradesh*** (1981) 4 SCC 149 the conviction of the Appellant was confirmed though he was held to be a child as defined in Section 2(4) of the Uttar Pradesh Children Act, 1951. However, he was not sent to an 'approved school' since he was 23 years old by that time. His sentence was quashed and he was directed to be released forthwith.

Similarly, in ***Bhoop Ram v. State of U.P.*** : (1989) 3 SCC 1 this Court followed Jayendra and while upholding the conviction of the Appellant who was 28 years old by that time, the sentence awarded to him was quashed.

In ***Pradeep Kumar v. State of U.P.*** : 1995 Supp (4) SCC 419 yet another case under the Uttar Pradesh Children Act, 1951 the conviction of the Appellant was upheld but since he was 30 years old by that time, his sentence was set aside.

In ***Bhola Bhagat and other v. State of Bihar*** : (1997) 8 SCC 720 the conviction of the Appellant was upheld by this Court but the sentence was quashed keeping in mind the provisions of the Bihar Children Act, 1970 read with the Bihar Children Act, 1982 and the Juvenile Justice Act, 1986.

In ***Upendra Kumar v. State of Bihar*** : (2005) 3 SCC 592 this Court followed Bhola Bhagat and upheld the conviction of the Appellant but quashed the sentence awarded to him.

In ***Gurpreet Singh v. State of Punjab*** : (2005) 12 SCC 615 one of the Appellants was a juvenile within the meaning of that expression occurring in Section 2(h) of the Juvenile Justice Act, 1986. This Court held that if the accused was a juvenile on the date of occurrence and continues to be so, then in that event he would have to be sentenced to a juvenile home. However, if on the date of sentence, the accused is no longer a juvenile, the sentence imposed on him would be liable to be set aside. In this context, reference was made to ***Bhoop Ram***.

Finally in ***Vijay Singh v. State of Delhi*** : (2012) 8 SCC 763 the conviction of the Appellant was upheld but the sentence was quashed since he was about 30 years old by that time.

The second category of cases includes ***Satish @ Dhanna v. State of Madhya Pradesh***: (2009) 14 SCC 187 wherein the conviction of the Appellant was upheld but the sentence awarded was modified to the period of detention already undergone. Similarly, in ***Dharambir v.State (NCT of Delhi)*** : (2010) 5 SCC 344 the conviction of the Appellant was sustained but since the convict

had undergone two years and four months of incarceration, the sentence awarded to him was quashed.

The third category of cases includes ***Hari Ram v. State of Rajasthan*** : (2009) 13 SCC 211 wherein the Appellant was held to be a juvenile on the date of commission of the offence. His appeal against his conviction was allowed and the entire case remitted to the Juvenile Justice Board for disposal in accordance with law.

In ***Daya Nand v. State of Haryana*** : (2011) 2 SCC 224 this Court followed Hari Ram and directed the Appellant to be produced before the Juvenile Justice Board for passing appropriate orders in accordance with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000.

The fourth category of cases includes ***Ashwani Kumar Saxena v. State of Madhya Pradesh***: (2012) 9 SCC 750 in which the conviction of the Appellant was upheld and the records were directed to be placed before the Juvenile Justice Board for awarding suitable punishment to the Appellant.

The sum and substance of the above discussion is that in one set of cases this Court has found the juvenile guilty of the crime alleged to have been committed by him but he has gone virtually unpunished since this Court quashed the sentence awarded to him. In another set of cases, this Court has taken the view, on the facts of the case that the juvenile is adequately punished for the offence committed by him by serving out some period in detention. In the third set of cases, this Court has remitted the entire case for consideration by the jurisdictional Juvenile Justice Board, both on the innocence or guilt of the juvenile as well as the sentence to be awarded if the juvenile is found guilty. In the fourth set of cases, this Court has examined the case on merits and after having found the juvenile guilty of the offence, remitted the matter to the jurisdictional Juvenile Justice Board on the award of sentence.

In our opinion, the course to adopt is laid down in Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000. This reads as follows:

> **20. Special provision in respect of pending cases.**--Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence:
>
> Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

Explanation.-In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of Clause (*l*) of Section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.

It is clear that the case of the juvenile has to be examined on merits. If it found that the juvenile is guilty of the offence alleged to have been committed, he simply cannot go unpunished. However, as the law stands, the punishment to be awarded to him or her must be left to the Juvenile Justice Board constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000. This is the plain requirement of Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000. In other words, ***Ashwani Kumar Saxena*** should be followed.

In the present case, the offence was committed by the Appellant when the Juvenile Justice Act, 1986 was in force. Therefore, only the 'punishments' not greater than those postulated by the Juvenile Justice Act, 1986 ought to be awarded to him. This is the requirement of Article 20(1) of the Constitution. The 'punishments' provided under the Juvenile Justice Act, 1986 are given in Section 21 thereof and they read as follows:

21. Orders that may be passed regarding delinquent juveniles.--(1) Where a Juvenile Court is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Juvenile Court may, if it so thinks fit,--

(*a*) allow the juvenile to go home after advice or admonition;

(*b*) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety as that Court may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years; Juvenile Justice Act, 1986

(*c*) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(*d*) make an order directing the juvenile to be sent to a special home,--

(*i*) in the case of a boy over fourteen years of age or of a girl over sixteen years of age, for a period of not less than three years;

(*ii*) in the case of any other juvenile, for the period until he ceases to be a juvenile:

Provided that xxx xxx xxx.

Provided further that xxx xxx xxx;

(e) order the juvenile to pay a fine if he is over fourteen years of age and earns money.

(2) Where an order under Clause (b), Clause (c) or Clause (e) of Sub-section (1) is made, the Juvenile Court may, if it is of opinion that in the interests of the juvenile and of the public it is expedient so to do, in addition make an order that the delinquent juvenile shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the delinquent juvenile:

Provided that xxx xxx xxx.

(3) xxx xxx xxx.

(4) xxx xxx xxx.

A perusal of the 'punishments' provided for under the Juvenile Justice Act, 1986 indicate that given the nature of the offence committed by the Appellant, advising or admonishing him [clause (a)] is hardly a 'punishment' that can be awarded since it is not at all commensurate with the gravity of the crime. Similarly, considering his age of about 40 years, it is completely illusory to expect the Appellant to be released on probation of good conduct, to be placed under the care of any parent, guardian or fit person [clause (b)]. For the same reason, the Appellant cannot be released on probation of good conduct under the care of a fit institution [clause (c)] nor can he be sent to a special home Under Section 10 of the Juvenile Justice Act, 1986 which is intended to be for the rehabilitation and reformation of delinquent juveniles [clause (d)]. The only realistic punishment that can possibly be awarded to the Appellant on the facts of this case is to require him to pay a fine under Clause (e) of Section 21 (1) of the Juvenile Justice Act, 1986.

While dealing with the case of the Appellant under the Indian Penal Code, the fine imposed upon him is only Rs. 100/-. This is ex facie inadequate punishment considering the fact that Asha Devi suffered a dowry death.

Recently, one of us (T.S. Thakur, J.) had occasion to deal with the issue of compensation to the victim of a crime. An illuminating and detailed discussion in this regard is to be found in ***Ankush Shivaji Gaikwad v. State of Maharashtra*** : 2013 (6) SCALE 778. Following the view taken therein read with the provisions of Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000 the appropriate course of action in the present case would be to remand the matter to the jurisdictional Juvenile Justice Board constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000 for determining the appropriate quantum of fine that

should be levied on the Appellant and the compensation that should be awarded to the family of Asha Devi.

Avoiding a recurrence:

How can a situation such as the one that has arisen in this case (and in several others in the past) be avoided? We need to only appreciate and understand a few provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (the Act) and the Model Rules framed by the Government of India called the Juvenile Justice (Care and Protection of Children) Rules, 2007 (the Rules).

The preamble to the Act draws attention to the Convention on the Rights of the Child which was ratified by the Government of India on 11th December 1992. The Convention has prescribed, *inter alia*, a set of standards to be adhered to in securing the best interests of the child. For the present purposes, it is not necessary to detail those standards. However, keeping this in mind, several special procedures, over and above or despite the Code of Criminal Procedure (for short the Code) have been laid down for the benefit of a juvenile or a child in conflict with law. These special procedures are to be found both in the Act as well as in the Rules. Some (and only some) of them are indicated below.

A Juvenile Justice Board is constituted Under Section 6 of the Act to deal exclusively with all proceedings in respect of a juvenile in conflict with law. When a juvenile charged with an offence is produced before a Juvenile Justice Board, it is required to hold an inquiry (not a trial) and pass such orders as it deems fit in connection with the juvenile (Section 14 of the Act).

A juvenile or a child in conflict with law cannot be kept in jail but may be temporarily received in an Observation Home during the pendency of any inquiry against him (Section 8 of the Act). If the result of the inquiry is against him, the said juvenile may be received for reception and rehabilitation in a Special Home (Section 9 of the Act). The maximum period for reception and rehabilitation in a Special Home is three years (Section 15 of the Act). Even this, in terms of Article 37 of the Convention on the Rights of the Child, shall be a measure of last resort.

The provision dealing with bail (Section 12 of the Act) places the burden for denying bail on the prosecution. Ordinarily, a juvenile in conflict with law shall be released on bail, but he may not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

Orders that may be passed by a Juvenile Justice Board against a juvenile, if it is satisfied that he has committed an offence, are mentioned in Section 15 of the Act. One of the orders that may be passed, as mentioned above, is for his reception and rehabilitation in a Special Home for a period of three years, as a measure of last resort.

The Rules, particularly Rule 3, provide, *inter alia*, that in all decisions taken within the context of administration of justice, the principle of best interests of a juvenile shall be the primary consideration. What this means is that "the traditional objectives of criminal justice, that is retribution and repression, must give way to rehabilitative and restorative objectives of juvenile justice". The right to privacy and confidentiality of a juvenile is required to be protected by all means and through all the stages of the proceedings, and this is one of the reasons why the identity of a juvenile in conflict with law is not disclosed. Following the requirements of the Convention on the Rights of the Child, Rule 3 provides that institutionalization of a child or a juvenile in conflict with law shall be the last resort after a reasonable inquiry and that too for the minimum possible duration.

> Rule 32 provides that:
>
> The primary aim of rehabilitation and social reintegration is to help children in restoring their dignity and self-worth and mainstream them through rehabilitation within the family where possible, or otherwise through alternate care programmes and long-term institutional care shall be of last resort.

It is quite clear from the above that the purpose of the Act is to rehabilitate a juvenile in conflict with law with a view to reintegrate him into society. This is by no means an easy task and it is worth researching how successful the implementation of the Act has been in its avowed purpose in this respect.

As regards procedurally dealing with a juvenile in conflict with law, the Rules require the concerned State Government to set up in every District a Special Juvenile Police Unit to handle the cases of juveniles or children in terms of the provisions of the Act (Rule 84). This Unit shall consist of a juvenile or child welfare officer of the rank of Police Inspector having an aptitude and appropriate training and orientation to handle such cases. He will be assisted by two paid social workers having experience of working in the field of child welfare of which one of them shall be a woman.

Rule 75 of the Rules requires that while dealing with a juvenile or a child, except at the time of arrest, a police officer shall wear plain clothes and not his uniform.

The Act and the Model Rules clearly constitute an independent code for issues concerning a child or a juvenile, particularly a juvenile in conflict with law. This code is intended to safeguard the rights of the child and a juvenile in conflict with law and to put him in a category separate and distinct from an adult accused of a crime.

Keeping in mind all these standards and safeguards required to be met as per our international obligations, **it becomes obligatory for every Magistrate before whom an accused is produced to ascertain, in the first instance or as soon thereafter as may be possible, whether the accused person is an adult or a juvenile in conflict with law.** The reason for this,

obviously, is to avoid a two-fold difficulty: first, to avoid a juvenile being subjected to procedures under the normal criminal law and de hors the Act and the Rules, and second, a resultant situation, where the "trial" of the juvenile is required to be set aside and quashed as having been conducted by a court not having jurisdiction to do so or a juvenile, on being found guilty, going 'unpunished'. This is necessary not only in the best interests of the juvenile but also for the better administration of criminal justice so that the Magistrate or the Sessions Judge (as the case may be) does not waste his time and energy on a "trial".

It must be appreciated by every Magistrate that when an accused is produced before him, it is possible that the prosecution or the investigating officer may be under a mistaken impression that the accused is an adult. **If the Magistrate has any iota of doubt about the juvenility of an accused produced before him, Rule 12 provides that a Magistrate may arrive at a *prima facie* conclusion on the juvenility, on the basis of his physical appearance. In our opinion, in such a case, this *prima facie* opinion should be recorded by the Magistrate.** Thereafter, if custodial remand is necessary, the accused may be sent to jail or a juvenile may be sent to an Observation Home, as the case may be, and the Magistrate should simultaneously order an inquiry, if necessary, for determining the age of the accused. Apart from anything else, it must be appreciated that such an inquiry at the earliest possible time, would be in the best interests of the juvenile, since he would be kept away from adult under-trial prisoners and would not be subjected to a regimen in jail, which may not be conducive to his well being. As mentioned above, it would also be in the interests of better administration of criminal justice. **It is, therefore, enjoined upon every Magistrate to take appropriate steps to ascertain the juvenility or otherwise of an accused person brought before him or her at the earliest possible point of time, preferably on first production**.

It must also be appreciated that due to his juvenility, a juvenile in conflict with law may be presumed not to know or understand the legal procedures making it difficult for him to put forth his claim for juvenility when he is produced before a Magistrate. Added to this are the factors of poor education and poor economic set up that are jointly the main attributes of a juvenile in conflict with law, making it difficult for him to negotiate the legal procedures. We say this on the strength of studies conducted, and which have been referred to by one of us (T.S. Thakur, J) in ***Abuzar Hossain v. State of West Bengal*** : (2012) 10 SCC 489. It is worth repeating what has been said:

> Studies conducted by National Crime Records Bureau (NCRB), Ministry of Home Affairs, reveal that poor education and poor economic set up are generally the main attributes of juvenile delinquents. Result of the 2011 study further show that out of 33,887 juveniles arrested in 2011, 55.8% were either illiterate (6,122) or educated only till the primary level (12,803). Further, 56.7% of the total juveniles arrested fell into the lowest income category. A similar study is conducted and published by B.N. Mishra in

his Book 'Juvenile Delinquency and Justice System', in which the author **states** as follows:

One of the prominent features of a delinquent is poor educational attainment. More than 63 per cent of delinquents are illiterate. Poverty is the main cause of their illiteracy. Due to poor economic condition they were compelled to enter into the labour market to supplement their family income. It is also felt that poor educational attainment is not due to the lack of intelligence but may be due to lack of opportunity.

Such being the position, it is difficult to expect a juvenile in conflict with law to know his rights upon apprehension by a police officer and if the precautions that have been suggested are taken, the best interests of the child and thereby of society will be duly served. Therefore, **it may be presumed, by way of a benefit of doubt that because of his status, a juvenile may not be able to raise a claim for juvenility in the first instance and that is why it becomes the duty and responsibility of the Magistrate to look into this aspect at the earliest point of time in the proceedings before him.** We are of the view that this may be a satisfactory way of avoiding the recurrence of a situation such as the one dealt with.

We may add that our international obligations as laid down in the Convention on the Rights of the Child and the Beijing Rules require the involvement of the parents or legal guardians in the legal process concerning a juvenile in conflict with law. For example, a reference may be made to Article 40 of the Convention and Principles 7, 10 and 15 of the Beijing Rules. That this is not unusual is clear from the fact that in civil disputes, our domestic law requires a minor to be represented by a guardian.

The remedy:

In ***D.K. Basu v. State of West Bengal*** : (1997) 1 SCC 416 this Court laid down some important requirements for being adhered to by the police "in all cases of arrest or detention till legal provisions are made in that behalf as *preventive measures*". The Code of Criminal Procedure has since been amended and some of the important requirements laid down by this Court have been given statutory recognition. These are equally applicable, *mutatis mutandis*, to a child or a juvenile in conflict with law.

Attention may be drawn to Section 41-B of the Code which requires a police officer making an arrest to prepare a memorandum of arrest which shall be attested by at least one witness who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made. The police officer is also mandated to inform the arrested person, if the memorandum of arrest is not attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest. Section 41-B of the Code reads as follows:

41-B. Procedure of arrest and duties of officer making arrest.-- Every police officer while making an arrest shall--

(*a*) bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(*b*) prepare a memorandum of arrest which shall be--

(*i*) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;

(*ii*) countersigned by the person arrested; and

(*c*) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest.

Every police officer making an arrest is also obliged to inform the arrested person of his rights including the full particulars of the offence for which he has been arrested or other grounds for such arrest (Section50 of the Code), the right to a counsel of his choice and the right that the police inform his friend, relative or such other person of the arrest. Section 50-A of the Code is relevant in this regard and it reads as follows:

50-A. Obligation of person making arrest to inform about the arrest, etc., to a nominated person.--(1) Every police officer or other person making any arrest under this Code shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may be disclosed or nominated by the arrested person for the purpose of giving such information.

(2) The police officer shall inform the arrested person of his rights under Sub-section (1) as soon as he is brought to the police station.

(3) An entry of the fact as to who has been informed of the arrest of such person shall be made in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government.

(4) It shall be the duty of the Magistrate before whom such arrested person is produced, to satisfy himself that the requirements of Sub-section (2) and Sub-section (3) have been complied with in respect of such arrested person.

When any person is arrested, it is obligatory for the arresting authority to ensure that he is got examined by a medical officer in the service of the Central or the **State** Government or by a registered medical practitioner. The medical officer or registered medical practitioner is

mandated to prepare a record of such examination including any injury or mark of violence on the person arrested. Section 54 of the Code reads as follows:

> **54. Examination of arrested person by medical officer.**--(1) When any person is arrested, he shall be examined by a medical officer in the service of Central or **State** Government, and in case the medical officer is not available, by a registered medical practitioner soon after the arrest is made:
>
> Provided that where the arrested person is a female, the examination of the body shall be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner.
>
> (2) The medical officer or a registered medical practitioner so examining the arrested person shall prepare the record of such examination, mentioning therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted.
>
> (3) Where an examination is made under Sub-section (1), a copy of the report of such examination shall be furnished by the medical officer or registered medical practitioner, as the case may be, to the arrested person or the person nominated by such arrested person.

In our opinion, the procedures laid down in the Code, in as much as they are for the benefit of a juvenile or a child, apply with full rigour to an apprehension made of a juvenile in conflict with law Under Section 10 of the Act. If these procedures are followed, the probability of a juvenile, on apprehension, being shown as an adult and sent to judicial custody in a jail, will be considerably minimized. If these procedures are followed, as they should be, along with the requirement of a Magistrate to examine the juvenility or otherwise of an accused person brought before him, subjecting a juvenile in conflict with law to a trial by a regular Court may become a thing of the past.

Conclusion:

68. The Appellant was a juvenile on the date of the occurrence of the incident. His case has been examined on merits and his conviction is upheld. The only possible and realistic sentence that can be awarded to him is the imposition of a fine. The existing fine of Rs. 100/- is grossly inadequate. To this extent, the punishment awarded to the Appellant is set aside. The issue of the quantum of fine to be imposed on the Appellant is remitted to the jurisdictional Juvenile Justice Board. The jurisdictional Juvenile Justice Board is also enjoined to examine the compensation to be awarded, if any, to the family of Asha Devi in terms of the decision of this Court in ***Ankush Shivaji Gaikwad***.

Keeping in mind our domestic law and our international obligations, it is directed that the provisions of the Code of Criminal Procedure relating to arrest and the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 being the law of the land, should be scrupulously followed by the concerned authorities in respect of juveniles in conflict with law.

It is also directed that whenever an accused, who physically appears to be a juvenile, is produced before a Magistrate, he or she should form a *prima facie* opinion on the juvenility of the accused and record it. If any doubt persists, the Magistrate should conduct an age inquiry as required by Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 to determine the juvenility or otherwise of the accused person. In this regard, it is better to err on the side of caution in the first instance rather than have the entire proceedings reopened or vitiated at a subsequent stage or a guilty person go unpunished only because he or she is found to be a juvenile on the date of occurrence of the incident.

Accordingly, the matter is remanded to the jurisdictional Juvenile Justice Board constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000 for determining the appropriate quantum of fine that should be levied on the Appellant and the compensation that should be awarded to the family of Asha Devi. Of course, in arriving at its conclusions, the said Board will take into consideration the facts of the case as also the fact that the Appellant has undergone some period of incarceration.

The appeal is partly allowed with the directions given above.

T.S. Thakur, J.

I have had the advantage of going through the judgment and Order proposed by my Esteemed Brother Madan B. Lokur, J. The draft judgment formulates three issues for determination and answers them with remarkable lucidity. While I agree with the view taken by Brother Lokur, J. That the Appellant was a juvenile on the date of the commission of the offence within the meaning of Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (in short, the "2000 Act") and that his conviction ought to be upheld, I wish to add a few words of my own in support of that view. As regards issue of general directions for guidance of the Courts below, I do not have any serious conceptual or other disagreement with what has been proposed by my erudite Brother, for the proposed directions will promote the objects underlying the 2000 Act, and prevent anomalous situations in which juveniles in conflict with law may stand to get prejudiced because of their economic and other handicaps/because of proverbial law's delay.

The facts have been succinctly summarised in the draft judgment of Brother Lokur, J. Which do not bear repetition except to the extent the same is absolutely necessary to elucidate the narrative in which the issues arise for our consideration. The Appellant was, together with three others, tried for offences punishable Under Sections 302, 304-B and 498-A of the Indian Penal Code by the Sessions Judge, Rae Bareli, who by her judgment dated 30th August, 1990 convicted him and

his father Lal Bahadur Singh (since deceased) Under Section 304-B and sentenced both of them to undergo rigorous imprisonment for a period of seven years. They were also convicted Under Section 498-A of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of two years and a fine of Rs. 200/- each. The prosecution case against the Appellant and his co-accused was that they set on fire Asha Devi, who was none other than the wife of the Appellant, on the night intervening 23rd and 24th May, 1988. The motive for the commission of the offence was the alleged failure of the deceased Asha Devi and her parents to satisfy the Appellant's demand for dowry.

Aggrieved by their conviction and sentence the Appellant and his co-accused filed Criminal Appeal No. 464 of 1990, which failed and was dismissed by the High Court in terms of the order impugned in this appeal. Demise of the second Appellant during the pendency of the present appeal abated the proceedings qua him, leaving the Appellant to pursue the challenge mounted against the judgments and orders passed by the Courts below, by himself.

Seven years after the filing of the present appeal, the Appellant for the first time filed Crl. Misc. Petition No. 16974 of 2010 for permission to urge an additional ground to the effect that the Appellant was on the date of the commission of the offence a juvenile within the meaning of Section 2(k) of the 2000, Act. It was urged on the basis of a school certificate that the Petitioner was on the date of commission of the offence hardly 14 years of age, and hence a juvenile entitled to the protection of the Act aforementioned. By an order dated 19th November, 2010, this Court allowed the Criminal Miscellaneous Petition, permitted the Appellant to raise the additional plea and directed an inquiry into the claim of juvenility of the Appellant by the Trial Court.

The Trial Court accordingly conducted an inquiry, examined the relevant school record and, based on the entirety of the evidence including the medical evidence adduced in the course of the inquiry, held that according to the school certificate the age of the Appellant on the date of the incident in question was around 13 years 8 months on the date of the incident. In doing so the trial Court gave credence to the school certificate in preference to the medical examination and other equally compelling records touching upon the age of the Appellant like the Family Register maintained by the Panchayat and the Electoral rolls according to which the Appellant's age was above 16 years and below 17 1/2 years on the date of the occurrence. Although the Respondent has objected to the finding of the Trial Court and the Assessment of the age as on the date of the commission of the offence, I am inclined to go along with Lokur, J's finding as to age of the Appellant when His Lordship says:

> *... Therefore, it does appear that the Appellant was about 17 years of age when the incident had occurred and that he had set up a claim of being a juvenile or child soon after his arrest and before the charge sheet was filed. In other words, the Appellant was a juvenile or a child within the meaning of that expression as defined in Section 2(k) of the Act.*

I may, independent of the conclusion drawn by my esteemed brother, briefly state my reasons for holding that the Appellant was above sixteen years as on the date of the commission of the offence, no matter the enquiry report submitted by the Trial Court has held him to be less than 16 years on that date. But before I do so, it is important to mention that the question whether the Appellant was less or more than 16 is important not because the benefit of the 2000 Act depends on that question, but because the answer to that question has a bearing on whether the conviction of the Appellant was itself illegal, hence liable to be set aside. I say so because, the benefit of the 2000 Act, would be in any case available to the Appellant, so long as he was less than 18 years of age on the crucial date, and it is nobody's case that he was above that age on that date. The decision of this Court in ***Hari Ram v. State of Rajasthan***: (2009) 13 SCC 211 authoritatively settles the legal position in that regard when it says:

> *A juvenile who had not completed eighteen years on the date of commission of the offence was also entitled to the benefits of the Juvenile Justice Act, 2000, as if the provisions of Section 2(k) had always been in existence even during the operation of the 1986 Act.*

Equally important is the fact that the jurisdiction of the Court to try the Appellant, as indeed any other person accused of commission of an offence would have to be determined by reference to the legal position that prevailed as on the date the Court tried, convicted and sentenced the Appellant. It is common ground that as on the date of the commission of the offence and right up to the date the trial Court convicted and sentenced the Appellant to imprisonment, the provisions of Juvenile Justice Act, 1986 (in short, the "1986 Act") held the field. Apart from the fact that the upper age limit for claiming juvenility was 16 years for boys, the question whether a person was or was not a juvenile could be decided by the Court on the basis of documentary or medical evidence or on a fair Assessment of both of them. That is because, the provisions of 1986 Act, did not, prioritise the basis on which such determination could be made. It was left for the accused to produce evidence or the Court to direct a medical examination for determining his age. The weightage which the Rules framed under the 2000 Act provide and the order of preference settled for purposes of placing reliance upon evidence coming from different sources were not in vogue while the 1986 Act held the field. The result was that the Court was free to determine the question on the basis of one such piece of evidence or on a cumulative effect and on such evidence that may have been produced before it. It is necessary to bear in mind this dichotomy in the legal framework while determining whether the trial Court had committed an error of jurisdiction in holding the Appellant to be not a juvenile and hence triable by it.

The question whether the Appellant was a juvenile was first raised before the trial Court at a very early stage of the case. The Appellant had prayed for bail on that basis, which appears to have led the Court to direct Assessment of his age on the basis of a medical examination. The medical examination, however, determined the age of the Appellant to be 17 years, which took him beyond the upper age of juvenility under the 1986 Act. What is noteworthy is that no attempt was made by the Appellant to adduce any evidence to support his claim of being a juvenile nor

was any documentary evidence in the form of school certificate or otherwise adduced. As a matter of fact the chapter was totally forgotten, and the trial allowed to proceed to its logical conclusion without the Appellant raising his little finger against the competence of the Court or agitating the issue regarding his age in any higher forum. The conviction and sentence recorded by the trial Court was also assailed on merits before the High Court but not on the ground that the trial was vitiated on account of the Appellant being a juvenile, not triable by an ordinary criminal Court. It was only in this Court that long after the appeal was filed that a fresh claim for benefit under the 2000 Act was made by the Appellant in which this Court directed a fresh enquiry that was conducted in terms of Rule 12 of the Rules framed under the 2000 Act. The enquiry report submitted supports the Appellant's claim of his being a juvenile Under Section 2(k) of the 2000 Act, hence, entitled to the benefits admissible thereunder. Although an attempt was made by the Respondent-State to assail the finding that the Appellant was less than 18 years of age on the date of the occurrence, we do not see any cogent reason to hold that the Appellant was more than 18 years on the date of the occurrence. In my view, the determination of age of the Appellant, by the trial Court, on the basis of the first medical examination is fully supported and corroborated by the medical examination of the Appellant conducted in the course of the enquiry directed by this Court by our order dated 19th November, 2010. The medical examination conducted by the Board of Doctors has determined the Appellant's age to be 40 years as on 24th December, 2010 which implies that he was around 17 1/2 years old on the date of the occurrence. Super added to the medical evidence is the documentary evidence that has come to light in the course of the enquiry in the form of the Family Register (Ex. Ka-3) maintained by the Panchayat and proved by A.P.W.2-Gokaran Nath Tiwari, Gram Panchayat Officer. According to this witness who spoke from the register, the Appellant was born in the year 1969. The Electoral roll for the year 2009 for the constituency in which the Appellant's village falls, also mentions this age to be 37 years, implying thereby that he was around 17 years old on the date of the occurrence. Deposition of the Gram Sabha Head examined as PW-12 in the course of the enquiry is supportive of the age of the Appellant as given in the Electoral roll. The two medical examinations and the documents referred to above come from proper custody and lend complete corroboration to the Appellant's age being above 16 years on the date of the occurrence. Besides, what cannot be lightly brushed away is the fact that the Appellant was a married man on the date of the occurrence and that the charge levelled against him was one of dowry harassment and dowry death of his wife who was 19 years old at the time of her demise. If the Appellant was only 13 years and 8 months old as suggested by the school certificate the question of his harassing the deceased almost six years his senior would not arise for he would be only an adolescent while his wife-the deceased was a grown up girl who could hardly get harassed by a mere child so young in age that he had barely cut his teeth. The trial Court did not in that view commit any error of jurisdiction in trying the Appellant for the offences alleged against him.

The upshot of the above discussion is that while the Appellant was above 16 years of age on the date of the commission of the offence, he was certainly below 18 years and hence entitled to the benefit of the 2000 Act, no matter the later enactment was not on the statute book on the date of the occurrence. The difficulty arises when we examine whether the trial and the resultant order of conviction of the Appellant, would also deserve to be set aside as illegal and without jurisdiction. The conviction cannot however be set aside for more than one reason. Firstly because there was and is no challenge to the order of conviction recorded by the Courts below in this case either before the High Court or before us. As a matter of fact the plea of juvenility before this Court by way of an additional ground stopped short of challenging the conviction of the Appellant on the ground that the Court concerned had no jurisdiction to try the Appellant.

Secondly because the fact situation in the case at hand is that on the date of the occurrence i.e. On 24th May, 1988 the Appellant was above 16 years of age. He was, therefore, not a juvenile under the 1986 Act that covered the field at that point of time, nor did the 1986 Act deprive the trial Court of its jurisdiction to try the Appellant for the offence he was charged with. Repeal of the 1986 Act by the 2000 Act raised the age of juvenility to 18 years. Parliament provided for cases which were either pending trial or were, after conclusion of the trial, pending before an appellate or a revisional Court by enacting Section20 of the Juvenile Justice (Care and Protection) Act, 2000 which is to the following effect:

> ***20. Special provision in respect of pending cases.-*** *Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence.*
>
> *Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.*
>
> *Explanation.- In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of Clause (1) of Section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.*

A plain reading of the above brings into bold relief the following features that have a significant bearing on the controversy at hand:

(i) The provision starts with a non-obstante clause, which implies that the provisions have an overriding effect on all other provisions contained in the enactment.

(ii) The provision deals with proceedings pending against a juvenile in any court.

(iii) The provision sanctions the continuance of such pending proceedings in the very same court, as if the 2000 Act had not been enacted.

(iv) The provision requires the Court seized of the matter to record a finding as to whether the juvenile has committed an offence.

(**v**) If the finding is against the juvenile in that he is found to have committed an offence, the court is required to forebear from passing an order of sentence and instead forward the juvenile to the Board, which shall then pass an order in accordance with the provisions of the Act, as if it had been satisfied on inquiry under the Act that the juvenile had committed an offence.

(vi)In all pending cases including trial, revision, appeal or any other criminal proceedings the determination of juvenility shall be in terms of Clause (l) of Section 2 even if the juvenile ceases to be so on or before the date of commencement of the 2000 Act.

It is manifest, that a case that was pending before 'any Court' (which expression would include both the trial Court and the High Court) would continue in that Court, who would not only proceed with the trial and/or hearing of the case as if the 2000 Act was not on the Statute book but also record a finding as to the guilt or innocence of the juvenile. Far from stipulating a specific prohibition, the provisions of Section 20, make it obligatory for the Court concerned to proceed with the matter and record its conclusion as to the guilt or otherwise of the juvenile. The prohibition is against the Court passing an order of sentence against the juvenile, for which purpose the juvenile has to be forwarded to the Board for appropriate orders. That is precisely the view which this Court has taken in a line of decisions to which I may briefly refer at this stage.

In ***Pratap Singh v. State of Jharkhand and Anr.*** : (2005) 3 SCC 551, this Court while interpreting the provisions of Section 20 (supra) held that the same is attracted to cases where the person, if male, has ceased to be a juvenile under the 1986 Act being more than 16 years of age but had not yet crossed the age of 18 years. Such cases alone were within the comprehension of Section 20 of the Act, observed the Court, in which the Court seized of the matter was bound to record its conclusion, as to the guilt or innocence of the accused.

The Court said:

> *30. Section 20 of the Act as quoted above deals with the special provision in respect of pending cases and begins with non-obstante clause. The sentence "Notwithstanding*

anything contained in this Act all proceedings in respect of a juvenile pending in any Court in any area on date of which this Act came into force" has great significance. The proceedings in respect of a juvenile pending in any court referred to in Section 20 of the Act is relatable to proceedings initiated before the 2000 Act came into force and which are pending when the 2000 Act came into force. The term "any court" would include even ordinary criminal courts. If the person was a "juvenile" under the 1986 Act the proceedings would not be pending in criminal courts. They would be pending in criminal courts only if the boy had crossed 16 years or girl had crossed 18 years. This shows that Section 20 refers to cases where a person had ceased to be a juvenile under the 1986 Act but had not yet crossed the age of 18 years then the pending case shall continue in that Court as if the 2000 Act has not been passed and if the Court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile.

(Emphasis supplied)

To the same effect is the decision of this Court in ***Bijender Singh v. State of Haryana and Anr.***: (2005) 3 SCC 685, where this Court reiterated the legal position as to the true purpose of Section 20 in the following words:

8. One of the basic distinctions between the 1986 Act and the 2000 Act relates to age of males and females. Under the 1986 Act, a juvenile means a male juvenile who has not attained the age of 16 years, and a female juvenile who has not attained the age of 18 years. In the 2000 Act, the distinction between male and female juveniles on the basis of age has not been maintained. The age-limit is 18 years for both males and females.

9. A person above 16 years in terms of the 1986 Act was not a juvenile. In that view of the matter the question whether a person above 16 years becomes "juvenile" within the purview of the 2000 Act must be answered having regard to the object and purport thereof.

10. In terms of the 1986 Act, a person who was not juvenile could be tried in any court. Section 20 of the 2000 Act takes care of such a situation stating that despite the same the trial shall continue in that court as if that Act has not been passed and in the event, he is found to be guilty of commission of an offence, a finding to that effect shall be recorded in the judgment of conviction, if any, but instead of passing any sentence in relation to the juvenile, he would be forwarded to the Juvenile Justice Board (in short the 'Board') which shall pass orders in accordance with the provisions of the Act as if it has been satisfied on inquiry that a juvenile has committed the offence. A legal fiction has, thus, been created in the said provision...

xx xx xx

12. Thus, by reason of legal fiction, a person, although not a juvenile, has to be treated to be one by the Board for the purpose of sentencing which takes care of a situation that the person although not a juvenile in terms of the 1986 Act but still would be treated as such under the 2000 Act for the said limited purpose.

(Emphasis supplied)

Reference may also be made to the decision of this Court in ***Dharambir v. State (NCT of Delhi)***: (2010) 5 SCC 344 where too this Court interpreted Section 20 of the Act, and the explanation appended to the same, to declare that the provision enables the Court to determine the juvenility of the accused even after conviction and while maintaining the conviction to set aside the sentence imposed upon him and to forward the case to the Board for passing an appropriate order in accordance with the provisions of the Act. This Court observed:

11. It is plain from the language of the Explanation to Section 20 that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, etc., the determination of juvenility of a juvenile has to be in terms of Clause (l) of Section 2, even if the juvenile ceases to be a juvenile on or before 1st April, 2001, when the Act of 2000 came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. Clause (l) of Section 2 of the Act of 2000 provides that "juvenile in conflict with law" means a "juvenile" who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence. Section 20 also enables the Court to consider and determine the juvenility of a person even after conviction by the regular Court and also empowers the Court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Act of 2000.

Two recent decisions of this Court are a timely reminder of the legal position on the subject to which I may gainfully refer at this stage. In ***Daya Nand v. State of Haryana*** : (2011) 2 SCC 224, this Court, reiterated the law on the subject in the following words.

11. The Juvenile Justice Act, 1986 was replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000 that came into force on April 1, 2001. The 2000 Act defined 'juvenile or child' in Section 2(k) to mean a person who has not completed eighteenth years of age. Section 69 of the 2000 Act, repealed the Juvenile Justice Act, 1986. The 2000 Act, in Section 20 also contained a provision in regard to cases that were pending when it came into force and in which the accused at the time of commission of offence was below 18 years of age but above sixteen years of age (and hence, not a

juvenile under the 1986 Act) and consequently who was being tried not before a juvenile court but a regular court.

(Emphasis supplied)

Similarly in ***Kalu @ Amit v. State of Haryana*** : (2012) 8 SCC 34, this Court summed up the law in the following passage:

> *16. Section 20 makes a special provision in respect of pending cases. It states that notwithstanding anything contained in the Juvenile Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which Juvenile Act comes into force in that area shall be continued in that court as if the Juvenile Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of the Juvenile Act as if it had been satisfied on inquiry under the Juvenile Act that the juvenile has committed the offence. The Explanation to Section 20 makes it clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of Clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1/4/2001, when the Juvenile Act came into force, and the provisions of the Juvenile Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed...*

The settled legal position, therefore, is that in all such cases where the accused was above 16 years but below 18 years of age on the date of occurrence, the proceedings pending in the Court concerned will continue and be taken to their logical end except that the Court upon finding the juvenile guilty would not pass an order of sentence against him. Instead he shall be referred to the Board for appropriate orders under the 2000 Act. Applying that proposition to the case at hand the trial Court and the High Court could and indeed were legally required to record a finding as to the guilt or otherwise of the Appellant. All that the Courts could not have done was to pass an order of sentence, for which purpose, they ought to have referred the case to the Juvenile Justice Board.

The matter can be examined from another angle. Section 7A(2) of the Act prescribes the procedure to be followed when a claim of juvenility is made before any Court. Section 7A(2) is as under:

> ***7A. Procedure to be followed when claim of juvenility is made before any court.-*** *(1) xxx xxx*
> *(2) If the court finds a person to be a juvenile on the date of commission of the offence under Sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect.*

A careful reading of the above would show that although a claim of juvenility can be raised by a person at any stage and before any Court, upon such Court finding the person to be a juvenile on the date of the commission of the offence, it has to forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed shall be deemed to have effect. There is no provision suggesting, leave alone making it obligatory for the Court before whom the claim for juvenility is made, to set aside the conviction of the juvenile on the ground that on the date of commission of the offence he was a juvenile, and hence not triable by an ordinary criminal court. Applying the maxim of *expressio unius est exclusio alterious*, it would be reasonable to hold that the law in so far as it requires a reference to be made to the Board excludes by necessary implication any intention on the part of the legislature requiring the Courts to set aside the conviction recorded by the lower court. The Parliament, it appears, was content with setting aside the sentence of imprisonment awarded to the juvenile and making of a reference to the Board without specifically or by implication requiring the court concerned to alter or set aside the conviction. That perhaps is the reason why this Court has in several decisions simply set aside the sentence awarded to the juvenile without interfering with the conviction recorded by the court concerned and thereby complied with the mandate of Section 7A(2) of the Act.

In ***Kalu @ Amit's*** case (supra), the plea of juvenility was raised before this Court for the first time as is the position in the present case also. This Court while dealing with the options available noticed the absence of plea on the ground of juvenility and held that even if such a plea had been raised before the High Court, the High Court would have had to record its finding that Kalu @ Amit was guilty, confirm his conviction, set aside the sentence and forward the case to the Board for passing an order Under Section15 of the Juvenile Act. The Court observed:

> ***24.*** *The instant offence took place on 7-4-1999. As we have already noted Kalu alias Amit was a juvenile on that date. He was convicted by the trial court on 7-9-2000. The Juvenile Act came into force on 1-4-2001. The appeal of Kalu alias Amit was decided by the High Court on 11-7-2006. Had the defence of juvenility been raised before the High Court and the fact that Kalu alias Amit was a juvenile at the time of commission of the offence has come to light the High Court would have had to record its finding that Kalu alias Amit was guilty, confirm his conviction, set aside the sentence and forward the case to the Board and the Board would have passed any appropriate order permissible Under Section 15 of the Juvenile Act (see Hari Ram).*

That procedure has been followed in several other cases where this Court has, after holding the accused to be a juvenile as on the date of the commission of offence, set aside the sentence awarded to him without interfering with the order of conviction. (See: ***Pradeep Kumar and Ors. v. State of U.P.***: 1995 Supp (4) SCC 419, ***Bhola Bhagat and Ors. v. State of Bihar***: (1997) 8 SCC 720, ***Upendra Kumar v. State of Bihar*** (2005) 3 SCC 592, ***Vaneet Kumar Gupta @ Dharminder v. State of Punjab*** : (2009) 17 SCC 587).

In the totality of the above circumstances, there is no reason why the conviction of the Appellant should be interfered with, simply because he is under the 2000 Act a juvenile entitled to the benefit of being referred to the Board for an order Under Section 15 of the said Act. There is no gain saying that even if the Appellant had been less than sixteen years of age, on the date of the occurrence, he would have been referred for trial to the Juvenile Court in terms of Section 8 of the 1986 Act. The Juvenile Court would then hold a trial and record a conviction or acquittal depending upon the evidence adduced before it. In an ideal situation a case filed before an ordinary Criminal Court when referred to the Board or Juvenile Court may culminate in a conviction at the hands of the Board also. But law does not countenance a situation where a full-fledged trial and even an appeal ends in a conviction of the accused but the same is set aside without providing for a trial by the Board.

With the above observations, I agree with the Order proposed by brother Lokur, J.

Abuzar Hossain @ Gulam Hossain v. State of West Bengal[1]

JUDGMENT

R.M. Lodha, J.

1. Delinquent juveniles need to be dealt with differently from adults. International covenants and domestic laws in various countries have prescribed minimum standards for delinquent juveniles and juveniles in conflict with law. These standards provide what orders may be passed regarding delinquent juveniles and the orders that may not be passed against them. This group of matters raises the question of when should a claim of juvenility be recognised and sent for determination when it is raised for the first time in appeal or before this Court or raised in trial and appeal but not pressed and then pressed for the first time before this Court or even raised for the first time after final disposal of the case.

2. It so happened that when criminal appeal preferred by Abuzar Hossain @ Gulam Hossain came up for consideration before a two-Judge Bench (Harjit Singh Bedi and J.M. Panchal, JJ) on 10.11.2009, on behalf of the Appellant, a plea of juvenility on the date of incident was raised. In support of the contention that the Appellant was juvenile on the date of incident and as such he could not have been tried in a normal criminal court, reliance was placed on a decision of this Court in *Gopinath Ghosh* v. *State of West Bengal*: 1984 (Supp) SCC 228. On the other hand, on behalf of the Respondent, State of West Bengal, in opposition to that plea, reliance was placed on a later decision of this Court in *Akbar Sheikh and Ors.* v. *State of West Bengal* : (2009) 7 SCC 415. The Bench found that there was substantial discordance in the approach of the matter on the question of juvenility in *Gopinath Ghosh* : 1984 (Supp) SCC 228 on the one hand and the two decisions of this Court in *Akbar Sheikh* : (2009) 7 SCC 415 and *Hari Ram* v. *State of Rajasthan and Anr.*: (2009) 13 SCC 211. The Bench was of the opinion that as the issue would arise in a very large number of cases, it was required to be referred to a larger Bench as the judgment in *Akbar Sheikh* : (2009) 7 SCC 415 and *Gopinath Ghosh*: 1984 (Supp) SCC 228 had been rendered by co-ordinate Benches of this Court. This is how these matters have come up before us.

3. The Parliament felt it necessary that uniform juvenile justice system should be available throughout the country which should make adequate provision for dealing with all aspects in the changing social, cultural and economic situation in the country and there was also need for larger involvement of informal systems and community based welfare agencies in the care, protection,

[1]R.M. Lodha, Anil R. Dave and T.S. Thakur, JJ. (DB), Decided On: 10.10.2012, AIR2013SC1020, 2013(1)ALD(Cri)64, 2013(1)ALT(Cri)SC43, (2013)1CALLT60(SC), 2013 (1) CG.L.R.W. 1, 2012(4)JCC2725(SC), JT2012(10)SC453, 2012MLJ(Crl)334, 2012(10)SCALE101, (2012)10SCC489.

treatment, development and rehabilitation of such juveniles and with these objectives in mind, it enacted Juvenile Justice Act, 1986 (for short, '1986 Act').

4. 1986 Act was replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short, '2000 Act'). 2000 Act has been enacted to carry forward the constitutional philosophy engrafted in Articles15(3), 39(e) and (f), 45 and 47 of the Constitution and also incorporate the standards prescribed in the Convention on the Rights of the Child, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) and all other relevant international instruments. Clause (k) of Section 2 defines "juvenile" or "child" to mean a person who has not completed eighteenth year of age. Clause (l) of Section 2 defines "juvenile in conflict with law" to mean a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age on the date of commission of such offence.

5. Section 3 of 2000 Act provides for continuation of inquiry in respect of juvenile who has ceased to be a juvenile. It reads as under:

> Section 3. Continuation of inquiry in respect of juvenile who has ceased to be a juvenile.--Where an inquiry has been initiated against a juvenile in conflict with law or a child in need of care and protection and during the course of such inquiry the juvenile or the child ceases to be such, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a juvenile or a child.

6. Chapter II of 2000 Act deals with juvenile in conflict with law. This Chapter comprises of Sections 4 to 28. Section 4 provides for constitution of juvenile justice board and its composition. Section 5 provides for procedure, etc. in relation to juvenile justice board. Section 6 deals with the powers of juvenile justice board. Section 6 reads as under:

> Section 6. Powers of Juvenile Justice Board.-- (1) Where a Board has been constituted for any district, such Board shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have power to deal exclusively with all proceedings under this Act relating to juvenile in conflict with law.
>
> (2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Court of Session, when the proceeding comes before them in appeal, revision or otherwise.

7. By Act 33 of 2006, the Parliament brought in significant changes in 2000 Act. *Inter alia*, Section 7A came to be inserted. This Section is lynchpin around which the debate has centered around in these matters. Section 7A provides for procedure to be followed when claim of juvenility is raised before any court. It reads as follows:

Section 7A. Procedure to be followed when claim of juvenility is raised before any court.-- (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under Sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect.

8. Section 49 of 2000 Act deals with presumption and determination of age. This Section reads as under:

49. Presumption and determination of age.--(1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit)and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority to be the age of person so brought before it, shall for the purpose of this Act, be deemed to be the true age of that person.

9. Sections 52 and 53 deal with appeals and revision. Section 54 provides for procedure in inquiries, appeals and revision proceedings, which reads as follows:

Section 54. Procedure in inquiries, appeals and revision proceedings.--(1) Save as otherwise expressly provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trials in summons cases.

(2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

10. In exercise of powers conferred by the proviso to Sub-section (1) of Section 68 of the 2000 Act, the Central Government has framed the rules entitled "The Juvenile Justice (Care and Protection of Children) Rules, 2007" (for short, "2007 Rules"). The relevant rule for the purposes of consideration of the issue before us is Rule 12 which provides for procedure to be followed in determination of age. Since this Rule has a direct bearing for consideration of the matter, it is quoted as it is. It reads as under:

Rule 12. Procedure to be followed in determination of Age.-- (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in Rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining--

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i),(ii) or (iii) of Clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact Assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the Clauses (a)(i),(ii), (iii) or in the absence whereof, Clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusion proof specified in Sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7A, Section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in Sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in Sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

11. It is not necessary to refer to facts of criminal appeal preferred by *Abuzar Hossain @ Gulam Hossain* or the other referred matters. Suffice it to say that in criminal appeal of *Abuzar Hossain @ Gulam Hossain*, in support of the argument that he was juvenile on the date of incident and as such he could not have been tried in the normal criminal court, his statement recorded under Section 313 of the Code of Criminal Procedure, 1973 (for short, 'the Code') was pressed into service. It was, however, found from the evidence as well as the judgments of the trial court and the High Court that the issue of juvenility was not pressed at any stage and no evidence whatsoever was led by him to prove the age. It was in the backdrop of these facts that *Gopinath Ghosh* : 1984 (Supp) SCC 228 was relied upon in support of the proposition that notwithstanding the fact that the plea of juvenility had not been pressed, it was obligatory on the court to go into the question of juvenility and determine his age.

12. *Gopinath Ghosh*: 1984 (Supp) SCC 228 was a case where he was convicted along with two others for an offence under Section 302 read with Section 34 of Indian Penal Code and sentenced to suffer imprisonment for life by the trial court. He and two co-accused preferred criminal appeal before Calcutta High Court. In the appeal, two accused were acquitted while the conviction and sentence of Gopinath Ghosh was maintained. Gopinath Ghosh filed appeal by special leave before this Court. On his behalf, the argument was raised that on the date of

offence, i.e. on 19.8.1974 he was aged below 18 years and he is therefore a "child" within the meaning of the expression in the West Bengal Children Act, 1959 and, therefore, the court had no jurisdiction to sentence him to suffer imprisonment after holding a trial. Having regard to the contention raised on behalf of the Appellant, this Court framed an issue for determination; what was the age of the accused Gopinath Ghosh (Appellant) on the date of offence for which he was tried and convicted? The issue was remitted to the Sessions Judge, Nadia to ascertain his age and submit the finding. The Additional Sessions Judge, First Court, Nadia, accordingly, held an inquiry and after recording the evidence and calling for medical report and after hearing parties certified that Gopinath Ghosh was aged between 16 and 17 years on the date of the offence. The finding sent by the Additional Sessions Judge was not questioned before this Court. The Court examined the scheme of West Bengal Children Act, 1959 and also noted Section 24 thereof which had an overriding effect taking away the power of the court to impose the sentence of imprisonment unless the case was covered by the proviso thereto. Then in paragraph 10 (pg. 231) of the Report, this Court held as under:

10. Unfortunately, in this case, Appellant Gopinath Ghosh never questioned the jurisdiction of the Sessions Court which tried him for the offence of murder. Even the Appellant had given his age as 20 years when questioned by the learned Additional Sessions Judge. Neither the Appellant nor his learned Counsel appearing before the learned Additional Sessions Judge as well as at the hearing of his appeal in the High Court ever questioned the jurisdiction of the trial court to hold the trial of the Appellant, nor was it ever contended that he was a juvenile delinquent within the meaning of the Act and therefore, the Court had no jurisdiction to try him, as well as the Court had no jurisdiction to sentence him to suffer imprisonment for life. It was for the first time that this contention was raised before this Court. However, in view of the underlying intendment and beneficial provisions of the Act read with Clause (f) of Article 39 of the Constitution which provides that the State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment, we consider it proper not to allow a technical contention that this contention is being raised in this Court for the first time to thwart the benefit of the provisions being extended to the Appellant, if he was otherwise entitled to it.

13. In paragraph 13 (pgs. 232-233) of the Report, the Court observed as under:

> 13. Before we part with this judgment, we must take notice of a developing situation in recent months in this Court that the contention about age of a convict and claiming the benefit of the relevant provisions of the Act dealing with juvenile delinquents prevalent in various States is raised for the first time in this Court and this Court is required to start the inquiry afresh. Ordinarily this Court would be reluctant to entertain a contention based on factual averments raised for the first time before it. However, the Court is equally reluctant to ignore, overlook or nullify the beneficial provisions of a very socially

progressive statute by taking shield behind the technicality of the contention being raised for the first time in this Court. A way has therefore, to be found from this situation not conducive to speedy disposal of cases and yet giving effect to the letter and the spirit of such socially beneficial legislation. We are of the opinion that whenever a case is brought before the Magistrate and the accused appears to be aged 21 years or below, before proceeding with the trial or undertaking an inquiry, an inquiry must be made about the age of the accused on the date of the occurrence. This ought to be more so where special Acts dealing with juvenile delinquent are in force. If necessary, the Magistrate may refer the accused to the Medical Board or the Civil Surgeon, as the case may be, for obtaining creditworthy evidence about age. The Magistrate may as well call upon accused also to lead evidence about his age. Thereafter, the learned Magistrate may proceed in accordance with law. This procedure, if properly followed, would avoid a journey upto the Apex Court and the return journey to the grass-root court. If necessary and found expedient, the High Court may on its administrative side issue necessary instructions to cope with the situation herein indicated.

14. In *Bhoop Ram* v. *State of U.P.*: (1989) 3 SCC 1, a two-Judge Bench of this Court was concerned with the question as to whether the Appellant Bhoop Ram should have been treated as a "child" within the meaning of Section 2(4) of the U.P. Children Act, 1951 and sent to an approved school for detention therein till he attained the age of 18 years instead of being sentenced to undergo imprisonment in jail. In *Bhoop Ram* : (1989) 3 SCC 1, the Chief Medical Officer, Bareilly gave a certificate that as per the radiology examination and physical features, he appeared to be 30 years of age as on 30.4.1987. Bhoop Ram did not place any other material before the Sessions Judge except the school certificate to prove that he had not completed 16 years on the date of commission of the offences. The Sessions judge rejected the school certificate produced by him on the ground that "it is not unusual that in schools ages are understated by one or two years for future benefits". As regards medical certificate the Sessions Judge observed that as he happened to be about 28-29 years of age on 1.6.1987, he would have completed 16 years on the date of occurrence. Before the Court, on behalf of the Appellant, Bhoop Ram, it was contended that school certificate produced by him contained definite information regarding date of birth and that should have prevailed over the certificate of the doctor and the Sessions Judge committed wrong in doubting the correctness of the school certificate. This Court on consideration of the matter held that Appellant Bhoop Ram could not have completed 16 years of age on 3.10.1975 when the occurrence took place and as such he ought to have been treated as "child" within the meaning of Section 2(4) of the U.P. Children Act, 1951 and dealt with under Section 29 of the Act. The Court gave the following reasons for holding Appellant, Bhoop Ram, a "child" on the date of occurrence of the incident:

> 7. ....The first is that the Appellant has produced a school certificate which carries the date 24-6-1960 against the column "date of birth". There is no material before us to hold that the school certificate does not relate to the Appellant or that the entries therein are

not correct in their particulars. The Sessions Judge has failed to notice this aspect of the matter and appears to have been carried away by the opinion of the Chief Medical Officer that the Appellant appeared to be about 30 years of age as on 30-4-1987. Even in the absence of any material to throw doubts about the entries in the school certificate, the Sessions Judge has brushed it aside merely on the surmise that it is not unusual for parents to understate the age of their children by one or two years at the time of their admission in schools for securing benefits to the children in their future years. The second factor is that the Sessions Judge has failed to bear in mind that even the trial Judge had thought it fit to award the lesser sentence of imprisonment for life to the Appellant instead of capital punishment when he delivered judgment on 12-9-1977 on the ground the Appellant was a boy of 17 years of age. The observation of the trial Judge would lend credence to the Appellant's case that he was less than 10 (sic 16) years of age on 3-10-1975 when the offences were committed. The third factor is that though the doctor has certified that the Appellant appeared to be 30 years of age as on 30-4-1987, his opinion is based only on an estimate and the possibility of an error of estimate creeping into the opinion cannot be ruled out. As regards the opinion of the Sessions Judge, it is mainly based upon the report of the Chief Medical Officer and not on any independent material. On account of all these factors, we are of the view that the Appellant would not have completed 16 years of age on the date the offences were committed...

15. A three-Judge Bench of this Court in *Pradeep Kumar* v. *State of U.P.* : 1995 Supp (4) SCC 419 was concerned with the question whether each of the Appellants was a "child" within the meaning of Section 2(4) of the U.P. Children Act, 1951 and as such on conviction under Section302/34 Indian Penal Code, they should have been sent to approved school for detention till the age of 18 years. The Court dealt with the matter in its brief order thus:

> 2. At the time of granting special leave, Jagdish Appellant produced High School Certificate, according to which he was about 15 years of age at the time of occurrence. Appellant Krishan Kant produced horoscope which showed that he was 13 years of age at the time of occurrence. So far as Appellant Pradeep is concerned a medical report was called for by this Court which disclosed that his date of birth as January 7, 1959 was acceptable on the basis of various tests conducted by the medical authorities.
>
> 3. It is thus proved to the satisfaction of this Court that on the date of occurrence, the Appellants had not completed 16 years of age and as such they should have been dealt with under the U.P. Children Act instead of being sentenced to imprisonment on conviction under Section 302/34 of the Act.

16. The above three decisions came up for consideration before this Court in *Bhola Bhagat* v. *State of Bihar* : (1997) 8 SCC 720. The plea raised on behalf of the Appellants that they were 'children' as defined in the Bihar Children Act, 1970 on the date of occurrence and their trial along with adult accused by the criminal court was not in accordance with law was

rejected by the High Court observing that except for the age given by the Appellants and the estimate of the court at the time of their examination under Section 313 of the Code, there was no other material in support of the Appellants' claim that they were below 18 years of age. This Court flawed the approach of the High Court and observed as follows:

> 8. To us it appears that the approach of the High Court in dealing with the question of age of the Appellants and the denial of benefit to them of the provisions of both the Acts was not proper. Technicalities were allowed to defeat the benefits of a socially-oriented legislation like the Bihar Children Act, 1982 and the Juvenile Justice Act, 1986. If the High Court had doubts about the correctness of their age as given by the Appellants and also as estimated by the trial court, it ought to have ordered an enquiry to determine their ages. It should not have brushed aside their plea without such an enquiry.

17. *Gopinath Ghosh* : 1984 (Supp) SCC 228, *Bhoop Ram* : (1989) 3 SCC 1 and *Pradeep Kumar* : 1995 Supp (4) SCC 419 were elaborately considered in paragraphs 10, 11 and 12 of the Report. The Court also considered a decision of this Court in*State of Haryana* v. *Balwant Singh* : 1993 (Supp) 1 SCC 409 and held that the said decision was not a good law. In paragraph 15 of the Report, the Court followed the course adopted in *Gopinath Ghosh* : 1984 (Supp) SCC 228, *Bhoop Ram* : (1989) 3 SCC 1 and*Pradeep Kumar* : 1995 Supp (4) SCC 419 and held as under:

> 15. The correctness of the estimate of age as given by the trial court was neither doubted nor questioned by the State either in the High Court or in this Court. The parties have, therefore, accepted the correctness of the estimate of age of the three Appellants as given by the trial court. Therefore, these three Appellants should not be denied the benefit of the provisions of a socially progressive statute. In our considered opinion, since the plea had been raised in the High Court and because the correctness of the estimate of their age has not been assailed, it would be fair to assume that on the date of the offence, each one of the Appellants squarely fell within the definition of the expression "child". We are under these circumstances reluctant to ignore and overlook the beneficial provisions of the Acts on the technical ground that there is no other supporting material to support the estimate of ages of the Appellants as given by the trial court, though the correctness of that estimate has not been put in issue before any forum...

18. Mr. Pradip Kr. Ghosh, learned senior counsel for the Appellant Abuzar Hossain @ Gulam Hossain, relying heavily upon the above cases, submitted that what was earlier established by judicial interpretation in *Gopinath Ghosh* : 1984 (Supp) SCC 228, *Bhoop Ram* : (1989) 3 SCC 1 and *Pradeep Kumar* : 1995 Supp (4) SCC 419 became the statutory law with the enactment of Section 7A of 2000 Act and Rule 12 of the 2007 Rules and in view thereof a different approach is required with regard to the delinquent juveniles as and when plea of juvenility is raised before the court. Learned senior counsel would submit that the courts have to ensure that the beneficial provisions contained in Section 7A and Rule 12 are not frustrated by procedural rigidity. It was

submitted that while enacting Section 7A, the Legislature has taken note of socio-economic ground realities of the country and had kept in view juveniles who come from amongst the poorest of the poor, slum dwellers, street dwellers and some of those having no shelter, no means of sustenance and for whom it would be a far cry to have any documents as they would have neither any schooling nor any birth registration. The law has to be applied in the manner so that its benefits are made available to all those who are entitled to it. He contended that the very fact that Rule 12 provided for every possible opportunity to establish the juvenility and when everything fails there is the mandate of holding the medical examination of the delinquent, shows the legislative intent.

19. Mr. Pradip Kr. Ghosh, learned senior counsel also submitted that the law with regard to juvenile delinquents by insertion of Section 7A has been given retrospective effect and made applicable even after disposal of the case and, therefore, in all such cases, those who had no occasion to claim the benefit of juvenility in the past deserve fresh opportunity to be given and they should be allowed to produce such materials afresh as may be available in support of the claim. He submitted that a purposive interpretation to Section 7A and Rule 12 must be given to bring within their fold not only documents which are contemplated in terms of Sub-rule (3) of Rule 12 but also cases in which no such document is available but if the accused is referred to a medical board, his age would eventually be found to be such as would make him a juvenile.

20. Mr. Pradip Kr. Ghosh, learned senior counsel did not dispute that for the purpose of making a claim with regard to juvenility, the delinquent has to produce some material in support of his claim and in the absence of any documentary evidence, file at least a supporting affidavit affirmed by one of his parents or an elder sibling or other relation who is competent to depose as to his age so as to make the court to initiate an inquiry under Rule 12(3). He did concede that a totally frivolous claim of juvenility which on the face of it is patently absurd and inherently improper may not be entertained by the court but at the same time the court must not be hyper-technical and must ensure that beneficial provision is not defeated by undue technicalities.

21. Learned senior counsel submitted that the statement under Section 313 of the Code or the voters' list may not be decisive but the documents of such nature may be adequate for the court to initiate an inquiry in terms of Rule 12(3). According to him, what is decisive is the result of the inquiry under Rule 12(3). However, semblance of material must justify an order to cause an inquiry to be made to determine the claim of juvenility.

22. Mr. Abhijit Sengupta, learned Counsel for the State of West Bengal, submitted that although the provisions of 2000 Act as amended in 2006, and the Rules must be given full effect as these are beneficial provisions for the benefit of juveniles, but at the same time this Court must ensure that the provisions are not abused and a floodgate of cases does not start. He submitted that in *Pawan* v. *State of Uttaranchal*: (2009) 15 SCC 259, a 3-Judge Bench of this Court had emphasized on the need for satisfactory, adequate and prima facie material before an inquiry under Rule 12 could be commenced and the law laid down in *Pawan* : (2009) 15 SCC 259 must

be followed as and when claim of juvenility is raised before this Court. He submitted that claim of juvenility must be credible before ordering an inquiry under Rule 12.

23. Mr. Nagendra Rai, learned senior counsel for the Petitioner in the connected Special Leave Petition being SLP (Criminal) No. 616 of 2012, Ram Sahay Rai v. State of Bihar submitted that by amendment brought in 2006, 2000 Act has been drastically amended. The Legislature by bringing in Section 7A has clearly provided that the claim of juvenility may be raised before any court and it shall be recognised at any stage, even after the final disposal of the case and such claim shall be determined in terms of the provisions contained in 2000 Act and the Rules made thereunder, even if the juvenile has ceased to be so on or before the commencement of the Act. He would submit that even if the question of juvenility had not been raised by the juvenile even upto this Court and there is some material to show that a person is a juvenile on the date of commission of crime, it can be recognised at any stage even at the stage of undergoing sentence. He agreed that inquiry cannot be initiated on the basis of mere assertion of the claim. There must be prima facie material to initiate the inquiry and once the prima facie test is satisfied, the determination may be made in terms of Rule 12. With reference to Rule 12, learned senior counsel would submit that appearance, documents and medical evidence are the only materials which are relevant for determining the age and as such only such materials should form the basis for forming an opinion about the prima facie case. The oral evidence should rarely form the basis for initiation of proceeding as in view of Rule 12, the said material can never be used in inquiry and thus forming an opinion on that oral evidence will not serve the purposes of the Act.

24. Learned Counsel for the State of Bihar on the other hand submitted that Legislature never intended to make Section 7A applicable to this Court after the final disposal of the case. He submitted that there was no provision in the Supreme Court Rules to re-open the concluded appeals or SLPs. Moreover, when SLP is filed, it is mandatory that no new ground or document shall be relied upon which has not been the part of record before the High Court and, therefore, if plea of juvenility has not been raised before the High Court, it cannot be raised before this Court. According to him, the power under the 2000 Act can be exercised only by the Juvenile Board, Sessions Court or High Court after final disposal of the case but not this Court. He, however, submitted that the Supreme Court in exercise of its power under Article 142 may remand the matter to such forums, if it appears expedient in the interest of justice.

25. The amendment in 2000 Act by the Amendment Act, 2006, particularly, introduction of Section 7A and subsequent introduction of Rule 12 in the 2007 Rules, was sequel to the Constitution Bench decision of this Court in *Pratap Singh* v. *State of Jharkhand and Anr.* : (2005) 3 SCC 551. In *Hari Ram* : (2009) 13 SCC 211, a two-Judge Bench of this Court extensively considered the scheme of 2000 Act, as amended by 2006 Amendment Act. With regard to Sub-rules (4) and (5) of Rule 12, this Court observed as follows:

> 27. Sub-rules (4) and (5) of Rule 12 are of special significance in that they provide that once the age of a juvenile or child in conflict with law is found to be less than 18 years on

> the date of offence on the basis of any proof specified in Sub-rule (3) the court or the Board or as the case may be the Child Welfare Committee appointed under Chapter IV of the Act, has to pass a written order stating the age of the juvenile or stating the status of the juvenile, and no further inquiry is to be conducted by the court or Board after examining and obtaining any other documentary proof referred to in Sub-rule (3) of Rule 12. Rule 12, therefore, indicates the procedure to be followed to give effect to the provisions of Section 7-A when a claim of juvenility is raised.

26. This Court observed that the scheme of the 2000 Act was to give children, who have, for some reason or the other, gone astray, to realize their mistakes, rehabilitate themselves and rebuild their lives and become useful citizens of the society, instead of degenerating into hardened criminals. In paragraph 59 of the Report, the Court held as under:

> 59. The law as now crystallised on a conjoint reading of Sections 2(k), 2(l), 7-A, 20and 49 read with Rules 12 and 98, places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1-4-2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted.

27. The Court observed in *Hari Ram* : (2009) 13 SCC 211 that often parents of children, who come from rural backgrounds, are not aware of the actual date of birth of a child, but relate the same to some event which might have taken place simultaneously. In such a situation, the Board and the Courts will have to take recourse to the procedure laid down in Rule 12.

28. The judgment in the case of *Hari Ram* : (2009) 13 SCC 211 was delivered by this Court on 5.5.2009. On that very day, judgment in *Akbar Sheikh* : (2009) 7 SCC 415 was delivered by a two-Judge Bench of which one of us (R.M. Lodha, J.) was a member. In *Akbar Sheikh* : (2009) 7 SCC 415 on behalf of one of the Appellants, Kabir, a submission was made that he was juvenile on the date of occurrence. While dealing with the said argument, this Court observed that no such question had ever been raised. Even where a similar question was raised by five other accused, no such plea was raised even before the High Court. On behalf of the Appellant, Kabir, in support of the juvenility, two documents were relied upon, namely, (i) statement recorded under Section 313 of the Code and (ii) voters' list. As regards the statement recorded under Section 313, this Court was of the opinion that the said document was not decisive. In respect of voters' list, this Court observed that the same had been prepared long after the incident occurred and it was again not decisive. In view of these findings, this Court did not find any merit in the claim of Kabir, one of the Appellants, that he was juvenile and the submission was rejected. From a careful reading of the judgment in the matter of*Akbar Sheikh* : (2009) 7 SCC 415, it is clear that the two documents on which reliance was placed in support of claim of juvenility were not found decisive and, consequently, no inquiry for determination of age was ordered. From the

consideration of the matter by this Court in Akbar Sheikh: (2009) 7 SCC 415, it is clear that the case turned on its own facts.

29. As a matter of fact, prior to the decisions of this Court in *Hari Ram* : (2009) 13 SCC 211 and *Akbar Sheikh* : (2009) 7 SCC 415, a three-Judge Bench of this Court speaking through one of us (R.M. Lodha, J.) in *Pawan* : (2009) 15 SCC 259 had considered the question relating to admissibility of claim of juvenility for the first time in this Court with reference to Section 7A. The contention of juvenility was raised for the first time before this Court on behalf of the two Appellants, namely, A-1 and A-2. The argument on their behalf before this Court was that they were juvenile within the meaning of 2000 Act on the date of incident and the trial held against them under the Code was illegal. With regard to A-1, his school leaving certificate was relied on while as regards A-2, reliance was placed on his statement recorded under Section 313 and the school leaving certificate. Dealing with the contention of juvenility, this Court stated that the claim of juvenility could be raised at any stage, even after final disposal of the case. The Court then framed the question in paragraph 41 of the Report as to whether an inquiry should be made or report be called for from the trial court invariably where juvenility is claimed for the first time before this Court. It was held that where the materials placed before this Court by the accused, prima facie, suggested that he was 'juvenile' as defined in 2000 Act on the date of incident, it was necessary to call for the report or an inquiry to be made for determination of the age on the date of incident. However, where a plea of juvenility is found unscrupulous or the materials lack credibility or do not inspire confidence and even prima facie satisfaction of the court is not made out, further exercise in this regard may not be required. It was also stated that if the plea of juvenility was not raised before the trial court or the High Court and is raised for the first time before this Court, the judicial conscience of the court must be satisfied by placing adequate material that the accused had not attained the age of 18 years on the date of commission of offence. In absence of adequate material, any further inquiry into juvenility would not be required.

30. Having regard to the general guidelines highlighted in paragraph 41 with regard to the approach of this Court where juvenility is claimed for the first time, the court then considered the documents relied upon by A-1 and A-2 in support of the claim of juvenility on the date of incident. In respect of the two documents relied upon by A-2, namely, statement under Section 313 of the Code and the school leaving certificate, this Court observed that the statement recorded under Section 313 was a tentative observation based on physical appearance which was hardly determinative of age and insofar as school leaving certificate was concerned, it did not inspire any confidence as it was issued after A-2 had already been convicted and the primary evidence like entry from the birth register had not been produced. As regards school leaving certificate relied upon by A-1, this Court found that the same had been procured after his conviction and no entry from the birth register had been produced. The Court was, thus, not prima facie impressed or satisfied by the material placed on behalf of A-1 and A-2. Those

documents were not found satisfactory and adequate to call for any report from the Board or trial court about the age of A-1 and A-2.

31. In *Jitendra Singh alias Babboo Singh and Anr.* v. *State of Uttar Pradesh* : (2010) 13 SCC 523, on behalf of the Appellant, a plea was raised that he was minor within the meaning of Section 2(k) of 2000 Act on the date of commission of the offence. The Appellant had been convicted for the offences punishable under Sections 304-B and 498A Indian Penal Code and sentenced to suffer seven years' imprisonment under the former and two years under the latter. The Appellant had got the bail from the High Court on the ground of his age which was on medical examination certified to be around seventeen years on the date of commission of the offence. One of us (T.S. Thakur, J.) who authored the judgment for the Bench held that in the facts and circumstances of the case, an enquiry for determining the age of the Appellant was necessary. This Court referred to the earlier decisions in *Gopinath Ghosh*: 1984 (Supp) SCC 228, *Bhoop Ram* (1989) 3 SCC 1, *Bhola Bhagat*: (1997) 8 SCC 720, *Hari Ram* : (2009) 13 SCC 211 and*Pawan* : (2009) 15 SCC 259 and then held that the burden of making out the prima facie case had been discharged. In paragraphs 9, 10 and 11 of the Report, it was held as under:

> 9. The burden of making out a prima facie case for directing an enquiry has been in our opinion discharged in the instant case inasmuch as the Appellant has filed along with the application a copy of the school leaving certificate and the marksheet which mentions the date of birth of the Appellant to be 24-5-1988. The medical examination to which the High Court has referred in its order granting bail to the Appellant also suggests the age of the Appellant being 17 years on the date of the examination. These documents are sufficient at this stage for directing an enquiry and verification of the facts.
>
> 10. We may all the same hasten to add that the material referred to above is yet to be verified and its genuineness and credibility determined. There are no doubt certain telltale circumstances that may raise a suspicion about the genuineness of the documents relied upon by the Appellant. For instance, the deceased Asha Devi who was married to the Appellant was according to Dr. Ashok Kumar Shukla, Pathologist, District Hospital, Rae Bareilly aged 19 years at the time of her death. This would mean as though the Appellant husband was much younger to his wife which is not the usual practice in the Indian context and may happen but infrequently. So also the fact that the Appellant obtained the school leaving certificate as late as on 17-11-2009 i.e. after the conclusion of the trial and disposal of the first appeal by the High Court, may call for a close scrutiny and examination of the relevant school record to determine whether the same is free from any suspicion, fabrication or manipulation. It is also alleged that the electoral rolls showed the age of the accused to be around 20 years while the extract from the panchayat register showed him to be 19 years old.
>
> 11. All these aspects would call for close and careful scrutiny by the court below while determining the age of the Appellant. The date of birth of Appellant Jitendra Singh's

siblings and his parents may also throw considerable light upon these aspects and may have to be looked into for a proper determination of the question. Suffice it to say while for the present we consider it to be a case fit for directing an enquiry, that direction should not be taken as an expression of any final opinion as regards the true and correct age of the Appellant which matter shall have to be independently examined on the basis of the relevant material.

32. In *Daya Nand* v. *State of Haryana* : (2011) 2 SCC 224, this Court found that on the date of occurrence the age of the Appellant was sixteen years five months and nineteen days and, accordingly, it was held that he could not have been kept in prison to undergo the sentence imposed by the Additional Sessions Judge and affirmed by the High Court. This Court set aside the sentence imposed against the Appellant and he was directed to be released from prison.

33. In *Lakhan Lal* v. *State of Bihar* : (2011) 2 SCC 251, the question was about the applicability of 2000 Act where the Appellants were not juveniles within the meaning of 1986 Act as they were above 16 years of age but had not completed 18 years of age when offences were committed and even when claim of juvenility was raised after they had attained 18 years of age. This Court gave benefit of 2000 Act to the Appellants and they were directed to be released forthwith.

34. In *Shah Nawaz* v. *State of Uttar Pradesh and Anr.* : (2011) 13 SCC 751, the matter reached this Court from the judgment and order of the Allahabad High Court. An F.I.R. was lodged against the Appellant, Shah Nawaz, and three others for the offences punishable under Sections 302 and 307 of Indian Penal Code. The mother of the Appellant submitted an application before the Board stating that Shah Nawaz was minor at the time of alleged occurrence. The Board after holding an enquiry declared Shah Nawaz a juvenile under the 2000 Act. The wife of the deceased filed criminal appeal against the judgment of the Board before the Additional Sessions Judge, Muzaffarnagar. That appeal was allowed and the order of the Board was set aside. Shah Nawaz preferred criminal revision before the High Court against the order of the Additional Sessions Judge which was dismissed giving rise to appeal by special leave before this Court. This Court considered Rule 12 of 2007 Rules and also noted, amongst others, the decision in *Hari Ram*: (2009) 13 SCC 211 and then on consideration of the documents, particularly entry relating to the date of birth entered in the marksheet held that Shah Nawaz was juvenile on the date of occurrence of the incident. This Court in paragraphs 23 and 24 of the Report held as under:

> 23. The documents furnished above clearly show that the date of birth of the Appellant had been noted as 18-6-1989. Rule 12 of the Rules categorically envisages that the medical opinion from the Medical Board should be sought only when the matriculation certificate or school certificate or any birth certificate issued by a corporation or by any panchayat or municipality is not available. We are of the view that though the Board has correctly accepted the entry relating to the date of birth in the marksheet and school

certificate, the Additional Sessions Judge and the High Court committed a grave error in determining the age of the Appellant ignoring the date of birth mentioned in those documents which is illegal, erroneous and contrary to the Rules.

24. We are satisfied that the entry relating to date of birth entered in the marksheet is one of the valid proofs of evidence for determination of age of an accused person. The school leaving certificate is also a valid proof in determining the age of the accused person. Further, the date of birth mentioned in the High School marksheet produced by the Appellant has duly been corroborated by the school leaving certificate of the Appellant of Class X and has also been proved by the statement of the clerk of Nehru High School, Dadheru, Khurd-o-Kalan and recorded by the Board. The date of birth of the Appellant has also been recorded as 18-6-1989 in the school leaving certificate issued by the Principal of Nehru Preparatory School, Dadheru, Khurd-o-Kalan, Muzaffarnagar as well as the said date of birth mentioned in the school register of the said School at Sl. No. 1382 which have been proved by the statement of the Principal of that School recorded before the Board.

In paragraph 26 of the Report, this Court observed that Rule 12 has described four categories of evidence which gave preference to school certificate over the medical report.

35. In *Pawan* : (2009) 15 SCC 259, a 3-Judge Bench has laid down the standards for evaluating claim of juvenility raised for the first time before this Court. If *Pawan* : (2009) 15 SCC 259 had been cited before the Bench when criminal appeal of Abuzar Hossain @ Gulam Hossain came up for hearing, perhaps reference would not have been made. Be that as it may, in light of the discussion made above, we intend to summarise the legal position with regard to Section 7A of 2000 Act and Rule 12 of the 2007 Rules. But before we do that, we say a word about the argument raised on behalf of the State of Bihar that claim of juvenility cannot be raised before this Court after disposal of the case. The argument is so hopeless that it deserves no discussion. The expression, 'any court' in Section7A is too wide and comprehensive; it includes this Court. Supreme Court Rules surely do not limit the operation of Section 7A to the courts other than this Court where the plea of juvenility is raised for the first time after disposal of the case.

36. Now, we summarise the position which is as under:

(i) A claim of juvenility may be raised at any stage even after final disposal of the case. It may be raised for the first time before this Court as well after final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in appeal court.

(ii) For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility.

(iii) As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rule 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard and fast rule can be prescribed that they must be prima facie accepted or rejected. In *Akbar Sheikh* (2009) 7 SCC 415 and *Pawan* : (2009) 15 SCC 259 these documents were not found prima facie credible while in *Jitendra Singh*: (2010) 13 SCC 523 the documents viz., school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the Appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7A and order an enquiry for determination of the age of the delinquent.

(iv) An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of age of the delinquent.

(v) The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in 2000 Act are not defeated by hyper-technical approach and the persons who are entitled to get benefits of 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability.

(vi) Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at threshold whenever raised.

37. The reference is answered in terms of the position highlighted in paragraph 36 (i) to (vi). The matters shall now be listed before the concerned Bench(es) for disposal.

T.S. Thakur, J.

38. I have had the advantage of going through the order proposed by my esteemed brother R.M. Lodha J., which summarises the legal position with remarkable lucidity. While I entirely agree with whatever is enunciated in the judgment proposed by my erudite colleague, I wish to add a few lines of my own confined to the proposition stated in Para 36 (IV) of the judgment. In that paragraph of the order fall cases in which the accused setting up the plea of juvenility is unable to produce any one of the documents referred to in Rule 12(3)(a)(i) to (iii) of the Rules, under the Act, not necessarily because, he is deliberately withholding such documents from the court, but because, he did not have the good fortune of ever going to a school from where he could produce a certificate regarding his date of birth. Para 36 (IV) sounds a note of caution that an affidavit of a parent or a sibling or other relative would not ordinarily suffice, to trigger an enquiry into the question of juvenility of the accused, unless the circumstances of the case are so glaring that the court is left with no option except to record a prima facie satisfaction that a case for directing an enquiry is made out. What would constitute a 'glaring case' in which an affidavit may itself be sufficient to direct an inquiry, is a question that cannot be easily answered leave alone answered by enumerating exhaustively the situations where an enquiry may be justified even in the absence of documentary support for the claim of juvenility. Two dimensions of that question may all the same be mentioned without in the least confining the sweep of the expression 'glaring case' to a strait-jacket formulation. The first of these factors is the most mundane of the inputs that go into consideration while answering a claim of juvenility like "Physical Appearance" of the accused made relevant by Rule 12(2) of the Rules framed under the Act. The Rule reads:

12. Procedure to be followed in determination of Age. -

(1) xxxx

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

39. Physical appearance of the accused is, therefore, a consideration that ought to permeate every determination under the Rule aforementioned no matter appearances are at times deceptive, and depend so much on the race or the region to which the person concerned belongs. Physical appearance can and ought to give an idea to the Court at the stage of the trial and even in appeal

before the High Court, whether the claim made by the accused is so absurd or improbable that nothing short of documents referred to in this Rule 12 can satisfy the court about the need for an enquiry. The advantage of "physical appearance" of the accused may, however, be substantially lost, with passage of time, as longer the interval between the incident and the court's decision on the question of juvenility, the lesser the chances of the court making a correct Assessment of the age of the accused. In cases where the claim is made in this Court for the first time, the advantage is further reduced as there is considerable time lapse between the incident and the hearing of the matter by this Court.

40. The second factor which must ever remain present in the mind of the Court is that the claim of juvenility may at times be made even in cases where the accused does not have any evidence, showing his date of birth, by reference to any public document like the register of births maintained by Municipal Authorities, Panchayats or hospitals nor any certificate from any school, as the accused was never admitted to any school. Even if admitted to a school no record regarding such admission may at times be available for production in the Court. Again there may be cases in which the accused may not be in a position to provide a birth certificate from the Corporation, the municipality or the Panchayat, for we know that registration of births and deaths may not be maintained and if maintained may not be regular and accurate, and at times truthful. Rule 12(3) of the Rules makes only three certificates relevant. These are enumerated in Sub-Rule 3(a)(i) to (iii) of the Rule which reads as under:

> (3)a (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
>
> (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
>
> (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

41. Non-production of the above certificates or any one of them is not, however, fatal to the claim of juvenility, for Sub-rule 3(b) to Rule 12 makes a provision for determination of the question on the basis of the medical examination of the accused in the 'absence' of the certificates. Rule 12(3)(b) runs as under:

> 12(3) (b) and only in the absence of either (i), (ii) or (iii) of Clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact Assessment of the age cannot be done, the Court, or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

42. The expression 'absence' appearing in the above provision is not defined under the Act or the Rules. The word shall, therefore, be given its literal dictionary meaning which is provided by Concise Oxford dictionary as under:

> Being away from a place or person; time of being away; non-existence or lack of; inattention due to thought of other things.

43. Black's Law Dictionary also explains the meaning of 'absence' as under:

> 1. The state of being away from one's usual place of residence. 2. A failure to appear, or to be available and reachable, when expected. 3. Louisiana Law. The State of being an absent person - Also termed (in sense 3) absentia.

44. It is axiomatic that the use of the expression and the context in which the same has been used strongly suggests that 'absence' of the documents mentioned in Rule 12(3)(a)(i) to (iii) may be either because the same do not exist or the same cannot be produced by the person relying upon them. Mere non-production may not, therefore, disentitle the accused of the benefit of the Act nor can it tantamount to deliberate non-production, giving rise to an adverse inference unless the Court is in the peculiar facts and circumstances of a case of the opinion that the non-production is deliberate or intended to either mislead the Court or suppress the truth.

45. It is in this class of cases that the court may have to exercise its powers and discretion with a certain amount of insight into the realities of life. One of such realities is that illiteracy and crime have a close nexus though one may not be directly proportional to the other. Juvenile delinquency in this country as elsewhere in the world, springs from poverty and unemployment, more than it does out of other causes. A large number of those engaged in criminal activities, may never have had the opportunity to go to school. Studies conducted by National Crime Records Bureau (NCRB), Ministry of Home Affairs, reveal that poor education and poor economic set up are generally the main attributes of juvenile delinquents. Result of the 2011 study further show that out of 33,887 juveniles arrested in 2011, 55.8% were either illiterate (6,122) or educated only till the primary level (12,803). Further, 56.7% of the total juveniles arrested fell into the lowest income category. A similar study is conducted and published by B.N. Mishra in his Book 'Juvenile Delinquency and Justice System', in which the author states as follows:

> *One of the prominent features of a delinquent is poor educational attainment. More than 63 per cent of delinquents are illiterate. Poverty is the main cause of their illiteracy. Due to poor economic condition they were compelled to enter into the labour market to supplement their family income. It is also felt that poor educational attainment is not due to the lack of intelligence but may be due to lack of opportunity. Although free education is provided to Scheduled Castes and Scheduled Tribes, even then, the delinquents had a*

very low level of expectations and aspirations regarding their future which in turn is due to lack of encouragement and unawareness of their parents that they play truant.

46. What should then be the approach in such cases, is the question. Can the advantage of a beneficial legislation be denied to such unfortunate and wayward delinquents? Can the misfortune of the accused never going to a school be followed or compounded by denial of the benefit that the legislation provides in such emphatic terms, as to permit an enquiry even after the last Court has disposed of the appeal and upheld his conviction? The answer has to be in the negative. If one were to adopt a wooden approach, one could say nothing short of a certificate, whether from the school or a municipal authority would satisfy the court's conscience, before directing an enquiry. But, then directing an enquiry is not the same thing as declaring the accused to be a juvenile. The standard of proof required is different for both. In the former, the court simply records a prima facie conclusion. In the latter the court makes a declaration on evidence, that it scrutinises and accepts only if it is worthy of such acceptance. The approach at the stage of directing the enquiry has of necessity to be more liberal, lest, there is avoidable miscarriage of justice. Suffice it to say that while affidavits may not be generally accepted as a good enough basis for directing an enquiry, that they are not so accepted is not a rule of law but a rule of prudence. The Court would, therefore, in each case weigh the relevant factors, insist upon filing of better affidavits if the need so arises, and even direct, any additional information considered relevant including information regarding the age of the parents, the age of siblings and the like, to be furnished before it decides on a case to case basis whether or not an enquiry under Section 7A ought to be conducted. It will eventually depend on how the court evaluates such material for a prima facie conclusion that the Court may or may not direct an enquiry. With these additions, I respectfully concur with the judgment proposed by my esteemed Brother Lodha J.

Defining Child Pornography: Law Enforcement Dilemmas in Investigations of Internet Child Pornography Possession[21]

Melissa Wells, David Finkelhor, Janis Wolak & Kimberly J. Mitchell[*]

This study examines law enforcement dilemmas in child pornography possession investigations in which no offender was arrested. A mail survey of US law enforcement agencies identified a sample of Internet child pornography possession cases where no arrest was made. Telephone surveys with law enforcement investigators were used to collect case specific data and information on dilemmas in these investigations. Law enforcement investigators reported that determining whether or not images fit within statutory limits and ascertaining the age of children in images impacted arrest outcomes in child pornography possession cases.

Keywords: Internet Crime; Child Pornography; Child Victimization; Law Enforcement; Police; Sex Crime.

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Introduction

Although child sex crimes have been a recognized social problem for more than two decades (Finkelhor, 1984), recent policy and media attention has focused on the commission of these crimes via the Internet. The emergence of Internet-facilitated sex crimes, including Internet child pornography possession, has raised crucial questions regarding the use of the Internet by offenders and the law enforcement challenges in addressing these offenses.

The problem of child pornography possession was thought to have been minimized prior to the emergence of the Internet. The availability of child pornography had declined due to legal actions and statutory revisions (Jenkins, 2001). However, there is a general consensus that the Internet has made child pornography more accessible and available to collectors and distributors (Biegel, 2001; Jenkins, 2001; Wolak, Mitchell, & Wells, 2002). Electronic child pornography can be obtained and traded on the World Wide Web, using Internet Relay Chat and via other online sources (Taylor, Quayle, & Holland, 2001). Online, child pornography possessors can download child pornography for collections and distribute images to other consumers.

Internet child pornography possession cases involve the use of the Internet or computer technology to possess and/or collect electronic images of child pornography. These investigations present challenges for law enforcement agents in the USA and around the world. This study explores law enforcement dilemmas related to defining child pornography in a sample of 34 Internet child pornography possession cases in which no offender was arrested. This study identifies specific dilemmas emerging in these investigations and presents recommendations related to these incidents.

Issues in Internet Child Pornography

This analysis examined law enforcement dilemmas related to *defining* child pornography in Internet crimes. Law enforcement agencies investigate these cases using traditional and undercover techniques and may encounter specific dilemmas related to the nature of these incidents. Additionally, there is considerable statutory variation among state and national definitions of child pornography and there can also be challenges related to establishing with certainty the ages of young people depicted in images. These issues can create obstacles for law enforcement.

What is Internet Child Pornography?

Within the USA, there is currently no uniform definition of child pornography, and therefore, significant variation exists among state statues. US federal law defines a youth under the age of 18 as a 'child' and includes in its definition of child pornography photographs and films of conduct that are sexually explicit (Klain, Davies, & Hicks, 2001). Sexually explicit conduct may include sexual intercourse, bestiality, masturbation, and 'lascivious exhibition of the genitals or pubic area.' These federal definitions have been adopted by some states and interpreted broadly, such that it is difficult to identify one specific definition for child pornography.

Child pornography *possessors* may use child pornography to validate their sexual interest in children, to groom children and lower their inhibitions, or to blackmail victims or other offenders (Klain et al., 2001; Tyler & Stone, 1983). Others may be motivated to collect child pornography out of curiosity, for sexual arousal, or for other reasons.

As noted, this study examines law enforcement dilemmas in alleged Internet child pornography *possession* and does not include cases of child pornography production. Therefore, the cases classified here as Internet child pornography possession did not involve any online correspondence, exchange of images, or other Internet connection between an adult suspect and an identified juvenile victim. Law enforcement agents in this sample did not identify or contact any of the youth depicted in the child pornography images.

Law Enforcement Investigations of Internet Child Pornography

In the USA, law enforcement agencies arrested an estimated 1,713 offenders for Internet-related crimes that involved the possession of child pornography during the 12 months starting July 1, 2000 (Wolak, Mitchell, & Finkelhor, 2003). Wolak et al. found that 80% of these offenders possessed pornography depicting graphic sexual images and 83% possessed images depicting prepubescent children (2003).

The Internet has opened up new opportunities for investigation and evidence collection in child sex crimes. Computer technology can provide law enforcement agents with powerful weapons and forensic evidence often lacking in conventional child sex crimes (Norland & Bartholet, 2001). Since much of what takes place on the Internet leaves a digital trail, it is possible that this may actually facilitate police investigations of some child sex crimes, and allow law enforcement agencies with access to computer forensic equipment to collect valuable digital evidence.

Dilemmas in Investigating Internet Child Pornography Possession

Despite these emerging investigative practices, law enforcement investigations of Internet child pornography possession can also present specific investigative challenges. These cases may require digital evidence collection, undercover operations, and tailored interviewing practices (SEARCH, 2001). In addition, these cases may involve multiple law enforcement jurisdictions when child pornography is transmitted via the Internet. Due to the global reach of the Internet, an individual may possess child pornography images created or disseminated from anywhere in the world (Copine Project, 2003). There is a general consensus that global partnerships and international law enforcement collaboration are needed to effectively address online child pornography (International Centre for Missing & Exploited Children, 2002; 'International Cooperation to Tackle Child Pornography,' 2001).

The Internet has opened up new avenues of child pornography possession and law enforcement agencies have developed approaches that facilitate investigations and convictions in these crimes. However, investigations of Internet child pornography possession may pose some dilemmas and require specific resources. Computers may need to be purchased or upgraded for

electronic communication, personnel are needed to work online, training in online investigations may be required, and specific digital technology is often useful in tracking suspects.

In cases where offenders are reported to possess images of child pornography on a computer, it is possible that images will have been deleted by the time law enforcement investigators examine the computer. Computer forensics experts with specific training may be able to locate files that have been deleted, and in most cases deleted information can be retrieved and used as evidence (Hardy & Kreston, 2002). Once images are located, investigators must be able to identify the age of victims in the photos, which may require expert testimony by medical experts.

Law enforcement agencies investigate Internet child pornography possession using both traditional and undercover investigations. Traditional methods could include responding to citizen reports and image discoveries. In undercover cases, law enforcement investigators may impersonate consumers interested in child pornography (Douglas, 2002) or take on the role of a child pornography collector interested in trading images, or infiltrating a child pornography bulletin board service.

A primary challenge is that law enforcement investigators must prove that images identified fit statutory definitions of child pornography. Wolak et al. found that 92% of offenders arrested for possessing child pornography had images of minors depicting explicit sexual activity or focusing on genitals (2003). Such images distinctly fit within most states' existing definitions of child pornography. However, some of the borderline Internet child pornography images identified in this study did not as clearly match state definitions.

Methodology

Research Design

The research project involves analysis of data collected as a component of the National Juvenile Online Victimization Study (N-JOV). N-JOV was sponsored by the National Center for Missing and Exploited Children and the United States Department of Justice. The primary objective of the N-JOV study was to capture incident estimates of Internet sex crimes against minors coming to the attention of law enforcement in a one-year timeframe. A secondary goal of N-JOV was to identify dilemmas in law enforcement investigations of these crimes. Please see the National Juvenile Online Victimization Study Methodology Report for a more detailed summary of N-JOV methodology (Wolak, Mitchell, & Finkelhor, 2004).

N-JOV collected detailed case information regarding Internet sex crimes against minors in which an arrest was made by a US law enforcement agency, as well as in cases in which no arrest was made by any US law enforcement agency. This study examines the cases where no offender was arrested. By definition, cases in this sample did not end in an arrest. Therefore, those cases may not have involved substantiated criminal activities or 'offenders' in a criminal sense. For

convenience, these cases may be called 'crimes' instead of 'investigations' in this analysis and the term 'offender' may be used instead of 'suspect' in some analyses.

Data Collection and Procedures

This project used a two-phase data collection process. In Phase 1, a mail survey was sent to a national sample of county, state, and federal law enforcement agencies asking if they had investigated cases of Internet-related child pornography or sexual exploitation cases between July 1, 2000 and June 30, 2001. Agency directors or chiefs of police from the sample of law enforcement agencies were asked to provide case numbers and investigator names in arrest cases and cases where no offender was arrested. Cases without an arrest were defined as, 'Any *significant* (your agency invested considerable energy and resources) Internet-related child pornography or sexual exploitation case' in which no arrest was made 'because of technical, legal, evidentiary or other obstacles.' In Phase 2 of the data collection process, interviewers conducted telephone interviews with law enforcement investigators about a sample of the cases reported in the mail survey. Three trained interviewers telephoned specified investigators at agencies with cases and collected data using a standardized instrument. Interviewers recorded answers on paper copies of the survey instrument and typed qualitative case summaries in Microsoft Word for each case.

Study Population and Sample

The Phase 1 mail survey was sent to a national sample of 2,574 law enforcement agencies. The initial stratified sample included three frames in order to collect information from agencies specializing in these crimes, those with training in these investigations, and from a random sample of all US law enforcement agencies (Table 1).

Table 1 Initial N-JOV Study Sample of Law Enforcement Agencies (LEA).

	Frame 1: Specialized agencies	Frame 2: Agencies with training	Frame 3: National sample of LEA	Total sample
Initial sample of law enforcement agencies	75	833	1,666	2,574
75 833 1,666 2,574	83%	93%	86%	88%
Agencies that responded 83% 93% 86% 88%	62	763	1,380	2,205
Final sample[22]				

The *first frame* consisted of 75 specialized agencies charged with investigating Internet sex crimes against minors, including 30 federally funded Internet Crimes Against Children (ICAC) Task Forces (one of the ICAC Task Forces included three agencies from three different states).

[22] Sixty-five agencies were ineligible because they lacked jurisdiction to investigate Internet sex crimes against minors.

Each agency was surveyed individually and the sample included 43 federally funded ICAC satellites that were in operation when the sample was developed. Eighty-three percent of the 75 ICAC Task Forces and satellite agencies completed and returned surveys.

The *second frame* consisted of 833 law enforcement agencies in which some staff attended training in Internet sex crimes against minors. Those trained agencies were randomly sampled from lists of agencies participating in training conducted by two training organizations, SEARCH and the National Center for Missing and Exploited Children. One additional agency in a large metropolitan area was added to the sample; this assured that agencies from all major metropolitan areas in the USA were included in the sample. Ninety-three percent of the eligible trained agencies returned mail surveys.

The *third frame* consisted of 1,666 other local, county, and state law enforcement agencies across the USA. This sample was drawn using a database available through the National Directory of Criminal Justice Data (National Directory of Law Enforcement Administrators, 2001). First and second frame agencies were cross-referenced with those in the third frame to avoid duplication in the final sample. Of the eligible third frame agencies, 86% completed and returned mail surveys.

Non-arrest Cases

The mail surveys included information about cases ending in arrest as well as cases where no arrest was made. These N-JOV mail surveys included 1,723 Internet sex crimes against minors cases ending in arrest and 200 Internet sex crimes against minors cases in which no offender was arrested. Approximately 70% of the 200 cases in the initial non-arrest sample screened out (n = 132) of the study. These screen outs were due to non-responses and refusals, duplicate or invalid cases, ineligible cases (i.e., an arrest did occur), and quota sampling to obtain a range of case types (Table 2). Particular emphasis was placed on obtaining a sample that included equal numbers of non-arrest cases involving Internet child pornography and Internet sex crimes against identified juvenile victims. The final sample included 68 cases in which no arrest was made by any law enforcement agency. Thirty-four of those cases involved Internet child pornography.

Table 2 Responses to Telephone Interviews in Cases Not Ending in Arrest.

Number of …	**Cases not ending in arrest**
Cases reported in mail surveys	200 (100%)
Cases screened out	
• Non-responders and refusals	63 (31%)
• Duplicate and invalid cases	11 (6%)
• Cases not selected for sample	16 (8%)
• Ineligible cases	42 (21%)
NO ARREST interviews completed (% cases initially reported)	68 (34%)
Internet child pornography cases	34

Three trained interviewers conducted telephone interviews with law enforcement agents familiar with these non-arrest cases using a standardized instrument. Interviewers used specific sections of the instrument to collect data on case components, victim and offender characteristics, and law enforcement complications in these cases where no arrest was made. Interviewers recorded answers on paper copies of the survey instrument and typed qualitative case summaries in Microsoft Word for each case. Data collected from the telephone surveys and case summaries were examined for each of the 34 Internet child pornography cases in which no arrest was made.

Internet child pornography possession is defined here as involving the use of the Internet or computer technology to possess and/or collect electronic images of child pornography. Qualitative case summaries for these investigations were reviewed and coded for consistent themes to identify specific categories of dilemmas law enforcement agents encounter in investigating Internet child pornography cases. Key words and contextual information from the case summaries were coded and analyzed using NVIVO software. The dilemmas identified in these Internet child pornography cases were initially classified into four general types of challenges: (1) defining child pornography, (2) identifying offenders, (3) gaps in training and resources, and (4) complications arising from multi-jurisdictional investigations (Wells, Finkelhor, Wolak, & Mitchell, 2003). These categories were based loosely on law enforcement dilemmas identified in US Department of Justice literature (2000).

These categories are not mutually exclusive, since investigators may have noted multiple dilemmas related to one case. For instance, both definitions of child pornography and offender identification would be problematic if a case involved borderline images of child pornography found on a computer used by multiple individuals.

Results

Internet Child Pornography Possession Cases Where No Offender was Arrested

These 34 Internet child pornography possession cases include unsubstantiated allegations of child pornography possession, anonymous online posting of child pornography, borderline cases where children depicted in images may or may not be minors, and undercover investigations of suspected child pornography possessors.

The cases discussed here all contain an allegation or discovery of child pornography collected via the Internet. Based on information collected in the telephone survey, it may appear that many of the images identified here could meet existing definitions of child pornography. About 70% of the cases identified here included graphic sexual images and a similar percentage depicted nudity or semi-nudity. About 44% featured sexual contact between children and adults and close to half of the images showed penetration (whether or not they included an adult).

However, all of these investigations share a primary similarity; law enforcement agencies were not able to make an arrest in any of these alleged crimes. There is no single explanation for why

arrests did not occur in these cases and the dilemmas reported by law enforcement involve complex social and legal dynamics. Some of the dilemmas presented may be directly related to the nature of computer crime, and others could be problematic with or without an Internet-nexus.

Although these cases may have involved multiple challenges for law enforcement (Table 3), the current analysis will address problems related to defining child pornography.

This analysis suggests that both evaluating the nature of child pornography images and ascertaining the age of children depicted in the images complicate this issue.

Evaluating the Nature of Child Pornography Images

The cases identified in this study illuminate divergent views regarding what constitutes child pornography. First, there may not be consensus regarding what types of images are graphic or explicit enough to fit existing definitions of child pornography. Second, it appears that images that depict prepubescent children are more likely to be considered child pornography than are those portraying older juveniles.

Determining whether or not images are explicit or graphic enough to meet the definition of child pornography is a primary dilemma for investigators (Lanning, 1992). That is because some images would consistently meet legal definitions of child pornography, and others may not. Consider the following case.

A Rent-A-Center contacted law enforcement when it repossessed a 40-year-old suspect's computer from his suburban home. The suspect lived alone, and when the Rent-A-Center staff took the computer, he told them 'Don't look on my hard drive.' They did, and found images of naked children. The law enforcement investigators found about 100 images of naked children, either at a nude beach or in a birch forest. The investigator believed that the images were a part of a series of images produced in Russia known to law enforcement. The investigator in this case described the images possessed by the suspect as 'Lolita art.' However, investigators were not able to prove that the suspect possessed any images that could be considered child pornography in his collection. Since images of naked children without graphic sexual activity or that do not focus on the genitals do not meet that state's definition of child pornography, the agency was unable to arrest the suspect.

Table 3 Primary Law Enforcement Dilemmas in Internet Child Pornography Cases.

Law enforcement dilemma[23]	***N* (%)**
Defining child pornography	16 (47%)
Identifying offenders	20 (59%)
Training and/or resources	12 (35%)
Collaboration with other agencies	4 (12%)

[23] Percentages will not add to 100% due to overlapping categories.

An image that shows sexually explicit conduct between an adult and a child can clearly be considered child pornography, while images of nude children may be seen by some as artistic or erotic, but not child pornography (Lanning, 1992). Statutory definitions of child pornography vary by state, and it is probable that even within states, prosecutors may use some discretion in determining which images to accept as evidence.

Law enforcement agents stress that the intent of child pornography statutes is to criminalize the production or possession of graphic sexual images of children, not to penalize 'normal parents who simply have photographs of their nude, young children' (Lanning, 1992, p. 33). Generally, images of nude children would only be considered child pornography if they focus on the genital area or are otherwise considered to be lascivious exhibitions (Lanning, 1992). However, law enforcement agents are encouraged to consider borderline or questionable material in the context of an offender's entire collection or other incident dynamics (Lanning, 1992).

It is likely that law enforcement investigators proceed with caution in cases involving borderline images of juveniles or less than graphic images of alleged Internet child pornography. In another case, a computer repair shop found suspicious images on a suspect's computer.

A suspect dropped a computer off at a repair shop in another state. While fixing the computer, technicians found images that appeared to be child pornography. Law enforcement agents in both states reviewed the images and determined that they did not meet statutory requirements for child pornography. The images found were not graphic sexual images, but did feature child nudity and semi-nudity.

In the case above, the nature of the image was a major dilemma for investigators. None of the images found on the suspect's computer or posted on the Internet met the states' definitions of child pornography. Recent findings that most offenders arrested for Internet child pornography offenses possess images of explicit sexual acts (Wolak et al., 2003) and this case suggest that explicitness of images may be associated with arrest outcomes.

Determining the Age of Children Depicted in Child Pornography Images

In addition to image explicitness, law enforcement agents may face other definitional dilemmas. One such complication is determining the age of children depicted in child pornography images. Wolak et al. found that most of the Internet child pornography possessors arrested in the 12 months after July 1, 2000 had images of prepubescent children (2003). Although images of pubescent children fall within federal and most state statues, they may be less likely to lead to legal action. Lanning and Burgess (1989) note that adolescent victims of sex crimes generally elicit less sympathy than younger children.

Consideration of child's age can be particularly problematic in these child pornography possession cases, in which offenders collect images produced by others. Since investigators

generally do not identify or contact the children depicted in the images, ascertaining their ages can present challenges. This was one of several dilemmas in a case involving a digital video.

A suspect's ex-wife reported that her ex-husband had child pornography on a computer. Law enforcement agents searched the 46-year-old suspect's ISP account and were only able to find one video clip. The victims in the clip looked like minors to the law enforcement investigators, but the prosecutor declined to prosecute as the children 'looked to be 14, 15, or 16.' During this investigation, police discovered that the suspect was communicating online with a 13-year-old female in another country. The suspect had made this juvenile the beneficiary of his life insurance policy, and wrote 'I am absolutely in love with ____' in his Internet service provider profile. However, the victim in this case was never contacted by law enforcement, as there was no evidence that the two had ever met in person.

In this case, the law enforcement agent noted that although he was confident that children were minors, the prosecutor refused to move ahead with the case. From a practical standpoint, and as is suggested in the example above, law enforcement and/or prosecutors may not always be able to determine whether or not children in images fit statutory definitions. Some prosecutors may be hesitant to move ahead with cases in which the only images available depict older children, while others may give priority to these cases.

In some instances, prosecutors may be hesitant to arrest an offender if they anticipate problems proving that an image depicts minors. That was the dilemma in the following case.

A 25-year-old disabled male had been using a work laptop computer and a digital camera. The computer was given to another person, who ran into some problems and had a technician look at the laptop. The technician found what appeared to be child pornography stored in the laptop. The prosecutor in the case was concerned about proving that the children depicted in the images were minors. The law enforcement investigator in the case felt confident the images were of minors, and added that 'they didn't have any pubic hair.'

Prosecutors have legitimate legal concerns about proving the age of children depicted in images. Generally, 'children' in child pornography must fit within states' definitions of 'child,' and those ages and definitions vary within the USA. In Michigan, for example, 'a child means a person who is less than 18 years of age and is not emancipated by operation of law' (National Center for Prosecution of Child Abuse, 1999, p. 24). New Jersey's child pornography statute defines a child as 'any person under 16 years of age' (National Center for Prosecution of Child Abuse, 1999, p. 28).

Some jurisdictions use medical experts to testify that children depicted in images are minors (Rosenbloom & Tanner, 1998). The use of medical experts in child sexual exploitation cases is not a new phenomenon. Doctors, nurses, and other medical professionals can be called to testify

regarding sexual abuse examinations and other medical procedures in child sex crimes (Holmgren, 2002).

If as some suggest, the number of pornographic images of children online is increasing (Jenkins, 2001), these two definitional dilemmas will likely continue to present challenges for law enforcement. Verifying whether or not images are graphic, explicit, or lascivious enough to fit within state statutes will be a primary difficulty. In addition, investigators and prosecutors will have to be able to ascertain that images depict minors.

Discussion and Recommendations

Recent research finds that the majority of offenders arrested for Internet child pornography possession have graphic sexual images and images depicting prepubescent victims (Wolak et al., 2003). However, this analysis suggests that some investigations reach an impasse if images identified do not fit existing statutes or if there is uncertainty regarding the age of children in images. These findings illustrate two dilemmas, the nature of child pornography images and the age of children depicted in the images, which can present challenges in law enforcement investigations of Internet child pornography possession.

Limitations

Several limitations of this study may affect the validity or the generalizability of these results. First, the sample of Internet child pornography possession cases where no arrest was made is small and was selected using quota sampling. Although the law enforcement agencies initially contacted for this study were selected randomly, it is possible that interviews completed in this project do not represent a random sample of all Internet child pornography cases in which no offender was arrested. Second, cases where no arrest was made may have been difficult for law enforcement agents to remember. This may have impacted the initial size of the sample, as well as the information collected from investigators. In some jurisdictions, no written information is maintained if there is not an arrest, and therefore, investigators based their responses on memory alone. Third, the nature of Internet child pornography crimes and law enforcement investigations are changing rapidly. Training, advances in forensic capabilities, and novel criminal approaches may mean that these dilemmas are obsolete and others have taken precedence. However, the cases described here were identified using a random sample of US law enforcement agencies and make a substantial contribution to current knowledge.

Recommendations Related to Defining Child Pornography

This analysis suggests three primary recommendations. First, investigators charged with ascertaining whether or not to proceed in an Internet child pornography case would benefit from a formal infrastructure to support child pornography investigations. Given the number of child pornography images thought to be replicated and shared online (Lemmey & Tice, 2000), it is probable that law enforcement agencies have already determined that some images can be defined as child pornography. Hames (1994) states that the lack of a centralized Internet child pornography database in the USA has led to a situation with ‘literally thousands of images of

children in abusive situations stored away in police files,' with no possibility for further action or identification (p. 203).

Law enforcement agencies in European countries have cataloged known images of child pornography (Persson, 2001) and the USA has begun to compile such a database (Caruso, 2003). Since it is generally believed that many of the images in these investigations are passed among child pornography consumers or are 'known' to law enforcement agents, such databases could minimize wasted resources if several agencies identify the same image. Similarly, global law enforcement collaborations may increasingly utilize these databases to facilitate cross-national investigations.

Second, as an adjunct to such a database, additional consideration should be given to the use of expert witness testimony in child pornography cases. Currently, some law enforcement agencies use expert witness testimony to support allegations that an image meets definitions of child pornography. Such witnesses may testify as to the age of children depicted in images, the nature of sexual acts, or other issues. Once experts confirm that images meet definitions of child pornography in one jurisdiction, they could be submitted to the centralized database. Such expert witness testimony may not be financially feasible for some smaller law enforcement agencies. Therefore, federal resources could be allocated for expert witness assistance, realizing that images determined to be child pornography by smaller agencies could be entered into the national database and possibly be used as supporting evidence in subsequent investigations in other jurisdictions.

Third, the law enforcement investigations described here all occurred in the 12 months between July 1, 2000 and June 30, 2001. Therefore, these investigations occurred prior to a landmark 2002 case in which the US Supreme Court ruled that 'virtual' child pornography could not be considered criminal (Brown, 2002). This Supreme Court decision ruled that virtual child pornography created entirely using computer graphics, with no actual children, is protected under the First Amendment (Brown, 2002). The ruling in this case, *Ashcroft v. the Free Speech*, stated that 'virtual' images of child pornography were a 'legal and logical alternative to actual child pornography' (Brown, 2002, p. 1).

This ruling had major implications for law enforcement and prosecutors, who are responsible for proving that children in child pornography images are 'real.' With advances in computer technology, discerning which images are real and which are 'virtual' may be increasingly difficult for police and prosecutors (Taylor, 2001). Although this ruling is still under debate (McCullagh, 2003), it has likely presented significant dilemmas for law enforcement agencies charged with defining Internet child pornography.

Conclusion

This study identifies specific challenges law enforcement agents may encounter in investigations of Internet child pornography possession. Defining child pornography can be complicated by

definitional challenges and identifying the age of children depicted in images. While this analysis examined a sample of cases known to US law enforcement agents, child pornography crimes may involve multiple jurisdictions and cross national borders. Therefore, this analysis suggests at least three implications for policy and law enforcement practice. First, there is a need for a more formal national and global infrastructure to support these investigations. Second, law enforcement agencies need additional resources, specifically allocated for assisting in expert witness or other assistance in ascertaining if images depict minor children. Finally, this analysis suggests that while law enforcement investigators report using innovative, technology-enhanced investigation strategies, the nature of the Internet appears to present significant challenges for law enforcement. Continued analysis of the impact of the Internet on both the commission and investigation of child pornography crimes is essential.

Ranjit D. Udeshi v. State of Maharashtra[1]

M. Hidayatullah J.

The appellant is one of four partners of a firm which owns a book-stall in Bombay. He was prosecuted along with the other partners under s. 292, Indian Penal Code. All the facts necessary for out purpose appear from the simple charge with two counts which was framed against them. It reads :

> "That you caused Nos. 1, 2, 3, 4 on or about the 12th day of December, 1959 at Bombay being the partners of a book-stall named Happy Book Stall were found in possession for the purpose of sale copies of an obscene book called *Lady Chatterley's Lover* (unexpurgated edition) which inter alia contained, obscene matter as detailed separately and attached herewith and thereby committed an offence punishable u/s 292 of the I.P. Code;

AND

> That you Gokuldas Shamji on or about the 12th day of December 1959 at Bombay did sell to Bogus Customer Ali Raza Sayeed Hasan a copy of an obscene book called *Lady Chatterley's Lover* (unexpurgated edition) which inter alia contained obscene matter as detailed separately and attached herewith and thereby committed an offence punishable u/s 292 of the I.P. Code."

The first count applied to the appellant who was accused No. 2 in the case. The Additional Chief Presidency Magistrate, III Court, Esplanade, Bombay, convicted all the partners on the first count and fined each of them Rs. 20 with one week's simple imprisonment in default. Gokuldas Shamji was additionally convicted on the second count and was sentenced to a further fine of Rs. 20 or like imprisonment in default. The Magistrate held that the offending book was obscene for purposes of the section. The present appellant filed a revision in the High Court of Bombay. The decision of the High Court was against him. He has now appealed to this Court by special leave and has raised the issue of freedom of speech and expression guarantied by the nineteenth

[1] P.B. Gajendragadkar, C.J., K.N. Wanchoo, M. Hidayatullah, N. Rajagopala Ayyangar and J.C. Shah, JJ. (CB), Decided On: 19.08.1964, [1965]1SCR65, MANU/SC/0080/1964, AIR1965SC881, 1965CriLJ8, 1966MhLJ257, 1966MPLJ273,

Article. Before the High Court he had questioned the finding of the Magistrate regarding the novel.

It is convenient to set out s. 292 of the Indian Penal Code at this stage :

> "292. Sale of obscene books etc. : whoever -
>
> (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or
>
> (b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or
>
> (c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or
>
> (d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or
>
> (e) offers or attempts to do any act which is an offence under this section,
>
> shall be punished with imprisonment for either description for a term which may extend to three months, or with fine, or with both.
>
> Exception. - This section does not extend to any book, pamphlet, writing, drawing or painting kept or used bona fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose."

To prove the requirements of the section the prosecution examined two witnesses. One was the test purchaser named in the charge and the other an Inspector of the Vigilance Department. these witnesses proved possession and sale of the book which facts are not denied. The Inspector in his testimony also offered his reasons for considering the book to be obscene. On behalf of the accused Mr. Mulkraj Anand, a writer and art critic gave evidence and in a detailed analysis of the novel, he sought to establish that in spite of its apparent indicate theme and the candidness of its delineation and diction, the novel was a work of considerable literary merit and a classic and not obscene. The question does not altogether depend on oral evidence because the offending novel

and the portions which are the subject of the charge must be judged by the court in the light of s. 292, India Penal Code, and the provisions of the Constitution. This raises two broad and independent issues of law - the validity of s. 292, Indian Penal code, and the proper interpretation of the section and its application to the offending novel.

Mr. Garg who argued the case with ability, raised these two issues. He bases his argument on three legal grounds which briefly are :

(i) that s. 292 of the Indian Penal code is void as being an impermissible and vague restriction on the freedom of speech and expression guaranteed by Art. 19(1)(a) and is not saved by clause (2) of the same article;

(ii) that even if s. 292, Indian Penal Code, be valid, the book is not obscene if the section is properly construed and the book as a whole is considered; and

(iii) that the possession or sale to be punishable under the section must be with the intention to corrupt the public in general and the purchasers in particular.

On the subject of obscenity his general submission is that a work of art is not necessarily obscene if it treats with sex even with nudity and he submits that a work of art or a book of literary merit should not be destroyed if the interest of society requires that it be preserved. He submits that it should be viewed as a whole, and its artistic or literary merits should be weighed against the so-called obscenity, the context in which the obscenity occurs and the purpose it seeks or serve. If on a fair consideration of these opposite aspects, he submits, the interest of society prevails, than the work of art or the book must be preserved, for then the obscenity is overborne. In no case, he submits, can stray passage or passages serve to stamp an adverse verdict on the book. He submits that the standard should not be that of an immature teenager or a person who is abnormal but of one who is normal, that is to say, with a *mens sana* in *corporis sana*. He also contends that the test adopted in the High Court and the Court below from *Queen v. Hicklin* (1868) L.R. 3 Q.B. 360 is out of date and needs to be modified and he commends for our acceptance the views expressed recently by the courts in England and the United States.

Article 19 of the Constitution which is the main plank to support these arguments reads :

"19(1) All citizens shall have the right -

(a) to freedom of speech and expression;

. …

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, 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 . . . public order, decency or morality . . . ."

No doubt this article guarantees complete freedom of speech and expression but it also makes an exception in favour of existing laws which impose restrictions on the exercise of the right in the interests of public decency or morality. The section of the Penal Code in dispute was introduced by the Obscene Publications Act (7 of 1925) to give effect to Article I of the International Convention for the suppression of or traffic in obscene publications signed by India in 1923 at Geneva. It does not go beyond obscenity which falls directly within the words "public decency and morality" of the second clause of the article. The word, as the dictionaries tell us, denotes the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive. It cannot be denied that it is an important interest of society to suppress obscenity. There is, of course, some difference between obscenity and pornography in that the latter denotes writings, pictures etc. intended to arouse sexual desire while the former may include writings etc. not intended to do so but which have that tendency. Both, of course, offend against public decency and morals but pornography is obscenity in a more aggravated form. Mr. Garg seeks to limit action to cases of intentional lewdness which he describes as "dirt for dirt's sake" and which has now received the appellation of hard-core pornography by which term is meant libidinous writings of high erotic effect unredeemed by anything literary or artistic and intended to arouse sexual feelings.

Speaking in terms of the Constitution it can hardly be claimed that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292, Indian Penal Code, manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality. The word obscenity is really not vague because it is a word which is well-understood even if persons differ in their attitude to what is obscene and what is not. Lawrence thought James Joyce's Ulysses to be an obscene book deserving suppression but it was legalised and he considered Jane Eyre to be pornographic but very few people will agree with him. The former he thought so because it dealt with excretory functions and the latter because it dealt with sex repression. (See Sex, Literature and Censorship pp. 26, 201). Condemnation of obscenity depends as much upon the mores of the people as upon the individual. It is always a question of degree or as the lawyers are accustomed to say, of where the line is to be drawn. It is, however, clear that obscenity by itself has extremely "poor value in the propagation of ideas, opinions and informations of public interest or profit." When there is propagation of ideas, opinions and informations of public interest or profit, the approach to the problem may become different because then the interest of society may tilt the scale in favour of free speech and expression. It is thus that books on medical science with intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book form without the medical

text would certainly be considered to be obscene. Section 292, Indian Penal Code deals with obscenity in this sense and cannot thus be said to be invalid in view of the second clause of Art. 19. The next question is when can an object be said to be obscene?

Before dealing with that problem we wish to dispose of Mr. Garg's third argument that the prosecution must prove that the person who sells or keeps for sale any obscene object knows that it is obscene, before he can be adjudged guilty. We do not accept this argument. The first sub-section of s. 292 (unlike some others which open with the words "whoever knowingly or negligently etc.") does not make knowledge of obscenity an ingredient of the offence. The prosecution need not prove something which the law does not burden it with. If knowledge were made a part of the guilty act (*acts reus*), and the law required the prosecution to prove it, it would place an almost impenetrable defence in the hands of offenders. Something much less than actual knowledge must therefore suffice. It is argued that the number of books these days is so large and their contents so varied that the question whether there is *mens rea* or not must be based on definite knowledge of the existence of obscenity. We can only interpret the law as we find it and if any exception is to be made it is for Parliament to enact a law. As we have pointed out, the difficulty of obtaining legal evidence of the offender's knowledge of the obscenity of the book etc., has made the liability strict. Under our law absence of such knowledge, may be taken in mitigation but it does not take the case out of the sub-section.

Next to consider is the second part of the guilty act (*actus reus*), namely, the selling or keeping for sale of an object which is found to be obscene. Here, of course, the ordinary guilty intention (*mens rea*) will be required before the offence can be said to be complete. The offender must have actually sold or kept for sale, the offending article. The circumstances of the case will then determine the criminal intent and it will be a matter of a proper inference from them. The argument that the prosecution must give positive evidence to establish a guilty intention involves a supposition that *mens rea* must always be established by the prosecution through positive evidence. In criminal prosecution *mens rea* must necessarily be proved by circumstantial evidence alone unless the accused confesses. The sub-section makes sale and possession for sale one of the elements of the offence. As sale has taken place and the appellant is a book-seller the necessary inference is readily drawn at least in this case. Difficulties may, however, arise in cases close to the border. To escape liability the appellant can prove his lack of knowledge unless the circumstances are such that he must be held guilty for the acts of another. The court will presume that he is guilty if the book is sold on his behalf and is later found to be obscene unless he can establish that the sale was without his knowledge or consent. The law against obscenity has always imposed a strict responsibility. When Wilkes printed a dozen copies of his Essay on Woman for private circulation, the printer took an extra copy for himself. That copy was purchased from the printer and it brought Wilkes to grief before Lord Mansfield. The gist of the offence was taken to be publication-circulation and Wilkes was presumed to have circulated it. Of course, Wilkes published numerous other obscene and libellous writings in different ways and when Madame Pampadour asked him : "How far does the liberty of the Press extend in

England ?" he gave the characteristic answer : "I do not know. I am trying to find out!" (See 52 Harv. L. Rev. 40)

The problem of scienter (knowingly doing an act) has caused anxious thought in the United States under the Comstock law 19 U.S.C. 1461 (1958) which deals with the non- availability of obscene matter. We were cited Manual Enterprises Inc. v. J. Edward Day 370 U.S. 478 : 8 L. ed. 2nd 639 but there was so little concurrence in the Court that it has often been said, and perhaps rightly, that the case has little opinion value. The same is perhaps true of the latest case *Nico Jacobellis v. State of Ohio* (decided on June 22, 1964) of which a copy of the judgment was produced for our perusal.

It may, however, be pointed out that one may have to consider a plea that the publication was for public good. This bears on the question whether the book etc. can in those circumstances be regarded as obscene. It is necessary to bear in mind that this may raise nice points of the claims of society to suppress obscenity and the claims of society to allow free speech. No such plea has been raised in this case but we mention it to draw attention to the fact that this may lead to different results in different cases. When Savage published his Progress of a Divine, and was prosecuted for it, his plea was that he had "introduced obscene ideas with a view to exposing them to detestation, and of amending the age by showing the depravity of wickedness" and the plea was accepted (See Dr. Johnson's Life of Savage in his Lives of the Poets). In *Hicklin's case* (1868) L.R. 3 Q.B. 360 Blackburn J. did not accept a similar plea in respect of the pamphlet before him observing that it would "justify the publication of anything however indecent, however obscene, and however mischievous." We are not called upon to decide this issue in this case but we have found it necessary to mention it because ideas having social importance will prima facie be protected unless obscenity is so gross and decided that the interest of the public dictates the other way. We shall now consider what is meant by the word "obscene" in s. 292, Indian Penal Code.

The Indian Penal Code borrowed the word from the English Statute. As the word "obscene" has been interpreted by English Courts something may be said of that interpretation first. The Common law offence of obscenity was established in England three hundred years ago when Sir Charles Sedley exposed his person to the public gaze on the balcony of a tavern. Obscenity in books, however, was punishable only before the spiritual courts because it was so held down to 1708 in which year *Queen v. Read* 11 Mod 205 Q.B. was decided, In 1727 in the case against one Curl it was ruled for the first time that it was a Common Law offence 2 Stra. 789 K.B.. In 1857 Lord Campbell enacted the first legislative measure against obscene books etc. and his successor in the office of Chief Justice interpreted his statute (20 & 21 Vict. C. 83) in *Hicklin's case* (1868) L.R. 3 Q.B. 360. The section of the English Act is long (they were so in those days), but it used the word "obscene" provided for search, seizure and destruction of obscene books etc. and made their sale, possession for sale, distribution etc. a misdemeanour. The section may thus be regarded as substantially in pari materia with s. 292, Indian Penal Code, in spite of some

differences in language. In *Hicklin's case* (1868) L.R. 3 Q.B. 360 the Queen's Bench was called upon to consider a pamphlet, the nature of which can be gathered from the title and the colophon which read; "The Confession Unmasked, showing the depravity of Romish priesthood, the iniquity of the confessional, and the questions put to females in confession." It was bilingual with Latin and English texts on opposite pages and the latter half of the pamphlet according to the report was "grossly obscene, as relating to impure and filthy acts, words or ideas". Cockburn, C.J. laid down the test of obscenity in these words :

> ". . . . . I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall . . . . it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."

This test has been uniformly applied in India.

The important question is whether this test of obscenity squares with the freedom of speech and expression guaranteed under our Constitution, or it needs to be modified and, if so, in what respects. The first of these questions invites the Court to reach a decision on a constitutional issue of a most far-reaching character and we must beware that we may not lean too far away from the guaranteed freedom. The laying down of the true test is not rendered any easier because art has such varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested, not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross. The Indian Penal Code does not define the word "obscene" and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by courts, and in the last resort by us. The test which we evolve must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. It is not necessary that the angles and saints of Michaelangelo should be made to wear breeches before they can be viewed. If the rigid test of treating with sex as the minimum ingredient were accepted hardly any writer of fiction today would escape the fate Lawrence had in his days. Half the book-shops would close and the other half would deal in nothing but moral and religious books which Lord Campbell boasted was the effect of his Act.

The question is now narrowed to what is obscenity as distinguished from a permissible treating with sex ? Mr. Garg relies on some passages from the opinions expressed in the Supreme Court

of the *United States in Samuel Roth v. U. S. A.* (354 U.S. 476; 1 L ed. 2d. 1498 (1957)) and from the charge to the jury by Stable J. in Regina v. Martin Secker and Warburg Ltd. [1954] 1 W.L.R. 738 and invites us to adopt the test of "hard-core pornography" for the interpretation of the word "obscene" in the Indian Penal Code. He points out that the latest statute in England now makes exceptions leading to the same result. He has also referred to some books and literary and artistic publications which have not been considered objectionable.

It may be admitted that the world has certainly moved far away from the times when Pamela, Moll Flanders, Mrs. Warren's Profession, and even Mill on the Floss were considered immodest. Today all these and authors from Aristophanes to Zola are widely read and in most of them one hardly notices obscenity. If our attitude to art versus obscenity had not undergone a radical change, books like Caldwell's God's Little Acre and Andre Gide's If It Die would not have survived the strict test. The English novel has come out of the drawing room and it is a far cry from the days when Thomas Hardy described the seduction of Tess by speaking of her guardian angels. Thomas Hardy himself put in his last two novels situations which "were strongly disapproved of under the conventions of the age", but they were extremely mild compared with books today. The world is now able to tolerate much more than formerly, having become indurated by literature of different sorts. The attitude is not yet settled. Curiously, varying results are noticeable in respect of the same book and in the United States the same book is held to be obscene in one State but not in another [See A Suggested Solution to the Riddle of Obscenity (1964), 112 Penn. L. Rev. 834.

But even if we agree thus far, the question remains still whether the *Hicklin test* is to be discarded ? We do not think that it should be discarded. It makes the court the judge of obscenity in relation to an impugned book etc. and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences. It will always remain a question to decide in each case and it does not compel an adverse decision in all cases. Mr. Garg, however, urges that the test must be modified in two respects. He wants us to say that a book is not necessarily obscene because there is a word here or a word there, or a passage here and a passage there which may be offensive to particularly sensitive persons. He says that the overall effect of the book should be the test and secondly, that the book should only be condemned if it has no redeeming merit at all, for then it is "dirt for dirt's sake", or as Mr. Justice Frankfurter put it in his inimitable way "dirt for money's sake." His contention is that judged of in this light the impugned novel passes the *Hicklin test* if it is reasonably modified.

Mr. Garg is not right in saying that the *Hicklin case* (1868) L.R. 3 Q.B. 360 emphasised the importance of a few words or a stray passage. The words of the Chief Justice were that "the matter charged" must have "a tendency to deprave and corrupt". The observation does not suggest that even a stray word or an insignificant passage would suffice. Any observation to that effect in the ruling must be read secundum subjectam materiam, that is to say, applicable to the pamphlet there considered. Nor is it necessary to compare one book with another to find the

extent of permissible action. It is useful to bear in mind the words of Lord Goddard, Chief Justice in the Reiter case. (1954) 2 Q.B. 16

> "The character of other books is a collateral issue, the exploration of which would be endless and futile. If the books produced by the prosecution are indecent or obscene, their quality in that respect cannot be made any better by examining other books ..."

The Court must, therefore, apply itself to consider each work at a time. This should not, of course, be done in the spirit of the lady who charged Dr. Johnson with putting improper words in his Dictionary and was rebuked by him: "Madam, you must have been looking for them." To adopt such an attitude towards art and literature would make the courts a board of censors. An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In this connection the interests of out contemporary society and particularly the influence of the book etc. on it must not overlooked. A number of considerations may here enter which it is not necessary to enumerate, but we must draw attention to one fact. Today our national and regional languages are strengthening themselves by new literary standards after a deadening period under the impact of English. Emulation by our writers of an obscene book under the aegis of this Court's determination likely to pervert our entire literature because obscenity pays and true art finds little popular support. Only an obscurant will deny the need for such caution. This consideration marches with all law and precedent on this subject and so considered we can only say that where obscenity and art are mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality (and these are the words of our Fundamental Law), judged of by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result. We need not attempt to bowdlerize all literature and thus rob speech and expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality but when the letter is substantially transgressed the former must give way.

We may now refer to *Roth's case* 354 U.S. 476 : 1 L. ed. 2d. 1498 (1957) to which a reference has been made. Mr. Justice Brennan, who delivered the majority opinion in that case observed that if obscenity is to be judged of by the effect of an isolated passage or two upon particularly susceptible persons, it might well encompass material legitimately treating with sex and might become unduly restrictive and so the offending books must be considered in it entirety. Chief Justice Warren on the other hand made "Substantial tendency to corrupt by arousing lustful desires" as the test. Mr. Justice Harlan regarded as the test that must "tend to sexually impure

thoughts". In our opinion, the test to adopt in our country (regard being had to our community mores) is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression, and obscenity is treating with sex in a manner appealing to the carnal sides of human nature, or having that tendency. Such a treating with sex it offensive to modesty and decency but the extent of such appeal in a particular book etc. are matters for consideration in each individual case.

It now remains to consider the book *Lady Chatterley's Lover*. The story is simple. A baronet, wounded in the war is paralysed from the waist downwards. He married Constance (Lady Chatterley) a little before he joined up and they had a very brief honeymoon. Sensing the sexual frustration of his wife and their failure to have an heir he leaves his wife free to associate with other men. She first experiences with one Michaelis and later with a game-keeper Mellors in charge of the grounds. The first lover was selfish sexually, the other was something of an artist. He explains to Constance the entire mystery of eroticism and they put it into practice. There are over a dozen descriptions of their sexual intimacies. The game-keeper's speech and vocabulary were not genteel. He knew no Latin which could be used to appease the censors and the human pudenda and other erogenous parts are freely discussed by him and also named by the author in the descriptions. The sexual congress each time is described with great candidness and in prose as tense as it is intense and of which Lawrence was always a consummate master. The rest of the story is a mundane one. There is some criticism of the modern machine civilization and its enervating effects and the production of sexually inefficient men and women and this, according to Lawrence, is the cause of maladjustment of sexes and their unhappiness.

Lawrence had a dual purpose in writing the book. The first was to shock the genteel society of the country of his birth which had hounded him and the second was to portray his ideal of sexual relations which was never absent from any of his books. His life was a long battle with censor-morons, as he called them. Even before he became an author he was in clash with conventions. He had a very repressive mother who could not reconcile herself to the thought that her son had written the White Peacock. His sisters were extremely prim and correct. In his letters he said that he would not like them to read *Lady Chatterley's Lover*. His school teacher would not let him use the word 'stallion' in an essay and his first love Jessie could not read aloud Ibsen as she considered him immodest. This was a bad beginning for a hyper-sensitive man of "wild and untamed masculinity." Then came the publishers and last of all censors. From 1910 the publishers asked him to prune and prune his writings and he wrote and rewrote his novels to satisfy them. Aldous Huxley tells us that *Lady Chatterley's Lover* was written three times [Essays (Dent)]. Aldington in his Portrait of a Genius has seen in this a desire to avoid being pornographic but the fact is that Lawrence hated to be bowdlerized. His first publisher Heinemann refused his Sons and Lovers and he went over to Duckworths. They refused his Rainbow and he went to Secker. They brought out his Lost girl and it won a prize but after the Rainbow he was a banned author whose name could not be mentioned in genteel society. He became bitter and decided to produce a "taboo-shattering bomb". At the same time he started

writing in defence of his fight for sexual liberation in English writing. This was Lawrence's first reason for writing the book under out review.

Lawrence viewed sex with indifference and also with passion. He was indifferent to it because he saw in it nothing to hide and he saw it with passion because to him it was the only "motivating power of life" and the culmination of all human strength and happiness. His thesis in his own words was - "I want men and women to be able to think of sex fully, completely, honestly and cleanly" and not to make of it "a dirty little secret". The taboo on sex in art and literature which was more strict thirty-five years ago, seemed to him to corrode domestic and social life and his definite view was that a candid discussion of sex through art was the only catharsis for purifying and relieving the congested emotions. This is the view he expounded through his writings and sex is never absent from his novels, his poems and his critical writings. As he was inclined freely to use words which Swift had used before him and many more, he never considered his writings obscene. He used them in this book with profusion and they occur in conversation between Mellors and Constance and in the descriptions of the sexual congresses and the erotic love play. The realism is staggering and outpaces the French Realists. But he says of himself :

> "I am abused most of all for using the so called 'obscene words'. Nobody quite knows what the word 'obscene' itself means, or what it is intended to mean; but gradually all the old words that belong to the body below the navel, have come to be judged obscene." (introduction to Pansies).
>
> That was the second motivating factor in the book.
>
> One cannot doubt the sincerity of Lawrence's belief and his missionary zeal. Boccaccio seemed fresh and wholesome to him and Dante was obscene. He prepared a theme which would lend itself to treating with sex on the most erotic plane and one from which the genteel society would get the greatest shock and introduced a game-keeper in whose mouth he could put all the taboo words and then he wrote of sex, of the sex organs and sex actions with brutal candidness. With the magic of words he made the characters live and what might even have passed for allegory and symbolism became extreme realism. He went too far. While trying to edit the book so that it could be published in England he could not excise the prurient parts. He admitted defeat and wrote to Seckers that he "got colour-blind and did not know any more what was supposed to be proper and what not." Perhaps he got colour-blind when he wrote it. He wanted to shock genteel society, a society which had cast him out and banned him. He wrote a book which in his own words was "a revolution - a bit of a bomb". No doubt he wrote a flowering book with pistil and stamens standing but it was to quote his on words again "a phallic novel, a shocking novel". He admitted it was too good for the public. He was a courageous writer but his zeal was misplaced because it was born of hate and his novel was "too phallic for the gross public."

This is where the law comes in. The law seeks to protect not those who can protect themselves but those whose prurient minds take delight and secret sexual pleasure from erotic writings. No doubt this is treating with sex by an artist and hence there is some poetry even in the ugliness of sex. But as Judge Hand said obscenity is a function of many variables. If by a series of descriptions of sexual encounters described in language which cannot be more candid, some social good might result to us there would be room for considering the book. But there is no other attraction in the book. As J.B. Priestly said, "Very foolishly he tried to philosophize upon instead of merely describing these orgiastic impulses : he is the poet of a world in rut, and and lately he has become its prophet, with unfortunate results in his fiction." [The English Novel. p. 142 (Nelson)]. The expurgated copy is available but the people who would buy the unexpurgated copy do not care for it. Perhaps the reason is as was summed up by Middleton Murray :

> "Regarded objectively, it is a wearisome and oppressive book; the work of a weary and hopeless man. It is remarkable, indeed notorious for its deliberate use or unprintable words."
>
> "The whole book really consists of detailed descriptions of their sexual fulfilment. They are not offensive, sometimes very beautiful, but on the whole strangely wearisome. The sexual atmosphere is suffocating. Beyond this sexual atmosphere there is nothing, nothing." [Son of woman (Jonathan Cape)].

No doubt Murray says that in a very little while and on repeated readings the mind becomes accustomed to them but he says that the value of the book then diminishes and it leaves no permanent impression. The poetry and music which Lawrence attempted to put into sex apparently cannot sustain it long and without them the book is nothing. The promptings of the unconscious particularly in the region of sex is suggested as the message in the book. But it is not easy for the ordinary reader to find it. The Machine Age and its impact on social life which is its secondary theme does not interest the reader for whose protection, as we said, the law has been framed.

We have dealt with the question at some length because this is the first case before this court invoking the constitutional guarantee against the operation of the law regarding obscenity and the book is one from an author of repute and the center of many controversies. The book is probably an unfolding of his philosophy of life and of the urges of the unconscious but these are unfolded in his other books also and have been fully set out in his Psychoanalysis and the Unconscious and finally in the Fantasia of the Unconscious. There is no loss to society if there was a message in the book. The divagations with sex are not a legitimate embroidery but they are the only attractions to the common man. When everything said in its favour we find the in treating with sex the impugned portions viewed separately and also in the setting of the whole book pass the permissible limits judged of from our community standards and as there is no social gain to us which can be said to preponderate, we must hold the book to satisfy type test we have indicated above.

In the conclusion we are of the opinion that the High Court was right in dismissing the revision petition. The appeal fails and is dismissed.

Appeal dismissed.

Shri Chandrakant Kalyandas Kakodkar v. The State of Maharashtra[1]

JUDGMENT

This appeal is by special leave directed against the judgment of the Bombay High Court.

The appellant is the author of a short story entitled Shama published in the 1962 Diwali Issue of Rambha, a monthly Marathi Magazine, which story is said to be obscene. Criminal proceedings were, therefore, initiated before the first class Magistrate, Poona by the complainant Bhide under Section 292 I.P.C. against the Printer and Publisher accused 1, the writer of the story accused 2 and the selling agent accused 3. The complainant stated that he had read the aforesaid Diwali issue of Rambha and found many articles and pictures in it to be obscene which are calculated to corrupt and deprave the minds of the readers in general and the young readers in particular. The Complainant further referred to several other articles in the same issue such as the story of Savitri and certain cartoons but we are not now concerned with these because both the Magistrate as well the High Court did not think that they offended the provisions of Section 292 I.P.C. the magistrate after an exhaustive consideration did not find the accused guilty of the offence with which they were charged and, therefore, acquitted them. The complainant and the State filed appeals against this judgment of acquittal. Before the High Court it was conceded that there was no evidence that accused No. 3 had sold any copies of the issues of Rambha and accordingly the order of acquittal in his favour was confirmed. In so far as the other two accused are concerned it reversed the order of acquittal and convicted the printer and publisher accused 1 and the writer accused 2 under Section 292 I.P.C. but taking into consideration the degree of obscenity in the passages complained of a fine of Rs. 25/- only was imposed on each of the accused and in default they were directed to suffer simple imprisonment for a week. It was also directed that copies of the magazine Rambha in which the offending story was published and which may be in possession and power of the two accused be destroyed.

The allegation against the accused is that certain passages in the story of Shama at pp. 111-112, 114, 116, 118-121, 127, 128, 131, and 134 are said to be obscene. In support of this the complainant examined himself and led the evidence of Dr. P. G. Sahstrabudhe and Dr. G. V. Purohit in support of his allegation that the novel is obscene and that the writer and publisher contravened the provisions of Section 292 I.P.C. Accused No. 1 stated that the story of Shama was written by an able writer which depicted the frustration in the life of a poet and denied that it was obscene. The writer Kakodar, accused No. 2 claims to have written about 60 such stories which are published in different periodicals by reputed publishers. He also denies that Shama is obscene and states that he has introduced certain characters in order to condemn the worst and

[1] G.K. Mitter, P. Jaganmohan Reddy and S.M. Sikri, JJ. (FB), Decided On: 25.08.1969, Criminal Appeal No. 170 of 1967, [1970]2SCR80, AIR1970SC1390, 1970(72)BOMLR917, 1970CriLJ1273, (1969)2SCC687

glorify the best and it was never his intention to titillate the sex feelings of the readers, but on the other hand his attempt was to achieve the literary and artistic standard which was in keeping with the style of some of the able and successful writers of Marathi literature. In support of his defence, he examined Shri Keluskar and Prof. Madho Manohar D.Ws. 1 and 2 respectively. The Court on its own summoned and examined Prof. N. S. Phadke and Acharya P. K. Atre. Both the magistrate as well as the learned Judge of the High Court were conversant with Marathi and they seem to have read the story of Shama in the original, an advantage which we have not got. However, on a consideration of the offending passages in the story to which we shall refer presently, they came to different and opposite conclusions.

It is apparent that the question whether a particular article or story or book is obscene or not does not altogether depend on oral evidence because it is the duty of the court to ascertain whether the book or story or any passage or passages therein offend the provisions of Section 292. Even so as the question of obscenity may have to be judged in the light of the claim that the work has a predominant literary merit, it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading litterateurs on that aspect particularly when the work is in a language with which the Court is not conversant. Often a translation may not bring out the delicate nuances of the literary art in the story as it does in the language in which it is written and in those circumstances what is said about its literary quality and worth by persons competent to speak may be of value, though as was said in an earlier decision, the verdict as to whether the book or article or story considered as a whole panders to the prurient and is obscene must be judged by the courts and ultimately by this Court.

What is obscenity has not been defined either in Section 292 I.P.C. or in any of the statutes prohibiting and penalising mailing, importing, exporting, publishing and selling of obscene matters. The test that has been generally applied in this country was that laid down by Cockburn, C.J. in Hicklin's case [1868] L.R. 3 Q.B. 360 and even after the inauguration of the Constitution and considered in relation to the fundamental right of freedom of speech and expression this test, it has been held, should not be discarded. In Hicklin's case [1868] L.R.3 Q.B.360while construing statutes 20 and 21 Victoria, a measure enacted against obscene books, Cockburn, C.J. formulated the test in these words :

> I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands publication of this sort may fall.... It is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thought of most impure and libidinous character.

This Court has in *Udeshi v. State of Maharashtra* : 1965CriLJ8 considered the above test and also the test laid down in certain other, American cases. Hidayatullah, J. as he then was, at the outset pointed out that it is not easy to lay down a true test because "art has such varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity

because his attention is arrested, not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross." It was also pointed out in that decision at p. 74.

> None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. It is not necessary that the angels and saints of Michaelangelo should be made to wear breeches before they can be viewed. If the rigid test of treating with sex as the minimum ingredient were accepted hardly any writer of fiction today would escape the fate Lawrence had in his days. Half the book-shops would close and the other half would deal in nothing but moral and religious books which Lord Campbell boasted was the effect of his Act.

It is, therefore, the duty of the court to consider the obscene matter by taking an overall view of the entire work and to determine whether the obscene passages are so likely to deprave and corrupt those whose minds are open to such influences and in whose hands the book is likely to fall and in doing so one must not overlook the influences of the book on the social morality of our contemporary society. We can do no better than to refer to this aspect in the language of Hidayatullah, J. at p. 76 :

> An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall.

Referring to the attempt which our national and regional languages are making to strengthen themselves by new literary standards after a deadening period under the impact of English, it was further observed at p. 77,

> that where obscenity and art are mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality (and these are the words of our Fundamental Law), judged of by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result. We need not attempt to bowdlerize all literature and thus rob speech and expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way.

Bearing in mind these observations and the tests laid down in Udeshi's case : 1965CriLJ8 : 1965CriLJ8 we propose to examine, having regard to our national standards, the passages in Shama to ascertain in the light of the work as a whole whether the treat with sex in such a way as to be offensive to public decency and morality as can be considered likely to pander to lascivious, prurient or sexually precocious minds.

The second appellant writes about the life of a poet Nishikant who left school in the days of freedom struggle, wrote revolutionary poems, but as the freedom struggle waned he did not join school as others had done notwithstanding his brother's advice that he should pass the matric so that he could be employed in service. As he was mostly unemployed, he was living on his brother and on the bounty of his sister-in-law who was kind and considerate to him. Nishikant, it will appear, is emotional, sensitive and has the power to discern right from wrong. The story starts with his being employed as a teacher and his meeting Shama, the Music teacher in the school. His attraction for her and the opportunity she gives him to meet her alone in her room fills him with a sense of foreboding lest he may have to endure the pangs of suffering which he had to undergo in his two earlier affairs with Neela and Vanita. The poet recalls these two affairs individually and we get the impression that the pain which he underwent should not be repeated. It is more as a repellent to any further involvement with Shama that these experiences are related.

Neela who is about 17 years of age is the daughter of a distant maternal cousin of his mother. As she had reached the marriageable age, her father in Goa, Wasudeo who always treated Nishikant's mother like his own sister is anxious to get her married to some eligible youngman, but evidently the opportunity for choosing the right person was remote. So he suggests to Nishikant's mother that Nishikant should come and bring Neela to Bombay to live with them where they would have better opportunity of choosing a youngman for her to be married. Nishikant who was appointed in a newspaper office was at first reluctant but his sister-in-law persuades him and so he goes to Goa. When he meets Neela, she had changed and was not as ugly as when he had seen her earlier. The author then depicts the slow but steady maturing of the love between them, the seeking of and getting of opportunities to be near to each other, their having to sleep in the same bed while on the boat coming to Bombay and ultimately falling in love with each other which developed during Neela's stay in Bombay. During Neela's stay with Nishikant's family the love between her and Nishikant became intense as a result Nishikant proposes to marry her and writes to her father for his consent. They wait for a reply but unknown to Nishikant, Neela receives a reply from her father rejecting the proposal on the ground that Nishikant is unemployed and would not join Government service even though he had suggested it to him. He says in that letter that poetry may bring him fame but would not give him a livelihood. As he was entirely dependant on his brother for his maintenance, the father refused to give his consent in the interest of Neela's happiness and told her that he was coming back to fetch her. As Neela was in love with Nishikant but she knew that she would not be married to him, she encourages him to bring their love to culmination. This state of affairs lasted for a few

days before her father took her away. About two months later Nishikant receives an invitation card for Neela's marriage and thereafter he received another letter written by Wasudeo to his daughter to which we have earlier referred and which also contained at the back of it Neela's message to Nishikant asking him to forget her.

Even after four years he was unable to forget Neela and had taken to drinking and coming home late. He was idle for long spells and whenever he thought of Neela he wrote a poem. Then one day he was introduced to Vanita who was a graduate and a married woman who had left her husband. She was a critic of stories and novels. When they met, she had praised his poems and had invited him to come to her room ostensibly to discuss his poetry. Vanita is shown as an oversexed woman, experienced and forward, making advances and suggestions. Ultimately she and Nishikant have several affairs till one morning he finds that the person who had introduced her to him was coming out of her room and when he went in he found Vanita sleeping naked. His spirit revolted seeing her in that condition. He was greatly upset at her recalcitrance when he asked her how many more men she had. She replied that it had nothing to do with him, that he had got what he wanted and she does not want to be a slave to any person. He retorted with indignation that He did not wish to see her face and walked out. He had then made up his mind not to have any relations with any woman.

It was with such unpleasant experiences that when he met Shama and was attracted to her he was hesitating and avoiding meeting her alone but circumstances conspired to bring them together and again another affair developed between them. He encourages Shama to sing, writes lyrics for her songs and when she gives a performance in school he arranges for a radio and gramophone representatives to be present there. Her music was appreciated and she began to get audition from these sources. It appears one of the school teacher Kale had earlier attempted to make love to Shama and she had slapped him. When Kale informs Nishikant that he knows about his affairs with Shama, Nishikant gets angry and tells him that he knows how he was slapped by Shama for making advances to her. This enraged Kale and he seems to have taken his revenge by maligning the character of Shama to the Principal. As a result of this, the Principal dismissed her. Hearing this, Nishikant gets angry, goes to the Headmaster and accuses him of being an accomplice of Kale and leaves the service. He then persuades Shama to start a music school, later gets her engagements in films as a playback singer for which he was asked to write lyrics. Shama's reputation as a singer grows rapidly in the Marathi public. It was then that her uncle knowing of it comes to see her and makes insinuations against Nishikant who is offended and hurt because Shama does not prevent her uncle but listens to him without a demur. Periodical quarrels are witnessed because Shama becomes more status minded, begins to think of her wealth and position and moves into wealthy quarters all of which are against Nishikant's outlook and temperament. Both began to fall apart and the visits of Nishikant to Shama became rare. Even though Nishikant lives in poverty, he is too proud to ask her money and is not willing to live with her on her conditions. He stays away from her, showing that he has pride, self respect and spirit of sacrifice. Suddenly a realisation comes to Shama that she had wronged Nishikant and that she

owed everything to him, and therefore has an intense desire for reconciliation. In this state of affairs when she hears that he is taking part in the Kavi Samelan on the radio she gets into the car and asks her driver to drive fast to the radio station. On this pitch of expectant reconciliation and ultimate reunion the story ends.

The story read as a whole does not, in our view, amount to its being a pornography nor does it pander to the prurient interest. It may not be of a very high literary quality and may show immaturity and insufficient experience of the writer, but in none of the passages referred to by the complainant do we find anything offending public order or morality. The High Court itself did not consider the description of Neela when Nishikant meets her in Goa (at p. 107) objectionable, nor the narration and the description of the situation which is created for Nishikant and Neela on the way back to Bombay from Goa when for want of room they had to sleep on a single bed (p. 112) as obscene. The passages at pp. 112, 114, 119-120 and 131 have been found by the High Court to come within the mischief of Section 292 I.P.C. We have been taken through the corresponding passages in the English translation and even allowing for the translation not bringing out the literary or artistic refinement of the original language, we find little in these passages which could be said to deprave or corrupt those in whose hands the book is likely to fall, nor can it be said that any of the passages advocates, as the High Court seems to think, a licentious behavior depraving and corrupting the morals of adolescent youth. We do not think that it can be said with any assurance that merely because adolescent youth read situations of the type presented in the book, they would become depraved, debased and encouraged to lasciviousness. It is possible that they may come across such situations in life and may have to face them. But if a narration or description of similar situations is given in a setting emphasising a strong moral to be drawn from it and condemns the conduct of the erring party as wrong and loathsome it cannot be said that they have a likelihood of corrupting the morals of those in whose hands it is likely to fall-particularly the adolescent.

In the passage at pp. 113-114 Nishikant takes Neela out to show the sights of the city of Bombay but instead takes her to a picture where after the lights go off, seeing a soldier and his girl friend in front kissing, they also indulge in kissing. Then as we said earlier, when the love between them develops Nishikant wanted to marry but the father of the girl was unwilling. Neela realising that their love could never be consummated encourages him to bring it to a culmination. In this way they enjoy unmarried bliss for a few days until Neela's father takes her away.

We agree with the learned Judge of the High Court that there is nothing in this or in the subsequent passages relating to Neela, Vanita and Shama which amounts to pornography nor has the author indulged in a description of the sex act or used any language which can be classed as vulgar. Whatever has been done is done in a restrained manner though in some places there may have been an exhibition of bad taste, leaving it to the more experienced to draw the inferences, but certainly not sufficient, to suggest to the adolescent anything which is depraving or lascivious. To the literate public there are available both to the adults and the adolescents

innumerable books which contain references to sex. Their purpose is not, and they have not the effect of stimulating sex impulses in the reader but may form part of a work of art or are intended to propagate ideas or to instill a moral.

The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country. But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex or that if they read any references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescent and not for the adults. In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow litterateurs and artists to give expression to their ideas, emotions and objectives with full freedom except that is should not fall within the definition of 'obscene' having regard to the standards of contemporary society in which it is read. The standards of contemporary society in India are also fast changing. The adults and adolescents have available to them a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. As observed in Udeshi's 1965CriLJ8 : 1965CriLJ8 case if a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. In the field of art and cinema also the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in anyway tending to debase or debauch the mind. What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thought aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect.

14. We do not think that any of the impugned passages which have been held by the High Court as offending Section 292 I.P.C. can be said to pervert the morals of the adolescent or be considered to be obscene. In this view, we allow the appeal, set aside the conviction and fine. The fine if paid is directed to be refunded.

Samaresh Bose v. Amal Mitra[1]

A.N. Sen, J.

Samaresh Bose, the first appellant, is a well-known writer of Bengali Novels and stories. He is the author of a novel which under the caption 'Prajapati' came to be published in 'Sarodiya Desh' (the annual pooja number of the Bengali Journal 'Desh') for the Bengali year 1374 B.S. Desh is a journal of repute with wide circulation and the puja number is read by lovers of Bengali literature of all age groups all over India, Sitangshu Kumar Dasgupta, the second appellant was the publisher and the printer of the journal at the relevant time.

On the 2nd of February 1968, Amal Mitra, a young Advocate, made an application in the Court of the Chief Presidency Magistrate at Calcutta complaining that the said novel 'Prajapati' "contains matters which are obscene and both the accused persons have, sold, distributed printed and exhibited the same which has the tendency to corrupt the morals of those in whose hands the said 'Sarodiya Desh' may fall and the reading public as well" and "both the accused persons have committed an offence punishable under Section 292 Indian Penal Code (I.P.C. for short) and under Section 292 read with Section 109 I.P.C.

On the basis of the said complaint and after compliance with the necessary formalities, a criminal case being case No. 353/68 against both the accused persons was started and the said criminal case was disposed of by the then Chief Presidency Magistrate of Calcutta by his judgment dated 11th February, 1968. The Learned Chief Presidency Magistrate for reasons recorded in the Judgment held:

> Two persons are facing their trial, accused No. 1, Shri Samaresh Basu, a modern writer of repute and accused No. 2, Shri Sitangshu Kumar Das Gupta, the Printer and Publisher of a very important magazine like 'Desh'.
>
> The novel in question has been found to be obscene and as such accused No. 1 Shri Samaresh Basu cannot escape liabilities. The same is also the condition with accused No. 2 - Shri Sitangshu Kumar Das Gupta. He has got special responsibilities to see that his publication may not affect the readers of the same.
>
> For the reasons stated above, though the accused No. 1 Shri Samaresh Basu, is a powerful writer, 1 cannot but strike down the impugned novel, after declaring the same as obscene.
>
> The result of my above findings, is to find both the accused guilty Under Section 292 I.P.C. and I convict both of them accordingly.

[1] A.N. Sen and R.S. Pathak, JJ. (DB), Decided On: 24.09.1985, Criminal Appeal No. 174 of 1973, AIR1986SC967, 1986CriLJ24, 1985(2)Crimes782(SC), 1985(2)SCALE1225, (1985)4SCC289, [1985]Supp3SCR17.

> Next question arises as to what punishment should be inflicted.
>
> Considering the facts and other connected matters 1 sentence both of them to pay a fine of Rs. 201/- each in default to undergo Section 1 for two months each.
>
> Let the pages from 174 to 226 of Ext. 1 be destroyed under the provisions of Section521 Cr. P.C. after the period of appeal be over.

Against the judgment and order passed by learned Chief Presidency Magistrate both the accused preferred an appeal to the High Court at Calcutta. The complainant also filed a criminal revision in the High Court for enhancement of the sentence imposed by the Chief Presidency Magistrate on the two accused persons. On the criminal revision application which was numbered as Criminal Revision No. 299 of 1969 rule was issued by the High Court. The criminal appeal which was filed by the two accused persons was numbered as Criminal Appeal No. 106/69. The Criminal Appeal No. 106/69 and also the Criminal Revision No. 299/69 were disposed of by a single Judge of the High Court by a common judgment delivered on 27.6.1972. The High Court discharged the rule in the Criminal Revision No. 299/69 and dismissed the appeal affirming the sentences imposed on both the accused persons with the following further observations:

> In the Petition of complaint only the publication of the novel the Sardiya Sankha of Desh of the Bengali Year 1374 at pp. 174 to 225 was mentioned. Only one copy of that journal Desh was marked Ext. 1 in the court of the Magistrate. The learned Chief Presidency Magistrate has directed that the pages from 174 to 226 of Ext. 1 be destroyed under the provisions of Section 521 Cr. P.C. That serves no purpose unless all the printed copies of that issue of Desh are forfeited and in every copy thereof pages from 174 to 226 be destroyed. The Magistrate also failed to notice that during evidence it has come out that this novel has been published also as a book. That publication in the form of a book of this novel need also be forfeited under Section 521 Cr.P.C. While I affirm that the learned Magistrate's decision to destroy the offending pages should be upheld. I direct that the learned Chief Presidency Magistrate shall take appropriate steps under Section 521 in respect of the other copies of Ext. 1 and also in respect of the novel if published in book form. The appeal fails and is dismissed.

Against this judgment of the High Court both the accused persons have preferred this appeal with special leave granted by this Court.

The question for consideration in this appeal is whether the two appellants can be said to have committed an offence under Section 292 I.P.C. and the answer to this question will necessarily depend on the finding whether the novel 'Prajapati' is obscene or not.

It may be noted that in the trial before the Learned Chief Presidency Magistrate the complainant and one Kalobaran Ghosh a businessman, had deposed; accused Samaresh Bose and accused Sitangshu Kumar Das Gupta were both examined, and two well-known persons in the literary

field, (1) Shri Budhadev Bose and (2) Dr. Naresh Guha had given evidence on behalf of the accused. Amal Mitra, the complainant, in the course of evidence stated that he was an Advocate of the Calcutta High Court and was a reader of Bengali Literature and he considered it to be his duty to uphold the purity of Bengali Literature. It is his evidence that the book is obscene and has got no literary value and the book, if read by any person and particularly young persons, may corrupt the morals of the readers. He marked various portions in the book which according to him were obscene. In the course of his cross- examination, Shri Mitra was asked about various other Bengali novels written by other eminent writers, namely, Probodh Kumar Sanyal, Budhadev Bose and Ananda Shankar Roy and he admitted that he had not read any book by them. He also stated in his cross- examination that though he had gone through the book his moral character had not been affected in any way. The other witnesses examined on behalf of the complainant was Kalobaran Ghosh, a businessman carrying on the business of manufacturing engineering goods. He has stated in his evidence that he has a family and he is interested in Bengali literature. It is his evidence that after going through the novel 'Prajapati' he formed an opinion that the novel was absolutely obscene meant to pollute the minds of the younger generation and was written with a view to earn money and he could not hand over the book to his children for reading the same. In the course of his cross-examination, this witness stated that he had read the writings of late Sarat Chandra Chattopadhyay, Rabindra Nath Tagore and Ananda Shankar Roy and he would not say that any of their writings was obscene. This witness further stated in the course of cross-examination that he had not read all the books written by Budhadev Bose, Probodh Sanyal, Achintya Kumar Sengupta. This witness admitted that with the passing of time, the standards of the literature were going down and so also the standards of obscenity.

The first witness called on behalf of the accused was Shri Budhadev Bose. In his evidence Shri Budhadev Bose stated that he was a whole time writer and in addition to that he was a Professor of various institutions and he had also been the Chairman of the Comparative Literature at Jadavpur University for seven years and he had also been the visiting professor of various universities in United States of America. He further stated that he had at least written about 200 books and also many critical works and the books written by him were mostly in Bengali excepting two books which were in English. He stated in the course of his evidence-

> I can unhesitatingly say that Shri Basu is one of the most important Bengali Novelists of the generation after mine. I might be 20 years older to Shri Basu. some sort of restraint should be there to regulate the obscene writings. I mean to say that in certain special cases it may be necessary to impose some restraint on literature. I have read the novel 'Prajapati' as published in the Sarodiya Desh issue of the Year 1374 and subsequently published in book form. That is the book which is being considered in this trial.
>
> Q. Do you consider that book or the novel 'Prajapati' to be an obscene writing?
>
> A. Not at all.

Q. Would you say any portion of that writing to be obscene?

A. No.

In the course of his evidence, his attention was drawn to various passages in the book which were alleged to be obscene and he categorically stated that there was nothing obscene in any of these passages. This witness was cross-examined at length. Various passages in the book alleged to be obscene were put to this witness and it was suggested to him that these passages were obscene. Shri Basu emphatically and categorically denied that those passages or any part thereof could be characterised as obscene. When asked what was his concept of obscenity, Shri Basu in his answer stated "In my opinion, if a piece of writing can be called literary in the special sense, it cannot be obscene. Literature in the technical sense means an imaginary piece of writing". When asked in the course of cross- examination to cite an example in support of the proposition that a writing vividly describing a sexual act and sexual perversity, was of literary and moral value, Shri Basu answered as follows:

> Anybody who knows the works of Rabindra Nath Tagore, knows that throughout his life he was a great advocate of freedom, we can say, also of social and sexual freedom. May I remind everyone here of his novel 'Chokher Bali' where he describes a love relationship between a young Hindu widow and a youngman. May I remind everybody here of 'Ghare Baire' where a married woman, a very highly respected woman falls in love with her husband's friend. May I remind everyone here of Tagore's novel 'Chaturanga' where an actual sexual act is described in a very poetic and moving language.

In cross-examination with regard to a particular passage at p. 178 which is alleged to be obscene, this witness was asked what was it that the author was describing in that passage. The following answer to this question followed by further questions and answers may be noted:

> A. He is describing some pictures that he had at one time seen.
>
> Q. Mr. Bose, do you say that this sort of writing is unconventional?
>
> A. It is not very unconventional in 1968.
>
> Q. Mr. Bose would you like to say that teenagers reading this portion would not be affected in any way?
>
> A. I have already said that they will be repelled.
>
> Q. I put it to you that this passage is obscene and it would pollute their minds?
>
> A. I do not think it is obscene at all, nor is it liable to corrupt the young or older people.
>
> Q. Mr. Bose do you agree that in this novel 'Prajapati', the writer has chosen many words which perhaps are unknown to the Bengali Literature?

> A. These words may have been unknown in literature but they were very widely current in speech. By Introducing these new and forceful words into literature the author has done a service to Bengali literature and language and that is one of the reasons why the book is praise-worthy. That passage was necessary because this passage brings out the moral aspects of the hero's character.

It was put to this witness that this novel 'Prajapati' has no moral value and in answer the witness stated "In my opinion, it has great social and moral value". When a further suggestion was put to him in the course of cross-examination that the book 'Prajapati' had been written only with commercial motive, the witness categorically denied the suggestion saying "certainly not". In answer to the suggestion made to Mr. Bose that he was not capable of judging what is good and what is bad in literature his evidence was:

> Many people think both in India and abroad that I am excellent Judge of literature and I agree with them. On the strength of the reputation I have been invited several times to teach at American Universities and to lecture on literature in many famous Universities in Europe and in Asia.

The other witness called on behalf of the accused was Dr. Naresh Chandra Guha who at the time of giving his evidence was the Professor and Head of the Department of Comparative Literature at Jadavpur University. Dr. Guha in the course of his evidence said that as part of his duty he had to deliver lectures on Bengali Literature and in addition to that he addressed various literary gatherings and had spoken over the radio and he had also addressed a meeting in the University of Chicago on the works of Rabindra Nath Tagore. This witness stated that he had written two books till then, one in English and the other in Bengali. It was the evidence of this witness that he had read quite a few books written by Samaresh Bose and he considered him to be a very powerful writer. It is his categorical evidence that he has read the novel 'Prajapati' and he does not consider that book as an obscene one and this novel is not obscene either in part or as a whole. When certain passages of the book alleged to be obscene by the complainant were pointed out to him to ascertain his views as to whether those passages were obscene, this witness stated that he did not consider the same to be obscene as in his view "it is a necessary part of the scheme" of the novel which scheme was social criticism with a moral purpose. When asked whether the moral purpose of the novel will come through to the general reader, this witness said in his evidence-

> If the reader is one who is used to literature, by which I mean who does not read once a while a book in his life, the moral purpose of the book will be very obvious. I feel as a man whose profession is teaching literature in M.A. classes this is how I could look to them for this book. Here is a young man Sukhen, a small town man, who never had the occasion to experience human love.

Dr. Naresh Chandra Guha was also cross-examined at length. Various passages which were alleged to be and were considered to be obscene by the complainant were put to this witness. Dr. Naresh Chandra Guha clearly and emphatically refuted that there was any obscenity in any of those passages. The following questions put to the witness and the answers given by him may also be noted:

> A. No Sir, My answer entirely goes against your suggestion.
>
> Q. Mr. Guha, I put it to you that the novel 'Prajapati' in question in general and the portions marked with red lines in particular are obscene?
>
> A. I do not think so.
>
> Q. I put it to you that the novel 'Prajapati' has the tendency to corrupt the morals of those whose minds are open to immoral influence.
>
> A. No, it is not so.
>
> Q. I put it to you that the novel Prajapati would pollute the minds of those readers who are young adolescent and of impressionable age?
>
> A. I have got some students. They have read the book. I know, they have not been corrupted. They are of the age group between 18 upwards. They are college students or university students.

It may be noted that the learned Chief Presidency Magistrate had placed no reliance on the testimony of these two witnesses. In fact, he has placed no reliance on the oral testimony which was adduced before him. The learned Chief Presidency Magistrate has proceeded to make his own assessment after reading the book, and as stated by him, with an open mind and a number of times. He has observed "Moreover expert knowledge has nothing to do with such cases. Whether a book is obscene or not depends on the interpretation of Section 292 I.P.C. and not on expert evidence". The learned Chief Presidency Magistrate has set out in his judgment the gist of the story and has referred to various aspects and incidents at length for considering whether the book can be said to be obscene. Dealing with the statement made on behalf of the accused author, that the passages complained of are not obscene and even if it may be said that there is some amount of indecency in those passages and the words used therein are vulgar, it has to be appreciated that they became necessary to put the scheme of the novel in its right perspective, the learned Chief Presidency Magistrate has observed:

> It may have exposed the hypocrisy of the people, exposed the politicians who live on others, exposed the teachers who do not care to look after the interests of the students, exposed the big officers of the workshops and factories and their most ultra-modern wives who do not take care of their children. No doubt, such a thing has been said and such characters have, been depicted, but to me it seems, it has so been depicted in a very

> veiled way. The character of Sukhen as offered to be a noble one, has got to be established by argument. So also the character of Sikha. A plain reading of the novel will no doubt raise pity in the mind of the readers for Sukhen and Sikha, but that will not heighten the importance of the novel in question. As a forceful writer, Shri Samaresh Basu has depicted those character in his own way, but unfortunately the purpose has been frustrated by his bringing some slang and unconventional words and for his depiction of some incidents which cannot be tolerated in a society like ours.

He further observed:

> As such in the fitness of things those words and incidents had to be mentioned like this through his mouth. Sukhen might be of a character of that type but the writer ought to be a little bit cautious. The writer must know that the story of Sukhen will not remain written and preserved in the iron- safe. The writer has got his duty towards his readers as well. Their writings have got their social implications as there is a right of the author to give his very best free from any restraint from any quarter and that too fearlessly. So there is his responsibility to the society as well. As his freedom is great, so must be the responsibility as well. With that end in view the social control has been imposed on the writers through the help of legislation. Accordingly, I hold that no writer should be allowed to take recourse to vulgarism under the pretence of writing some novel with some social purpose.

The Chief Presidency Magistrate ultimately held:

> I find that this book has got no literary merit, nor educational or sociological value. An attempt, however, was made on behalf of the writer to show that the novel in question has served those purposes, but a simple reading of the same will show that it was nothing but a camouflage to introduce obscenity in this book and this has played prominent part. Under the pretence of doing good to the society the novel in question has done greater mischief.

On the basis of the findings on his own appreciation and assessment of the novel on the question of obscenity, the learned Chief Presidency Magistrate came to the conclusion that the novel was obscene within the mischief of Section 292 I.P.C. and the learned Chief Presidency Magistrate imposed the conviction and the sentence which we have earlier recorded.

The learned Single Judge of the High Court has affirmed the view expressed by the learned Chief Presidency Magistrate that the novel in question is obscene and comes within the mischief of Section 292 I.P.C. It may be appropriate to note some of the observations made by the learned Judge. He observed:

> I have read the whole novel. It is remarkable for many reasons, more so because the author Samaresh Basu who is the Principal accused in this case is a well known writer of

contemporary Bengali literature and has published works in the past which have often been in the background of that strata of society where manual labour is often victim of exploitation and sweating, resulting in continuation or even perpetuation of poverty, illiteracy.... In those works Samaresh Basu has employed language of his hero in the particular literary work as such character would do in real life. This Sri Basu has done with courage and deftness that have not only served his purpose well in those writings but also earned reputation for him as a remarkable Bengali writer of present age. Both the defence witnesses have spoken of that well known fact.

The learned Judge has further observed:

It cannot be questioned that the problem has grown in its bulk because of the complete break down of moral fibre of the society in general and individual members of the society in particular, and also in the family units and that can by no means be denied also. The causes that have led to the reasons of the problem need to be carefully discerned. To my mind it is also in the fitness of things that thinkers and literatures have a function to deal with the problem by use of the strength of their pen for giving expression to their thoughts and suggestions. Yet literature as an art is one of certain technique and conscious caution. When the subject is virulent, that provides all the more reason for subdued caution, lest in the attempt to locate the virus and disclosure of its causes, the treatment itself spreads the poison to contaminate many more who are yet uncontaminated that is why the quality of the writer and quality of the languages employed by the writer is relevant. His purpose may be good but his language may betray his purpose and bring about a completely reverse affect. Mere goodness of purpose, therefore, does not offer justification for employment of bad language-bad in the larger sense including lascivious and vulgar. In matter of technical interest and for the concern of technically trained minds a language may be not only inevitable but also useful. But the same language when employed as a vehicle for treatises which are not for the technical purpose becomes obscene due to its vulgarity.

By reading this novel printed in Ex. 1 in the whole I have come to the definite conclusion that the author Samaresh Basu has lapsed into that fault in so far he appears to have intended it for the purpose of getting a market for the journal in which it has been printed amongst the young Section of the society. Whether he has unintentionally lapsed into that vulgarity of language as the vehicle of expression in this writing is irrelevant. What is relevant is that it definitely tends to, not only tends but in my view, it does, deprave and corrupt persons who are likely to read, see or hear the matter contained in it.

The learned Judge held:

I am of the view that successful description of reality is not a good defence against charge of obscenity in literature published for general reader. Students of obstetrics read in the

> medical treatise and get full explanation of all the detail of female anatomy that helps in the cause of science of medicine. But such description of the female anatomy offered as literature for the general public with all the good qualities of successful realism remains obscene punishable under Section 292 I.P.C. It can not be whittled down by merely saying it is bad taste. By the law of our country it is a crime. In the present case, I am of the view that the episodes and the use of so much slang are all deliberately included, not to serve any purpose of art of literary value, but only for getting the seller's market of poronography. Poronography it is and with all the gross taste not because it has sacrificed the art of restraint in the description of female body and also because in some part it has indulged in complete description of sexual act of a male with a female and also of lower animal.

The learned Judge on the basis of his aforesaid findings and other reasons stated in the judgment affirmed the view of the learned Chief Presidency Magistrate that the novel in question was obscene and the learned Judge passed an order which we have earlier noted, upholding the conviction and sentence, while discharging the Rule.

The correctness of the decision holding the novel to be obscene is the subject matter of challenge in this appeal by special leave before us.

Mr. Sanghi, learned Counsel appearing on behalf of the appellants, has contended that neither the novel as a whole nor any part thereof can be considered to be obscene within the meaning of S. 292 I.P.C. It is his contention that in various portions of the novel and in particular the marked portions which were considered by the Chief Presidency Magistrate and also the High Court, various slang words might have been used and the description of the incidents including the description of various parts of female body may be verging on vulgarity and may offend sophisticated minds, but the same cannot be considered to be obscene, as the same cannot have any tendency of depraving and corrupting the minds of persons whose minds are open to such immoral influences and the same cannot also suggest to the minds of the young people of either sex or to persons of more advanced years thoughts of any impure and libidinous character. Mr. Sanghi has submitted that the novel depicts the feelings, thoughts, actions and the life of Sukhen who is the hero of the novel and is its main character; and through the speeches, thoughts and actions of Sukhen the novel seeks to condemn and criticise various aspects of life in society now prevailing in its various strata. It is his submission that slang words and almost vulgar language had to be used in keeping with the character of Sukhen who was accustomed to the use of only such language. He argues that if different kinds of words, cultured and sophisticated, were to be used in the thoughts, speeches and actions of Sukhen, the entire portrayal of Sukhen's character would become unreal and meaningless. It is his argument that true art and literature require that the character sought to be portrayed must be so depicted as to make it real and artistic; and, if for achieving that purpose the language which the kind of person sought to be portrayed indulges in is put into his mouth it does not become obscene. The contention of Mr. Sanghi is that persons

brought up in a particular atmosphere or belonging to a particular class of society choose to use particular types of words to which they are accustomed and if any author has to portray the life of any person belonging to any such strata of the society or brought up in that particular environment, the author for appropriately depicting the character of such a person must necessarily employ as a matter of art and literature the words and expressions that such a person whose character is sought to be depicted uses. Mr. Sanghi has argued that in literature as also in life there is a good deal of distinction between obscenity and vulgarity though both may be offensive to any sophisticated mind. It is his Submission that it is obscenity in literature which attracts the provisions of Section 292 I.P.O. Mr. Sanghi has argued that the word 'obscenity' which is not defined in the Code has come up for consideration in various cases and has been judicially interpreted by various courts including this Court. It is his argument that this book has a social purpose to serve and has been written with the main object of focussing the attention of persons interested in literature to the various ills and maladies ailing and destroying the social fabric and the author who is a powerful writer has used his talents for achieving the said purpose; and in this connection Mr. Sanghi has referred to the evidence of Budhadev Bose and Dr. Naresh Chandra Guha. In support of the submissions made, Mr. Sanghi has referred to decisions of this Court and other authorities.

Mr. Mukherjee, learned Counsel appearing for the State, has supported the judgment of the Chief Presidency Magistrate and the High Court affirming the judgment of the Chief Presidency Magistrate. Mr. Mukherjee has submitted that the novel has to be judged in the background of the conditions prevailing in the society at the time when the novel was written. It is his submission that the learned Chief Presidency Magistrate and the learned Judge of the High Court have both read the novel carefully a number of times and on their own appreciation of the merits of the novel they have both come to the conclusion after considering all the submissions which were made on behalf of the accused persons that the novel in question was obscene.

Mr. Lalit, learned Counsel, appeared as an Amicus curiae at the request of the Court. When the matter had earlier been called, nobody had appeared on behalf of the respondents which included the complainant and the State. At that time the Court had requested Mr. Lalit to assist the Court. It appears that the matter had been adjourned and the counsel for the State had appeared thereafter at the subsequent hearing. Nobody, however, had appeared on behalf of the complainant at the hearing of the appeal. Mr. Lalit has rendered useful assistance to the Court and he has aptly pointed out with reference to authorities that the position in law appears to be well-settled. He rightly contends that the real question is the proper application of the well-settled legal principles to the facts of any particular case. Mr. Lalit has drawn our attention to various passages complained of as obscene and noticed in the judgments and has fairly submitted that it will be for this Court to decide finally on a proper appreciation of the novel itself as a whole and in parts whether the novel or any part thereof is obscene within the meaning of Section 292 I.P.C. The Court expresses its appreciation for the assistance given by Mr. Lalit.

25. Section 292 I.P.C. as it stood at the relevant time was in the following terms:

> Whoever-
>
> (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or
>
> (b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or
>
> (c) takes part, in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported exported, conveyed, publicly exhibited or in any manner put into circulation, or
>
> (d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any persons, or
>
> (e) offers or attempts to do any act which is an offence under this section,
>
> shall be punished with imprisonment of either description for a term which may extend to three months or with fine, or with both.
>
> Exception - This Section does not extend to any book, pamphlet, writing, drawing or painting kept or used bona fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

This Section came to be amended in 1969 by Act 36 of 1969 and the amended Section reads as follows:

> (1) For the purposes of Sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object shall be deemed to be obscene if it is lascivious of appeals to the prurient interest or if its effect, or (whether it comprises two or more distinct items) the effect of say one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or bear the matter contained or embodied in it.
>
> (2) Whoever-

(a) sells, lets to hire, distributes, publicly exhibits, or in any manner puts into circulation or for purposes of sale, hire, distribution, public exhibition or circulation, makes produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figures or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section,

shall be punished on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees-

Exception - This Section does not extend to-

(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure-

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or

(ii) which is kept or used bona fide for religious purposes:

(b) any representation sculptured, engraved, painted or otherwise represented on or in-

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 or

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

It may be noticed that the amended Section to which reference has been made by the High Court in the judgment does not appear to be of any material consequence in deciding this particular case. The amended provision seeks to clarify what may be deemed to be obscene within the meaning of the section, as the word 'obscene' appearing in the Section has not been defined in the Section or in any provision in the Act. The amended provision embodies to an extent in the Section itself the import, effect and meaning of the word 'obscene' as given by courts on interpretation of the word 'obscene'.

In the case of *Ranjit D. Udeshi v. State of Maharashtra*, : 1965CriLJ8 this Court had to decide the question of constitutional validity of Section 292 I.P.C. and had also to interpret the word 'obscene' used in the said Section. This Court upheld the constitutional validity of the Section and the question of validity of the said Section is, therefore, no longer open and has not been very appropriately challenged in the present case. On the question of interpretation of the word 'obscene' in Section 292 I.P.C. this Court observed at pp. 73-74:

> We shall now consider what is meant by the word 'obscene' in Section 292, Indian Penal Code.
>
> The Indian Penal Code borrowed the word from the English Statute. As the word 'obscene' has been interpreted by English Courts something may be said of that interpretation first. The Common law offence of obscenity was established in England three hundred years ago when Sir Charles Sedley exposed his person to the public gaze on the balcony of a tavern. Obscenity in books, however, was punishable only before the spiritual courts because it was so held down to 1708 in which year Queen v. Read,Mod.Q.B 205 ., was decided. In 1717 in the case against one Curl it was ruled for the first time that it was a common Law Offence (2 Stra. 789 K.B.) In 1857 Lord Campbell enacted the first legislative measure against obscene books etc. and his successor in the office of Chief Justice interpreted his statute (20 & 21 Vict. C. 83) in Hicklin's case,(1868) L.R. 3 Q.B. 360, case. The Section of the English Act is long (they were so in those days), but it used the word 'obscene' and provided for search, seizure and destruction of obscene books etc. and made their sale, possession for sale, distribution etc. a misdemeanour. The section may thus be regarded as substantially in pari materia with Section 292 Indian Penal Code, in spite of some difference in language. In Hicklin's case the Queen's Bench was called upon to consider a pamphlet, the nature of which can be gathered from the title and the colophon which read: The Confession Unmasked, showing the depravity of Romish Priesthood, the iniquity of the confessional and the questions put to females in confession. It was bilingual with Latin and English texts on opposite pages and the latter half of the pamphlet according to the report was 'grossly' obscene; as relating to impure and filthy acts words or ideas'. Cockburn, C.J. laid down the test of obscenity in these words:

> '...I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.... It is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character'.
>
> This test has been uniformly applied in India.

This Court further observed at p. 75:

> It may be admitted that the world has certainly moved far away from the times when Pamela, Moll Flanders, Mrs. Warren's Profession, and even Mill on the Floss were considered immodest. Today all these and authors from Aristophanes to Zola are widely read and in most of them one hardly notices obscenity. If our attitude to are versus obscenity had not undergone a radical change, books like Caldwell's God's Little Acre and Andhre Gide's If It would not have survived the strict test. The English Novel has come out of the drawing room and it is a far cry from the days when Thomas Hardy described the seduction of Tests by speaking of her guardian angels. Thomas Hardy himself put in his last two novels situations which 'were strongly disapproved of under the conventions of the age', but they were extremely mild compared with books today. The world is now able to tolerate much more than formerly, having become indurated by literature of different sorts. The attitude is not yet settled. Curiously, varying results are noticeable in respect of the same book and in the United States the same book is held to be obscene in one State but not in another (See A Suggested solution to the Riddle of Obscenity) (1964) 112 P L. R 834.
>
> But even if we agree thus far, the question remains still whether the Hicklin test is to be discarded? We do not think that it should be discarded. It makes the court the judge of obscenity in relation to an impugned book etc. and lays emphasis on the potentially of the impugned object to deprave and corrupt by immoral influences. It will always remain a question to decide in each case and it does not compel an adverse decision in all cases.

This Court held at pp. 76-77:

> The Court must, therefore, apply itself to consider each work at a time. This should not, of course, be done in the spirit of the lady who charged Dr. Johnson with putting improper words in his Dictionary and was rebuked by him: Madam, you must have been looking for them'. To adopt such an attitude towards art and literature would make the courts a board of censOrs. An overall view of the obscene matter in the setting of the whole work would, of course be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it

is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the books is likely to fall. In this connection the interests of our contemporary society and particularly the influence of the book etc. on it must not be overlooked. A number of considerations may here enter which it is not necessary to enumerate, but we must draw our attention to one fact. Today our national and regional languages are strengthening themselves by new literary standards after a deadening period under the impact of English. Emulation by our writers of an obscene book under the aegis of this Court's determination is likely to pervert our entire literature because obscenity pays and true art finds little popular support. Only an obscurant will deny the need for such caution. This consideration marches with all law and precedent on this subject and so considered we can only say that where obscenity and art are. mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality (and these are the words of our Fundamental law), judged of by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result. We need not attempt to bowdlerize all literature and thus rob speech and expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give away.

We may now refer to Roth's 354 U.S. 476 case to which a reference has been made. Mr. Justice Brennan, who delivered the majority opinion in that case observed that if Obscenity is to be judged of by the effect of an isolated passage or two upon particularly susceptible persons, it might well encompass material legitimately treating with sex and might become - unduly restrictive and so the offending book must be considered in its entirety. Chief Justice Warren on the other hand made 'substantial' tendency to corrupt by arousing lustful desires' as the test. Mr. Justice Harian regarded as the test that must 'tend to sexually impure thoughts'. In our opinion, the test to adopt in our country (regard being had to our community mores) is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression, and obscenity is treating with sex in a manner appealing to the carnal side of human nature, or having that tendency. Such a treating with sex is offensive to modesty and decency but the extent of such appeal in a particular book etc. are matters for consideration in each individual case.

In holding the book Lady Chaterlay's Lover which had come up for consideration before this Court to be obscene this Court held at p. 81:

There is no loss to society if there was a message in the book. The divagations with sex are not a legitimate embroidery but they are the only attractions to the common man.

> When everything said in its favour we find that in treating with sex the impugned portions viewed separately and also in the setting of the whole book pass the permissible limits judged of from our community standards and as there is no social gain to us which can be said to preponderate, we must hold the book to satisfy the test we have indicated above.

The question of obscenity of a book, within the meaning of S. 292 I.P.C. again fell for consideration before this Court in the Case of *Chandrakant Kalyandas Kskodar v. State of Maharashtra*: 1970CriLJ1273 . In this case a complaint had been filed against the appellant who was an author of short-story entitled Shama which came to be published in the year 1962 Diwali Issue of Rambha, a monthly magazine. On the basis of the complaint criminal proceedings had been started under Section 292 I.P.C. but the Magistrate dealing with the complaint acquitted the accused of the charge. The complainant and the State filed appeals against this judgment of acquittal by the Magistrate. The High Court, however, held the accused to be guilty of the charge and imposed in convicting the accused a fine. Against the judgment of the High Court, an appeal had been preferred to this Court. While dealing with the question of obscenity within the meaning of Section 292 I.P.C. this Court relied on the earlier decision in *Ranjit D. Udeshi's* case (supra) and referred to various observations made therein. This Court observed at p. 82:

> It is apparent that the question whether a particular article or story or book is obscene or not does not altogether depend on oral evidence because it is the duty of the court to ascertain whether the book or story or any passage or passages therein offend the provisions of Section 292. Even so as the question of obscenity may have to be judged in the light of the claim that the work has a predominant literary merit, it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading litterateurs on that aspect particularly when the work is in a language with which the Court is not conversant. Often a translation may not bring out the delicate nuances of the literary art in the story as it does in the language in which it is written and in those circumstances what is said about its literary quality and worth by persons competent to speak may be of value, though as was said in an earlier decision, the verdict as to whether the book or article or story considered as a whole panders to the prurient and is obscene must be judged by the courts and ultimately by this Court.

This Court held that the book in question was not obscene within the meaning of Section 292 I.P.C. and observed at p. 87:

> We do not think that it can be said with any assurance that merely because adolescent youth read situations of the type presented in the book, they would become depraved, debased and encouraged to lasciviousness. It is possible that they may come across such situations in life and may have to face them. But if a narration or description of similar situations is given in a setting emphasising a strong moral to be drawn from it and condemn the conduct of the erring party as wrong as loathsome it cannot be said that they

have a likelihood of corrupting the morals of those in whose hands it is likely to fall particularly the adolescent.

In the passage at pp. 113-114 Nishikant takes Neela out to show the sights of the city of Bombay but instead takes her to a picture where after the lights go off, seeing a soldier and his girl friend in front kissing, they also indulge in kissing. Then as we said earlier, when the love between them develops Nishikant wanted to marry but the father of the girl was unwilling. Neela realising that their love could never be consummated encourages him to bring it to a culmination. In this way they enjoy unmarried bliss for a few days until Neela's father takes her away.

We agree with the learned Judge of the High Court that there is nothing in this or in the subsequent passages relating to Neela, Vanita and Shama which amounts to poronography nor has the author indulged in a description of the sex act or used any language which can be classed as vulgar. Whatever has been done in a restrained manner though in some places there may have been an exhibition of bad taste, leaving it to the more experienced to draw the inferences, but certainly not sufficient to suggest to the adolescent anything which is depraving or lascivious. To the literate public there are available both to the adults and the adolescents innumerable books which contain reference to sex. Their purpose is not, and they have not the effect of stimulating sex impulses in the reader but may form part of a work of art or are intended to propagate ideas or to instill a moral.

The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a place of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country. But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex, or that if they read any references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescent and not for the adults. In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow litterateurs and artists to give expressions to their ideas, emotions and objectives with full freedom except that it should not fall within the definition of 'obscene' having regard to the standards of contemporary society in India are also fast changing. The adults and adolescents have available to them, a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. As observed in Udesh's case if a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. In the field of art and cinema also the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for

> granted without in anyway tending to debase or debauch the mind. What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thought aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect.

These two decisions of this Court lay down the legal principles to be observed in deciding the question of obscenity within the meaning of Section 292 I.P.C. As these two decisions of this Court settle the legal principles involved, it does not really become necessary to refer to the other authorities cited from Bar. We may, however, note that the novel Lady Chatterleys Lover which came to be condemned as obscene by this Court was held to be not obscene in England by Central Criminal Court. In England the question of obscenity is left to the Jury and the Jury decides whether the book in question is obscene or not. It is of interest to note the summing up of Byrne, J., the learned Judge who presided over the Central Criminal Court which was deciding the question of obscenity of the novel Lady Chatterley's Lover. The summing up by the learned Judge in the case of R.V. Penguine Books Ltd., as reported in Criminal Law Review, 1961 may be reproduced.

> In summing up his lordship instructed the Jury that: They must consider the book as a whole, not selecting passages here and there and, keeping their feet on the ground, not exercising questions of taste or the functions of a censor. The first question, after publication was: was the book obscene? Was its effect taken as a whole to stand to deprave and corrupt persons who were likely, having regard to all the circumstances, to read it? To deprave meant to make morally bad, to prevent, to debase or corrupt morally. To corrupt meant to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality, to debase, to defile. No intent to deprave or corrupt was necessary. The mere fact that the jury might be shocked and disgusted by the book would not solve the question. Authors had a right to express themselves but people with strong views were still members of the community and under an obligation to others not to harm them morally, physically or spiritually. The jury as men and women of the world, not prudish but with liberal minds, should ask themselves was the tendency of the book to deprave and corrupt those likely to read it, not only those reading under guidance in the rarefied atmosphere of some educational institution, but also those who could buy the book for three shillings and six pence or get it from the public library, possibly without any knowledge of Lawrence and with little knowledge of literature. If the jury were satisfied beyond reasonable doubt that the book was obscene, they must then consider the question of its being justified for public good in the interest of science, literature, art or learning or ether subjects of general concern. Literary merits were not sufficient to save the book, it must be justified as being for the public good. The book was not to be judged by comparison with other books. If it was obscene then if the defendant had established the probability that the merits of the book as a novel were so

high that they outbalanced the obscenity so that the publication was the public good, the jury should acquit.

In England, as we have earlier noticed, the decision on the question of obscenity rests with the jury who on the basis of the summing up of the legal principles governing such action by the learned Judge decides whether any particular novel, story or writing is obscene or not. In India, however, the responsibility of the decision rests essentially on the Court. As laid down in both the decisions of this Court earlier referred to, "the question whether a particular article or story or book is obscene or not does not altogether depend on oral evidence, because it is the duty of the Court to ascertain whether the book or story or any passage or passages therein offend the provisions of Section 292 I.P.C." In deciding the question of obscenity of any book, story or article the Court whose responsibility it is to adjudge the question may, if the Court considers it necessary, rely to an extent on evidence and views of leading literary personage, if available, for its own appreciation and assessment and for satisfaction of its own conscience. The decision of the Court must necessarily be on an objective assessment of the book or story or article as a whole and with particular reference to the passages complained of in the book, story or article. The Court must take an overall view of the matter complained of as obscene in the setting of the whole work, but the matter charged as obscene must also be considered by itself and separately to find out whether it is so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall. Though the Court must consider the question objectively with an open mind, yet in the matter of objective assessment the subjective attitude of the Judge hearing the matter is likely to influence, even though unconsciously, his mind and his decision on the question. A Judge with a puritan and prudish outlook may on the basis of an objective assessment of any book or story or article, consider the same to be obscene. It is possible that another Judge with a different kind of outlook may not consider the same book to be obscene on his objective assessment of the very same book. The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. In our opinion, in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the view point of the author the judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. The Judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. A Judge should thereafter apply his judicial mind dispassionately to decide whether the book in question can be said to be obscene within the meaning of Section 292 I.P.O. by an objective assessment of the book as a whole and also of the passages complained of as obscene separately. In appropriate cases, the Court, for eliminating any subjective element or personal preference which may remain hidden in the sub-conscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence

on record and also consider the views expressed by reputed or recognised authors of literature on such questions if there be any for his own consideration and satisfaction to enable the Court to discharge the duty of making a proper assessment.

In the light of the above discussions we now proceed to consider whether the novel in question is obscene or not.

The novel centers round one Sukhen who can be called the hero in this book and who figures as the main character. The novel seeks to express the feelings, thoughts and actions of Sukhen and to portray his character. This the author seeks to do through Sukhen himself who narrates his own experiences, feelings, thoughts and actions in his own words. It is Sukhen who mainly tells the readers his own story in his own words.

Sukhen is the youngest son of his parents. The picture of his family life is, indeed, in the nature of a reflection of what is commonly now found in very many families in the society. Sukhen's father holds a good job and the only interest he has in life is to make money. He takes bribes from every source and he manages to see that bribes are paid to him. Office, money and bribes are the only things Sukhen's father appears to be concerned with. Sukhen's mother who is painted as a delicate and beautiful woman mixed with his father's friends freely and also would not hesitate to bestow favours on them. Sukhen, it appears, was fond of his mother and his mother was also fond of Sukhen. Unfortunately, Sukhen's mother died very earlier when Sukhen was only a child. Sukhen had two elder brothers. Both of them are painted as men of affairs and men of the world. They belonged to different political parties on which each of them had gained sufficient hold and they exploited their position in the political parties for their personal ends. They do not practise what they preach and they have both a good deal of weakness for drinks and women. Sukhen indeed developed a hatred for the two brothers for their hypocracy. Though Sukhen had a soft corner for his father, he had neither great love nor respect for him and he would often accuse him for bringing him into the world. There was an old servant in the family who used a look after Sukhen and it appears that Sukhen had some affection for him. Brought up in such an atmosphere at the house bereft of any love and affection and proper guidance, Sukhen gradually slided into slimy life. He with other students participated in a fast which was organised by the students of the College in which he was studying as a protest against some high-handed and arbitrary action of the college authorities and had, in fact, come into lime-light, as the fast had succeeded in achieving the object for which fast was undertaken after the fast had lasted for five days. While he was on fast he came in close contact with a girl called Shikha, who was a college student and who appears to be the other important personality in the novel. Sukhen developed a weakness for Sikha. The fast undertaken by Sukhen and his association with Sikha in the initial stage did not bring about any marked change in his character. He had started leading the life of a desperate youngman who was considered to be a Goonda, dreaded by the community, particularly the richer section. Sukhen got addicted to wine and women. Shikha with whom Sukhen has come in contact developed a liking for Sukhen inspite of the kind of life

Sukhen led. The recklessness on the part of Sukhen, his boldness, his hatred for hypocrites, political leaders who thrive on others and frank and candid criticism of social evils appear to have attracted Shikha to Sukhen. Various incidents are narrated mostly in Sukhen's words to depict various traits of Sukhen's character. As already indicated, Sukhen had hatred for hypocrites and false political leaders who participated in politics for their own personal ends. He had also hatred for teachers who seek to keep hold on the student community for serving their own ends by creating rift amongst the students and by completely ignoring the interests of the student community, for businessmen and business executives who exploit the workers, for parents who do not have any scruples in making money, remain obsessed with making money and do not take care of their children and for those people who under the guise of gentlemen seek to satisfy their lust and do not spare even young girls. Sukhen had a restless mind and he would often feel that there was something missing in his life and would often suffer from a peculiar feeling when left alone, though in society he was dreaded and regarded as a goonda. It appears that as a result of his association with Shikha, and the closer and more intimate the association became, a kind of change was coming over. The feeling of restlessness was gradually passing away and he was finding peace and seeing some kind of meaning in life. Shikha's association brought some peace and solace to his restless life. Shikha kindled in him the human feelings which had remained dormant in him and had in fact been perverted. Because of his association with Shikha and Shikha's love for him, Sukhen was about to change his ways of life to lead a meaningful and useful life. As this change was gradually coming over the Sukhen he fell a victim of the violence of rival political parties and he succumbed to the injuries inflicted on him by rival political groups. This in substance is the story.

We shall now refer at some length to some of the portions of the book challenged as obscene and so found by the courts below.

The story begins with the scene showing that Sukhen was trying to catch a beautiful butterfly moving about in the room where Shikha was lying on the bed. His attempt to catch the butterfly initially failed and Sukhen used a long pole to push down the butterfly which was resting in the wall at a height beyond his reach. Shikha protested, apprehending that the butterfly would be hurt. In his attempt to catch the butterfly, Sukhen did hurt the butterfly which fell down with one of the wings severed. Shikha takes the butterfly in one of her palms with her face and body turned against Sukhen towards the wall. Seeing Shikha in that position with the butterfly on her palm and Shikha trying to fix the severed wing in its place in the body of the butterfly, Sukhen is reminded of what happened to Zina, a daughter of one of the officers of the factory at the picnic party of the factory owner and its big executives. Sukhen remembers how at that party Zina, a girl of about 14 years of age was being fondled by the elderly persons holding high posts in the factory and whom Zina would call 'Kaku' (Uncle). Sukhen also recalls that how he thereafter had taken Zina away from those persons to a sugarcane field and had an affair with her there. This part of the affair with Zina in the sugarcane field had been considered to be obscene. Sukhen feels that the butterfly resting in the palms of Shikha resembled Zina in the sugarcane field while

she was there with him. After remembering this incident Sukhen turns to Shikha and goes near her. There he notices Shikha's dress and he finds Shikha had only a loose blouse with nothing underneath and a good part of her body was visible and there is some description by Sukhen of what was visible and of his feelings on seeing Shikha in that position. Sukhen's kissing Shikha and going to bed with Manjari, his friend's sister, are other parts of the book considered obscene. The affairs of Sukhen's 'Mejda' (second elder brother) with the maid-servant's daughter and Sukhen's description of the same have also been hold to be obscene.

We have read with great care. It is to be remembered that Sarodiya Desh is a very popular journal and is read by a large number of Bengalies of both sexes and almost of all ages all over India. This book is read by teenagers, young boys, adolescents, grown-up youngmen and elderly people. We are not satisfied on reading the book that it could be considered to be obscene. Reference to kissing, description of the body and the figures of the female characters in the book and suggestions of acts of sex by themselves may not have the effect of depraving, debasing and encouraging the readers of any age to lasciviousness and the novel on these counts, may not be considered to be obscene. It is true that slang and various unconventional words have been used in the book. Though there is no description of any overt act of sex, there can be no doubt that there are suggestions of sex acts and that a great deal of emphasis on the aspect of sex in the lives of persons in various spheres of society and amongst various classes of people, is to be found in the novel. Because of the language used, the episodes in relation to sex life narrated in the novel, appear vulgar and may create a feeling of disgust and revulsion. The mere fact that the various affairs and episodes with emphasis on sex have been narrated in slang and vulgar language may shock a reader who may feel disgusted by the book does not resolve the question of obscenity. It has to be remembered that the author has chosen to use such kind of words and language in expressing the feelings, thoughts and actions of Sukhen as men like Sukhen could indulge in to make the whole thing realistic. It appears that the vulgar and slang language used have greatly influenced the decision of the Chief Presidency Magistrate and also of the learned Judge of the High Court. The observations made by them and recorded earlier go to indicate that in their Chinking there has been kind of confusion between vulgarity and obscenity. A vulgar writing is not necessarily obscene. Vulgarity arouses a feeling of disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences. We may observe that characters like Sukhen, Shikha, the father and the brothers of Sukhen, the business executives and others portrayed in the book are not just figments of the author's imagination. Such characters are often to be seen in real life in the society. The author who is a powerful writer has used his skill in focussing the attention of the readers on such characters in society and to describe the situation more eloquently he has used unconventional and slang words so that in the light of the author's understanding, the appropriate emphasis is there on the problems. If we place ourselves in the position of the author and judge the novel from his point of view, we find that the author intends to expose various evils and ills pervading the society and to pose with particular emphasis the problems which all and afflict the

society in various spheres. He has used his own technique, skill and choice of words which may in his opinion, serve properly the purpose of the novel. If we place our selves in the position of readers, who are likely to read this book, and we must not forget that in this class of readers there will probably be readers of both sexes and of all ages between teenagers and the aged, we feel that the readers as a class will read the book with a sense of shock, and disgust and we do not think that any reader on reading this book would become depraved, debased and encouraged to lasciviousness. It is quite possible that they come across such characters and such situations in life and have faced them or may have to face them in life. On a very anxious consideration and after carefully applying our judicial mind in making an objective assessment of the novel we do not think that it can be said with any assurance that the novel is obscene merely because slang and unconventional words have been used in the book, in which there have been emphasis on sex and description of female bodies and there are the narrations of feelings, thoughts and actions in vulgar language. Some portions of the book, may appear to be vulgar and readers of cultured and refined taste may feel shocked and disgusted. Equally in some portions, the words used and description given may not appear to be in proper taste. In some places there may have been an exhibition of bad taste leaving it to the readers of experience and maturity to draw the necessary inference but certainly not sufficient to bring home to the adolescents any suggestion which is depraving or lascivious. We have to bear in mind that the author has written this novel which came to be published in the Sarodiya Desh for all classes of readers and it cannot be right to insist that the standard should always be for the writer to see that the adolescent may not be brought into contact with sex. If a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents, adolescents will not be in a position to read any novel and "will have to read books which are purely religious". We are, therefore, of the opinion that the Courts below went wrong in considering this novel to be obscene. We may observe that as on our own appreciation of the novel, we are inclined to take a view different from the view taken by the Courts below, we have taken the benefit of also considering the evidence given in this case by two eminent personalities in the literary field for proper appreciation and assessment by us. It has already been held by this Court in two earlier decisions which we have already noted that "the question whether a particular book is obscene or not, does not altogether depend on oral evidence because it is duty of the Court to ascertain whether the book offends the provisions of Section 292 I.P.C." but "it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading litterateurs on that aspect particularly when the book is in a language with which the court is not conversant". It is indeed a matter of satisfaction for us that the views expressed in course of their evidence by the two eminent persons in the literary field are in accord with the views taken by us.

We must, therefore, allow this appeal. We set aside the judgment of the Courts below and the conviction recorded and sentenced imposed on the appellants. We acquit the appellants of the charges framed against them and we hold that the novel is not obscene and does not offend Section 292 I.P.C. We direct that the fine, if paid by the appellants, shall be refunded to them. We make no order as to costs.

Raju Thapa v. State of Uttarakhand[2]

B.S. Verma, J.

This criminal appeal u/s. 374 of Cr.P.C. is directed against the judgment and order dated 22-9-2001, passed by District and Sessions Judge Bageshwar District Bageshwar in Sessions Trial No. 4 of 2011, State v. Raju Thapa, convicting the accused Raju Thapa u/S. 376, I.P.C. and Section 67A of The Information Technology Act, 2000 and sentencing him to undergo R.I. for ten years and to pay a fine of Rs. 10,000/- u/S. 376, I.P.C. and in default of payment of fine to further undergo six months R.I. and further sentencing him to undergo R.I. for two years u/S. 67A of The Information Technology Act and a fine of Rs. 10,000/- and in default of payment of fine to further undergo six months R.I. However, it is directed that the sentences shall run concurrently. The prosecution story in brief is that on 15-12-2010, complainant Dalip Singh Khetwal lodged written report at RS. Kotwali Bageshwar to the effect that his niece the prosecutrix aged 14 years who is studying in class 10th in Inter College Tuped, two years ago Raju Thapa a teacher of Gairad Bilkhet School had forcibly committed rape on her after given her threats and also prepared a obscene mobile clip after giving her threats to fail her in the class and due to the threats she could not tell the occurrence to any one. On 14-12-2010, when a Nepali customer came to the shop of Darshan Khetwal, owner of Kumaun Photo Studio, in order to load picture-songs in his mobile, then it came to light that there was an obscene video-recording of Km. Reeta, who is his Bua in relation. At this Darshan informed the informant and he came to the Photo Studio and saw the obscene video recording and inquired from prosecutrix about the said video recording whereupon the prosecutrix told the informant that the incident is of two years ago, accused Raju Thapa, teacher of Bilkhet Gairad High School had prepared the video record after giving threats her to fail her in the class and to expel her from the school. The complainant also handed over the C.D. at the police station. On the basis of written report, Ext. Ka. 1, chick F.I.R. Ext. Ka. 5 was prepared and case crime No. 1533 of 2010 u/Ss. 376/506, I.P.C. and Section 67A, 67B of Information Technology Act, 2000 was registered, carbon copy of registration of the case is Ext. Ka. 6. The prosecutrix was medically examined by the doctor. The I.O. inspected the place of occurrence and prepared site-plan Ext. Ka. 11. After completing the investigation the I.O. submitted charge-sheet Ext. Ka. 14 against the accused.

The C.J.M. Bageshwar committed the case to the court of Sessions.

The Sessions Judge, Bageshwar framed charges u/Ss. 376, 506, I.P.C., Section 67A and 67B of Information Technology Act and Section 4/6 of Indecent Representation of Women(Prevention) Act, 1986. The accused denied the charges and claimed his trial.

[2] Brahma Singh Verma, J., Decided On: 25.07.2013, Criminal Appeal No. 286 of 2011; 2014CriLJ324, MANU/UC/0176/2013

The prosecution to prove its case produced P.W.1, Dalip Singh, P.W.2, prosecutrix, P.W.3, Constable 40-C.P. Nandu Kumar Joshi, P.W.4, Dr. Gayatri Pangti, P.W.5, Dr. Khempal, P.W.6, Rajendra Singh, P.W.7, Darshan Singh and P.W.8, Basant Lal Biswakarma, I.O.

The accused in his statement u/S. 313 Cr.P.C. denied the prosecution case and alleged that he has been falsely implicated in the case.

The learned Sessions Judge after considering the entire evidence on record and having heard counsel for the parties found the accused guilty of Offences u/S. 376, I.P.C. and Section 67A of the Information Technology Act, 2000, and passed sentences against him.

Feeling aggrieved, the accused/appellant has preferred this appeal.

I have heard learned counsel for the parties and have gone through the record.

Learned counsel appearing on behalf of the appellant emphatically contended that there has been inordinate delay in lodging the FIR and the prosecution could not furnish any satisfactory explanation for the same, therefore, the whole prosecution case based on this F.I.R., cannot be relied upon. Apart from this no effort was made by the prosecution to prove the factum of recording obscene mobile video taken by the accused on the mobile and further the computer hard-disc was not produced before the court for forensic examination. Even mobile of the witness P.W.7, Sri Darshan Singh was not taken by the I.O. for forensic examination and even no date and time of occurrence was mentioned by the prosecutrix in her statement. The prosecution failed to prove his case and thus the accused-appellant is entitled to get benefit of doubt in the case.

In reply, the learned Brief Holder appearing on behalf of State has submitted that in sexual offences delay in lodging FIR has to be considered with different yardstick. The accused was class teacher of the victim and he had committed rape on the prosecutrix after giving her threats to fail her and to expel her from the class and the accused also extended threats to her life and as the honour of family was involved, the prosecutrix did not tell the incident to any one and when the video recording prepared by the accused came to light, then she was compelled to tell the truth. Therefore, the delay has been explained satisfactorily. In support of her contention learned Brief Holder has relied on the case of Satpal Singh v. State of Haryana, reported in 2010 Cri LJ 4283 : (2010 AIR SCW 4951).

I have gone through the above cited case. In para-15, the Hon'ble Apex Court has observed as under-

> However, no straight-jacket formula can be laid down in this regard. In case of sexual offences, the criteria may be different altogether. As honour of the family is involved, its members have to decide whether to make the matter to the court or not. In such a fact-situation, near relations of the prosecutrix may take time as to what course of action

should be adopted. Thus, delay is bound to occur. This Court has always taken judicial notice of the fact that-4 'ordinarily the family of the victim would not intend to get a stigma attached to the victim. Delay in lodging the First Information Report in a case of this nature is a normal phenomenon

The Apex Court also considered the issue at length in the case of State of *Himachal Pradesh v. Prem Singh*, reported in : AIR 2009 SC 1010 : (2009 Cri LJ 786) and observed as under:--

> So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming the police station to lodge a complaint. In a tradition bound society prevalent in India more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR.

Learned Brief Holder also relied upon the case of State of *U.P. v. Manoj Kumar Pandey*, reported in: AIR 2009 SC 711, wherein it has been observed in para-3-

> The approach of the trial court and the High Court is clearly unsustainable. Merely the victim was more than 16 years of age as held by the trial court that cannot be a ground to hold that she was consenting party. No evidence was led to show such consent. Apart from that normal rule regarding the duty of the prosecution to explain the delay in lodging FIR and the lack of prejudice and/or prejudice caused because of such delayed lodging of FIR does not per se apply to cases of rape. This has been the consistent view of this Court. The High Court was, therefore, clearly wrong in disposing of the appeal in such cryptic manner. In the circumstances of the case, we set aside the order of the High Court and remit the matter to it for fresh hearing so that it can consider the matter and hear in detail and dispose of the same by a reasoned judgment. Whatever has been expressed by us supra is only for the purpose of coming to the conclusion that the manner of disposal of the appeal is not proper.

The written report was lodged by Dalip Singh Khetwal, P.W.1. This witness has stated that on 14-12-2010, Darshan Singh Khetwal, owner of Kumaun Photo Studio Bageshwar has informed him that a Nepali customer had come to his shop to load songs on his mobile and he had seen that there is an obscene video clipping in the mobile whose face is like the face of his niece prosecutrix. This information was given by Darshan Singh on his mobile and this witness had gone to the Photo Studio and Darshan Singh had shown the video M.M.S. and this video clipping was of the prosecutrix. The video clipping was the photo of prosecutrix in naked position from knee upto breast. In that picture the prosecutrix was wearing school dress-white salwar, blue colored shirt and white coloured chunari and the logo was of Junior High School Gairad and the scene of commission of rape with prosecutrix was seen in the picture. This witness further told that he came to his home and inquired from prosecutrix about the matter. At this the prosecutrix

told him that the incident is of 11/2 years ago. The accused Raju Thapa a teacher of Gairad School had committed rape on her after threatening her to fail her and expel her from the school and he had taken her photo on his mobile. This witness further deposed that at the time when the rape was committed on prosecutrix she was 12-13 years of age. He further deposed that on 14-12-2010 he got prepared C.D. of video clipping and on 15.12.2010 he lodged the F.I.R. against the accused. This witness has proved the written report Ext. Ka. 1 and the C.D. was handed over to the Station Officer which has been proved as Ext. Ka. 2. This witness also proved the material Ext. 1 and 2, cloths of prosecutrix and C.D. respectively. In the cross-examination this witness has stated that the prosecutrix after passing her 8th class had left Gairad School and in the year 2010 she is studying in Inter College Toped in 10th class. He further stated that he does not know the person in the video clipping, who has done sexual intercourse. He also stated that he does not know how the video clipping had come with Darshan Singh.

Thus from the statement of complainant P.W.1, Dalip Singh, it is quite clear that when the obscene video clipping came to the notice of Darshan Singh, owner of Kumaun Photo Studio, then this witness came to the shop of Darshan Singh and he had seen the video clipping and thereafter he got prepared CD. and inquired from prosecutrix and the prosecutrix had told this witness that the accused had committed forcible rape on her about 11/2 years ago whereas in the written report this witness has mentioned the period of incident two years ago. This witness also could not tell the name of the person doing intercourse in the video clipping.

P.W.2, prosecutrix has stated that in the year 2008, she was studying in 8th class in Junior High School Gairad. There accused was posted as a teacher and he used to teach her also. When she was studying in class-8th in the month of October, 2008, the accused called her alone at the Varandah of the School and told her that her study work is not upto the mark, she had failed in class-6th twice and if she has to pass class 8th she should be in his contact and if she declines his advise, she will not pass class 8th and the accused would expel her from the school and she could not get admission in some other school also. Prosecutrix further deposed that on the same day the accused told her to come to his office but she did not go to the office room of accused. At this the accused beat her on the pretext of study. In the month of October, 2008 one day when Head Master was not in the school, in the third period the accused told her to bring food in the office room. She went in the office room in the interval. The accused was sitting in the room. The accused bolted the door from inside and asked the prosecutrix to lay down on the mat, but she refused to do so. The accused forcibly laid her down on the that and committed rape on her. When she cried the accused closed her mouth with his hand. When the prosecutrix tried to run away from the room the accused gave threats to her that if she would tell the incident to any one, he would kill her and due to fear of accused and for the sake of her honour she did not narrate the incident to any one. This witness further deposed that after 20-25 days of the above incident, in the month of November, 2008 the accused again called her in the same office room and asked her to raise the hem of shirt and put-down the salwar and due to fear of accused she did that and accused took out photo of her naked body on his mobile. This witness also stated that on that day

she was wearing school dress-green shirt, white salwar and white scarf and school badge. When this witness refused to do so, the accused had told her that he would delete the photo from mobile. She further deposed that on that day the accused committed rape on her and took obscene photo of commission of rape on her. When C.D. Ext. 2 was shown to this witness playing on lap-top, this witness has admitted that it is her photo. This witness further deposed that when in the month of December, 2010 her paternal uncle told her about the obscene photo on mobile then she narrated the truth to him. Then her statement u/S. 164, Cr.P.C. was recorded and she was medically examined by the doctor. This witness has proved her signature on statement recorded u/S. 164, Cr.P.C. as Ext. Ka. 4. In the cross-examination this witness has denied the suggestion that the accused has not committed rape on her and no M.M.S. was prepared by the accused on mobile.

The evidence of P.W.7, Darshan Singh is important. He is the witness who had at the first instance seen the video clipping on the mobile of a person, resident of Nepal and had informed the complainant about the video clipping and thereafter prepared the C.D. He has stated that he does the business of photography and Tent House. His shop is situated at Pindari Road Bageshwar. He also does the work of down-loading songs and videos on mobile through computer. He further alleged that on 13-10-2010 at about 2 p.m. a Nepali person came at his shop to load songs on his mobile and he handed over the chip of his mobile to him and asked this witness to down-load Nepali songs. The memory of chip was full and he asked the Nepali person that song cannot be downloaded on the chip. At this that person asked him to delete some video clipping and when he was deleting the video clipping he saw an obscene video clipping and the face of the girl in video clipping was matching with the face of prosecutrix daughter of his Bua and when he asked the person how this video came to his mobile, he replied the same was loaded from the mobile of his friend. He further deposed that he saved that video clipping on his computer and deleted the same from the mobile of Nepali person. Thereafter he downloaded the songs on the mobile and handed over the chip to Nepali person. Then he called Dalip Singh paternal uncle of prosecutrix at his shop on 14th and when he came to his shop, this witness told him about the incident. After seeing the clipping Dalip Singh told this witness to prepared C.D. and he prepare C.D. and deleted the clipping from the computer. This witness also proved the C.D. material Ext. 2. In the cross-examination this witness has stated that police had interrogated him and he had given the statement to the police which he had given in examination-in-chief before the court and if the I.O. has not noted these facts in his statement he cannot tell the reason. Thus, from cross-examination of this witness it reveals that the I.O. had not noted the facts narrated by this witness in court. The conduct of this witness seems to be highly doubtful. When a Nepali person had come to him to down-load Nepali songs and he came to know about the obscene video clipping then why this witness has not narrated the facts to the police and allowed that person to go away. It has also come in the statement of this witness that that Nepali person had told him that the video clipping was downloaded by him from the mobile of his friend. This witness also admitted that he has no registration under I.T. Act to do the work of down-loading the songs on mobile and for preparing C.D. from computer whereas registration is essential.

The evidence of P.W.8, Inspector Basant Lal Viswakarma has got relevance. This witness has stated that on the day when the investigation was entrusted to him he had arrested the accused. He inspected the registers of Junior High School Gairad took them into custody and prepared Fard Ext. Ka. 12. No effort was made to know whether the Principal was really on leave on the dates when the accused called the prosecutrix in the office room and committed rape and prepared video clipping as narrated by prosecutrix. This fact could very well be verified from the attendance registers, but it has not been done. This witness further deposed in his cross-examination that two years ago this video clipping had come in the mobiles. He further stated that he made search for the said Nepali person but he could not be traced. He further stated that the mobile of accused was taken by him from his brother but the same was not sent for forensic test as the make of the mobile was of 2009 and he also did not make the said mobile as case property. From the above statement of I.O. it seems that no effective efforts were made by him to search for the mobile on which the video clipping was prepared. This witness also admitted in his cross-examination that in the recent technology the date and time of video clipping can be known but he did not send the video clipping for forensic examination. He further stated that he has recorded the statement of Sri Rajendra Bora, Head Master, Ramesh Singh Bhakuni, Assistant Teacher, Sri Rajendra Singh Clerk and Sri Harish Chandra Kandpal, Chaukidar of Junior High School Gairad, but he did not record the statement of Sri Soban Singh Bisht, the then Principal of the school and these witness did not support the theory of sexual intercourse by the accused with the prosecutrix and video clipping.

This is an admitted fact that the person shown doing sexual intercourse in the video clipping is not identifiable. Prosecutrix in her statement has stated that she has identified the accused by his pant, thigh, and penis. P.W.1, Dalip Singh in his cross-examination has stated that he does not know the person in the video clipping doing sexual intercourse. The face and other parts of body of the person are not there in the video clipping and it cannot be said with certainty that the video clipping is of the accused. It has also come in evidence of the I.O. that two years ago this video clipping had come in light. When this video clipping had come on the mobiles two years ago then this fact remains as to why action was not taken against the accused. Therefore in the facts and circumstances of the case it is not a fit case where inordinate delay of about two years may not be ignored and the case laws cited on behalf of the learned Brief Holder on behalf of the State has no application in the case at hand.

The prosecutrix was medically examined by P.W.4, Dr. Gayatri Pangti on 16-12-2010. According to prosecutrix the incident was committed in the months of October 2008 and thereafter in the month of November, 2008. Thus the medical of the prosecutrix was done after more than two years of the incident. According to this witness hymen of the prosecutrix was ruptured, vagina was admitting two fingers. Vaginal smear was taken and slide was sent for examination but no sperm dead or alive was found.

P.W.5, Dr. Khempal had taken x-ray of elbow and writ for determining the age of prosecutrix and this witness has opined that both the elbow joint and wrist joint had fused and on 16-12-2010 her age was above 14 years and below 16 years. Thus from the evidence of P.W.1, Dalip Singh and P.W.2, prosecutrix as well as medical evidence it is proved that the prosecutrix at the time of occurrence was minor.

Prosecutrix in her statement on oath has given statement that one day in the month of October 2008 the accused called her in the office room in the interval and committed rape upon her. Her further statement is that after 20-25 days of the above incident the accused called her in that very room and took her naked photo on mobile and also took photo when he was committing rape on her. This witness also admitted that she did not tell the incident to any one due to the threats extended to her by the accused.

P.W. 1, Dalip Singh in his cross-examination has stated that prosecutrix had left the Gairad School after passing her class 8th in the year 2007 to 2009 and in the year 2010 she was studying in class 10th in Inter College Tuped. Suggestion has been given to P.W. 1, Dalip Singh that the accused has been implicated in false case due to the reason that prosecutrix was weak in her studies and she was failed in her class and she was annoyed with the accused. This witness also stated in cross-examination that the parents of prosecutrix are alive. She has one brother and grand mother and the prosecutrix never narrated the incident to them. It also creates a doubt to this fact that the accused committed rape on the prosecutrix once in the month of October, 2008 and then again in the month of November 2008 and also prepared video clipping but surprisingly enough no one had seen the incident particularly when it has come in the statement of prosecutrix that the accused had used force and she had raised alarm. This fact cannot be ignored that there were many students and teachers, clerks and chokidar in the school but no one had noticed the incident. Further when the prosecutrix left the school then also she did not narrate the incident to her family members. Again when the M.M.S. had come to light two years earlier as has been stated by the I.O. in his statement, then also no action was taken in the matter and there is no explanation from the side of complainant as to why the action was not taken at that time. P.W.7, Darshan Singh is alleged to have noticed the video clipping from the mobile of a Nepali who had come to his shop to download Nepali songs and Darshan Singh saved the video clipping on his computer and deleted the same from the mobile of that Nepali, but this witness did not try to report the matter to the police and allowed him to go away. P.W.7, Darshan Singh also stated before the court that the Nepali person had told him that the video clipping was loaded to his mobile from the mobile of his friend. Darshan Singh also admitted that he has no registration under I.T. Act to do the work of preparing C.D. from mobile and to do the work of downloading the songs on mobile. All the above circumstances of video clipping don't make a complete chain of events so that it may be inferred that the video clipping was prepared by the accused.

It is to be mentioned here that according to prosecutrix the accused asked her to lift the border of her shirt and to pull down her Salwar and she did that due to fear of the accused. The prosecutrix

was in school dress at that time and the accused took naked photos of her body and when she refused to take her naked photos the accused told her that he would delete the same. She further stated that the accused committed rape on her on that day also and also prepared video himself when he was committing rape on her. This part of statement of prosecutrix is unbelievable. How a person can prepare a video while he was doing sexual intercourse by using force with the prosecutrix. In the situation like this some other person could have prepared the video, but it is not a case of prosecution and as per statement of prosecutrix the accused himself prepared video of naked part of her body when he was committing rape on her. This possibility cannot be ruled out that some other person might have done sexual intercourse with prosecutrix and she has falsely named the accused-her teacher. Apart from this P.W.7, Darshan Singh, owner of Kumaun Photo Studio, did not produce the hard disc of the computer as a primary evidence to prove the factum of recovery of M.M.S. from mobile of Nepali person and he has prepared the C.D. without forensic examination of mobile of the accused, it cannot be said that the accused prepared the video of naked parts of the body of the prosecutrix, particularly when in the disputed video the person shown committing rape is not identifiable and thus the charges levelled against the accused-appellant are not proved.

The witnesses of facts produced by prosecution i.e. P.W.1, Dalip Singh and P.W.7, Darshan Singh, could not prove this fact that in the video the person committing rape with the girl is the accused, except the prosecutrix who has stated that she has recognized the accused with the thigh, pant and penis. Thus, in the above facts and circumstances it cannot be said that the person in the video clipping, is the accused and no one-else. In the above facts and circumstances of the case and the evidence discussed above, in my opinion, the case law cited on behalf of learned Brief Holder referred above, is not applicable to the facts of this case. The prosecution has failed to explain satisfactorily the long delay of about two years in lodging the F.I.R., therefore, the whole prosecution story based on it is not believable.

In view of discussion made in foregoing paragraphs, the prosecution has failed to prove its case against the accused beyond all reasonable doubts therefore, the accused-appellant is entitled to get the benefit of doubt. The learned trial court has failed to appreciate the evidence and facts of the case in right perspective and the judgment and order passed by the trial court is liable to be set aside.

The appeal is allowed. The judgment and order passed by trial court convicting the accused-appellant u/S.376, I.P.C. and section 67A of I.T. Act and accordingly sentencing the accused-appellant, is set aside.

The accused-appellant is in jail. He shall be released forthwith. Let the record be transmitted to the trial court for compliance.

Privacy & Media Law[1]

In her research, Sonal Makhija, a Bangalore-based lawyer, tries to delineate the emerging privacy concerns in India and the existing media norms and guidelines on the right to privacy. The research examines the existing media norms (governed by Press Council of India, the Cable Television Networks (Regulation) Act, 1995 and the Code of Ethics drafted by the News Broadcasting Standard Authority), the constitutional protection guaranteed to an individual's right to privacy upheld by the courts, and the reasons the State employs to justify the invasion of privacy. The paper further records, both domestic and international, inclusions and exceptions with respect to the infringement of privacy.

Introduction

Last year's satirical release, Peepli [Live], accurately captured what takes place in media news rooms. The film revolves around a debt-ridden farmer whose announcement to commit suicide ensue a media circus. Ironically, in the case of the Radia tapes, the same journalists found themselves in the centre of the media's frenzy-hungry, often intrusive and unverified style of reporting.[1] Exposés, such as, the Radia tapes and Wikileaks have thrown open the conflict between the right to information, or what has come to be called 'informational activism', and the right to privacy. Right to information and the right to communicate the information via media is guaranteed under Article 19(1) (a) of the Constitution of India. In *State of Uttar Pradesh v Raj Narain*,[2] the Supreme Court of India held that Article 19(1) (a), in addition, to guaranteeing freedom of speech and expression, guarantees the right to receive information on matters concerning public interest. However, more recently concerns over balancing the right to information with the right to privacy have been raised, especially, by controversies like the Radia-tapes.

For instance, last year Ratan Tata filed a writ petition before the Supreme Court of India alleging that the unauthorised publication of his private conversations with Nira Radia was in violation of his right to privacy. The writ, filed by the industrialist, did not challenge the action of the Directorate-General of Income Tax to record the private conversations for the purpose of investigations. Instead, it was challenging the publication of the private conversations that took place between the industrialist and Nira Radia by the media. Whether the publication of those private conversations was in the interest of the public has been widely debated. What the Tata episode brought into focus was the need for a law protecting the right to privacy in India.

India, at present, does not have an independent statute protecting privacy; the right to privacy is a deemed right under the Constitution. The right to privacy has to be understood in the context of

[1] Sonal Makhija, 19 July, 2011, available at: http://cis-india.org/internet-governance/blog/privacy/privacy-media-law.

two fundamental rights: the right to freedom under Article 19 and the right to life under Article 21 of the Constitution.

The higher judiciary of the country has recognised the right to privacy as a right "implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21". The Indian law has made some exceptions to the rule of privacy in the interest of the public, especially, subsequent to the enactment of the Right to Information Act, 2005 (RTI). The RTI Act, makes an exception under section 8 (1) (j), which exempts disclosure of any personal information which is not connected to any public activity or of public interest or which would cause an unwarranted invasion of privacy of an individual. What constitutes an unwarranted invasion of privacy is not defined. However, courts have taken a positive stand on what constitutes privacy in different circumstances.

The purpose of this paper is to delineate the emerging privacy concerns in India and the existing media norms and guidelines on the right to privacy. At present, the media is governed by disparate norms outlined by self-governing media bodies, like the Press Council of India, the Cable Television Networks (Regulation) Act, 1995 and the Code of Ethics drafted by the News Broadcasting Standard Authority (NBSA). The paper examines the existing media norms, constitutional protection guaranteed to an individual's right to privacy and upheld by courts, and the reasons the State employs to justify the invasion of privacy. The paper records, both domestic and international, inclusions and exceptions with respect to the infringement of privacy.

The paper traces the implementation of media guidelines and the meanings accorded to commonly used exceptions in reporting by the media, like, 'public interest' and 'public person'. This paper is not an exhaustive attempt to capture all privacy and media related debates. It does, however, capture debates within the media when incursion on the right to privacy is considered justifiable. The questions that the paper seeks to respond to are: When is the invasion on the right to privacy defensible? How the media balances the right to privacy with the right to information? How is 'public interest' construed in day-to-day reporting? The questions raised are seen in the light of case studies on the invasion of privacy in the media, the interviews conducted with print journalists, the definition of the right to privacy under the Constitution of India and media's code of ethics.

Constitutional Framework of Privacy

The right to privacy is recognised as a fundamental right under the Constitution of India. It is guaranteed under the right to freedom (Article 19) and the right to life (Article 21) of the Constitution. Article 19(1) (a) guarantees all citizens the right to freedom of speech and expression. It is the right to freedom of speech and expression that gives the media the right to publish any information. Reasonable restrictions on the exercise of the right can be imposed by the State in the interests of sovereignty and integrity of the State, 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. Article 21 of the Constitution provides, **"No person shall be deprived of his life or personal liberty except according to procedure established by law."** Courts have interpreted the right to privacy as implicit in the right to life. In *R.Rajagopal v. State of T.N.*[3]; and *PUCL v. UOI*[4], the courts observed that the right to privacy is an essential ingredient of the right to life.

For instance, in *R. Rajagopal v State of Tamil Nadu*, Auto Shankar — who was sentenced to death for committing six murders — in his autobiography divulged his relations with a few police officials. The Supreme Court in dealing with the question on the right to privacy, observed, that the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of the country by Article 21. It is a 'right to be left alone.' "A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters." The publication of any of the aforesaid personal information without the consent of the person, whether accurate or inaccurate and 'whether laudatory or critical' would be in violation of the right to privacy of the person and liable for damages. The exception being, when a person voluntarily invites controversy or such publication is based on public records, then there is no violation of privacy.

In *PUCL v. UOI*,[5]which is popularly known as the wire-tapping case, the question before the court was whether wire-tapping was an infringement of a citizen's right to privacy. The court held that an infringement on the right to privacy would depend on the facts and circumstances of a case. It observed that, **"telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone-conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law."** It further observed that the right to privacy also derives from Article 19 for **"when a person is talking on telephone, he is exercising his right to freedom of speech and expression."**

In Kharak Singh v. State of U.P,[6] where police surveillance was being challenged on account of violation of the right to privacy, the Supreme Court held that domiciliary night visits were violative of Article 21 of the Constitution and the personal liberty of an individual.

The court, therefore, has interpreted the right to privacy not as an absolute right, but as a limited right to be considered on a case to case basis. It is the exceptions to the right to privacy, like 'public interest', that are of particular interest to this paper.

International Conventions

Internationally the right to privacy has been protected in a number of conventions. For instance, the Universal Declaration of Human Rights, 1948 (UDHR) under Article 12 provides that:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

The UDHR protects any arbitrary interference from the State to a person's right to privacy. Similarly, International Covenant on Civil and Political Rights, 1976 (ICCPR) under Article 17 imposes the State to ensure that individuals are protected by law against "arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. [7]

Thus, ensuring that States enact laws to protect individual's right to privacy. India has ratified the above conventions. The ratification of the Conventions mandates the State to take steps to enact laws to protect its citizens. Although, human right activists have periodically demanded that the State take adequate measures to protect human rights of the vulnerable in society, the right to privacy has received little attention.

Similarly, Article 16 of the Convention on the Rights of the Child (CRC) provides protection to a minor from any unlawful interference to his/her right to privacy and imposes a positive obligation on States who have ratified the convention to enact a law protecting the same. India does have safeguards in place to protect identity of minors, especially, juveniles and victims of abuse. However, there are exceptions when the law on privacy does not apply even in case of a minor.

The right to privacy, therefore, is not an absolute right and does not apply uniformly to all situations and all class of persons. For instance, privacy with respect to a certain class of persons, like a person in public authority, affords different protection as opposed to private individuals.

Public Person

In case of a representative of the public, such as a public person, the right to privacy afforded to them is not of the same degree as that to a private person. The Press Council of India (PCI) has laid down Norms of Journalistic Conduct, which address the issue of privacy. The PCI Norms of Journalistic Conduct, recognises privacy as an inviolable human right, but adds a caveat; that the degree of privacy depends on circumstances and the person concerned.

In the landmark judge's asset case, *CPIO, Supreme Court of India vs Subhash Chandra Agarwal*,[8] the court recognised the tension between the right to information and the right to privacy, especially, with respect to public persons. The case arose from an application filed by a citizen who was seeking information under the RTI Act on whether judges of high courts and Supreme Court were filing asset declarations in accordance with full resolution of the Supreme Court. The court held that information concerning private individuals held by public authority falls within the ambit of the RTI Act. It remarked that whereas public persons are entitled to

privacy like private persons, the privacy afforded to private individuals is greater than that afforded to those in public authority, especially in certain circumstances.

The court commented:

"A private citizen's privacy right is undoubtedly of the same nature and character as that of a public servant. Therefore, it would be wrong to assume that the substantive rights of the two differ. Yet, inherent in the situation of the latter is the premise that he acts for the public good, in the discharge of his duties, and is accountable for them. The character of protection, therefore, afforded to the two classes — public servants and private individuals, is to be viewed from this perspective. The nature of restriction on the right to privacy is therefore, of a different order; in the case of private individuals, the degree of protection afforded is greater; in the case of public servants, the degree of protection can be lower, depending on what is at stake."

In testing whether certain information falls within the purview of the RTI Act, the court said one should consider the following three tests:

- whether the disclosure of the personal information is with the aim of providing knowledge of the proper performance of the duties and tasks assigned to the public servant in any specific case;
- whether the information is deemed to comprise the individual's private details, unrelated to his position in the organization, and,
- whether the disclosure will furnish any information required to establish accountability or transparency in the use of public resources.

Would this rule hold true for information on relatives/ friends of public persons? The rule is that, unless, private information on relatives/friends of public person's impacts public interest and accountability, the information should not be revealed.

In 2010, the media reported that Sunanda Pushkar, a close friend of the Minister of State for External Affairs, Shashi Tharoor, holds a significant holding in the IPL Kochi team. The media exposure led to the exit of Shashi Tharoor from the government. While the media's questioning of Pushkar's holdings was legitimate, the media's reporting on her past relationships and how she dressed had no bearing on public interest or accountability.[9] The media accused Pushkar of playing proxy for Tharoor in the Rs. 70 crore sweat equity deal. Much of the media attention focussed on her personal life, as opposed to, how she attained such a large stake in the IPL Kochi team. It minutely analysed her successes and failures, questioned her ability and accused her of having unbridled ambition and greed for money and power.[10]

If one was to consider the rules of privacy set by the court in the judges assets' case much of the personal information published by the media on Tharoor and Pushkar, failed to shed light on the

IPL holdings or the establishment of the nexus between the IPL holdings and the government involvement.

The tests delineated by the court in considering what personal information regarding a public authority may be shared under the RTI Act, can be adopted by the media when reporting on public officials. If personal information divulged by the media does not shed light on the performance of a public official, which would be of public interest, then the information revealed violates the standards of privacy. Personal details which have no bearing on public resources or interests should not be published.

The media coverage of the Bombay terror attacks displayed the same lack of restraint, where the minutest details of a person's last communication with his/her family were repeatedly printed in the media. None of the information presented by the media revealed anything new about the terror attack or emphasised the gravity of the attack.

A senior journalist, who talked off the record and reported on the Mumbai terror attacks, agreed that the media overstepped their limits in the Mumbai terror attacks. As per her, violation of privacy takes place at two stages: the first time, when you overstep your boundaries and ask a question you should not have, and the second, when you publish that information. Reflecting on her ten years of reporting experience, she said, "Often when you are covering a tragedy, there is little time to reflect on your reporting. Besides, if you, on account of violating someone's privacy, choose not to report a story, some competing paper would surely carry that story. You would have to defend your decision to not report the story to your boss." The competitiveness of reporting and getting a story before your competitor, she agreed makes even the most seasoned journalists ruthless sometimes. Besides, although PCI norms exist, not many read the PCI norms or recall the journalistic ethics when they are reporting on the field.[11]

The PCI Norms reiterate that the media should not intrude "the privacy of an individual, unless outweighed by genuine overriding public interest, not being a prurient or morbid curiosity."[12] The well accepted rule, however, is that once a matter or information comes in the public domain, it no longer falls within the sphere of the private. The media has failed to make the distinction between what is warranted invasion of privacy and what constitutes as an unwarranted invasion of privacy. For instance, identity of a rape or kidnap victim that would further cause discrimination is often revealed by the media.

Safeguarding Identity of Children

The Juvenile Justice (Care and Protection of Children) Act lays down that the media should not disclose the names, addresses or schools of juveniles in conflict with the law or that of a child in need of care and protection, which would lead to their identification. The exception, to identification of a juvenile or child in need of care and protection, is when it is in the interest of the child. The media is prohibited from disclosing the identity of the child in such situations.

Similarly, the Convention on the Rights of the Child (CRC) stipulates that:

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 40 of the Convention, states that the privacy of a child accused of infringing penal law should be protected at all stages of the proceedings.

Almost all media, print and broadcast, fail to observe these guidelines. Prashant Kulkarni[13] (name changed), who was a photographer with Reuters a few years ago, said that in Reuters photographs taken by photojournalists could not be altered or edited, to ensure authenticity.

As far as taking photographs of certain vulnerable persons is concerned, he admitted to photographing street children who are drug addicts on the streets of Mumbai. The photographs were published by Reuters. However, when he was on an assignment for an NGO working with children, the NGO cautioned him about photographing children who are drug addicts, to protect their identity. Similarly, identity of HIV and AIDS patients, including children, should be protected and not revealed. Children affected with HIV and AIDS should not be identified by name or photograph, even if consent has been granted by the minor's parents/guardian.

As a rule, Kulkarni said, he does not seek consent of individuals when he is taking their photographs, if they are in a public place. If they do not object, the assumption is that they are comfortable with being photographed. The PCI norms do not expressly provide that consent of a person should be sought. But, journalists are expected to exercise restraint in certain situations. Likewise, identifying juveniles in conflict with law is restricted. This includes taking photographs of juveniles that would lead to their identification.

Kulkarni, who extensively covered the Bombay train blasts in 2006, explains, "At the time of the Bombay train explosions, I avoided taking pictures that were gory or where dead people could be identified. However, I did take photographs of those injured in the blast and were getting treated in government hospitals. I did not expressly seek their consent. They were aware of being photographed. That is the rule I have applied, even when I was on an assignment in West Africa. I have never been on an assignment in Europe, so am not sure whether I would have applied the same rule of thumb. Nonetheless, now as a seasoned photographer, I would refrain from taking pictures of children who are drug addicts."

Safeguarding Identity of Rape Victims

Section 228A of the Indian Penal Code makes disclosure of the identity of a rape victim punishable. In the recent Aarushi Talwar murder case and the rape of an international student

studying at the Tata Institute of Social Sciences (TISS) the media frenzy compromised the privacy of the TISS victim and besmirched the character of the dead person.[14] In the TISS case, the media did not reveal the name of the girl, but revealed the name of the university and the course she was pursuing, which is in violation of the PCI norms. In addition to revealing names of individuals, the PCI norms expressly states that visual representation in moments of personal grief should be avoided. In the Aarushi murder case, the media repeatedly violated this norm.

The media in both cases spent enough newsprint speculating about the crimes. Abhinav Pandey[15] (name changed), a senior journalist reporting on crime, agrees that the media crossed its boundaries in the TISS case by reporting sordid details of how the rape took place. "Names of victims of sexual crime cannot be reported. In fact, in many instances the place of stay and any college affiliation should also be avoided, as they could be easily identified. Explicit details of the offence drawn from the statement given by the victim to the police are irrelevant to the investigation or to the public at large. Similarly, names of minors and pictures, including those of juveniles, have to be safeguarded."

"Crime reporters receive most of their stories from the police. Therefore, one has to be careful before publishing the story. At times in the rigour of competitive journalism, if you decide to publish an unverified story, as a good journalist you should present a counter-point. As a seasoned journalist it is easy to sense when a story is being planted by the police. If you still want to carry the story, one has to be careful not to taint the character of a person," he adds.

"For instance, in my reporting if I find that the information will not add to the investigation, I will not include it in my copy. Last year, we had anonymous letters being circulated among crime reporters which alleged corruption among senior IPS officers. Instead of publishing the information contained in those letters with the names of the IPS officers, we published a story on corruption and cronyism on IPS officers. In the Faheem Ansari matter, who was an accused in the 26/11 trial, I had received his email account password. Accessing his account also amounts to violation of privacy. But, we only published the communication between him and some handlers in Pakistan, which we knew would have an impact on the investigation. Our job requires us to share information in the public domain, sometimes we would violate privacy. Nonetheless, one has to be cautious."

Trial by Media & Media Victimisation

The PCI norms lay down the guidelines for reporting cases and avoiding trial by media. The PCI warns journalists not to give excessive publicity to victims, witnesses, suspects and accused as that amounts to invasion of privacy. Similarly, the identification of witnesses may endanger the lives of witnesses and force them to turn hostile. Zaheera Sheikh, who was a key witness in the Gujarat Best Bakery case, was a victim of excessive media coverage and sympathy. Her turning hostile invited equal amount of media speculation and wrath. Her excessive media exposure

possibly endangered her life. Instead, of focussing on the lack of a witness protection program in the country, the media focussed on the twists and turns of the case and the 19 year old's conflicting statements. The right of the suspect or the accused to privacy is recognised by the PCI to guard against the trial by media.

Swati Deshpande,[16] a Senior Assistant Editor (Law) at the Times of India, Mumbai, observes that, "As a good journalist one will always have more information than required, but whether you publish that information or exercise restraint is up to you." In a span of 11 years of court reporting, as per her, there have been instances when she has exercised the option of not reporting certain information that could be defamatory and cannot be attributed. If an allegation is made in a court room, but is not supported by evidence or facts, then it is advisable that it be dropped from the report.

"In the Bar Dancers' case which was before the Bombay High Court, the petition made allegations of all kinds against certain ministers. I did not report that, although I could have justified it by saying it is part of the petition, and I was just doing my job. The allegation was neither backed by facts nor was it of public interest. As a rule one should report on undisputed facts. Then again, with court reporting one is treading on safer grounds, as opposed to other beats."

"In cases of rape when facts are part of the judgement, you report facts that are relevant to the judgement or give you an insight on why the court took a certain view and add value to the copy. One should avoid a situation where facts revealed are offensive or reveal the identity of the victim. The past history of both the victim and the accused should not be reported."

She admitted, that "Media reporting often gives the impression that the accused has committed the crime or the media through its independent investigation wing has found a particular fact. When in fact, it has relied entirely on the information given by the police and failed to question or verify the facts by an independent source. The result is that most crime reporting is one-sided, because the information received from the police is rarely questioned."

As per her, to a certain degree the publication of Tata–Radia conversations did violate Tata's privacy. "Media needs to question itself prior to printing on how the information is of public interest. Of course, as a journalist you do not want to lose out on a good story, but there needs to be gate keeping, which is mostly absent in most of the media today."

In the Bofors pay-off case[17] the High Court of Delhi, observed that, "The fairness of trial is of paramount importance as without such protection there would be trial by media which no civilised society can and should tolerate. The functions of the court in the civilised society cannot be usurped by any other authority."[18] It further criticised the trend of police or the CBI holding a press conference for the media when investigation of a crime is still ongoing. The court

agreed that media awareness creates awareness of the crime, but the right to fair trial is as valuable as the right to information and freedom of communication.

The 200th report of the Law Commission dealt with the issue of **Trial by media: Free Speech vs Fair Trial under Criminal Procedure**. The report, focussed on the pre-judicial coverage of a crime, accused and suspects, and how it impacts the administration of justice. The Contempt of Courts Act, under section 2 defines criminal contempt as:

"…the publication, (whether by words, spoken or written or by signs, or by visible representations, or otherwise), of any matter or the doing of any other act whatsoever which
(i) … … … …
(ii) prejudices or interferes or tends to interfere with the due course of any judicial proceedings; or
(iii) interferes or tends to interfere with or obstructs or tends to obstruct, the administration of justice in any manner."

Section 3(1) of the Act exempts any publication and distribution of publication, "if the publisher had no reasonable grounds for believing that the proceeding was pending". In the event, the person is unaware of the pendency, any publication (whether by words spoken or written or signs or visible representations) interferes or tends to interfere with or obstructs "the course of justice in connection with any civil or criminal proceeding pending at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending." The report emphasizes that publications during the pre-trial stage by the media could affect the rights of the accused. An evaluation of the accused's character is likely to affect or prejudice a fair trial.

If the suspect's pictures are shown in the media, identification parades of the accused conducted under Code of Civil Procedure would be prejudiced. Under Contempt of Court Act, publications that interfere with the administration of justice amount to contempt. Further, the principles of natural justice emphasise fair trial and the presumption of innocence until proven guilty. The rights of an accused are protected under Article 21 of the Constitution, which guarantees the right to fair trial. This protects the accused from the over-zealous media glare which can prejudice the case. Although, in recent times the media has failed to observe restraint in covering high-profile murder cases, much of which has been hailed as media's success in ensuring justice to the common man.

For instance, in the Jessica Lal murder case, the media took great pride in acting as a facilitator of justice. The media in the case whipped up public opinion against the accused and held him guilty even when the trial court had acquitted the accused. The media took on the responsibility of administering justice and ensuring the guilty are punished, candle light vigils and opinion polls on the case were organised by the media. Past history of the accused was raked up by the media, including photographs of the accused in affluent bars and pubs in the city were published

after he was acquitted. The photographs of Manu Sharma in pubs insinuated how he was celebrating after his acquittal.

The Apex Court observed that the freedom of speech has to be carefully and cautiously used to avoid interference in the administration of justice. If trial by media hampers fair investigation and prejudices the right of defence of the accused it would amount to travesty of justice. The Court remarked that the media should not act as an agency of the court.[19]

The Court, commented, "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."[20]

Sting Operations

On 30 August, 2007 Live India, a news channel conducted a sting operation on a Delhi government school teacher forcing a girl student into prostitution. Subsequent to the media exposé, the teacher Uma Khurana[21] was attacked by a mob and was suspended by the Directorate of Education, Government of Delhi. Later investigation and reports by the media exposed that there was no truth to the sting operation. The girl student who was allegedly being forced into prostitution was a journalist. The sting operation was a stage managed operation. The police found no evidence against the teacher to support allegations made by the sting operation of child prostitution. In this case, the High Court of Delhi charged the journalist with impersonation, criminal conspiracy and creating false evidence. The Ministry of Information and Broadcasting sent a show cause notice to TV-Live India, alleging the telecast of the sting operation by channel was “defamatory, deliberate, containing false and suggestive innuendos and half truths."[22]

Section 5 of the Cable Television Networks (Regulation) Act, 1995 and the Cable Television Network Rules (hereafter the Cable Television Networks Act), stipulates that no programme can be transmitted or retransmitted on any cable service which contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half truths. The Rules prescribes a programming code to be followed by channels responsible for transmission/re-transmission of any programme.

The programme code restricts airing of programmes that offend decency or good taste, incite violence, contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half truths, criticises, maligns or slanders any individual in person or certain groups, segments of social, public and moral life of the country and affects the integrity of India, the President and the judiciary. The programme code provided by the Rules is exhaustive. The Act empowers the government to restrict operation of any cable network it thinks is necessary or expedient to do so in public interest.

The court observed that false and fabricated sting operations violate a person's right to privacy. It further, observed, "Giving inducement to a person to commit an offence, which he is otherwise not likely and inclined to commit, so as to make the same part of the sting operation is deplorable and must be deprecated by all concerned including the media." It commented that while "…sting operations showing acts and facts as they are truly and actually happening may be necessary in public interest and as a tool for justice, but a hidden camera cannot be allowed to depict something which is not true, correct and is not happening but has happened because of inducement by entrapping a person."[23]

The court criticised the role of the media in creating situations of entrapment and using the 'inducement test'. It remarked that such inducement tests infringe upon the individual's right to privacy. It directed news channels to take steps to prohibit "reporters from producing or airing any programme which are based on entrapment and which are fabricated, intrusive and sensitive.[24]

The court proposed a set of guidelines to be followed by news channels and electronic media in carrying out sting operations. The guidelines direct a channel proposing to telecast a sting operation to obtain a certificate from the person who recorded or produced the same certifying that the operation is genuine to his knowledge. The guidelines propose that the Ministry of Information and Broadcasting should set up a committee which would have the powers to grant permission for telecasting sting operations. The permission to telecast a sting operation should be granted by the committee only if it is satisfied about the overriding public interest to telecast the sting operation. The guidelines mandate that, in addition, to ensuring accuracy, the operation should not violate a person's right to privacy, "unless there is an identifiable large public interest" for broadcasting or publishing the material. However, the court failed to define what constitutes 'larger public interest'.

The PCI norms also lay down similar guidelines which require a newspaper reporting a sting operation to obtain a certificate from the person involved in the sting to certify that the operation is genuine and record in writing the various stages of the sting. The decision to report the sting vests with the editor who merely needs to satisfy himself that the sting operation is of public interest.

In addition, to the Cable Television Networks Act and the PCI norms, the News Broadcasting Standard Authority (NBSA) was set up in 2008 as a self-regulatory body by News Broadcasters Association.[25] The primary objective of the NBSA is to receive complaints on broadcasts. The NBSA has drafted a Code of Ethics and Broadcasting Standards governing broadcasters and television journalists. The Code of Ethics provides guiding principles relating to privacy and sting operations that broadcasters should follow.

With respect to privacy, the Code directs channels not to intrude into the private lives of individuals unless there is a "clearly established larger and identifiable public interest for such a broadcast." Any information on private lives of persons should be "warranted in public interest." Similarly, for sting operations, the Code directs that they should be used as "a last resort" by news channels and should be guided by larger public interest. They should be used to gather conclusive evidence of criminality and should not edit/alter visuals to misrepresent truth.

In a recent judgement on a supposed sting operation conducted by M/s. Associated Broadcasting Company Pvt. Limited[26] on TV9 on 'Gay culture rampant in Hyderabad', the NBA took suo motu notice of the violation of privacy of individuals with alternate sexual orientation and misuse of the tool of sting operation. NBA in its judgement held that the Broadcaster had violated clauses on privacy, sting operations and sex and nudity of the Code of Ethics. It further, observed, that the Broadcaster and the story did not reveal any justifiable public interest in using the sting operation and violating the privacy of individuals. In this particular case, the Broadcaster had revealed the personal information and faces of supposedly gay men in Hyderabad to report on the 'underbelly' of gay culture and life. However, the news report, as NBSA observed, did not prove any criminality and was merely a sensational report of gay culture allegedly prevalent in Hyderabad.

The PCI norms provide that the press should not tape-record conversations without the person's express consent or knowledge, except where it is necessary to protect a journalist in a legal action or for "other compelling reason." What constitutes a compelling reason is left to the discretion of the journalist.

It was in the 1980s, that the first sting operation on how women were being trafficked was carried out by the Indian Express reporter Ashwin Sarin. As part of the sting, the Express purchased a tribal girl called Kamla. Subsequently, in 2001, the sting operation conducted by Tehelka exposed corruption in defence contracts using spy cams and journalists posing as arms dealers. The exposé on defence contracts led to the resignation of the then defence minister George Fernandes. Sting operations gained legitimacy in India, especially in the aftermath of the Tehelka operation, exposing corruption within the government. The original purpose of a sting operation or an undercover operation was to expose corruption. Stings were justifiable only when it served a public interest. Subsequent to the Tehelka exposé, stings have assumed the status of investigative journalism, much of which has been questioned in recent times, especially, with respect to ethics involved in conducting sting operations and the methods of entrapment used by the media. Further, stings by Tehelka, where the newspaper used sex workers to entrap politicians have brought to question the manner in which stings are operated. Although, the overriding concern surrounding sting operations has been its authenticity, as opposed to, the issue of personal privacy.

For instance, in March 2005 a television news channel carried out a sting operation involving Bollywood actor Shakti Kapoor to expose the casting couch phenomenon in the movie industry. The video showing Shakti Kapoor asking for sexual favours from an aspiring actress, who was an undercover reporter, was received with public outrage. Nonetheless, prominent members of the media questioned the manner in which the sting was conducted. The sting was set up as an entrapment. The court has taken a strong view against the use of entrapment in sting operations. In the case of the Shakti Kapoor sting, privacy of the actor was clearly violated. The manner in which the sting was conducted casts serious doubt on who was the victim.[27]

Additionally, the sting violated the PCI norms. It failed to provide a record of the various stages of how the sting operation was conducted. In United Kingdom, the media when violating privacy of a person has to demonstrate that it is in the interest of the public.

International Law on Media & Privacy Ethics

United Kingdom

The Press Complaints Commission (PCC), UK is a self-regulatory body similar to NBA. The PCC has put down code of ethics to be followed by journalists. The PCC guidelines provide that everyone has the right to privacy and editors must provide reason for intrusions to a person's privacy. This includes photographing individuals in private places without their consent. Interestingly, private places include public or private property "where there is a reasonable expectation of privacy." In India however, as Kulkarni pointed out, photographs are taken without the consent of an individual if he/she is in a public space.

Like the PCI norms, the PCC Code lays down guidelines to follow when reporting on minors (below 16 years of age) who have been victims of sexual assault. As per the guidelines, the identity of the children should be protected. Further, relatives or friends of persons convicted or accused of a crime should not be identified without their consent, unless the information is relevant to the story. References to a person's race, colour, sexual orientation and gender should be avoided. For instance, the media reportage of the TISS rape case, which revealed the nationality and colour of the victim, would be in violation of the PCC Code. In the TISS rape case, the information on the nationality and colour of the victim was not only irrelevant to the story, but as amply demonstrated by the media it reinforced prejudices against white women as 'loose or amoral'.[28]

As far as sting operations are concerned, the PCC lays down that the press must not publish material acquired by hidden camera or clandestine devices by intercepting private messages, emails or telephone calls without consent. However, revealing private information in cases of public interest is an exception to the general rule to be followed with respect to individual privacy. The PCC defines public interest to include, but it is not restricted to:

i. Detecting or exposing crime or serious impropriety.
ii. Protecting public health and safety.
iii. Preventing the public from being misled by an action or statement of an individual or organization.

It requires editors to amply demonstrate that a publication is of public interest. In case the material is already in public domain the same rules of privacy do not apply. However, in cases involving children below 16 years of age, editors must demonstrate exceptional public interest that overrides the interest of the child. Tellingly, the PCC recognises freedom of expression as public interest.

The PCC, to ensure that persons are not hounded by the media have started issuing desist orders. The PCC issues a desist notice to editors to prevent the media from contacting the person. Preventive pre-publication is when the PCC pre-empts a story that may be pursued or published and attempts to either influence the reporting of the story in a way that it is not in violation of a person's privacy or persuades the media house not to publish the story. The PCC, however, does not have the powers to prevent publication.

Further, United Kingdom is a member of the European Convention on Human Rights (ECHR), which guarantees the right to privacy under Article 8 of the Convention: "**Everyone has the right to respect for his private and family life, his home and his correspondence.**"

However, there is no independent law which recognises the right to privacy. The judiciary however has protected the right to privacy in several occasions, like in the famous J.K. Rowling case where the English Court held, that a minor's photograph without the consent of the parent or guardian, though not offensive, violates the child's right to privacy.[29]

France

The French legal system protects the right to privacy under: Article 9 of the Civil Code.

Article 9 of the Civil Code states:

Everyone has the right to respect for his private life. Without prejudice to compensation for injury suffered, the court may prescribe any measures, such as sequestration, seizure and others, appropriate to prevent or put an end to an invasion of personal privacy; in case of an emergency those measures may be provided for by an interim order. The right to privacy allows anyone to oppose dissemination of his or her picture without their express consent.

Article 9 covers both the public and private spheres, and includes not merely the publication of information but also the method of gathering information. Also, in France violation of one's privacy is a criminal offence. This includes recording or transmitting private conversations or picture of a person in a private place without the person's consent. This implies that privacy is

not protected in a public place. Any picture taken of a person dead or alive, without their prior permission, is prohibited. Buying of such photographs where consent of a person also constitutes as an offence. Journalists, however, are not disqualified from the profession if they have committed such an offence.[30]

France has the Freedom of the Press of 29 July 1881 which protects minors from being identified and violent and licentious publication which targets minors. It punishes slander, publication of any information that would reveal the identity of a victim of a sexual offence, information on witnesses and information on court proceedings which include a person's private life.[31]

Sweden

Privacy is protected in Sweden under its Constitution. All the four fundamental laws of the country: the Instrument of Government, the Act of Succession, the Freedom of the Press Act, and the Fundamental Law on Freedom of Expression protect privacy. The Instrument of Government Act of 1974 provides for the protection of individual privacy. It states that freedom of expression is limited under Article 13 of the Constitution:

"Freedom of expression and freedom of information may be restricted having regard to the security of the Realm, the national supply, public safety and order, the integrity of the individual, the sanctity of private life, or the prevention and prosecution of crime. Freedom of expression may also be restricted in economic activities. Freedom of expression and freedom of information may otherwise be restricted only where particularly important reasons so warrant."

Sweden has a Press Council which was established in 1916. The Council consists of the Swedish Newspaper Publishers' Association, the Magazine Publishers' Association, the Swedish Union of Journalists and the National Press Club. The Council consists of "a judge, one representative from each of the above-mentioned press organisations and three representatives of the general public who are not allowed to have any ties to the newspaper business or to the press organisations."

Additionally, there is an office of the Press Ombudsman which was established in 1969. Earlier the Swedish Press Council used to deal with complaints on violations of good journalistic practice. After the setting up of the Press Ombudsman, the complaints are first handled by the Press Ombudsman, who is empowered to take up matters suo motu. "Any interested members of the public can lodge a complaint with the PO against newspaper items that violate good journalistic practice. But, the person to whom the article relates to must provide a written consent, if the complaint is to result in a formal criticism of the newspaper."[33]

The Swedish Press Council reports that in the recent years, 350-400 complaints have been registered annually, of which most concern coverage of criminal matters and invasion of privacy.

Sweden, additionally, has a Code of Ethics which applies to press, radio and television. The Code of Ethics was adopted by the Swedish Co-operation Council of the Press in September 1995. The Code of Ethics for Press, Radio and Television in Sweden has been drawn up by the Swedish Newspaper Publishers' Association, the Magazine Publishers' Association, the Swedish Union of Journalists and the National Press Club.

The Code of Ethics lay down norms to be followed in respect of privacy. It states that caution should be exercised when publishing information that:

- Infringes on a persons' privacy, unless it is obviously in public interest,
- Information on suicides or attempted suicides
- Information on victims of crime and accidents. This includes publication of pictures or photographs[34]

Race, sex, nationality, occupation, political affiliation or religious persuasion in certain cases, especially when such information is of no importance, should not be published.

One should exercise care in use of pictures, especially, retouching a picture by an electronic method or formulating a caption to deceive the reader. In case a picture has been retouched, it should be indicated below the photograph.

Further, the Code asks journalists to consider "the harmful consequences that might follow for persons if their names are published" and names should be published only if it is in the public interest. Similarly, if a person's name is not be revealed, the media should refrain from publishing a picture or any particulars with respect to occupation, title, age, nationality, sex of the person, which would enable identification of the person.

In case of court reporting or crime reporting, the Code states that the final judgement of the Court should be reported and given emphasis, as opposed to conducting a media trial. In addition, Sweden has incorporated the ECHR in 1994.

Japan

The Japan Newspaper Publishers & Editors Association or Nihon Shinbun Kyokai (NSK),[35] was established in 1946 as an independent and voluntary organisation to establish the standard of reporting, and protect and promote interests of the media. The organisation as part of its mandate has developed the Canon of Journalism, which provides for ethics and codes members of the body should follow. The Canon recognises that with the easy availability of information, the media constantly has to grapple with what information should be published and what should be held back. The Code provides that journalists have a sense of responsibility and should not hinder public interests. In addition, to ensuring accuracy and fairness, the Code states that

respect of human rights, includes respect for human dignity, individual honour and right to privacy. Right to privacy is acknowledged as a human right.

Japan does not have an information ministry or organs like the PCC in the U.K. or the Press Ombudsman in Sweden. Apart from the Canon, the NSK has a code for marketing of newspapers, an advertising code and the Kisha club guidelines.[36]

Japan in 2003 formulated the Personal Information Protection Act, which regulates public and private sector. The Act, which came into effect in 2005, aims to ensure that all personal data collected by the public and private sector are handled with care. The Act requires that the purpose of collecting personal information and its use should be specified, information should be acquired by fair means, any information should not be supplied to third parties without prior consent of the individual concerned.

Netherlands

The right to privacy is protected under Article 10 of the Netherlands Constitution. Further, the Article also provides for the enactment of Rules for dissemination of personal data and the right of persons to be informed when personal data is being recorded.

Netherlands also has the Netherlands Press Council which keeps the media in check. The Code of the International Federation of Journalists and the Code of Conduct for Dutch Journalists was drafted by the Dutch Society of Editors-in-Chief to establish media reporting standards. These guidelines can be disregarded by the media only in cases involving social interest.

The Code recognises:

- That a person's privacy should not be violated when there is no overriding social interest;
- In cases concerning public persons violation of privacy would take place, but they have the right to be protected, especially, if that information is not of public interest;
- The media should refrain from publishing pictures and images of persons without prior permission of persons. Similarly, the media should not publish personal letters and notes without the prior permission of those involved;
- The media should refrain from publishing pictures and information of suspects and accused; and
- Details of criminal offence should be left out if they would add to the suffering of the victim or his/her immediate family and if they are not needed to demonstrate the nature and gravity of the offence or the consequences thereof.

Conclusion

The right to privacy in India has failed to acquire the status of an absolute right. The right in comparison to other competing rights, like, the right to freedom of speech & expression, the right of the State to impose restrictions on account of safety and security of the State, and the right to information, is easily relinquished. The exceptions to the right to privacy, such as, overriding public interest, safety and security of the State, apply in most countries. Nonetheless, as the paper demonstrates, unwarranted invasion of privacy by the media is widespread. For instance, in the UK, Sweden, France and Netherlands, the right to photograph a person or retouching of any picture is prohibited unlike, in India where press photographers do not expressly seek consent of the person being photographed, if he/she is in a public space. In France, not only is the publication of information is prohibited on account of the right to privacy, but the method in which the information is procured also falls within the purview of the right to privacy and could be violative. This includes information or photograph taken in both public and private spaces. Privacy within public spaces is recognised, especially, "where there is reasonable expectation of privacy." The Indian norms or code of ethics in journalism fail to make such a distinction between public and private space. Nor do the guidelines impose any restrictions on photographing an individual without seeking express consent of the individual.

The Indian media violates privacy in day-to-day reporting, like overlooking the issue of privacy to satisfy morbid curiosity. The PCI norms prohibit such reporting, unless it is outweighed by 'genuine overriding public interest'. Almost all the above countries prohibit publication of details that would hurt the feelings of the victim or his/her family. Unlike the UK, where the PCC can pass desist orders, in India the family and/or relatives of the victims are hounded by the media.

In India, the right to privacy is not a positive right. It comes into effect only in the event of a violation. The law on privacy in India has primarily evolved through judicial intervention. It has failed to keep pace with the technological advancement and the burgeoning of the 24/7 media news channels. The prevalent right to privacy is easily compromised for other competing rights of 'public good', 'public interest' and 'State security', much of what constitutes public interest or what is private is left to the discretion of the media.

Notes

[1] The Radia Tapes' controversy concerns recording of conversations between the lobbyist Nira Radia and politicians, industrialists, bureaucrats and journalists with respect to the 2G spectrum scam. The tapes were recorded by the Income Tax Department. The role played by the media, especially some prominent journalists, in scam has been questioned. A handful of magazines and newspapers have questioned the media ethics employed by these journalists, whose recorded conversations are in the public domain or have been published by a few political magazines. The publication of the recorded conversations by a few media

publications has received a sharp reaction from the said journalists. They have accused those media journals of unverified reporting and conducting a smear campaign against them.

[2] 1975 AIR 865, 1975 SCR (3) 333.

[3] (1994) 6 S.C.C. 632.

[4] AIR 1997 SC 568.

[5] AIR 1997 SC 568.

[6] AIR 1997 SC 568.

[7] International Covenant on Civil and Political Rights, Part III Art. 17. Available at: http://www2.ohchr.org/english/law/ccpr.htm [Last accessed 20//04/2011].

[8] W.P. (C) 288/2009

[9] PTI, Media just turned me into a 'slut' in IPL row: Sunanda Pushkar, 23/04/2010 Available at http://articles.timesofindia.indiatimes.com/2010-04-23/india/28149154_1_sunanda-pushkar-shashi-tharoor-ipl-kochi [Last accessed 20/04/2011].

[10] Vrinda Gopinath, "Got A Girl, Named Sue", 26/04/2010 Available at http://www.outlookindia.com/article.aspx?265098 [Last accessed 20/04/2011]

[11] Interview with Senior Assistant Editor, Hindustan Times, on 18.04.11.

[12] Guideline 6 (i) Right to Privacy, Norm if Journalistic Conduct, PCI.

[13] Interview with a freelance photographer and a former Reuters photographer on 16.04.11.

[14] Kumar, Vinod, "Raped American student's drink not spiked in our bar," 16.04.09 Available at http://www.mid-day.com/news/2009/apr/160409-Mumbai-News-Raped-American-student-date-drug-CafeXO-Tata-Institute-of-Social-Sciences.htm, Anon, "Party pics boomerangon TISS rape victim" , 04 .05.09, Available at http://www.mumbaimirror.com/index.aspx?page=article§id=15&contentid=20090504200905040312274 95d8b4e80f [Last Accessed April 20,2011].

[15] Interview with Abhinav Pandey, crime reporter with a leading newspaper, on 21.04.11.

[16] Interview with Swati Deshpande, Senior Assistant Editor (Law), Times of India, on 15.04.11.

[17] Crl.Misc.(Main) 3938/2003

[18] Ibid.

[19]Sidhartha Vashisht @ Manu Sharma vs State (Nct Of Delhi), Available at http://www.indiankanoon.org/doc/1515299/.

[20] Ibid

[21] WP(Crl.) No.1175/2007

[22] Ibid

[23] Ibid

[24] Ibid

[25] NBA is a community formed by private television & current affairs broadcasters. As per the NBA website, it currently has 20 leading news channels and current affairs broadcaster as its members. Complaints can be filed against any of the broadcasters that are members of NBA on whom the Code of Ethics is binding.

[26] For additional details, please refer to the website: http://www.nbanewdelhi.com/authority-members.asp [Last Accessed April 20,2011]

[27]TNN, "'Full video will further embarrass Shakti', 15.03.2005 Available at http://articles.timesofindia.indiatimes.com/2005-03-15/mumbai/27849089_1_sting-operation-shakti-kapoor-film-industry.

[28] For more details please refer to the PCC website: http://www.pcc.org.uk/ [Last Accessed April 20,2011].

[29] Singh, A., May 2008, "JK Rowling wins privacy case over son's photos"http://www.telegraph.co.uk/news/uknews/1936471/JK-Rowling-wins-privacy-case-over-sons-photos.html [Last Accessed April 20,2011].

[30] For more details, please refer to: http://www.kbkcl.co.uk/2008/03/privacy-law-the-french-experience/ and http://ambafrance-us.org/spip.php?article640 [Last Accessed April 20,2011].

[31] For more details, please refer to:http://www.ambafrance-uk.org/Freedom-of-speech-in-the-French.html [Last Accessed April 20,2011].

[32] http://www.po.se/english/how-self-regulation-works [Last Accessed April 20,2011].

[33]Ibid.

[34] Please refer to this website for additional details: http://ethicnet.uta.fi/sweden/code_of_ethics_for_the_press_radio_and_television and http://www.po.se/english/code-of-ethics/85-code-of-ethics-for [Last Accessed April 20,2011].

[35] http://www.pressnet.or.jp/english/index.htm [Last Accessed April 20,2011].

[36] Kisha Clubs, are clubs where only a few media houses/newspapers have access to public institution information. They have been criticised for its lack of openness and encouraging monopoly on reporting.

Dinesh @ Buddha v. State of Rajasthan[1]

Arijit Pasayat, J.

Leave granted.

An eight years old girl was sexually ravished by the appellant is what was alleged and for that the appellant faced trial. The victim suffered ignominy on 5.2.1998. The appellant has been found guilty of offence punishable under Section 376(2) of the Indian Penal Code, 1860 (in short the 'IPC') read with Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short the 'Atrocities Act'). The appellant was directed to undergo imprisonment for life and to pay a fine of Rs. 1,000/- and the **State** was directed to pay a compensation of Rs. 50,000/- to the victim.

Background facts are essentially as follows:

On 5.2.1998 the victim had gone to witness a marriage procession in the night. When she was coming back to her house in the night at about 12 O' clock the accused sexually assaulted her. She was threatened that if she disclosed about the incident to anybody, she would be killed. Suffering from the acute pain the victim told her sister, mother and grandmother about the incident. The matter was reported to the police. The accused person was arrested; medical tests were conducted both in respect of the accused and the victim, and after completion of investigation charge sheet was filed. The Trial Court found the accused guilty of the offences charged under Section 376(2) IPC and Section 3(2)(v) of the Atrocities Act and sentenced him. The appeal before the Rajasthan High Court, Jaipur Bench, did not bring any relief to the accused.

In support of the appeal, learned Counsel for the appellant submitted that the evidence is not credible and cogent. There are many inconsistencies in the evidence, more particularly, of the victim (PW-8). This is not a case where life imprisonment could have been awarded. In any event there is no material to bring in application of Section 3(2)(v) of the Atrocities Act. It is further submitted that the appellant belongs to the lowest economic strata of society who could not even afford to engage a lawyer at any stage. Even during trial and before the High Court,

[1] Dr. Arijit Pasayat and S.H. Kapadia, JJ. (DB), Criminal Appeal No. 263 of 2006 (Arising Out of S.L.P (Crl.) No. 5753 of 2005), Decided On: 28.02.2006; MANU/SC/8078/2006, 2006CriLJ1679, (2006)3SCC771.

lawyers were engaged at State's cost. The young age of the accused should also be taken into consideration.

In response, learned Counsel for the State submitted that though Section 3(2)(v) of the Atrocities Act may not be applicable, but imposition of life sentence is also permissible in a case covered under Section376(2)(f) IPC. It is also submitted that the compensation of Rs. 50,000/- directed to be paid by the State, should be set aside.

Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity - it degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman, it is a crime against the entire society. It destroys, as noted by this Court in *Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty* AIR1996SC922, the entire psychology of a woman and pushes her into deep emotional crisis. 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 of the Constitution of India, 1950 (in short the 'Constitution') The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.

We do not propose to mention name of the victim. Section 228A of IPC makes disclosure of identity of victim of certain offences punishable. Printing or publishing name of any matter which may make known the identity of any person against whom an offence under Sections 376, 376A, 376B, 376C or 376D is alleged or found to have been committed can be punished. True it is, the restriction, does not relate to printing or publication of judgment by High Court or Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228A has been enacted, it would be appropriate that in the judgments, be it of this Court, High Court or lower Court, the name of the victim should not be indicated. We have chosen to describe her as 'victim' in the judgment. (See *State of Karnataka v. Puttaraja*: 2004 CriLJ579 .

9. The offence of rape occurs in Chapter XVI of IPC. It is an offence affecting the human body. In that Chapter, there is a separate heading for "Sexual offences", which encompass Sections 375, 376, 376A,376B, 376C and 376D I.P.C. "Rape" is defined in Section 375 I.P.C. Sections 375 and 376 I.P.C. have been substantially changed by Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act, i.e. 376A, 376B, 376C and 376D. The fast sweeping changes introduced reflect the legislative

intent to curb with iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape or Raptus' is when a man hath carnal knowledge of a woman by force and against her will (Co. Litt. 123 b); or, as expressed more fully, 'rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will'. (Hale P.C. 628) The essential words in an indictment for rape are rapid and carnaliter cognovit; but carnalities cognovit, nor any other circumlocution without the word rapid, are not sufficient in a legal sense to express rape: (1 Hen. 6, 1a, 9 Edw. 4, 26 a (Hale P.C.628). In the crime of rape, 'carnal knowledge' means the penetration to any the slightest degree of the male organ of generation (Stephens Criminal Law, 9th Ed., p.262). In "Encyclopedia of Crime and Justice" (Volume 4, page 1356), it is stated "...even slight penetration is sufficient and emission is unnecessary". In Halsburys' Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation, with violence, of the private person of a woman, an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.

The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery.

It is to be noted that in Sub-section (2) of Section 376 I.P.C. more stringent punishment can be awarded taking into account the special features indicated in the said sub-section. The present case is covered by Section 376(2)(f) IPC i.e. when rape is committed on a woman when she is under 12 years of age. Admittedly, in the case at hand the victim was 8 years of age at the time of commission of offence.

In the Indian Setting refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. 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. She would be conscious of the danger of being ostracized by the society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. A woman or a girl who is raped is not an accomplice. Corroboration is not the sine qua non for conviction in a rape case. The observations of Vivian Bose, J. in *Rameshwar v. The State of Rajasthan*: 1952CriLJ547 were:

> The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge....

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. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. 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. Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, as in this case, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum on the appellant. To show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced.

The legislative mandate to impose a sentence, for the offence of rape on a girl under 12 years of age, for a term which shall not be less than 10 years, but which may extend to life and also to fine reflects the intent of stringency in sentence. The proviso to Section 376(2) IPC, of course, lays down that the court may, for adequate and special reasons to be mentioned in the judgment, impose sentence of imprisonment of either description for a term of less than 10 years. Thus, the normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years' RI, though in exceptional cases "for special and adequate reasons" sentence of less than 10 years' RI can also be awarded. It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso particularly in such like penal provisions. The courts are obliged to respect the legislative mandate in the matter of awarding of sentence in all such cases. Recourse to the proviso can be had only for "special and adequate reasons" and not in a casual manner. Whether there exist any "special and adequate reasons" would depend upon a variety of factors and the peculiar facts and circumstances of each case. No hard and fast rule can be laid down in that behalf of universal application.

At this juncture it is necessary to take note of Section 3 of the Atrocities Act. As the Preamble to the Act provides 'the Act has been enacted to prevent the commission of offences of atrocities against the members of the Scheduled Castes and Scheduled Tribes. The expression 'atrocities' is

defined in Section 2 of the Atrocities Act to mean an offence punishable under Section 3. The said provision so far relevant reads as follows:

> **3(2)(v): Punishments for offences of atrocities -**
>
> (2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, -
>
> x x x
>
> (v) commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;
>
> x x x

Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) has no application. Had Section 3(2)(v) of the Atrocities Act been applicable then by operation of law, the sentence would have been imprisonment for life and fine.

In view of the finding that Section 3(2)(v) of the Atrocities Act is not applicable, the sentence provided in Section 376(2)(f) IPC does not per se become life sentence. Though learned Counsel for the State submitted that even in a case covered under Section 376(2)(f) IPC, imprisonment for life can be awarded, it is to be noted that minimum sentence of 10 years has been statutorily provided and considering the attendant circumstances the imprisonment for life in a given case is permissible. Neither the Trial Court nor the High Court has indicated any such factor. Only by applying Section 3(2)(v) of the Atrocities Act the life sentence was awarded. Therefore, the sentence is reduced to 10 years. The other question is legality of the compensation awarded. Since the State has not challenged the award of compensation, it is not open to it to question the legality of the award in the present appeal filed by the accused. Therefore, State's challenge to the legality and/or quantum of compensation awarded is without merit. The amount shall be paid to the victim if not already paid within a period of eight weeks.

With the modification of sentence as abovementioned, the appeal is dismissed.

Guide to Mandatory Reporting[1]

Section 21(1) of the POCSO Act, 2012 requires mandatory reporting of cases of child sexual abuse to the law enforcement authorities, and applies to everyone including parents, doctors and school personnel. Failure to report a suspicion of child abuse is an offence under the Act. The legislation makes it clear that the reporting obligation exists whether the information was acquired through the discharge of professional duties or within a confidential relationship. Any private person who fails to report suspected child abuse, having acquired the information in the discharge of his or her professional responsibilities, commits a summary conviction offence. Similarly, school personnel, doctors and other professionals may, in the course of delivering services, receive information which causes them to suspect that a child has been sexually abused. It is possible that the information obtained includes the identity of the perpetrator. The alleged perpetrator may be a person who is unknown to the reporter of the offence, but the suspicion could also involve a colleague, co-worker, friend or other associate. The obligation to report is unrestricted by any pre-condition that the complaint be first reported within the respective departments, services or agencies, even if the perpetrator is alleged to be an employee of that institution, service or agency. Thus, a person who has knowledge that an offence has been committed under the child can directly report it to the police or magistrate.

1. Why report?

The purpose of reporting is to identify children suspected to be victims of sexual abuse and to prevent them from coming to further harm. Without detection, reporting and intervention, these children may remain victims for the rest of their lives, carrying the scars of the abuse throughout their lives and even, in some cases, repeating the pattern of abuse with their own children. However, the nature of sexual abuse, the shame that eh child victim feels and the possible involvement of a parent, family friend or other close person, makes it extremely difficult for children to come forward to report sexual abuse. This is why the law provides for mandatory reporting, placing the responsibility to report not on the child but on a surrounding adult who may be in a better position to help.

2. Obligation to inform the child

The Act does not lay down that a mandatory reporter has the obligation to inform the child and/ or his/her parents or guardian about his/her duty to report. However, it is good practice to let them know that this will need to be done. For example, where a doctor is confronted with a situation where a child brought into his/her care is exhibiting symptoms of child sexual abuse, he

[1] *See*, Chapter 9, Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012 September, 2013 Guidelines for the Use of Professionals and Experts under the POCSO Act, 2012, Ministry of Women and Child Development, available at: http://wcd.nic.in/act/POCSO%20-%20Model%20Guidelines.pdf; last visited on 20-08-2015

should inform the child and/or his/her caregiver that he has a legal duty to report the abuse. This will help establish an open relationship and minimize the child's feelings of betrayal if a report needs to be made. When possible, discuss the need to make a child abuse report with the family. However, be aware that there are certain situations where if the family is warned about the assessment process, the child may be at risk for further abuse, or the family may leave with the child.

3. What to Report?

Explain, as well as you can, what happened or is happening to the child. Describe the nature of the abuse or neglect and the involved parties. Be as specific as possible. Be prepared to give the name, address, and telephone number of the child and also the name of the parent or caretaker if known. Even if you do not know all of this information, report what you do know. Tell all you know about the situation. However, the reporter is not expected to investigate the matter, know the legal definitions of child abuse and neglect, or even know the name of the perpetrator. This should be left to the police and other investigative agencies.

A report of sexual abuse should contain the following information, if it is known:

i) The names and home address of the child and the child's parents or other persons believed to be responsible for the child's care.
ii) The child's present whereabouts.
iii) The child's age.
iv) The nature and extent of the child's injuries, including any evidence of previous injuries.
v) The name, age, and condition of other children in the same household.
vi) Any other information that you believe may be helpful in establishing the cause of the abuse to the child.
vii) The identity of the person or persons responsible for the abuse or neglect to the child, if known
viii) Your name and address.

4. Sanctions

4.1 Failure to Report Child Abuse

The POCSO Act, 2012 provides under Section 21(1) that any person, who fails to report the commission of an offence or who fails to record such offence shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

4.2 Reporting False Information

The POCSO Act, 2012 makes it an offence to report false information, when such report is made other than in good faith. It states that any person, who makes false complaint or provides false

information against any person, in respect of an offence committed under sections 3, 5, 7 and section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both. Where such information is provided against a child, the punishment may extend to one year.

Challenges before the Investigating Agency[1]

This part of the material has been extracted from the Maharashtra State Consultation to Review The Protection of Children From Sexual Offences Act, 2012, held during 8th& 9th August, 2014, at the Sahyadri State Guest House. Certain selected portions of the publication are being reproduced hereunder for the advantage of the participating judges for academic purposes. However, the complete report is available as cited in the foot note for further references.

The first sessions dealt with the challenges faced by the investigating agency. The expert contributor for this session was Mr. Harsh Mander, Director of Centre for Equity Studies, a former IAS Officer and a former member of the National Advisory Council (NAC). Investigating Officers from three districts presented the challenges they face while implementing the Act. The situation prevailing in smaller towns and rural districts were the particular focus of this session. Presentations by Investigating Officers

1. Though the Act prescribes many child friendly measures, some of these are not accepted by the victim or her family. For instance, due to the stigma attached to sexual violence in our society, parents prefer to record the statement at the police station rather than at their residence. Even if a lady police officer is in civilian clothes, the police van is easily identifiable, even if it is parked at a distance, and this raises the curiosity among the neighbours. Parents like to avoid such situations to protect the confidentiality of the child.

2. Similarly, children are not comfortable when their statements are video recorded. Children become inhibited and tongue–tied when they face the camera and are not able to speak in a natural and free flowing manner. This hinders the process of recording their statement.

3. If the victim is a very young child, the statement is recorded over several days as the investigating officer has to wait till the child feels comfortable to confide and talk freely about the incident. Many times, junior officers are chided by their seniors for taking a long time for recording the statement of a child as they are unable to understand the process involved and want quick results.

4. As the distances in rural areas are huge, it takes an entire day to take the child and the accused for medical examination to the district hospital and bring them back. In some cases, the police

[1]Maharashtra State Consultation to Review The Protection of Children From Sexual Offences Act, 2012 8 and 9 August, 2014. Venue: Sahyadri State Guest House; Available at: file:///C:/Documents%20and%20Settings/Administrator/My%20Documents/Downloads/A2015312618_19%20(1).pdf, last accessed on 21-08-2015.

have to walk long distances in difficult terrain to reach the victim, which further delays investigations.

5. Police lack the infrastructure required to follow all the provisions stipulated under the Act. They do not have sufficient number of lady officers particularly in rural areas, they do not have sufficient number of vehicles to take the victim and accused separately for the mandatory medical examination.

6. Police do not have the required training or assistance of experts to deal with victims who suffer from disabilities.

7. There is pressure from the media to provide daily information regarding the progress in investigations in some high profile cases, which hinders investigation. Excessive media exposure results in providing vital clues regarding the victim and her family through which the reporters can identify the victim. The victims are in constant fear of this exposure.

9. Pressure exerted by social workers also adversely impacts the investigation.

Response to the Presentations

Judicial Officers and Public Prosecutors

1. The police often use general statements such as "*ganda kam kiya*" without elaborating further on the actual incident of abuse which has taken place. The Police will have to make the effort of building a rapport with the child and then eliciting accurate information about the offence. It was suggested that body charts can be used for this purpose. This will greatly enhance the quality of evidence produced before the court.
2. Recording of several additional statements of the child must be avoided as the defence lawyers can exploit this situation to their advantage. Instead, a memorandum of the statement can be prepared and after the entire statement is recorded, it should be finalised and then signed.
3. It is not required to record a *panchnama* of the clothes of the child and send them for forensic examination when the incident has occurred several weeks/months prior to the filing of the FIR as vital evidence would already be lost. Such unnecessary procedures should be avoided as they only serve to delay the investigation and the trial and adds to the workload of the police and the court.
4. The Investigating Officer (IO) must regularly consult the Public Prosecutor (PP) during the investigation, especially prior to filing the charge sheet to ensure that all legal points are well covered. However, this is seldom done and most officers bring the final charge sheet directly to court on the date of filing, without consulting the PP in advance. Hence, the PP is not able to provide valuable legal inputs in order to present a strong case without any loopholes.

5. The officer must confirm with the court staff before bringing the child for her deposition, if the judge will be free to examine the child on the specified date. If there is better coordination between the police, prosecutor and the court staff, it will prevent inconvenience which is caused to the child and her family and save the family of avoidable hardship of bringing the child to court repeatedly.
6. The frequent excuse made by police officers for non-appearance in court or failure to comply with court orders is that they are busy with *bandobast*. This needs to be rectified immediately and cases of sexual offences must be treated as a priority by the police machinery.

Medical Officers

1. Samples for forensic examination must be sent to the forensic laboratory immediately without delay by the Police. In several cases, forensic samples had become unfit for examination due to a delay by the Police.

2. The chain of custody should be accurately maintained as any lapses will benefit the accused.

3. The protocols evolved by the Public Health Department must be accurately followed regarding the manner in which records of body fluids collected during the medical examination and sent for forensic examination.

Child Welfare Committees

1. The Police are mandated to inform the CWC about every FIR recorded under the Act. This is not being done. Only cases where the child is produced before the CWC are coming to the notice of the CWC. In order to do this routinely, a format needs to be evolved and it must be made mandatory for the police to inform the CWC of every FIR registered under POCSO to the CWC in this format. This will ensure that a proper record of all POCSO cases within their jurisdiction is maintained by the CWC.

2. Documentary evidence relating to age must be produced before the CWC. If there is no documentary evidence, age verification test must be done. The procedure prescribed under the JJ Act for age verification should be followed. Very often the Police produce children before the CWC without age proof and medical examination. While the CWC accepts the child, it also directs the Police to return the following day to complete the requirements. However, the Police come after several days and the CWC has to repeatedly follow up with them.

Civil Society

1. Though statements are signed by lady officers as per the provisions of the Act, the child is made to narrate the incident several times in the presence of male officers which defeats the very purpose of this provision and causes embarrassment to the child.

2. Very often, after an incident of sexual assault, the family changes their residence and the police do not bother to stay in contact with the child and her family. Hence, they are unable to

trace the child at the time of recording her evidence. This delays the matter and sometimes may result in the victim not being traceable.

3. Despite the mandate of the Act that the victim should not be brought in contact with the accused, very often, the police take the accused and victim in the same vehicle for medical examination. They also bring the accused face to face with the victim and permit him to intimidate the child. Such unethical and illegal practices must be stopped immediately.

4. The charge sheet has to be filed within 60 days in cases under the POCSO Act. The Police are not complying with the same and this results in the accused availing the provision of statutory bail. Hence, the Police must file the charge sheet within the stipulated time to avoid this situation.

5. Once bail is granted, the trial is prolonged and the statutory period of one year to complete the trial is not complied with.

6. If the accused is on bail, the Police should proactively work towards making the victim and her family feel secure. An application for cancellation of bail should immediately be made if the accused tries to threaten / intimidate the victim or her family.

7. Though the Police is mandated to record an FIR immediately, it is observed that in cases where the accused belongs to an affluent background and the girl comes from a poor background, the Police try to "settle" the dispute. It has also been brought to the notice of the Hon'ble High Court instances where the police, instead of lodging an FIR, have tried to arrange the marriage between the victim and the accused to save the accused from the ignonimity of facing the criminal trial. Such illegal practises should be stopped immediately and the Police should restrain from indulging in such practices.

Action Points

- ✓ There is an urgent need for improving the infrastructure and providing the necessary budgets to comply with all the mandatory requirements as stipulated under the POCSO Act
- ✓ The DCPU must prepare a list of translators and special educators and provide the same to all police stations, CWCs and Sessions Courts. The fees for their services, as prescribed under the Act, must also be stipulated and necessary budgetary allocations must be made.
- ✓ Under the POCSO Act, the Police must approach the Special Court directly for all purposes including remand and not approach the Magistrate Court.
- ✓ In cases of pornography, ensure the seizure of CD player, TV equipment and include the content of the CD, pen-drive, etc in the panchnama.

- ✓ Preferably, there should be one comprehensive statement of the child. If the statement is recorded over a period of time, a station diary entry should be made for the statements taken each time. This will ensure that the defence does not take objections to delay.
- ✓ Statements must be recorded using phrases and expressions used by the child. Even while explaining in legal language, use parenthesis to explain the vocabulary used by child so that there are no inconsistencies.
- ✓ The Maharashtra State Health Protocols regarding collection and maintenance of body fluids and chain of custody must be strictly followed.
- ✓ The police should not try to "settle" matters at their level. The common complaint continues to be that the police refuse to file an FIR. Strict action must be taken against such officers as per the provisions of S.166A of the IPC.
- ✓ There is an immediate need to provide training to the investigating officers and those recording statements of the child and the impact of such training must be strictly monitored to record the changes in the system.

Important Procedures to be followed by Police

Recording of the offence:

The information of a sexual offence committed or likely to be committed on a child can be given by any person to the Special Juvenile Police Unit (SJPU) or the local police. S.19 (1) Every information given shall be recorded in writing (FIR) and shall be given an entry number. The same should be read over to the informant S.19 (2). The informant shall be given a copy free of cost. Rule 4 (2) (a) The police officer shall share his name, designation, address, telephone number as well as the details of his supervising officer with the informant. Rule 4 (1) If a police officer fails to record an FIR it a cognizable offence under S. 166A CrPC

Recording a Child's Statement:

The police officer shall ensure that: If the sexual offence is reported by a child, it shall be recorded in simple language. S.19(3) The child's statement shall be recorded at a place where the child resides or where the child feels comfortable by a police officer shall not be below the rank of sub inspector and should preferably be a woman officer. S.24 (1).

A person who the child trusts shall be present at the time of recording statement. S.26 (1).

While recording the statement of the child, the police officer shall not be in uniform. S.24 (2).

If the child speaks a different language, an interpreter or translator may be called and shall be paid for the service. S.26 (2).

If the child is temporarily or permanently mentally or physically disabled, a special educator or a person familiar with the manner of communication or an expert may be called and shall be paid for the service. S.26 (3).

If possible, the statement of the child may be recorded using audio-video electronic means. S.26 (4).

The child does not come in contact in any way with the accused. S.24 (3).

The child is not detained in the police station at night. S.24 (4).

The identity of child shall be protected from the media, unless directed by the Special Court. S.24 (5).

If the child's statement is being recorded by the Magistrate u/s. 164 of Cr. P.C., then the same shall be recorded as spoken by the child. S.25 (1).

The Magistrate shall provide the child or parents or representative a copy of the police report, FIR, statements of the witnesses, documents containing confessions and statements and other relevant documents. S.25 (2).

Medical Examination and treatment:

The SJPU or local police shall get the victim examined by a registered medical practitioner within 24 hours of receiving information whether or not the FIR or complaint has been registered.

Forensic:

The SJPU or local police shall ensure the samples collected from the hospital and in the course of rendering emergency medical care are sent to the forensic laboratory at the earliest. Rule 4 (2) (d) & Rule 5 (5) Inform Special Court: The SJPU or local police shall inform the Special Court about the assignment of the support person within 24 hours of such assignment. Rule 4 (9).

Challenges Before Health Care Professionals

This important session was chaired by Ms. Sujata Saunik, Principal Secretary, Public Health Department. Ms. Enakshi Ganguli, Co-Director, HAQ Centre for Child Rights, Delhi and Dr. Duru Shah ex-chairperson of FOGSI were the contributors. Presentations were made by senior doctors from District Hospitals. The Initiative by Municipal Corporation of Greater Mumbai (MCGM) was also discussed.

Presentations by Doctors in District Hospitals and MCGM

1. One Stop Help Centres have been established by MCGM in five hospitals in Mumbai which are based on a convergence model between different departments. Standard Operating Procedures have also been evolved for their effective functioning.

2. They will be implemented in three phases. At present the first phase is being implemented where a coordinator has been appointed at each Hospital who is the first point of contact for

all cases of sexual violence from the time the victim enters the hospital. Every department has been informed about the designation of this coordinator. It will be her duty to guide the victim through the medical examination and coordinate with all departments to ensure that the victim does not have to go from one department to another and is treated in a timely and effective manner.

3. Doctors from the districts emphasised that even though the law mandates that a lady doctor shall conduct the medical examination, no provision had been made to increase the number of lady doctors in their hospitals. They also lack facilities such as counselling and tests such as colostromy.

4. There was no private and separate space designated for the examination of victims of sexual violence. The child is usually examined in the labour ward, in casualty, or sometimes even in the same room as the accused.

5. The health care system is overburdened and this causes delay in submitting forensic / medical reports, which is a concern for the investigating agency.

6. The Police and the Courts require a "conclusive" report. However, a doctor cannot determine rape or contact abuse. They can only determine sexual intercourse / penetration and even this may not be possible without the Doppler test. Hence other stakeholders must refrain from expecting doctors to draw such conclusions in their medical reports.

7. Standardised Medical Examination Formats: A GR has been issued by the Maharashtra Government titled 'Forensic Medical Examination of Sexual Assault Cases: An Instruction Manual by Proforma', dated 10th May 2013. This is the standardised format to be followed by all doctors while conducting examinations in cases of sexual violence. However, each hospital had their own variations of the prescribed format. Care should be taken to ensure that there is no deviation from the format.

8. With regards to the National Guidelines and Protocols, once it is adopted by the State of Maharashtra, the same will be adopted by all district hospitals.

9. Issues relating to lack of basic infrastructure such as dedicated space, adequate furniture and equipment were repeatedly highlighted in all presentations.

10. Doctors were concerned about the contradiction between the provisions of mandatory reporting under POCSO and patient-doctor confidentiality. They believe that mandatory reporting will discourage patients from approaching the health system and availing treatment after sexual violence as they may not wish to approach the Police.

11. The MTP Act provides complete confidentiality to the victim while POCSO stipulates mandatory reporting. Mandatory reporting may result in young girls approaching quacks or

resorting to other dangerous methods of abortion rather than approaching the health care system for a safe abortion. This will adversely affect the health of young girls. The government should take note of this and provide a solution.

12. It was suggested that a complaints committee or a similar mechanism could be set up where a victim could complain to the committee instead of the Police. When she is ready to report, then she could approach the Police. This procedure is followed in some countries.

13. Dr. Duru Shah spoke about the duty of private doctors under the amended law. However, she said that private doctors were not equipped with the required legal and procedural knowledge and they require training.

14. She also suggested the concept of task shifting whereby trained female nurses can be given the responsibility of examination of victims, especially since there are not adequate female doctors. The nurses will also require to be trained on how to report.

15. It was suggested that awareness regarding the provisions of this Act is necessary for adolescent children. However, instead of sex education, a better term such as "Reproductive Health Education" may be used.

Response to the Presentations

Judicial Officers and Public Prosecutors

1. Most doctors are not aware of the new definitions of sexual offences under POCSO and continue to use archaic terms in their reports which causes confusion. This must be avoided as it benefits the accused.

2. Doctors must be made aware of the latest law and its requirements and they must also be guided to record medical reports in a manner that is required under the law.

3. Doctors should also note the mental condition of the victim in their medical reports, especially if the victim appears to be stressed, anxious or traumatised. However, care should be taken while recording the same, because the defence should not benefit from loose statements, such as the victim was calm and composed.

4. Very often the doctor who signs the medical examination report does not come to court for the deposititon and a doctor who was not involved in the examination is sent to court, which weakens the prosecution case.

5. The chain of custody with regards to medical evidence is not adhered to by the Police and doctors. This results in a sample reaching the forensic laboratory after it has become unfit for testing, resulting in loss of crucial evidence of the prosecution.

6. Judges and Public Prosecutors were concerned that a delay in the submission of the forensic medical report, delays the entire trial. It generally takes around 4 -6 months for the forensic reports to be submitted to court.

7. A major concern for Judges was that victims were not being examined by lady doctors, even though this is mandated by law. This issue needs to be taken up urgently, as it results in re-victimisation for the victim.

8. Most doctors to do not come prepared to court for their deposition. They do not even read the medical examination report prior to their deposition, thereby contradicting their own findings. Care should be taken about the same and doctors must always come prepared for their deposition.

9. Archaic books on Medical Jurisprudence by authors such as Modi are still used by defence advocates while cross-examining doctors. Doctors must be careful while answering suggestions put to them at the time of cross examination based on these books, as a wrong answer could adversely affect the case of the prosecution.

Police Officers

1. At the time of conducting the medical examination, police officers are often made to go from one department to another, along with the victim, without any guidance from doctors or hospital authorities. This causes hardships to the victim and delays the medical examination resulting in loss of vital evidence. It also violates the mandate of confidentiality.

2. In most hospitals, the victim and Police are made to wait for a long time, generally 2-3 hours, before the medical examination commences. No special arrangements are made to treat victims of sexual violence on an urgent basis.

3. Doctors are frequently transferred which causes problems at the time of service of summons. It becomes difficult to trace the appropriate doctor and serve the summons.

4. Often doctors who examine the victim do not come to court for their deposition, despite being served the summons several times. This delays the trial.

5. Often, samples of medical evidence, clothes of the victim, etc are not sealed correctly; panchnamas are not drawn up properly, which results in weakening the case of the prosecution.

Child Welfare Committee

1. For facilities such as X-rays, MRIs, etc some payment has to be made to the Hospital. When the child is an orphan, there is no one to make this payment on her behalf. The CWC also is unable to make the payment, as they do not have funds for this. Hence these children are not

provided the required medical treatment. It was proposed that hospitals can make exceptions for such children and give treatment free of charge. Moreover, under the amended law, S. 357C Cr.P.C., medical aid and treatment shall be provided free of cost in cases of sexual violence.

2. An emergency fund should be provided by the District WCD for responding to such emergency needs of medical treatment to the child.

Civil Society Response

1. The emphasis of health professionals is "examination" rather than "treatment". This must change. The victim's health and treatment should be of paramount importance.

2. The history of the victim is not recorded accurately. Doctors do not take the effort of gaining the confidence of the victim so that she is able to narrate the incident without hesitation.

3. Care should be taken to ensure that the history is written in the words of the victim and not in medical terms. If the child is very small and the history is taken from the parent, the same should be mentioned. If the victim is pregnant, the date of the incident and LMP become very crucial at the time of the trial and care should be taken while recording the same.

4. During cross examination, the doctor will have to answer several questions on recording the history and therefore this should be done carefully.

5. In most cases, victims are not called for follow up visits even though they experience continued health problems due to the sexual assault. Though medical reports do mention that counselling is required, no attempt is made to guide the victim to an appropriate counsellor and ensure that she avails of the same.

6. The imperative of having a female doctor undertaking medical examination of the child reiterated by many, in the best interest of the child.

Action Points

- ✓ Ms. Sujata Saunik, Principal Secretary, Public Health Department agreed to designate one Coordinator in all hospitals under the Public Health Department who shall be the point of contact in all cases of sexual violence. This coordinator shall be with the victim as soon as she comes to the hospital, guide her through the medical examination and ensure that all departments respond to her in a timely and effective manner. This will ensure that the victim does not have to wait endlessly when she comes to the hospital and she receives an effective response from doctors.

- ✓ Treatment should be provided free of cost to all victims of child sexual abuse in public hospitals in accordance with the amended law. Even tests such as X-ray, MRI etc. should be provided free of cost.

Important Procedures to be followed by Medical Practitioners

- ✓ All medical practitioners (public or private) shall provide medical care and treatment without demanding any legal documentation from the victim. Rule 5 (3).
- ✓ If the child victim is female then the medical examination shall be conducted by a woman doctor. S.27 (2).
- ✓ If such person is not available then a woman nominated by head of the medical institution shall be present. S.27 (4).
- ✓ A person who the child trusts shall be present at the time of medical examination S.27 (3).
- ✓ The consent of the child or person who the child trusts shall be taken by the medical practitioner. The examination shall be conducted without any delay. S.27 (1), S.164A of Cr. P.C.
- ✓ Care shall be rendered in a manner that the privacy of the child is protected. A person who the child trusts shall be present at the time of medical examination. Rule 5 (2).
- ✓ The medical practitioner shall treat the child for cuts, bruises, bodily and genital injuries, exposure to STDs & HIV. S/he shall discuss possible pregnancy and emergency contraceptives with the child or the person who the child trusts. Rule 5 (4).
- ✓ The child may be referred for mental, psychological or other counseling. Rule 5 (4) (v).
- ✓ Non treatment of a victim by a Hospital is an offence punishable with imprisonment for a term which may extend to one year or fine or both under S. 166B Cr. P. C.

Child Welfare Committee and Juvenile Justice Board

Two important state institutions were the focus of the discussion of this session which was chaired by Mr. Rahul More, Deputy Commissioner, Department of Women and Child Development. The expert contributor was Ms. Alpa Vora, Child Protection specialist from UNICEF (Maharashtra). Presentations regarding challenges faced by them were made by members of CWC Magistrates of JJB from Districts.

Functioning of Special Courts

This most important session was chaired by Dr. Shalini Phansalkar Joshi, Registrar General, Bombay High Court. The expert contributor for this session was Adv. Flavia Agnes, Director, MAJLIS Legal Centre and consultant to RAHAT. The presentations were made by judicial officers designated as Special Judges under POCSO and designated Special Public Prosecutors.

Presentations by Judges and Prosecutors

1. Though the Act provides for setting up of child friendly court rooms, the courts lack the adequate infrastructure to meet these requirements. Due to this, many Judges have improvised by using cupboards, curtains, etc to prevent the victim from seeing the accused. They also make the victim enter from the Judges' entrance and make her sit in the Judge's chamber or the steno's room. Some Judges record the statement of the victim in the Judges' chamber.

2. It takes time to build rapport with a young child who comes before the court to depose. Building rapport and gaining confidence requires time. However, this poses an obstacle to the mandate of speedy disposal. Moreover, delay in receiving the forensic report delays the entire trial.

3. The Police must confirm with the court staff before bringing the victim for her deposition.

4. The rights of the victim must be seen in relation to the rights of the accused. For instance, the accused must hear the deposition of the victim, through the partition, curtain, etc. If he does not hear, he can deny it in his statement in S. 313 (Cr.PC), which has detrimental consequences.

5. A female doctor must examine the child to avoid causing further trauma to the child.

6. Sensitivity of the defence advocate is important while cross examining the child.

7. The statement of the child must be recorded in her language or else the defence can take advantage of this.

8. Certain inconsistencies in the Act were pointed out as follows: S.18 of the Act. Quantum of punishment one half of the imprisonment for life. (This provision requires clarification.)

9. Moreover, it was suggested that only women JMFC / MM must record the 164 statement of the victim. In Mumbai, a list of women MM who shall record the 164 statement of the victim has been provided to each Police Station. Police Stations have been divided according to jurisdiction for this purpose. This should be extended to the entire state of Maharashtra.

10. The Public Prosecutors raised the issue that the Police do not provide them with a complete set of the papers.

11. Several issues relating to the manner in which the statement of the victim is recorded were raised. In cases of sexual violence this is the most crucial piece of evidence. Chronology must be maintained, unnecessary information should not be included, the incident of sexual violence must be stated in detail and it must be recorded in the language of the child. Any lubricant, condoms used should be mentioned, threats given to the child must be stated, and any accomplice should be mentioned.

12. The spot panchanama must be conducted even in cases of non penetrative sexual violence. It is an important piece of evidence.

13. It was suggested that any statement of the child recorded before the CWC may also be made part of the charge sheet.

14. There should be only one defence lawyer and she should preferably be a lady. The defence advocate should not be allowed to bring juniors at the time of recording the evidence of the child.

15. Some defence lawyers adopt the strategy of continuously questioning the child to cause further trauma to the child. The Judges should take care and such cross examination must not be allowed as it is the duty of the Judge to maintain the dignity of the victim.

Response to the Presentations

Civil Society Response

1. To maintain confidentiality trials are conducted behind closed doors (in-camera). In such a situation, it is impossible to monitor whether the prescribed rules and procedures are being followed while conducting the trial. At times, gross violations of the prescribed procedures have been noticed. Hence there is a need to monitor the Special Courts to assess if they are functioning as per the prescribed rules. There must be mechanisms of redressal in the event it is found that there are lapses in the manner in which trials are conducted.

2. Since a female child of sexual abuse may be more comfortable while deposing before a lady judge, only lady judges are assigned to these courts. However, this does not mean that all lady judges are more sensitive to victims of sexual abuse than male judges. It is not biology that determines sensitivity. Judges assigned to the Special Courts must be provided with training not just on the Act and its provisions but also on case law and the requirements of being sensitive to a child of sexual abuse. Such training has not been provided so far while appointing Judges to the special courts.

3. When reputed criminal lawyers appear before the special courts, judges presiding over these courts get intimidated by their presence and are not able to strictly control the aggressive behaviour of these lawyers towards the victim. All Judges must take due care that they do not get intimidated by such tactics of defence lawyers.

4. The Sakshi Guidelines have stipulated that all questions of cross examination must be given in writing to the presiding judge by the defence and the judge must only ask relevant questions to the child. However, it has been noticed that this procedure is not followed. Guidelines must be issued by Registrar General, High Court to all Special Courts to strictly follow the Sakshi Guidelines regarding cross examination of a child victim of sexual violence.

5. The layout of a special court must be different from a regular sessions court. The layout of a family court is a good example. The judge should not be seated on a high podium. Judges and lawyers should not be in black coats. The child should not be put in a witness box while deposing, but made to sit. Frequent breaks for drinking water, toilet etc. must be given as mandated by the Act.

6. Judges must take care that the child is not intimidated by the accused, his family members or the defence lawyers when she comes to court to depose.

7. Maintaining Confidentiality of the Child – In some courts the mandate is followed only as a ritual without taking due care. The judge must take care to first vacate the court and then bring the victim inside. If this is not followed, the provision of maintaining confidentiality and conducting in-camera trial becomes meaningless.

Action Points

- ✓ Dr. Shalini Phansalkar Joshi agreed to ensure that a list of women JMFC / MM who would record the statement of the child under S. 164 CrPC would be issued for each district in Maharashtra, based on the circular that has been issued in Mumbai.
- ✓ Until adequate infrastructural provisions are made in the Court for recording the evidence of the child, Judges should improvise by using the existing infrastructure, such as a cupboard, curtain, etc. Judges may also record the evidence of the child in their chamber. This will ensure that the provisions of the Act are followed and the child is not traumatised.
- ✓ All questions during the cross examination must be given to the Judge in writing by the defence, and the Judge will then administer the relevant questions to the child, in accordance with *Sakshi* Guidelines.
- ✓ The child should not be called repeatedly to Court. Her examination in chief and cross examination should preferably be completed on the same day.

Important Procedures to be followed by Special Courts

Cases of offences committed under this Act shall be tried in a Special Court which shall have all the powers of a Court of Sessions. S.28 (1) S. 33 (9).

While trying such cases, the Special Court shall also try offences under CrPc and/or Information Technology Act, 2000 if clubbed together. S.28 (2) & (3).

Every Special Court shall have a Special Public Prosecutor with a minimum experience of 7 years as an advocate. S.32 (1) & (2).

The Special Court may directly take cognizance of an offence or on receiving information by police. S.33 (1).

Examination of the Victim in Special Court:

Questions by the Judge: questions to the child shall be asked only by the Special Judge. S.33 (2).

Aggressive Questioning: The Special Court shall ensure that the dignity of the child is maintained at all times. No aggressive questioning or character assassination shall be permitted. S.33 (6).

Assistance of Translator or Interpreter: If the child does not speak the language of the court, the Special Court may take the assistance of an interpreter or translator who shall be paid for the service S.38 (1). The Special Court shall verify that the interpreter or translator has no conflict of interest with the case. Rule 3 (9) Special Children: If the child is mentally or physically (temporary or permanent) disabled a special educator or a person familiar with the manner of communication or an expert may be called and shall be paid for the service S. 38 (2). The Special Court shall verify that the special educator or expert has no conflict of interest in the case Rule 3 (9).

No exposure to the Accused: The child should not be able to see the accused while testifying. The statement may be recorded through video conferencing or by using single visibility mirrors, curtains or any other device to shield the child victim from the direct gaze of the accused. S. 36 (1) & (2).

Frequent Breaks: The court may permit frequent breaks for the child during examination if necessary. S.33.

Trial In Camera: The entire trial shall be conducted in camera i.e. behind closed doors in the presence of a person in whom the child has trust S.37. No member of the public or an advocate who is not connected with the case shall be present in court. Presence of Persons who the child trusts: In order to make the child comfortable, the child shall be examined in the presence of a person who s/he trusts. S.33 (4).

Child Victim should not be called repeatedly: The child shall not be called repeatedly to the court to give evidence. S.33 (5).

Confidentiality: Identity of the child shall not be revealed. Identity of the child includes the family's identity, school, relatives, neighbourhood and other information. S.33 (7).

Examination at another location: The Special Court may order that the examination of the child may be conducted at an alternate location. S.37.

Onus of Proof is on the Accused: S.29 states that the Special Court shall presume that the accused has committed / abetted / attempted the offence, unless s/he proves otherwise. The Special Court shall presume that the accused had a culpable mental state at the time of

committing the offence, unless s/he proves otherwise. The defence will have to prove that the accused had no culpable mental state beyond reasonable doubt S.30 (1) & (2).

Compensation to be awarded by the Special Court: In addition to punishment, the court may prescribe payment of interim or final compensation to the child for causing physical or mental trauma or for immediate rehabilitation of the child. S.33.

Interim Compensation: May be awarded by the court on its own or by an application filed by or on behalf of the child to meet immediate needs of relief and rehabilitation. The amount paid shall be adjusted against final compensation, if any. Rule 7 (1).

Final Compensation: May be awarded by the court where it is of the opinion that the child has suffered loss or injury as a result of the offence. It may be paid even if the case ends in acquittal, discharge or if the accused cannot be found or identified. Rule 7 (2).

Consideration: The following considerations shall be taken into account before awarding compensation - Type, gravity of abuse and severity of mental or physical harm/injury; expenditure incurred or likely to be incurred on medical treatment; loss of educational opportunity including absence from school; loss of employment including absence from place of employment; relationship of the child to the offender; whether the abuse was a single isolated incidence or whether it took place over a period of time; child pregnancy; contraction of STD or HIV; any disability suffered; financial condition and any other factor. Rule 7 (3) The child or person who the child trusts may also submit an application for seeking relief under any rules or schemes of the Central or State Government. Rule 7 (6).

Rights of an Accused Child:

- ✓ A child under 7 years cannot be tried for an offence. S.82 of IPC.
- ✓ A child under 12 years who has not attained sufficient maturity cannot be tried for an offence. S.83 of IPC.
- ✓ A child who has committed a sexual offence shall be tried as per provisions of the Juvenile Justice (Care and protection of Children) Act, 2000. S.34 (1) & (2).
- ✓ If the age of the child is in doubt then the same shall be determined by the Special court and the reasons must be recorded. The judgment of the court cannot be invalidated, if at a later stage, it is found that the age of the child as determined by the court was not correct. S.34 (3).

Action Points by Stakeholders

Investigation Agency

- ✓ There is an urgent need for improving the infrastructure and providing the necessary budgets to comply with all the mandatory requirements as stipulated under the POCSO Act.
- ✓ The DCPU (District Child POCSO Unit) must prepare a list of translators and special educators and provide the same to all police stations, CWCs and Sessions Courts. The fees for their services, as prescribed under the Act must also be stipulated and necessary budgetary allocations must be made.
- ✓ Under the POCSO Act, the Police must approach the Special Court directly for all purposes including remand and not go to the Magistrate Court.
- ✓ In cases of pornography, ensure the seizure of CD player, TV equipment and include the content of the CD, pen-drive, etc in the panchnama.
- ✓ Preferably, there should be one comprehensive statement of the child. If the statement is recorded over a period of time, a station diary entry should be made for the statements taken each time. This will ensure that the defence does not take objections to delay.
- ✓ Statements must be recorded using phrases and expressions used by the child. Even while explaining in legal language, use parenthesis to explain the vocabulary used by child so that there are no inconsistencies.
- ✓ The Maharashtra State Health Protocols regarding collection and maintenance of body fluids and chain of custody must be strictly followed.
- ✓ The police should not try to "settle" matters at their level. The common complaint continues to be that the police refuse to file an FIR. Strict action must be taken against such officers as per the provisions of S.166A of the IPC.
- ✓ There is an immediate need to provide training to the investigating officers and those recording statements of the child and the impact of such training must be strictly monitored to record the changes in the system.

Health Care Professionals

- ✓ Ms. Sujata Saunik, Principal Secretary, Public Health Department agreed to designate one Coordinator in all hospitals under the Public Health Department who shall be the point of contact in all cases of sexual violence. This coordinator shall be with the victim as soon as she comes to the hospital, guide her through the medical examination and ensure that all departments respond to her in a timely and effective manner. This will ensure that the victim does not have to wait endlessly when she comes to the hospital and she receives an effective response from doctors.

- ✓ Treatment should be provided free of cost to all victims of child sexual abuse in public hospitals in accordance with the amended law. Even tests such as X-ray, MRI etc. should be provided free of cost.

Child Welfare Committee and Juvenile Justice Board

- ✓ The WCD shall conduct training for all CWC members on a regular basis, keeping in mind their requirements.
- ✓ WCD also agreed to review the vacancies in CWC at the earliest.
- ✓ CWC will maintain a resource directory of all Police Stations, NGOs, counseling centres, Special Educators, within its jurisdiction.
- ✓ WCD has permitted every CWC to appoint one data operator. This will assist the CWC in information collection, data collection of maintaining records. The WCD shall provide the remuneration for the data operator.

Special Courts

- ✓ Dr. Shalini Phansalkar Joshi agreed to ensure that a list of women JMFC / MM who would record the statement of the child under S. 164 CrPC would be issued for each district in Maharashtra, based on the circular that has been issued in Mumbai.
- ✓ Until adequate infrastructural provisions are made in the Court for recording the evidence of the child, Judges should improvise by using the existing infrastructure, such as a cupboard, curtain, etc. Judges may also record the evidence of the child in their chamber. This will ensure that the provisions of the Act are followed and the child is not traumatised.
- ✓ All questions during the cross examination must be given to the Judge in writing by the defence, and the Judge will then administer the relevant questions to the child, in accordance with Sakshi Guidelines.
- ✓ The child should not be called repeatedly to Court. Her examination in chief and cross examination should preferably be completed on the same day.

Time Period to be observed by various agencies:

- ✓ First Information Report: The police shall record an FIR immediately on receiving information about the commission of an offence, without waiting for the aggrieved person.
- ✓ Medical Examination: The police shall send the victim for medical examination within 24 hours of recording the FIR.
- ✓ Investigation: The police shall complete the investigation within 60 days from the date of recording the information. S. 173 (1-A) of Cr.P.C.

- ✓ Evidence of the child: The Special Court shall record the evidence of the child within 30 days of the court taking cognizance of the offence. Delay if any shall be recorded with reasons. S.35 (1)
- ✓ Trial: The Special Court shall conclude the trial within a period of one year of the court taking cognizance of the offence, as far as practicable. S.35 (2).
- ✓ Compensation: The State Government shall pay any compensation awarded by the Special Court within 30 days from the receipt of the order. Rule 7 (4).

Re-writing the Concept of Burden of Proof
Supreme Court Judgment in Sher Singh @ Partapa v. State of Haryana requires re-consideration[1]

M.A.Rashid[*]

The golden rule that runs through the web of civilised criminal jurisprudence is that an accused is presumed to be innocent unless he is found guilty of the charged offence. Presumption of innocence is a human right as envisaged under Art.14 (2) of the International Covenant on Civil and Political Rights 1966. Art.11(1) of the Universal Declaration of Human Rights 1948 also provides that any charged with penal offences has a right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. Even before, it was part of English Common Law as observed by Viscount Sankey in ***Woolmington v. Director of Public Prosecutions, (1935 AC 462),*** [Golden Thread Judgment] that "no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained". This principle is also became a fundamental part of Criminal Law of India. ***[See V. D. Jhingan Vs. State of Uttar Pradesh AIR 1966 SC 1762]*** It is also the cardinal rule of our criminal jurisprudence that the burden in the web of proof of an offence would always lie upon the prosecution to prove all the facts constituting the ingredients beyond reasonable doubt. If there is any reasonable doubt, the accused is entitled to the benefit of the reasonable doubt. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. But in ***Veeraswamy Case [(1991) 3 SCC 655]*** the Constitution Bench held that ".....a statute placing burden on the accused cannot be regarded as unreasonable, unjust or unfair. Nor it can be regarded as contrary to Art.21 of the Constitution as contended for the appellant. It may be noted that the principle reaffirmed in Woolmington case (Supra), is not a universal rule to be followed in every case. The principle is applied only in the absence of statutory provision to the contrary". As observed by Justice K.T.Thomas in ***State of West Bengal v. Mir Mohammad Omar and Others, [2000 (8)***

[1]Available at: http://www.livelaw.in/re-writing-concept-burden-proof-supreme-court-judgment--sher-singh-partapa-vs-state-haryana-requires-re-consideration/. Last accessed on 17-08-2015.

[*] **M.A.Rashid is the Co-Founder of *LIVE LAW*, published on** February 3, 2015**. He revised Ratanlal Dheeraj Lal "Indian Penal Code" (34th Ed) with Justice KT Thomas.**

SCC 382] that "the pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage the offenders in serious offences would be the major beneficiaries, and the society would be the casualty". The Concept of "reverse burden" has been adopted in many statutes like Negotiable Instruments Act, Prevention of Corruption Act, Narcotic Drugs and Psychotropic Substances Act etc. In Indian Evidence Act, Section 113A (for S.306 IPC) and Section 113B (for 304B IPC) places a reverse burden on the accused.

A Two Judge Bench [Vikramjit Sen and Kurian Joseph.JJ] of the Supreme Court **in *Sher Singh @ Partapa Vs. State of Haryana* [Criminal Appeal No. 1592 of 2011 dt 9.1.2015] while dealing with S.304B IPC and S.113B Evidence Act *interalia* held as follows;**

1. The Prosecution can discharge the initial burden to prove the ingredients of S.304B even **by preponderance of Probabilities**
2. Once the presence of the concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, **beyond reasonable doubt.**
3. Keeping in perspective that Parliament has employed the amorphous pronoun/noun "it" (which we think should be construed as an allusion to the prosecution), followed by the word "shown" in Section 304B, the proper manner of interpreting the Section is that **"shown"** has to be read up to mean **"prove"** and the word **"deemed"** has to be read down to mean **"presumed".**

Regarding the third proposition, there is no scope for doubt since the Courts in India have been interpreting the word **"shown"** to mean **"prove"** and the word **"deemed"** has to mean**"presumed"** though not expressly declared as 'reading down' and 'reading up'. *[See Gurdip Singh vs. State of Punjab (2013) 10 SCC 395 in which Kurian.J held "Though the expression "presumed" is not used under Section 304B of IPC, the words "shall be deemed" under Section 304B carry, literally and under law, the same meaning since the intent and context requires such attribution"]*

But the first two propositions require serious consideration because of a profusion of precedents against it. The genesis of Section 304B of IPC introduced w.e.f. 19.11.1986 as per Act 43 of 1986 relates back to the 91st Report of the Law Commission of India. The Commission, in its Report dated 10th August, 1983, recommended reform of the law to deal with the situation which led to incorporation of Sections 304 B in IPC, making 'dowry death' an offence and Section 113B in the Evidence Act which provides for raising a presumption as to dowry death in case of an unnatural death within seven years of marriage when it is shown that a woman was subjected to harassment for dowry soon before her death. Presumption under S.113B of Indian Evidence Act is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials;

(1) The question before the court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under S.304B, IPC.)

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death. ***[Raman Kumar vs. State of Punjab (2009) 16 SCC 35].***

Reading S.113B of the Evidence Act, as a part of S.304B, if the prosecution succeeds in showing that soon before her death she was subjected by him to cruelty or harassment for or in connection with any demand for dowry and that her death had occurred (within seven years of her marriage) otherwise than under normal circumstances "the court shall presume that such person had caused the dowry death***" [S.M.Multani v. State of Karnataka AIR 2001 SC 921].*** The key words in S.113B are 'shall presume' leaving no option with a Court but to presume an accused brought before it of causing a dowry death guilty of the offence. However, the redeeming factor of this provision is that the presumption is rebuttable.

Can the prosecution discharge the initial burden to prove the ingredients of S.304B evenby preponderance of Probabilities?

There is a catena of precedents which unequivocally held that in order to establish the offence of dowry death under Section 304B, IPC the prosecution has to prove beyond reasonable doubt that the husband or his relative has subjected the deceased to cruelty or harassment in connection with demand of dowry soon before her death. Most recently in**Karan Singh vs. State of Haryana** ***[(2014) 5 SCC 73- Ranjana Prakash Desai.J and Madan B. Lokur.J]*** it was held as follows;

"It has been held times without number *that, "To establish the offence of dowry death under Section 304-B IPC* ***the prosecution has to prove beyond reasonable doubt that*** *the husband or his relative has subjected the deceased to cruelty or harassment in connection with demand of dowry soon before her death.* In **Rajeev Kumar v State of Haryana** ***[AIR 2014 SC 227- AK.Patnaik.J and Gyan Sudha Misra.J]*** it is held as follows;

"One of the essential ingredients of the offence of dowry death under S.304B, IPC is that the accused must have subjected a woman to cruelty in connection with demand of dowry soon before her death and ***this ingredient has to be proved by the prosecution beyond reasonable doubt and only then the Court will presume that the accused has committed the offence of dowry death under S.113B of the Indian Evidence Act.****"*

In ***Indrajit Sureshprasad Bind v. State of Gujarat, [(2013) 14 SCC 678]***, it was again held that to establish the offence of dowry death under Section 304B, IPC ***the prosecution has to prove beyond reasonable doubt*** that the husband or his relative has subjected the deceased to cruelty or harassment in connection with demand of dowry soon before her death. In***Vipin Jaiswal Vs. State of A.P.[(2013) 3 SCC 684; AIR 2013 SC 1567]*** the positions is made clear as follows;

*In any case, to hold an accused guilty of both the offences under Sections 304B and 498A, IPC,****the prosecution is required to prove beyond reasonable doubt*** *that the deceased was subjected to cruelty or harassment by the accused. Similarly, for the Court to draw the presumption under S.113B of the Evidence Act that the appellant had caused dowry death as defined in S.304B, IPC, the prosecution has to prove besides the demand of dowry, harassment or cruelty caused by the accused to the deceased soon before her death. Since the prosecution has not been able to prove beyond reasonable doubt this ingredient of harassment or cruelty, neither of the offences under S.498A and S.304B, IPC has been made out by the*

prosecution.[Also see Madivallappa V. Marabad Vs. State of Karnataka 2013(2) SCALE 665 ;Devinder Vs. State of Haryana (2012) 10 SCC 763; Narayanamurthy Vs. State of Karnataka AIR 2008 SC 2377 ; (2008) 16 SCC 512]Raj v. State of Punjab and Others [(2000) 5 SCC 207];Sanjiv Kumar v. State of Punjab, (2009) 16 SCC 487;Bakshish Ram Vs. State of Punjab (2013) 4 SCC 131]

In ***Arulvelu Vs. State [(2009) 10 SCC 206]*** while allowing an appeal filed by the Accused against conviction U/S 304B and 498A IPC the Apex Court held that In criminal cases the conviction can be sustained only when there is clear evidence beyond reasonable doubt. The accused **cannot be convicted on the ground that in all probabilities the accused may have committed the crime**. The above Judgments reflect the judicial consensus in the issue and the Judgment in ***Sher Singh @ Partapa Vs. State of Haryana*** is a clear deviation from the settled principle of law. It is also to be noted that even in statutory offences which creates absolute liability the initial burden is on the prosecution and it must be discharged by the prosecution by the standard of proof beyond reasonable doubt. *[See PC Act- State of Maharashtra Vs. Wasudeo Ramchandra Kaidalwar [AIR 1981 SC 1186]; NDPS Act –Bhola Singh Vs. State of Punjab (2011) 11 SCC 653; NI Act; Krishna Janardhan Bhat v. Dattatraya G. Hegde, 2008 (1) SCALE 421]*

Whether the accused has to discharge his burden beyond reasonable doubt?

In Para-14 of the Judgment it is held as follows;

"It seems to us that what Parliament intended by using ***the word 'deemed' was that only preponderance of evidence would be insufficient to discharge the husband or his family members of their guilt****".*

In Para-17 of the Judgment it is held as follows;

The other facet is that the husband has indeed ***a heavy burden cast on his shoulders*** *in that his deemed culpability would have to be* ***displaced and overturned beyond reasonable doubt.*** *……..In order to avoid prolixity we shall record that* ***our understanding of the law finds support*** *in an extremely extensive and erudite judgment of this Court in* ***P.N. Krishna Lal***

v. Government of Kerala, [1995 Supp (2) SCC 187], *in which decisions spanning the globe have been mentioned and discussed.*

In *P.N.Krishna Lal* (Supra) a two Judge Bench *[K.Ramswamy and N. Venkatachala.JJ]* of the Supreme Court upheld the constitutional validity of Section 57A of Kerala Abkari Act which also placed a reverse burden on the accused [(sub-s.(5)]. But there is no whisper in *Krishna Lal (Supra)* in support of the proposition that the Accused has to discharge his burden beyond reasonable doubt.

In ***Sanjiv Kumar v. State of Punjab, [(2009) 16 SCC 487 -B.P.Singh and Tarun Chatterjee.JJ]*** it was held as follows;

If the accused successfully ***rebuts the presumption by pleading and proving a probable defence****, the presumption under S.113 – B stands rebutted and the prosecution must prove its case without the aid of such presumption.*

In Para-20 of the Judgments the Apex Court held in no uncertain terms as follows;

"We cannot lose sight of the principle that while ***the prosecution has to prove its case beyond reasonable doubt, the defence of the accused has to be tested on the touchstone of probability.*** *The burden of proof lies on the prosecution in all criminal trials, though the onus may shift to the accused in given circumstances, and if so provided by law. Therefore,****the evidence has to be appreciated to find out whether the defence set up by the appellant is probable and true."***

Burden of proof in offences created by legal fiction;

In Para-14 of the Judgment Justice Sen held as follows;

As is already noted above, Section 113B of the Evidence Act and Section 304B of the IPC were introduced into their respective statutes simultaneously and, therefore, it must ordinarily be assumed that ***Parliament intentionally used the word 'deemed' in Section 304B to distinguish this provision from the others.***

It is also held that *"In our opinion,* ***it would not be appropriate to lessen the husband's onus to that of preponderance of probability as that would annihilate the deemed guilt expressed in Section 304B****, and such a curial interpretation would defeat and neutralise the intentions and purposes of Parliament.*

It is respectfully pointed out that no Judgment either Indian or foreign has been cited in support of the above preposition. The two Judge Bench was not appraised of any precedential support when giving a new interpretation to a provision which is contrary to the consistent view taken by the Supreme Court for the last 28 years. It is a well established dictum of the Evidence Act that misplacing burden of proof would vitiate judgment ***[Rangammal vs. Kuppuswami AIR 2011 SC 2344].*** A legal fiction, as is well known, although is required to be given full effect, has its own limitations. It cannot be taken recourse to any purpose other than the one mentioned in the statute itself ***[See Raj Kumar Khurana vs. State (2009) 6 SCC 72].*** In ***Devinder Vs. State of Haryana [(2012) 10 SCC 763],*** it is held that the word "deemed" in Section 304B, IPC, however, does not create a legal fiction but creates a presumption that the husband or relative of the husband has caused dowry death. Section 138 of Negotiable Instrument Act also contains the words "shall be deemed to have committed an offence". It is well settled that offence U/S 138 is created by a legal fiction ***[See R. Kalyani v. Janak C. Mehta and Others 2009 (1) SCC 516 and DCM Financial Services Ltd. v. J.N. Sareen and Another, 2008 (8) SCC 1]*** A three Judge Bench of the Supreme Court in ***Rangappa v. Sri Mohan [AIR 2010 SC 1898]*** examined the degree of proof required for an accused to discharge his burden in a prosecution U/S 138 0f NI Act and it is held as follows;

"S.139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments……..it is a settled position that when an accused has to rebut the presumption under S.139, ***the standard of proof for doing so is that of 'preponderance of probabilities'.*** *Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail"*

Legislative Intention

In Para-14 of the Judgment it is held as follows;

"It seems to us that ***what Parliament intended by using the word 'deemed' was that only preponderance of evidence would be insufficient to discharge the husband or his family members of their guilt"*** But the following provisions will make it clear that if the Parliament intends the accused to discharge his burden/part of burden/or to prove any ingredient beyond reasonable doubt, it would have expressed in clear terms.

1. 35 of NDPS Act
2. 138A of Customs Act
3. 278E of Income Tax Act
4. 9C of Central Excise Act 1944
5. 30 of POCSO Act 2012 [List is not exhaustive]

Section 35 of NDPS Act is extracted below;

5. ***Presumption of culpable mental state.***

(1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, ***the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution****.*

Explanation. -In this section "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, ***a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.***

All other Sections quoted above are *in parimateria* with Section 35 of NDPS Act.

Explaining the nature and extend of burden cast on the Accused U/S 35(2) of NDPS Act, in *Abdul Rashid vs. State of Gujarat* ***[AIR 2000 SC 821]*** , Justice KT.Thomas speaking for three Judge Bench held as follows;

"The burden of proof cast on the accused under S.35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross examination to

dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that appellant could not have had the knowledge or the required intention, the burden cast on him under S.35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence."

Even in a case where the statute (S.35 NDPS Act) requires the accused to prove his case beyond reasonable doubt, the three Judge Bench of the Apex Court had read it down in the afore said manner, evidently to save the section from the vires of Constitution.

Hence, except when there is a statutory provision which cast the burden of proof to a degree beyond reasonable doubt on the accused, the Court cannot impose such a heavy burden on him. It is definitely a new innovation, something which Parliament had not even thought of while enacting S.304B IPC and S.113B Evidence Act. The inherent disability of an accused must always be borne in mind by the Courts when casting the degree of proof on the accused. The position becomes more formidable as Article 20(3) of the Constitution of India offers the constitutional protection to the accused by saving him from testimonial compulsion. I strongly doubt that the ratio propounded by the two Judge Bench in ***Sher Singh @ Partapa Vs. State of Haryana*** is not only contrary to the well established jurisprudential standards in criminal cases, but also amounts to negation of the fundamental right to fair trial guaranteed under Article 21 of Constitution of India.

Noor Aga v. State of Punjab[1]

S.B. Sinha, J

1. Leave granted.

INTRODUCTION

2. Several questions of grave importance including the constitutional validity of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act"), the standard and extent of burden of proof on the prosecution *vis-a-vis* accused are in question in this appeal which arises out of a judgment and order dated 9.06.2006 passed by the High Court of Punjab and Haryana in Criminal Appeal No. 810-SB of 2000 whereby and whereunder an appeal filed by the applicant against the judgment of conviction and sentence dated 7.6.2000 under Section 22 and 23 of the Act has been dismissed.

PROSECUTION CASE

3. Appellant is an Afghan national.

4. He was arrested and later on prosecuted under Sections 22 and 23 of the Act allegedly for carrying 1 kg 400 grams of heroin as a member of crew of Ariana Afghan Airlines.

5. Appellant arrived at Raja Sansi Airport at about 6 p.m. on 1.08.1997. He presented himself before the authorities under the Customs Act, 1962 (for short "the Customs Act") for customs clearance. He was carrying a carton with him said to be containing grapes. The cardboard walls of the said carton were said to have two layers. As some concealment in between the layers was suspected by one Kulwant Singh, an Inspector of the Customs Department, the appellant was asked as to whether he had been carrying any contraband or any other suspicious item. Reply thereto having been rendered in the negative, a search was purported to have been conducted.

6. Kulwant Singh, who examined himself as PW-1 before the trial court, allegedly asked the appellant as to whether he intended to be searched by a Magistrate or a Gazetted officer of the

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[1] S.B. Sinha and V.S. Sirpurkar, JJ.(DB), Decided On: 09.07.2008, (2008)16SCC417, MANU/SC/2913/2008, Criminal Appeal No. 1034 of 2008 (Arising out of SLP (Crl.) No. 5597 of 2006).

Customs Department; in response whereto, he exercised his option for the latter, whereupon one Shri K.K. Gupta, Superintendent of the Customs Department and two independent witnesses, Mohinder Singh and Yusaf were sent for. K.K. Gupta disclosed his identity to the appellant as a Gazetted officer working in the Customs Department.

7. The layers of the walls of the carton were thereafter separated, wherefrom 22 packets of polythene containing brown powder were allegedly recovered. The same was weighed; the gross weight whereof was found to be 1 kg. 400 grams. Representative homogeneous samples from each packet in small quantities were taken weighing 5 gms. each. They were purported to have been sealed with a seal bearing No. 122 of the Customs Department. The cardboard carton was also sealed with the same seal. The recovered item being of brown colour was taken in possession vide recovery memo (Ex. PB), Panchanama (Ex. PC) prepared by Shri Kulwant Singh. The entire bulk was put into cotton bags and sealed.

ARREST AND PURPORTED CONFESSION

8. Although the appellant had all along been in the custody of the Customs Department, he was formally arrested at about 3 p.m. on 2.08.1997, i.e., 15 hours after the recovery having been effected. Grounds of arrests allegedly were supplied to him. His body was also searched wherefore his jamatalashi was prepared which was marked as Ex. PE.

9. Appellant purported to have confessed his guilt on 2.08.1997 as also on 4.08.1997.

INVESTIGATION

10. Samples were sent to the Central Forensic Laboratory on 5.08.1997. The weight of the said samples was found to be 8.7 gms. The document is said to have been tinkered with, as the words "net weight" were crossed and converted into `gross weight'.

11. The alleged contraband was found to be of white colour containing Diacetyl Morphine. The report was submitted on 2.09.1997; on the basis whereof a complaint Ex. PL was filed in the Court and in a consequence thereof, appellant was to put on trial having been charged under Sections22 and 23 of the Act.

12. The contraband articles were produced before the Magistrate on 30.01.1999. The purpose for production is mired in controversy. Whereas the appellant contends that the same was done for the purpose of authentication, according to the respondent, it was produced for the purpose of obtaining a judicial order for destruction thereof. No order, however, was passed by the learned Magistrate for destruction of the contraband. No application for destruction was also filed.

PROCEEDINGS

13. At the trial, the following witnesses were examined on behalf of the State:

PW-1 Kulwant Singh-Inspector Customs (Complainant and investigating officer)

PW-2 KK Gupta- Superintendent-Customs (A Gazetted Officer)

PW-3 Ashok Kumar- Inspector, Customs Department (Deposited sample)

PW-4 Rajesh Sodhi-Deputy Commissioner Custodian of case property from 1-8-97 to 4-897 PW-5 KK Sharma-Inspector Incharge- Malkhana

14. Appellant, in his examination under Section 313 of the Code of Criminal Procedure in categorical terms denied that the carton belonged to him. He also retracted from his alleged confession.

15. The learned Additional Sessions Judge by his order and judgment dated 7.06.2000 convicted the appellant under Sections 22 and 23 of the Act and sentenced him to undergo rigorous imprisonment for 10 years and also imposed a fine of Rs. 1 lakh on him.

16. Aggrieved by and dissatisfied with the said judgment and order of the learned Additional Sessions Judge, the appellant filed an appeal before the High Court of Punjab and Haryana. The High Court dismissed the said appeal by a judgment and order dated 9.06.2006. Appellant is, thus, before us.

CONTENTIONS

17. Ms. Tanu Bedi, learned Counsel appearing on behalf of the appellant, in support of this appeal, submits:

(i) The provisions of Sections 35 and 54 of the Act being draconian in nature imposing reverse burden on an accused and, thus, being contrary to Article 14(2) of the International Covenant on Civil and Political Rights providing for `an accused to be innocent until proved guilty' must be held to be ultra vires Articles 14 and 21 of the Constitution of India.

(ii) Burden of proof under the Act being on the accused, a heightened standard of proof in any event is required to be discharged by the prosecution to establish the foundational facts and the same having not been done in the instant case, the impugned judgment is liable to be set aside.

(iii) The prosecution having not produced the physical evidence before the court particularly the sample of the purported contraband materials, no conviction could have been based thereupon.

(iv) Independent witnesses having not been examined, the prosecution must held to have failed to establish actual recovery of the contraband from the appellant.

(v) There being huge discrepancies in the statements of official witnesses in regard to search and seizure, the High Court judgment is fit to be set aside.

(vi) The purported confessions of the appellant before the customs authorities are wholly inadmissible in evidence being hit by Section 25 of the Indian Evidence Act, as Section 108 of the Customs Act should be read in terms thereof coupled with Sections 53 and 53A of the Act.

18. Mr. Kuldip Singh, learned Counsel appearing on behalf of the State, on the other hand, would contend:

(i) The learned Trial Judge as also the High Court upon having examined the materials brought on records by the prosecution to hold that the guilt of the accused sufficiently has been established in the case, this Court should not interfere with the impugned judgment.

(ii) Appellant having exercised his option of being searched by a Gazetted Officer; and the legal requirements of Sections 42 and 50 of the Act must be held to have been fully complied with. In any event, search and seizure of the carton did not attract the provisions of Section 50 of the Act.

(iii) Despite some discrepancies in the statements of the witnesses as regards recovery, the same cannot be said to be a vital flaw in the case of the prosecution so as to make the impugned judgment unsustainable. The learned Trial Judge as also the High Court had considered the practices prevailing in the Customs Department for the purpose of appreciating the evidence brought on record, and having recorded their satisfaction with regard thereto, the impugned judgments do not warrant any interference.

(iv) Any confession made before the customs authorities in terms of Section 108 of the Customs Act is not hit by Section 25 of the Indian Evidence Act and the same, thus, being admissible in evidence could have been relied upon for the purpose of recording a judgment of conviction.

AN OVERVIEW OF THE STATUTORY PROVISIONS

19. Before embarking upon the rival contentions of the parties, as noticed hereinbefore, it is appropriate to notice the relevant provisions of the Act as also the Customs Act, 1962.

20. The purported recovery was made by the Customs Department. In terms of the provisions of the Act they were entitled to make investigations as also file the chargesheet.

21. The Act was enacted to consolidate and amend the law relating to narcotic drugs to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. It was enacted to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances and the matters connected therewith.

22. Section 2(xiv) of the Act defines "narcotic drug" to mean coca leaf, cannabis (hemp), opium poppy straw and includes all manufactured drugs.

23. "Illicit traffic", in relation to narcotic drugs and psychotropic substances, has been defined in Section 2(viiia) of the Act, inter alia, to mean:

> (iv) dealing in any activities in narcotic drugs or psychotropic substances other than those referred to in Sub-clauses (i) to (iii); or
>
> (v) handling or letting out any premises for the carrying on of any of the activities referred to in Sub-clauses (i) to (iv);

24. "Commercial quantity" has been defined in Section 2(viia) to mean any quantity greater than the quantity specified by the Central Government by notification in the official gazette.

25. Indisputably, the commercial quantity prescribed for heroin is only 250 gms.

26. "International Conventions" have been specified in Section 2(ix) of the Act.

27. Chapter II of the Act enables the Central Government to take measures as may be necessary or expedient inter alia for the purpose of preventing and combating abuse of and illicit traffic therein including constitution of an authority or hierarchy of authorities by such name or names as may be specified in the order for the purpose of exercising such of the powers and functions of the Central Government under the Act and for taking measures with respect to such of the matters referred to in Sub-section (2) as being specified therein, subject, of course, to the supervision and control of the Central Government.

28. Chapter III provides for prohibition, control and regulation. Section 8 inter alia bars possession, sale, purchase, transport of any narcotic drugs except for medical or scientific purposes and in the manner and the extent provided by the provisions of the Act or the Rules or orders framed thereunder. Section 9 of the Act empowers the Central Government to make rules inter alia permitting and regulating possession of narcotic substance, subject, however, to the provisions contained in Section 8 thereof.

29. Chapter IV provides for offences and penalties. Section 22 provides for punishment for contravention in relation to psychotropic substances. Section 23 provides for punishment for illegal import into India, export from India or transshipment of narcotic drugs and psychotropic substances.

30. The punishment under both the provisions in case of commercial quantity provides for rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may be extended to two lakh rupees. The proviso appended thereto, however, empowers the court, for reasons to be recorded in the judgment, to impose a fine exceeding two lakh rupees.

31. Section 35 of the Act provides for presumption of culpable mental state. It also provides that an accused may prove that he had no such mental state with respect to the act charged as an offence under the prosecution. Section 54 of the Act places the burden of proof on the accused as regards possession of the contraband to account for the same satisfactorily.

32. Section 37 of the Act makes offences cognizable and non-bailable. It contains a non-obstante clause in terms whereof restrictions have been imposed upon the power of the court to release an accused on bail unless the following conditions are satisfied:

> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

33. The said limitations on the power of the court to grant bails as provided for in Clause (b) of Section (1) of Section 37 of the Act are in addition to the limitations provided for under the Code of Criminal Procedure, 1973 or any other law for the time being in force.

34. Section 39 provides for the power of the court to release certain offenders on probation.

35. We may notice that the restrictions on the power of the court to suspend the sentence as envisaged in Section 39 of the Act has been held to be unconstitutional in *Dadu @ Tulsidas v. State of Maharashtra* : 2000CriLJ4619 , subject, of course, to the restrictions for grant of bail as contained in Section 37 of the Act.

36. Section 42 provides for power of entry, search, seizure and arrest without any warrant or authorization by an officer who is otherwise empowered by the Central Government by general or special order.

37. If the authorities or officers specified therein have any reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic

drug or psychotropic substances in respect of which an offence punishable under the Act has been committed, they may enter into and search such building, conveyance or enclosed place at any time between sunrise and sunset and detain, search and arrest any person whom he has reason to believe to have committed an offence punishable under the Act.

38. Section 43, however, empowers an officer of any department mentioned in Section 42 to detain and search any person who he has reason to believe has committed an offence punishable under the Act in a public place. Section 50 provides for the conditions under which search of persons are to be conducted. Section 51 provides for application of the Code of Criminal Procedure, 1973 insofar as they are not inconsistent with the provisions of the Act. Section 52 provides for disposal of persons arrested and articles seized. Section 52A provides for disposal of seized narcotic drugs and psychotropic substances; Sub-section (2) whereof reads as under:

> (2) Where any narcotic drugs or psychotropic substances has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in Sub-section (1) shall prepare an inventory of such narcotic drugs or, psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in Sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any purpose of,-
>
> > (a) Certifying correctness of the inventory so prepared; or
> >
> > (b) Taking, in the presence of such Magistrate, photographs substances and certifying such photographs as true; or
> >
> > (c) Allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

39. Indisputably, the proper officers of the 1962 Act are authorized to take action under the Act as regards seizure of goods, documents and things.

40. We may notice Section 110 of the 1962, Sub-section (1) whereof reads as under:

> 110. Seizure of goods, documents and things. -
>
> > (1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(1A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under subsection (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.

(1B) Where any goods, being goods specified under Sub-section (1A), have been seized by a proper officer under Sub-section (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceedings under this Act and shall make an application to a Magistrate for the purpose of -

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of the Magistrate, photographs of such goods, and certifying such photographs as true; or

(c) allowing to draw representative samples of such goods, in the presence of the Magistrate, and certifying the correctness of any list of samples so drawn.

(1C) Where an application is made under Sub-section (1B), the Magistrate shall, as soon as may be, allow the application.

41. Indisputably, the Central Government has issued guidelines in this behalf being Standing Order No. 1 of 1989 dated 13.06.1989 which is in the following terms:

WHEREAS the Central Government considers it necessary and expedient to determine the manner in which the narcotic drugs and psychotropic substances, as specified in Notification No. 4/89 dated the 29th May, 1989

(F. No. 664/23/89- Opium, published as S.O. 381(E)), which shall, as soon as may be, after their seizure, be disposed of, having regard to their hazardous nature, vulnerability to theft, substitution and constraints of proper storage space;

Now, therefore, in exercise of the powers conferred by Sub-section (1) of Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), (hereinafter referred to as `the Act'), the Central Government hereby determines that the drugs specified in the aforesaid Notification shall be disposed off in the following manner....

42. These guidelines under the Standing order have been made under Statute, and Heroin is one of the items as substances listed for disposal under Section I of the Standing Order.

43. Paragraphs 3.1 and 6.1 of the Standing Order read as under:

Preparation of inventory

3.1 After sampling, detailed inventory of such packages/containers shall be prepared for being enclosed to the panchnama. Original wrappers shall also be preserved for evidentiary purposes.

Certificate of destruction

6.1 A certificate of destruction (in triplicate (Annexure III) containing all the relevant data like godown entry, no., file No., gross and net weight of the drugs seized etc. shall be prepared and duly endorsed by the signature of the Chairman as well as Members of the Committee. This could also serve the purpose of panchanama. The original copy shall be posted in the godown register after making necessary entries to this effect, the duplicate to be retained in the seizure case file and the triplicate copy will be kept by the Disposal Committee.

CONSTITUTIONALITY

44. Presumption of innocence is a human right as envisaged under Article 14(2) of the International Covenant on Civil and Political Rights. It, however, cannot per se be equated with the fundamental right and liberty adumbrated in Article 21 of the Constitution of India. It having regard to the extent thereof would not militate against other statutory provisions (which, of course, must be read in the light of the constitutional guarantees as adumbrated in Articles 20 and 21 of the Constitution of India).

45. The Act contains draconian provisions. It must, however, be borne in mind that the Act was enacted having regard to the mandate contained in International Conventions on Narcotic Drugs and Psychotropic Substances. Only because the burden of proof under certain

circumstances is placed on the accused, the same, by itself, in our opinion, would not render the impugned provisions unconstitutional.

46. A right to be presumed innocent, subject to the establishment of certain foundational facts and burden of proof, to a certain extent, can be placed on an accused. It must be construed having regard to the other international conventions and having regard to the fact that it has been held to be constitutional. Thus, a statute may be constitutional but a prosecution thereunder may not be held to be one. Indisputably, civil liberties and rights of citizens must be upheld.

47. A Fundamental Right is not absolute in terms.

48. It is the consistent view of this Court that `reason to believe', as provided in several provisions of the Act and as defined in Section 26 of the Indian Penal Code, on the part of the officer concerned is essentially a question of fact.

49. The procedures laid down under the Act being stringent in nature, however, must be strictly complied with.

50. In *Directorate of Revenue and Anr. v. Mohammed Nisar Holia* : (2008)2SCC370 , this Court held:11. Power to make search and seizure as also to arrest an accused is founded upon and subject to satisfaction of the officer as the term "reason to believe" has been used. Such belief may be founded upon secret information that may be orally conveyed by the informant. Draconian provision which may lead to a harsh sentence having regard to the doctrine of "due process" as adumbrated under Article 21 of the Constitution of India require striking of balance between the need of law and enforcement thereof, on the one hand, and protection of citizen from oppression and injustice on the other.

51. Application of international law in a case involving war crime was considered by the Constitutional Court of South Africa in State v. Basson2004 (6) BCLR 620 (CC) opining:

> The rules of humanitarian law constitute an important ingredient of customary international law. As the International Court of Justice [("the ICJ)] has stated, they are fundamental to the respect of the human person and "elementary considerations of humanity. The rules of humanitarian law in armed conflicts are to be observed by all States whether or not they have ratified the Conventions that contain them because they constitute intransgressible principles of international customary law. The ICJ has also stressed that the obligation on all governments to respect the Geneva Conventions in all circumstances does not derive from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.

52. It was furthermore observed:

> When allegations of such serious nature are at issue, and where the exemplary value of constitutionalism as against lawlessness is the very issue at stake, it is particularly

important that the judicial and prosecutorial functions be undertaken with rigorous and principled respect for basic constitutional rights. The effective prosecution of war crimes and the rights of the accused to a fair trial are not antagonistic concepts. On the contrary, both stem from the same constitutional and humanitarian foundation, namely the need to uphold the rule of law and the basic principles of human dignity, equality and freedom.

[See also `War, Violence, Human Rights, and the overlap between national and international law: Four cases before the South African Constitutional Court' by Albie Sachs, 28 Fordham International Law Journal 432]

53. The provision for reverse burden is not only provided for under the special acts like the present one but also under the general statutes like the Indian Penal Code. The Indian Evidence Act provides for such a burden on an accused in certain matters, as, for example, under Section 113Aand 113B thereof. Even otherwise, this Court, having regard to the factual scenario involved in cases, e.g., where husband is said to have killed his wife when both were in the same room, burden is shifted to the accused.

54. Enforcement of law, on the one hand and protection of citizen from operation of injustice in the hands of the law enforcement machinery, on the other, is, thus, required to be balanced.

55. The constitutionality of a penal provision placing burden of proof on an accused, thus, must be tested on the anvil of the State's responsibility to protect innocent citizens.

56. The court must assess the importance of the right being limited to our society and this must be weighed against the purpose of the limitation. The purpose of the limitation is the reason for the law or conduct which limits the right. {See S v. Dlamini; S v. Dladla and Ors. 1999(7) BCLR 771 (CC)}

57. While, however, saying so, we are not unmindful of serious criticism made by the academies in this behalf.

58. In Glanville Williams, Textbook of Criminal Law (2nd Edn.) page 56, it is stated:

> Harking back to *Woolmington*, it will be remembered that Viscount Sankey said that "it is the duty of the prosecution to prove the prisoner's guilt, subject to the defence of insanity and subject also to any statutory exception".... Many statutes shift the persuasive burden. It has become a matter of routine for Parliament, in respect of the most trivial offences as well as some serious ones, to enact that the onus of proving a particular fact shall rest on the defendant, so that he can be convicted "unless he proves" it.

59. But then the decisions rendered in different jurisdictions are replete with cases where validity of the provisions raising a presumption against an accused, has been upheld.

60. The presumption raised in a case of this nature is one for shifting the burden subject to fulfillment of the conditions precedent therefor.

61. The issue of reverse burden vis-a-vis the human rights regime must also be noticed. The approach of the Common Law is that it is the duty of the prosecution to prove a person guilty. Indisputably this common law principle was subject to parliamentary legislation to the contrary. The concern now shown worldwide is that the Parliaments had frequently been making inroads on the basic presumption of innocence. Unfortunately unlike other countries no systematic study has been made in India as to how many offences are triable in the Court, where the legal burden is on the accused. In the United Kingdom it is stated that about 40% of the offences triable in the Crown Court appear to violate the presumption. (See - The Presumption of Innocence in English Criminal Law, 1996 Crim.L.R. 306, at 309).

62. In Article 11(1) of the Universal Declaration of Human Rights (1948) it is stated:

> Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law....

63. Similar provisions have been made in Article 6. 2 of the European Convention for the protection of Human Rights and Fundamental Freedoms (195) and Article 14. 2 of the International Covenant on Civil and Political Rights (1966).

64. The legal position has, however, undergone a drastic change in the United Kingdom after coming into force of the Human Rights Act, 1998. The question as to whether on the face of Article 6. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the doctrine of reverse burden passes the test of constitutionality came up for consideration before the House of Lords in *Regina v.Lambert* [2001] UKHL 37 : [2001] 3 All ER 577 wherein the following two questions came up for consideration:

> The first is whether a defendant is entitled to rely on convention rights when the court is hearing an appeal from a decision which was taken before the Human Rights Act, 1998 came into effect. The second is whether a reverse burden provision in Section 28(2) and (3) of the Misuse of Drugs Act, 1971 is a compatible with the presumption of innocence contained in article 6. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

65. Sub-section (2) of Section 28 of the Misuse of Drugs Act, 1971, with which the House was concerned, reads as under:

(2) Subject to Sub-section (3) below, 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.

Lord Steyn stated the law thus:

> Taking into account that Section 28 deals directly with the situation where the accused is denying moral blameworthiness and the fact that the maximum prescribed penalty is life

> imprisonment, I conclude that the appellant's interpretation is to be preferred. It follows that Section 28 derogates from the presumption of innocence. I would, however, also reach this conclusion on broader grounds. The distinction between constituent elements of the crime and defensive issues will sometimes be unprincipled and arbitrary. After all, it is sometimes simply a matter of which drafting technique is adopted: a true constituent element can be removed from the definition of the crime and cast as a defensive issue whereas any definition of an offence can be reformulated so as to include all possible defences within it. It is necessary to concentrate not on technicalities and niceties of language but rather on matters of substance. I do not have in mind cases within the narrow exception "limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities;

66. Section 28 of the Misuse of Drugs Act, 1971 was read in the manner which was compatible with convention rights opining that Section 28(2)and (3) create an evidential burden on the accused.

67. Applicability of the doctrine of compatibility may be somewhat equated (essential differences although cannot be ignored) with the applicability of the doctrine of constitutionality in our country.

68. Sections 35 and 54 of the Act may have to be read in the light of Articles 14 and 21 of the Constitution of India.

69. We may notice that Sachs, J. in State v. Coetzee (1997) 2 LRC 593 explained the significance of the presumption of innocence in the following terms:

> There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book.... Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car- jacking, housebreaking, drug-smuggling, corruption...the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.

70. In R. v. Hansen (2007) NZSC 7, while construing Section 6(6) of the Misuse of Drugs Act, 1975 the New Zealand Supreme Court held as under:

> In the context of a prosecution for an offence of possession of controlled drugs for the purpose of supply, that reversal of the onus of proof is obviously inconsistent with the aspect of the presumption of innocence that requires the Crown to prove all elements of a crime beyond reasonable doubt. While the Crown must prove to that standard that the person charged was in possession of the stipulated quantity of drugs, the jury can convict even if it is left with a reasonable doubt on the evidence over whether the accused had the purpose of supply of the drugs concerned. Indeed, as Lord Steyn pointed out in R v. Lambert, the jury is obliged to convict if the version of the accused is as likely to be true as not.

71. However, in our opinion, limited inroad on presumption would be justified. We may consider the question from another angle. The doctrine of res ipsa loquitur providing for a reverse burden has been applied not only in civil proceedings but also in criminal proceedings. [See Alimuddin v. King Emperor 1945 Nagpur Law Journal 300]. In Home v. Dorset Yacht Company 1970 (2) ALL E.R. 294, House of Lords developed the common law principle and evolved a presumptive duty to care.

72. It is, however, of some interest to note that in *Syed Akbar v. State of Karnataka*: 1979CriLJ1374 this Court held:

> 28. In our opinion, for reasons that follow, the first line of approach which tends to give the maxim a larger effect than that of a merely permissive inference, by laying down that the application of the maxim shifts or casts, even in the first instance, the burden on the defendant who in order to exculpate himself must rebut the presumption of negligence against him, cannot, as such, be invoked in the trial of criminal cases where the accused stands charged for causing injury or death by negligent or rash act. The primary reasons for non- application of this abstract doctrine of res ipsa loquitur to criminal trials are: Firstly, in a criminal trial, the burden of proving everything essential to the establishment of the charge against the accused always rests on the prosecution, as every man is presumed to be innocent until the contrary is proved, and criminality is never to be presumed subject to statutory exception.No such statutory exception has been made by requiring the drawing of a mandatory presumption of negligence against the accused where the accident "tells its own story" of negligence of somebody. Secondly, there is a marked difference as to the effect of evidence viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man beyond all reasonable doubt. Where negligence is an essential ingredient of

> the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. As pointed out by Lord Atkin in *Andrews* v. *Director of Public Prosecutions*, "simple lack of care such as will constitute civil liability, is not enough"; for liability under the criminal law "a very high degree of negligence is required to be proved. Probably, of all the epithets that can be applied `reckless' most nearly covers the case".
>
> (emphasis supplied)

73. The said dicta was followed *in* *Jacob Mathew* *v.* *State of Punjab* : 2005CriLJ3710 . We may, however, notice that the principle of `res ipsa loquitur' has been applied in *State of A.P. v. C. Uma Maheswara Rao and Anr.* : 2004CriLJ2040] {see also *B. Nagabhushanam v. State of Karnataka* : (2008)5SCC730 .

74. The Act specifically provides for the exceptions.

75. It is a trite law that Presumption of innocence being a human right cannot be thrown aside, but it has to be applied subject to exceptions.

76. Independence of judiciary must be upheld. The superior courts should not do something that would lead to impairment of basic fundamental and human rights of an accused. We may incidentally notice a decision of the Privy Council in an appeal from the Supreme Court of Mauritius in The *State* *v.* *Abdul Rashid Khoyratty* 2006 UKPC 13. In that case, an attempt on the part of the Parliament to curtail the power of the court to grant bail in respect of the Dangerous Drugs Act (Act No.32 of 1986) was held to be unconstitutional being contrary to the doctrine of separation of power, necessary to protect individual liberty stating that the power to grant bail is exclusively within the judicial domain. A constitutional amendment to overcome the impact of the said decision was also held to be unconstitutional by the Supreme Court of Mauritius. In Abdul Rashid Khoyratty (supra), the Privy Council upheld the said view.

77. Dealing with the provisions of Sections 118(b) and 139 of the Negotiable Instruments Act, 1881 in *Krishna Janardhan Bhat* *v. Dattatraya G. Hegde* : 2008CriLJ1172 this Court upon referring to *Hiten P. Dalal v. Bratindranath Banerjee* : 2001CriLJ4647 , opined:

32. But, we may at the same time notice the development of law in this area in some jurisdictions.

> The presumption of innocence is a human right. [See *Narender Singh and Anr. v. State of M.P.* 2004CriLJ2842 , *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Anr.* : 2005CriLJ2533 and *Rajesh Ranjan Yadav @ Pappu Yadav* : 2007CriLJ304] Article 6(2) of he European Convention on Human Rights provides: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to

> law". Although India is not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law into land with the Convention, a balancing of the accused's rights and the interest of the society is required to be taken into consideration. In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of the offence, seriousness as also gravity thereof may be taken into consideration. The courts must be on guard to see that merely on the application of presumption as contemplated under Section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for the aforementioned reasons that we have taken into consideration the decisions operating in the field where the difficulty of proving a negative has been emphasized. It is not suggested that a negative can never be proved but there are cases where such difficulties are faced by the accused e,g,. honest and reasonable mistake of fact. In a recent Article "The Presumption of Innocence and Reverse Burdens : A Balancing Duty" published in [2007] C.L.J. (March Part) 142 it has been stated:

In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice - where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment.

78. The above stated principles should be applied in each case having regard to the statutory provisions involved therein.

79. We may, however, notice that recently in *Seema Silk & Sarees and Anr. v. Directorate of Enforcement and Ors.* : 2008(226)ELT673(SC) , in a 33 case where the constitutionality of the provisions of Sections 18(2) and 18 (3) of the Foreign Exchange Regulation Act, 1973 were questioned on the ground of infringing the `equality clause' enshrined in Article 14 of the Constitution of India, this Court held:

> 16. A legal provision does not become unconstitutional only because it provides for a reverse burden. The question as regards burden of proof is procedural in nature. [See *Hiten P. Dalal v. Bratindranath Banerjee* : 2001CriLJ4647 and *M.S. Narayana Menon v. State of Kerala (* : 2006CriLJ4607]
>
> 17. The presumption raised against the trader is a rebuttable one. Reverse burden as also statutory presumptions can be raised in several statutes as, for example, the Negotiable Instruments Act, Prevention of Corruption Act,

TADA, etc. Presumption is raised only when certain foundational facts are established by the prosecution. The accused in such an event would be entitled to show that he has not violated the provisions of the Act. In a case of this nature, particularly, when an appeal against the order of the Tribunal is pending, we do not think that the appellants are entitled to take the benefit thereof at this stage. Such contentions must be raised before the criminal court.

18. Commercial expediency or auditing of books of accounts cannot be a ground for questioning the constitutional validity of a Parliamentary Act. If the Parliamentary Act is valid and constitutional, the same cannot be declared ultra vires only because the appellant faces some difficulty in writing off the bad debts in his books of accounts. He may do so. But that does not mean the statute is unconstitutional or the criminal prosecution becomes vitiated in law.

80. Provisions imposing reverse burden, however, must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the statute in question.

81. The provisions of Section 35 of the Act as also Section 54 thereof, in view of the decisions of this Court, therefore, cannot be said to be ex facie unconstitutional. We would, however, keeping in view the principles noticed hereinbefore examine the effect thereof, vis-a-vis the question as to whether the prosecution has been able to discharge its burden hereinafter.

BURDEN OF PROOF

82. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs.2,00,000/- as also the presumption of guilt emerging from possession of Narcotic Drugs and Psychotropic substances, the extent of burden to prove the foundational facts on the prosecution, i.e., `proof beyond all reasonable doubt' would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of `wider civilization'. The courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In *State of Punjab v.Baldev Singh* : 1999CriLJ3672 , it was stated:

It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed.

[See also *Ritesh Chakravarty v. State of Madhya Pradesh* : 2006(9)SCALE644]

83. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however high may be, can under no circumstances, be held to be a substitute for legal evidence.

84. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is `preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

85. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.

86. Whether the burden on the accused is a legal burden or an evidentiary burden would depend on the statute in question. The purport and object thereof must also be taken into consideration in determining the said question. It must pass the test of doctrine of proportionality. The difficulties faced by the prosecution in certain cases may be held to be sufficient to arrive at an opinion that the burden on the accused is an evidentiary burden and not merely a legal burden. The trial must be fair. The accused must be provided with opportunities to effectively defend himself. In Sheldrake v. Director of Public Prosecutions (2005) 1 All ER 237 in the following terms:

> 21. From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirements of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant

> to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.
>
> (emphasis added)

87. It is, however, interesting to note the recent comments on Sheldrake (supra) by Richard Glover in an Article titled "Sheldrake Regulatory Offences and Reverse Legal Burdens of Proof" [(2006) 4 Web JCLI] wherein it was stated:

> It is apparent from the records in Hansard (implicitly if not expressly) that the Government was content for a legal onus to be on the defendant when it drafted the Road Traffic Act 1956. An amendment to the Bill was suggested in the Lords "which puts upon the accused the onus of showing that he had no intention of driving or attempting to drive a motor vehicle" (Lord Brabazon 1955, col 582). Lord Mancroft, for the Government, although critical of the amendment stated: "...the Government want to do exactly what he wants to do. We have, therefore, to try to find some means of getting over this technical difficulty" (Lord Mancroft 1955, col 586). It is submitted that this tends to suggest that the Government intended a reverse legal burden.
>
> The reverse legal burden was certainly in-keeping with the tenor of the 1956 Act to "keep death off the road" (Lord Mancroft 1954, col 637) by increased regulation of road transport, particularly in the light of a sharp increase in reported road casualties in 1954 - there was an 18 per cent increase (Lord Mancroft 1954, col 637). The Times lead article for the 4 July 1955 (at 9d) stressed the Bill's importance for Parliament: "They have the casualty lists - 5,000 or more killed on the roads every year, 10 times as many killed and more than 30 times as many slightly hurt". This was "a national scandal". The Earl of Selkirk, who introduced the Bill in the Lords, remarked that "we require a higher standard of discipline on the roads" (The Earl of Selkirk 1954, col 567) and Lord Mancroft commented specifically in relation to `being drunk in charge' that "...we should be quite right if we erred on the side of strictness" (Lord Mancroft 1955, col 586). Notwithstanding this historical background it was, of course, open to their Lordships in Sheldrake to interpret Section 5(2) as only imposing an evidential burden on the defendant. Lord Bingham referred to the courts' interpretative obligation under the Human Rights Act 1998 Section 3 as "a very strong and far-

> reaching one, and may require the court to depart from the legislative intention of Parliament" ([2004] UKHL 43, para 28).However, he must also have had in mind further dicta from the recent judgment in *Ghaidan v. Godin-Mendoza*:

Parliament is charged with the primary responsibility for deciding the best way of dealing with social problems. The court's role is one of review. The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's Convention rights (Lord Nicholls, [2004] UKHL 30, para 19. Also see *Johnstone* [2003] UKHL 28, para 51).

> That is, the Courts should generally defer (11) to the Legislature or, at least, allow them a discretionary area of judgment (R v. DPP, ex p Kebilene [1999] UKHL 43; [2000] 2 AC 326, 380- 381). (Lord Hoffman has criticised the use of the term `deference' because of its "overtones of servility, or perhaps gratuitous concession" R (Prolife Alliance) v. BBC [2003] UKHL 23, paras 75-762; WLR 1403, 1422.) This principle now appears firmly established, as is evident from the decision of an enlarged Privy Council sitting in Attorney-General for Jersey v. Holley [2005] UKPC 23. Lord Nicholls, who again delivered the majority judgment (6-3), stated:

The law of homicide is a highly sensitive and highly controversial area of the criminal law. In 1957 Parliament altered the common law relating to provocation and declared what the law on this subject should thenceforth be. In these circumstances it is not open to judges now to change (`develop') the common law and thereby depart from the law as declared by Parliament (para 22).

> Parliament's intentions also appear to have been of particular importance in the recent case Makuwa [2006] EWCA Crim 175, which concerned the application of the statutory defence provided by the Immigration and Asylum Act 1999 s31(1) to an offence under the Forgery and Counterfeiting Act 1981 s3 of using a false instrument. The question was whether there was an onus on a refugee to prove that he (a) presented himself without delay to the authorities; (b) showed good cause for his illegal entry and (c) made an asylum claim as soon as was reasonably practicable. Moore-Bick LJ's judgment was, with respect, rather confused. He appeared to approve gravamen analysis when he stated that the presumption of innocence was engaged by a reverse burden (paras 28 and 36). However, he then stated that the statutory defence did not impose on the defendant the burden of disproving an essential ingredient of the offence (para 32), in which case it is clear that the presumption of innocence was not engaged. Nonetheless, he did, at least, recognise the limits of gravamen analysis, which was clearly inapplicable to Sections 3 and 31 as the statutory defence applied to a number of other offences under the same Act and the Immigration Act 1971 (para 32). His Lordship acknowledged that particular attention should be

> paid to Parliament's actual intentions (para 33), as had been the case in Sheldrake.
>
> In light of the above it is submitted that their Lordships in Sheldrake, as in Brown v. Stott [2000] UKPC D3 : [2003] 1 AC 681, 711C-D, PC, were entitled to uphold a legal rather than an evidential burden on the defendant and to take into account other Convention rights, namely the right to life of members of the public exposed to the increased danger of accidents from unfit drivers (European Convention on Human Rights and Fundamental Freedoms, article 2). That is, there were sound policy reasons for imposing a reverse legal burden, which will be the subject of further discussion in the second part to this article.

88. Whereas in India the statute must not only pass the test of reasonableness as contained in Article 14 of the Constitution of India but also the `liberty' clause contained in Article 21 of the Constitution of India, in England it must satisfy the requirements of the Human Rights Act 1998 and consequently the provisions of European Conventions of Human Rights.

89. Placing persuasive burden on the accused persons must justify the loss of protection which will be suffered by the accused. Fairness and reasonableness of trial as also maintenance of the individual dignity of the accused must be uppermost in the court's mind.

90. In a case involving infringement of trade mark, the House of Lords in R. v. Johnstone (2003) 3 All ER 884] stated the law, thus:

> [52] I turn to Section 92. (1) Counterfeiting is fraudulent trading. It is a serious contemporary problem. Counterfeiting has adverse economic effects on genuine trade. It also has adverse effects on consumers, in terms of quality of goods and, sometimes, on the health or safety of consumers. The Commission of the European Communities has noted the scale of this `widespread phenomenon with a global impact.' Urgent steps are needed to combat counterfeiting and piracy (see the Green Paper, Combating Counterfeiting and Piracy in the Single Market (COM (98) 569 final) and its follow up (COM (2000) 789 final). Protection of consumers and honest manufacturers and traders from counterfeiting is an important policy consideration. (2) The offences created by s 92 have rightly been described as offences of `near absolute liability'. The prosecution is not required to prove intent to infringe a registered trade mark. (3) The offences attract a serious level of punishment: a maximum penalty on indictment of an unlimited fine or imprisonment for up to ten years or both, together with the possibility of confiscation and deprivation orders. (4) Those who trade in brand products are aware of the need to be on guard against counterfeit goods. They are aware of the need to deal with reputable suppliers and keep records and of the risks they take if they do not. (5) The s 92 (5) defence relates to facts within the accused person's own knowledge: his state of

> mind, and the reasons why he held the belief in question. His sources of supply are known to him. (6) Conversely, by and large it is to be expected that those who supply traders with counterfeit products, if traceable at all by outside investigators, are unlikely to be co-operative. So, in practice, if the prosecution must prove that a trader acted dishonestly, fewer investigations will be undertaken and fewer prosecutions will take place.
>
> [53] In my view factors (4) and (6) constitute compelling reasons why the s 92(5) defence should place a persuasive burden on the accused person. Taking all the factors mentioned above into account, these reasons justify the loss of protection which will be suffered by the individual. Given the importance and difficulty of combating counterfeiting, and given the comparative case with which an accused can raise an issue about his honesty, overall it is fair and reasonable to require a trader, should need arise, to prove on the balance of probability that he honestly and reasonably believed the goods were genuine.

91. The same principle applies to this case.

CASE AT HAND

Confession of the Appellant

92. With the aforementioned principles in mind, let us consider the evidence brought on record by the respondents. We may, at the outset, notice that a fundamental error has been committed by the High Court in placing explicit reliance upon Section 108 of the Customs Act.

93. It refers to leading of evidence, production of document or any other thing in an enquiry in connection of smuggling of goods. Every proceeding in terms of Sub-section (4) of Section 108 would be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. The enquiry contemplated under Section 108 is for the purpose of 1962 Act and not for the purpose of convicting an accused under any other statute including the provisions of the Act.

94. Appellant contended that the purported confessions recorded on 2.08.1997 and 4.08.1997 were provided by an officer of the Customs Department roughly and later the same were written by him under threat, duress and under gun point and had, thus, not been voluntarily made.

95. The High Court should have considered the question having regard to the stand taken by the appellant. Only because certain personal facts known to him were written, the same by itself would not lead to the conclusion that they were free and voluntary.

96. Clause (3) of Article 20 of the Constitution provides that no person accused of any offence shall be compelled to be a witness against himself. Any confession made under Section 108 of the Customs Act must give way to Article 20(3) wherefore there is a conflict between the two. A retracted confessional statement may be relied upon but a rider must be attached thereto namely if it is made voluntary. The burden of proving that such a confession was made voluntarily would, thus, be on the prosecution. It may not be necessary for us to enter into the question as to whether the decisions of this Court that a Custom Officer is not a Police Officer should be revisited in view of the decision of this Court in *Balkrishna Chhaganlal Soni v. State of West Bengal* : 1974CriLJ280 , wherein it was stated:

> On the proved facts the gold bar is caught in the criminal coils of Section 135, read with Sections 111 and 123, Customs Act, as the High Court has found and little has been made out before us to hold to the contrary.

97. It may also be of some interest to note the decision of this Court in *State of Punjab v. Barkat Ram* : [1962]3SCR338 , holding:

> 17. There has, however, arisen a divergence of opinion about officers on whom some powers analogous to those of police officers have been conferred being police officers for the purpose of Section 25 of the Evidence Act. The view which favours their being held police officers, is based on their possessing powers which are usually possessed by the police and on the supposed intention of the legislature at the time of the enactment of Section 25 of the Evidence Act to be that the expression 'police officer, should include every one who is engaged in the work of detecting and preventing crime. The other view is based on the plain meaning of the expression and on the consideration that the mere fact that an officer who, by no stretch of imagination is a police officer, does not become one merely because certain officers similar to the powers of a police officer are conferred on him.

98. It was pointed out that the power of a Police Officer as crime detection and custom officer as authorities invested with a power to check the smuggling of goods and to impose penalty for loss of revenue being different, they were not Police Officers but then the court took notice of the general image of police in absence of legislative power to enforce other law enforcing agencies for the said purpose in the following terms:

> 23. It is also to be noticed that the Sea Customs Act itself refers to police officer in contradistinction to the Customs Officer. Section 180 empowers a police officer to seize articles liable to confiscation under the Act, on suspicion that they had been stolen. Section 184 provides that the officer adjudging confiscation shall take and hold possession of the thing confiscated and every officer of police, on request of such officer, shall assist him in taking and holding such possession. This leaves no room for doubt that a Customs Officer is not an officer of the Police. 24. Section 171-A of the Act empowers the Customs Officer to summon any person to give evidence or to produce a document or any other thing in any enquiry which he be making in connection with the smuggling of any goods.

99. The extent of right to a fair trail of an accused must be determined keeping in view the fundamental rights as adumbrated under Article 21 of the Constitution of India as also the International Convention and Covenants chartered in Human Rights. We cannot lose sight of the fact that criminal justice delivery system prevailing in our country lacks mechanisms to remedy systemic violations of the accused's core constitutional rights which include the right to effective assistance of counsel, the right to have exculpatory evidence disclosed, and the right to be free from suggestive eyewitness identifications, coerced custodial interrogation and the fabrication of evidence. (See Aggregation in Criminal Law by Brandon L. Garrett : April 2007 California Law Review Vol. 95 No.2 page 385 at 393).

100. When, however, the custom officers exercise their power under the Act, it is not exercising its power as an officer to check smuggling of goods; it acts for the purpose of detection of crime and bringing an accused to book.

101. This Court in Barkat Ram (supra) left the question, as to whether officers of departments other than the Police on whom the powers of Officer-in-charge of a Police Station under Chapter XIV of the Code of Criminal Procedure has been conferred are police officers or not for the purpose of Section 25 of the Act, open, stating:

> 34. In the Oxford Dictionary, the word "police" is defined thus:
>
> The department of government which is concerned with the maintenance of public order and safety, and the enforcement of the law; the extent of its functions varying greatly in different countries and at different periods.
>
> The civil force to which is entrusted the duty of maintaining public order, enforcing regulations for the prevention and punishment of breaches of the law and detecting crime; construed as plural, the members of a police force; the constabulary of a locality."
>
> Shortly stated, the main duties of the police are the prevention and detection of crimes. A police officer appointed under the Police Act of 1861 has such powers and duties under the Code of Criminal Procedure, but they are not confined only to such police officers. As the State's power and duties increased manifold, acts which were at one time considered to be innocuous and even praiseworthy have become offences, and the police power of the State gradually began to operate on different subjects. Various Acts dealing with Customs, Excise, Prohibition, Forest, Taxes etc., came to be passed, and the prevention, detection and investigation of offences created by those Acts came to be entrusted to officers with nomenclatures appropriate to the subject with reference to which they functioned. It is not the garb under which they function that matters, but the nature of the power they exercise or the character of the function they perform is decisive. The question, therefore, in each case is, does the officer under a particular Act exercise the powers and discharge the duties of prevention and detection of crime? If be does, he will be a police officer.

102. Section 25 of the Evidence Act was enacted in the words of Mehmood J in *Queen Empress v. Babulal* ILR (1884) 6 All. 509 to put a stop to the extortion of confession, by taking away from the police officers as the advantage of proving such extorted confession during the trial of accused persons. It was, therefore, enacted to subserve a high purpose.

103. The Act is a complete code by itself. The customs officers have been clothed with the powers of police officers under the Act. It does not, therefore, deal only with a matter of imposition of penalty or an order of confiscation of the properties under the Act but also with the offences having serious consequences.

104. Section 53 of the Act empowers the customs officers with the powers of the Station House Officers. An officer invested with the power of a police officer by reason of a special statute in terms of Sub-section (2) of Section 53 would, thus, be deemed to be police officers and for the said purposes of Section 25 of the Act shall be applicable.

105. A legal fiction as is well known must be given its full effect. [See *UCO Bank and Anr. v. Rajinder Lal Capoor :* (2008)IIILLJ299SC

106. Section 53A of the Act makes such a statement relevant for the purposes of the said Act. The observations of the High Court, thus, that confession can be the sole basis of conviction in view of Section 108 of the Customs Act, thus, appear to be incorrect.

107. An inference that the appellant was subject to duress and coercion would appear from the fact that he is an Afgan National. He may know English but the use of expressions such as `homogenous mixture', `drug detection kit', `independent witnesses' which evince a knowledge of technical terms derived from legal provisions, possibly could not be attributed to him. Possibility of fabrication of confession by the officer concerned, thus, cannot altogether be ruled out.

108. The constitutional mandate of equality of law and equal protection of law as adumbrated under Article 14 of the Constitution of India cannot be lost sight of. The courts, it is well settled, would avoid a construction which would attract the wrath of Article 14. It also cannot be oblivious of the law that the Act is complete code in itself and, thus, the provisions of the 1962 Act cannot be applied to seek conviction thereunder.

109. This Court in *Alok Nath Dutta v. State of West Bengal* 2006(13)SCALE467], stated:

> We are not suggesting that the confession was not proved, but the question is what would be the effect of a retracted confession. It is now a well- settled principle of law that a retracted confession is a weak evidence. The court while relying on such retracted confession must satisfy itself that the same is truthful and trustworthy. Evidences brought on records by way of judicial confession which stood retracted should be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon.

[See also *Babubhai Udesinh Parmar v. State of Gujarat*, : 2007CriLJ786 .

110. In *Pon Adithan v. Deputy Director, Narcotics Control Bureau, Madras* : 1999CriLJ3663 whereupon reliance has been placed by the High Court, this Court had used retracted confession as a corroborative piece of evidence and not as the evidence on the basis whereof alone, a judgment of conviction could be recorded.

111. There is another aspect of the matter which cannot also be lost sight of.

112. A search and seizure or an arrest made for the purpose of proceeding against a person under the Act cannot be different only because in one case the authority was appointed under the Customs Act and in the other under another. What is relevant is the purpose for which such arrest or search and seizure is made and investigation is carried out. The law applicable in this behalf must be certain and uniform.

113. Even otherwise Section 138B of the 1962 Act must be read as a provision containing certain important features, namely:

(a) There should be in the first instance statement made and signed by a person before a competent custom official.

(b) It must have been made during the course of enquiry and proceedings under the Customs Act.

114. Only when these things are established, a statement made by an accused would become relevant in a prosecution under the Act. Only then, it can be used for the purpose of proving the truth of the facts contained therein. It deals with another category of case which provides for a further clarification. Clause (a) of Sub-section (1) of Section 138B deals with one type of persons and Clause (b) deals with another. The Legislature might have in mind its experience that sometimes witnesses do not support the prosecution case as for example panch witnesses and only in such an event an additional opportunity is afforded to the prosecution to criticize the said witness and to invite a finding from the court not to rely on the assurance of the court on the basis of the statement recorded by the Customs Department and for that purpose it is envisaged that a person may be such whose statement was recorded but while he was examined before the court, it arrived at an opinion that is statement should be admitted in evidence in the interest of justice which was evidently to make that situation and to confirm the witness who is the author of such statement but does not support the prosecution although he made a statement in terms of Section 108 of the Customs Act. We are not concerned with such category of witnesses. Confessional statement of an accused, therefore, cannot be made use of in any manner under Section 138B of the Customs Act. Even otherwise such an evidence is considered to be of weak nature.

{See *Gopal Govind Chogale* v. *Assistant Collector of Central Excise and Anr.* : 1985(2)BomCR499 }

NON PRODUCTION OF PHYSICAL EVIDENCE

115. The prosecution alleged that 1.4 kgs heroin was concealed in a cardboard container for carrying grapes and were recovered from the appellant at Raja Sansi Airport. Essential key items necessary to prove the same were:

> i) The cardboard carton allegedly used for carrying the heroin to test the veracity.
>
> ii) The bulk, which establishes the quantity recovered.
>
> iii) The three homogenous samples of five grams each taken from the bulk amount of heroin, which would be essential in ascertaining whether the substance that the accused was allegedly in possession of was, in fact, heroin.

116. Indisputably, the cardboard carton was not produced in court being allegedly missing. No convincing explanation was rendered in that behalf. The High Court, in its judgment, stated:

> The case set up by the prosecution is that the appellant being a member of a crew party, was in possession of his luggage, which included the cardboard carton, from which the recovery of heroin was allegedly effected. The appellant himself had presented the said carton along with the other luggage for custom clearance. From these facts, at least one thing is clear that the carton which was carrying the contraband, was under his immediate control. The argument advanced by Mr. Guglani is that the luggage which was being carried by the crew members, had no specific identification slips as in the case of an ordinary passenger travelling in an aircraft. So what was being carried in the carton was within the knowledge of the appellant alone and, therefore, the element of possession and control of the contraband qua the appellant is writ large and the presumption of culpable mental state under Section 35 and 54 of the Act has to be drawn against him.

117. The inference was drawn only on the basis of a mere assertion of the witness that the cardboard carton wherefrom the contraband was allegedly recovered as the one which had been in possession of the appellant without any corroboration as regards the purported "apparent practice of crew members carrying their own luggage" and there being no identification marks on the same. No material in this behalf has been produced by the respondent. No witness has spoken of the purported practice. For all intent and purport another presumption has been raised by the High Court wherefore no material had been brought on record. No explanation has been given as to what happened to the container. Its absence significantly undermines the case of the prosecution. It reduces the evidentiary value of the statements made by the witnesses referring the fact of recovery of the contraband therefrom.

118. Perseverance of original wrappers, thus, comes within the purview of the direction issued in terms of Section 3. 1 of the Standing Order No. 1 of 1989. Contravention of such guidelines could not be said to be an error which in a case of this nature can conveniently be overlooked by the Court.

119. We are not oblivious of a decision of this Court in *Chief Commercial Manager, South Central Railway, Secunderabad and Ors. v. G. Ratnam and Ors.* : AIR2007SC2976 relating to disciplinary proceeding, wherein such guidelines were held not necessary to be complied with but therein also this Court stated:

> In the cases on hand, no proceedings for commission of penal offences were proposed to be lodged against the respondents by the investigating officers.

120. In *Moni Shankar v. Union of India and Anr.* : (2008)3SCC484 , however, this Court upon noticing G. Ratnam (supra), stated the law thus:

> 15. It has been noticed in that judgments that Paras 704 and 705 cover the procedures and guidelines to be followed by the investigating officers, who are entrusted with the task of investigation of trap cases and departmental trap cases against the railway officials. This Court proceeded on the premise that the executive orders do not confer any legally enforceable rights on any persons and impose no legal obligation on the subordinate authorities for whose guidance they are issued.
>
> 16. We have, as noticed hereinbefore, proceeded on the assumption that the said paragraphs being executive instructions do not create any legal right but we intend to emphasise that total violation of the guidelines together with other factors could be taken into consideration for the purpose of arriving at a conclusion as to whether the department has been able to prove the charges against the delinquent official.
>
> 17. The departmental proceeding is a quasi judicial one. Although the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The Court exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely - preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality. (See - State of U.P. v. Sheo Shanker Lal SrivastavaMANU/SC/2117/2007 : (2007)IILLJ724SC and Coimbatore District Central Cooperative Bank v. Coimbatore District Central Cooperative Bank Employees Association and Anr. 2004 QB 1004.

121. It was furthermore opined:

> It may be that the said instructions were for compliance of the Vigilance Department, but substantial compliance therewith was necessary, even if the same were not imperative in character. A departmental instruction cannot totally be ignored. The Tribunal was entitled to take the same into consideration along with other materials brought on record for the purpose of arriving at a decision as to whether normal rules of natural justice had been complied with or not.

122. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-a-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

123. Recently, this Court in *State of Kerala and Ors.* *v.* *Kurian Abraham (P) Ltd. and Anr.* : [2008]303ITR284(SC) , following the earlier decision of this Court in *Union of India* *v.* *Azadi Bachao Andolan* : [2003]263ITR707(SC) held that statutory instructions are mandatory in nature.

124. Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.

125. Omission on the part of the prosecution to produce evidence in this behalf must be linked with second important piece of physical evidence that the bulk quantity of heroin allegedly recovered indisputably has also not been produced in court. Respondents contended that the same had been destroyed. However, on what authority it was done is not clear. Law requires that such an authority must flow from an order passed by the Magistrate. Such an order whereupon reliance has been placed is Exhibit PJ; on a bare perusal whereof, it is apparent that at no point of time any prayer had been made for destruction of the said goods or disposal thereof otherwise. What was necessary was a certificate envisaged under Section 110(1B) of the 1962 Act. An order was required to be passed under the aforementioned provision providing for authentication, inventory etc. The same does not contain within its mandate any direction as regards destruction. The only course of action the prosecution should have resorted to is to obtain an order from the competent court of Magistrate as envisaged under Section 52A of the Act in terms whereof the officer empowered under Section 53 upon preparation of an inventory of narcotic drugs containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as he may consider

relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings thereunder make an application for any or all of the following purposes:

> (a) Certifying correctness of the inventory so prepared; or
>
> (b) Taking, in the presence of such Magistrate, photographs substances and certifying such photographs as true; or
>
> (c) Allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

126. Sub-section (3) of Section 52A of the Act provides that as and when such an application is made, the Magistrate may, as soon as may be, allow the application. The reason wherefore such a provision is made would be evident from Sub-section (4) of Section 52A which reads as under:

> **52A. Disposal of seized narcotic drugs and psychotropic substances.**
>
> (4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every Court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under Sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

127. Concededly neither any such application was filed nor any such order was passed. Even no notice has been given to the accused before such alleged destruction.

128. We must also notice a distinction between Section 110(1B) of the 1962 Act and Section 52A(2) of the Act as Sub-section (4) thereof, namely, that the former does not contain any provision like Sub-section (4) of Section 52A. It is of some importance to notice that paragraph 3.9 of the Standing Order requires pre-trial disposal of drugs to be obtained in terms of Section 52A of the Act. Exhibit PJ can be treated as nothing other than an order of authentication as it is a certificate under Section 110(1B) of the 1962 Act as the aspect of disposal clearly provided for under Section 52A of the Act is not alluded to. The High Court in its judgment purported to have relied upon an assertion made by the prosecution with regard to prevalence of a purported general practice adopted by the Customs Department to obtain a certificate in terms of the said provision prior to destruction of case property, stating:

> To a specific query put to Mr. Guglani by the Court with regard to aforesaid arguments, he fairly states that the general practice adopted by the Customs Department is that before destroying the case property, a certificate is obtained Under Section 110(1B) of Customs Act. He states that in this regard, a sample as per the provisions contained in

> Sub clause (c) to Clause (1B) is also drawn for the purposes of certification of correctness so that at a later stage, the identity of the case property is not disputed.
>
> May be, in my view, some irregularities are committed in this case by the Customs Department while obtaining the order Exhibit PJ) from the court for the reason that if the case property was to be destroyed, at least a notice should have been given to the accused on the application moved Under Section 100(1B) of the Customs Act or at least a specific request in this regard should have been made in the application but at the same time, the aforesaid irregularity cannot be said to be a vital flaw in the case of the prosecution for which the appellant can derive any benefit especially under the circumstances when confessional statements made by the appellant are held to be made voluntary as observed by me hereinabove.... Similarly, non- production of cardboard card board carton is also not fatal to the prosecution.

129. The question which arises for our consideration is as to whether it is permissible to do so. Evidently it is not. Firstly because taking recourse to the purported general practice adopted by the Customs Department is not envisaged in regard to prosecution under the Act. Secondly, no such general practice has been spoken of by any witness. A statement made at the Bar as regards existence of such a purported general practice to say the least cannot be a substitute of evidence whereupon only the court could rely upon. Secondly, the High Court failed to take into consideration that a certificate issued under Section 110(1B) of the 1962 Act can be recorded as a certificate of authentication and no more; authority for disposal would require a clear direction of the Court in terms of Section 52A of the Act. Thirdly, the High Court failed and/or neglected to consider that physical evidence being the property of the Court and being central to the trial must be treated and disposed of in strict compliance of the law.

130. The High Court proceeded on the basis that non-production of physical evidence is not fatal to the prosecution case but the fact remains that a cumulative view with respect to the discrepancies in physical evidence creates an overarching inference which dents the credibility of the prosecution. Even for the said purpose the retracted confession on the part of the accused could not have been taken recourse to.

131. The last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin were also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52A of the Act.

132. The fate of these samples is not disputed. Two of them although were kept in the malkahana along with the bulk but were not produced. No explanation has been offered in this regard. So far as the third sample which allegedly was sent to the Central Forensic Science Laboratory, New Delhi is concerned, it stands admitted that the discrepancies in the documentary evidence available have appeared before the court, namely:

i) While original weight of the sample was 5 gms, as evidenced by Ex. PB, PC and the letter accompanying Ex.PH, the weight of the sample in the laboratory was recorded as 8.7 gms.

ii) Initially, the colour of the sample as recorded was brown, but as per the chemical examination report, the colour of powder was recorded as white.

133. We are not oblivious of the fact that a slight difference in the weight of the sample may not be held to be so crucial as to disregard the entire prosecution case as ordinarily an officer in a public place would not be carrying a good scale with him. Here, however, the scenario is different. The place of seizure was an airport. The officers carrying out the search and seizure were from the Customs Department. They must be having good scales with them as a marginal increase or decrease of quantity of imported articles whether contraband or otherwise may make a huge difference under the Customs Act.

134. We cannot but also take notice other discrepancies in respect of the physical evidence which are:

i) The bulk was kept in cotton bags as per the Panchnama, Ex PC, while at the time of receiving them in the malkhana, they were packed in tin as per the deposition of PW 5.

ii) The seal, which ensures sanctity of the physical evidence, was not received along with the materials neither at the malkhana nor at the CFSL, and was not produced in Court.

135. Physical evidence of a case of this nature being the property of the court should have been treated to be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114(g) of the Evidence Act. While there are such a large number of discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are created with respect of the prosecution's endeavour to prove the fact of possession of contraband from the appellant.

136. This aspect of the matter has been considered by this Court in *Jitendra v. State of U.P.* : 2003CriLJ4985 , in the following terms:

In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchanama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS, Act.

137. Several other lacunae in the prosecution case had been brought to our notice. The samples had been kept at the airport for a period of three days. They were not deposited at the malkhana. It was obligatory on the part of the Customs Department to keep the same in the safe custody. Why such precautions were not taken is beyond anybody's comprehension.

138. The High Court, however, opined that the physical evidence was in safe custody. Such an inference was drawn on the basis that the seals were intact but what was not noticed by the High Court is that there are gaping flaws in the treatment, disposal and production of the physical evidence and the conclusion that the same was in safe custody required thorough evidence on the part of the prosecution which suggests that the sanctity of the physical evidence was not faulted. It was not done in the present case.

139. PW-1 Kulwant Singh, Inspector-Customs, in his deposition, stated:

> I had told the accused that I asked the accused that his search be conducted under Section 50 of the N.D.P.S. Act before a gazetted officer or a magistrate. I did not mention this fact in the panchanama Ex. PC. It is incorrect to suggest that version in Ex. PA was roughly drafted by the department and given to the accused for writing. It is also incorrect to suggest that the accused was not aware of the provisions of Section 50 of the N.D.P.S. Act, 1985. It is incorrect to suggest that after the recovery of heroin from the cartoon, the option for the personal search of the accused was given to the accused that whether he be searched before a gazetted officer or before a magistrate. It is correct that on the panchanama Ex. PC on thumb impression mark `A', witness No. 2 is written but his name is not specifically written.

140. The samples taken allegedly contained the signature of the appellant as also those of the custom officials. PW-1, in his deposition, stated:

> I have also not brought the relevant samples in the court today. It is incorrect to suggest that I have deliberately not produced the samples in the court today. So far as I remember, three seals were affixed on the test memo sent to the Chemical Examiner. The sample was sent to the office of Chemical Examiner on 4.8.1997. I do not send the samples myself. The signatures of both the independent witnesses were not appended on the sealed samples and the case property. Volunteered, the accused had signed the remaining bulk and the samples. It is incorrect that portion Ex.PG/1 was later on incorporated at my instance.

141. However, in Exhibit PH against the column `marking on envelope (s)/ packet (s)' there was a blank line. It did not say a word with regard to the accused's signature on the sample. Exhibit PC, however, suggests that the samples bore the appellant's signature. The sample, thus, with only a seal of custom by itself cannot be stated to be one recovered from the appellant specially when the prosecution case is that it contained accused's signature and date of it which is not found on the original. The independent witnesses did not sign the samples. The original seal was not produced. It is a mystery to whom the seal was entrusted. Thus, the change in colour, weight of the sample as also the absence of the accused's signature thereupon cannot be totally ignored.

142. PW-2 Shri K.K. Gupta stated:

> The panchnama was prepared after the recovery at about 8.30 P.M. before me. I did not make offer to the accused myself regarding the search of the accused that whether he wants to be searched before a gazetted officer or before a magistrate. In my presence, the panchnama was not read over to the accused. It is correct that the only signatures of the accused were obtained on panchnama Ex. PC in my presence. I had gone through the panchnama and then I signed the same.

143. He furthermore accepted:

> It is correct that many recoveries have been effected from the passengers Arian Afghan Airlines earlier to this recovery and cases are pending before this Court.

144. PW-1 stated that seal had been given to PW-4, Rajesh Sodhi, Deputy Commissioner, but PW-4 denied the same.

145. His deposition, inter alia, is to the following effect:

> In August 1997, I was posted at A.C. In charge Raja Sansi Airport. On 1.8.1997, heroin One kg. 460 grams was recovered from the accused (1.460 Kgs.). This recovery was made by Inspector Kulwant Singh and K.K. Gupta Supdt. Customs and I was informed of this recovery. Samples and remaining bulk were handed over to me by Kulwant Singh, Inspector bearing seal No.122 of the Customs Divn. Amritsar. There is no Malkhana of the Customs department at the Raja Sansi Airport. On 4.8.1997 samples were handed over to Ashok Kumar for taking to the Central Revenue Control Laboratory, Delhi. Remaining case property was given to Kulwant Singh for depositing the same in Malkhana at Amritsar. So long as the case property remained in my possession the same was not tampered with.

Cross-examination by Sh. D.S. Attari, Adv.

> I was not given sample seal along with the case property by Inspector Kulwant Singh. Sample was of 5 grams. I do not remember whether 5 grams weight was gross or net. I did not made entry regarding receipt of sample and the case property.
>
> I also did not make any entry regarding sending the samples to the Central Revenue Control Laboratory at New Delhi. It is wrong to suggest that sample and the case property was not deposited with me by Kulwant Singh. I also did not produce the case property in the court. It is wrong to suggest that I have deposed falsely being official witness.

146. The seal was not even deposited in the malkhana. As no explanation whatsoever has been offered in this behalf, it is difficult to hold that sanctity of the recovery was ensured.

147. Even the malkhana register was not produced. There exist discrepancies also in regard to the time of recovery. The recovery memo Exhibit PB shows that the time of seizure was 11.20 pm. PW1, Kulwant Singh and PW2, K.K. Gupta, however, stated that the time of seizure was 8.30 pm. Appellant's defence was that some carton left by some passenger was passed upon him being a crew member in this regard assumes importance (See Jitendra (supra) Para 6).

148. Panchnama was said to have been drawn at 10.00 pm as per PW1 whereas PW2 stated that panchnama was drawn at 8.30 pm. Exhibit PA, containing the purported option to conduct personal search under Section 50 of the Act, only mentioned time when the flight landed at the airport.

149. In Baldev Singh (supra), it was stated:

> 28. This Court cannot overlook the context in which the NDPS Act operates and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences. It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. We are not able to find any reason as to why the empowered officer should shirk from affording a real opportunity to the suspect, by intimating to him that he has a right "that if he requires" to be searched in the presence of a Gazetted Officer or a Magistrate, he shall be searched only in that manner. As already observed the compliance with the procedural safeguards contained in Section 50 are intended to serve dual purpose - to protect a person against false accusation and frivolous charges as also to lend credibility to the search and seizure conducted by the empowered officer. The argument that keeping in view the growing drug menace, an insistence on compliance with all the safeguards contained in Section 50 may result in more acquittals does not appeal to us. If the empowered officer fails to comply with the requirements of Section 50 and an order or acquittal is recorded on that ground, the prosecution must think itself for its lapses. Indeed in every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the Court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted.

Independent Witnesses

150. It is accepted that when the appellant allegedly opted for being searched by a Magistrate or a Gazetted Officer, Kuldip Singh called K.K. Gupta, Superintendent Customs, PW2) and independent witnesses Mahinder Singh and Yusaf. Whereas K.K. Gupta was examined as PW2, the said Mahinder Singh and Yusuf were not examined by the prosecution. There is nothing on record to show why they could not be produced. Their status in life or location had also not been stated. It is also not known as to why only the said two witnesses were sent for. The fact remains that they had not been examined. Although examination of independent

witnesses in all situations may not be imperative, if they were material, in terms of Section 114(e) of the Evidence Act, an adverse inference could be drawn.

151. In a case of his nature, where there are a large number of discrepancies, the appellant has been gravely prejudiced by their non- examination. It is true that what matters is the quality of the evidence and not the quantity thereof but in a case of this nature where procedural safeguards were required to be strictly complied with, it is for the prosecution to explain why the material witnesses had not been examined. Matter might have been different if the evidence of the Investigating Officer who recovered the material objects was found to be convincing. The statement of the Investigating Officer is wholly unsubstantiated. There is nothing on record to show that the said witnesses had turned hostile. Examination of the independent witnesses was all the more necessary inasmuch as there exist a large number of discrepancies in the statement of official witnesses in regard to search and seizure to which we may now take note of.

Discrepancies in the Statements of Official Witnesses

152. Section 50 of the Act provides for an option to be given. This Court in Baldev Singh (supra) quoted with approval the decision of the Supreme Court of United States in Miranda v. Arizona (1966) 384 US 436 in the following terms:

The Latin maxim *salus populi suprema lex (the safety of the people is the supreme law) and salus republicae suprema lex* (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be `right, just and fair'.

153. Justness and fairness of a trial is also implicit in Article 21 of the Constitution.

154. A fair trial is again a human right. Every action of the authorities under the Act must be construed having regard to the provisions of the Act as also the right of an accused to have a fair trial.

155. The courts, in order to do justice between the parties, must examine the materials brought on record in each case on its own merits. Marshalling and appreciation of evidence must be done strictly in accordance with the well known legal principles governing the same; wherefore the provisions of the Code of Criminal Procedure and Evidence Act must be followed.

156. Appreciation of evidence must be done on the basis of materials on record and not on the basis of some reports which have nothing to do with the occurrence in question.

157. Article 12 of the Universal Declaration of Human Rights provides for the Right to a fair trail. Such rights are enshrined in our Constitutional Scheme being Article 21 of the Constitution of India. If an accused has a right of fair trial, his case must be examined keeping in view the ordinary law of the land.

158. It is one thing to say that even applying the well-known principles of law, they are found to be guilty of commission of offences for which they are charged but it is another thing to say that although they cannot be held guilty on the basis of the materials on record, they must suffer punishment in view of the past experience or otherwise.

159. PW1 states that he had asked the accused that a search be conducted under the Act before a Gazetted Officer or a Magistrate but the same was not mentioned in the panchnama Exhibit PC. If the evidence of PW1 in that behalf is correct, we fail to understand how PW2 satisfied himself that an option had been given to the accused to be searched before a gazetted officer. Exhibit PA shows that option to search was given after the recovery was made since it is stated therein:

> After recovery the custom officer informed his senior officer and was asked whether I would like to present myself for personal search before a Magistrate or a Gazetted Officer

160. The said document, therefore, indicates that the gazetted officer or the independent witnesses were not present at the time of purported recovery. Exhibit PC, however, shows the presence of independent witnesses at the time of recovery. The credibility of the statements, having regard to these vital discrepancies stands eroded.

161. A person who is sought to be arrested or searched has some rights having regard to the decision of this Court in *D.K. Basu v. State of West Bengal* : 1997CriLJ743 . D.K. Basu rule states that if a person in custody is subjected to interrogation, he must be informed in clear and unequivocal terms as to his right to silence. This rule was also invoked in Balbir Singh (supra).

162. We are not oblivious that the decision of State of Himachal Pradesh v. Pawan Kumar : 2005CriLJ2208 wherein Section50 of the Act having been held to be inapplicable in relation to a search of a bag but in this case the appellant's person had also been searched. The High Court disregarded that although Exhibit PA may not affect a technical compliance of Section 50 of the Act on taking a complete and circumspect view of the materials brought on record, but the same, in our opinion, affect the credibility of the documentary evidence and the statements of the official witnesses, namely, PW1 and PW2. If origin of principle has not been followed and discrepancies and contradictions have occurred in the statements of PW1 and PW2 the same would cause doubt on the credibility of prosecution case and their claim of upholding procedure established by law in effecting recovery.

CONCLUSION

163. Our aforementioned findings may be summarized as follows:

> 1. The provisions of Sections 35 and 54 are not ultra vires the Constitution of India.
>
> 2. However, procedural requirements laid down therein are required to be strictly complied with.

3. There are a large number of discrepancies in the treatment and disposal of the physical evidence. There are contradictions in the statements of official witnesses. Non-examination of independent witnesses and the nature of confession and the circumstances of the recording of such confession do not lead to the conclusion of the appellant's guilt.

4. Finding on the discrepancies although if individually examined may not be fatal to the case of the prosecution but if cumulative view of the scenario is taken, the prosecution's case must be held to be lacking in credibility.

5. The fact of recovery has not been proved beyond all reasonable doubt which is required to be established before the doctrine of reverse burden is applied. Recoveries have not been made as per the procedure established by law.

6. The investigation of the case was not fair. We, therefore, are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly.

164. Before, however, parting with this judgment, we would like to place emphasis on the necessity of disposal of such cases as quickly as possible. The High Courts should be well advised to device ways and means for stopping recurrence of such a case where a person undergoes entire sentence before he gets an opportunity of hearing before this Court. The appeal is allowed with the aforementioned observations.

Prosecutrix in a Rape Case – Evaluation of Evidence[1]

The most important question in a prosecution for the offence of rape is how exactly to appreciate the testimony of the rape victim. One important aspect is whether the testimony invariably requires corroboration or not and in case corroboration is required or desired, what is the nature and extent of such corroboration and the source of such corroboration.

(2) In *Rameshwar V/s. State of Rajasthan* the accused, charged with the offence of raping a girl below 8 years of age was convicted by the Asst. Sessions Judge under section 376 IPC and sentenced to undergo RI for one year. The Sessions Judge, in appeal, held that evidence of the victim was not corroborated by sufficient evidence and acquitted the accused. The High Court in the appeal filed by the State held that guilt of the accused was proved by the evidence of the victim which was legally corroborated by the girl's statement to her mother and such a statement was legally admissible as corroboration, and restored the conviction and sentence, setting aside the acquittal.

The Supreme Court speaking through Vivian Bose, J, held in para 16 as follows:-

"Now a woman who has been raped is not an accomplice. If she was ravished she is the victim of an outrage. …… In the case of a girl who is below the age of consent, her consent will not matter so far as offence of rape is concerned, but if she consented, her testimony will naturally be as suspect as that of an accomplice. So also in the case of an unnatural offence. But in all these cases a large volume of case law has grown up which treats the evidence of the complainant somewhat along the same lines as accomplice evidence though often for widely differing reasons and the position now reached is that the rule about corroboration has hardened into one of law. But it is important to understand exactly what the rule is and what the expression "hardened into a rule of law" means."

(Emphasis supplied)

(3) The Bench referred to the leading case in England in King V/s. Baskar Ville (1916) 2 KB 658 which dealt with conviction of the accused for having committed acts of gross indecency with two boys. The English decision held (Para 18 of Rameshwar):-

"There is no doubt that the uncorroborated evidence ofan accomplice is admissible in law. …….. but it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices and in the discretion of judge, to advise them not to convict upon such evidence, but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. …… the

[1] Justice (retd) U.L. Bhat, available at: http://www.livelaw.in/prosecutrix-rape-case-evaluation-evidence-part/; last accessed on 26-08-2015. Published on, May 1, 2014.
The article has been published in live law site in four parts at deferent dates all the parts are herein combined for the puposes of this study material.

rule of practice has become virtually a rule of law, and since the court of criminal appeal came into operation, this court has held that, in the absence of such a warning by the judge the conviction must be quashed ….. If after the proper caution by the judge the jury nevertheless convict he prisoner, this court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated"(Emphasis supplied)

The *Rameshwar judgment* thereupon observed (Para 18):-

"That in my opinion, is exactly the law in India so far as accomplices are concerned, and it is certainly not any higher in the case of sexual offences. The clarification necessary for purpose of this country is where this class of offence is sometimes tried by a judge without the aid of jury. In these cases, it is necessary that the judge should give some indication in his judgment that he has had this rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safeto convict without corroboration in that particular case. I am of opinion that the learned High Court judges were wrong n thinking that they could not as a matter of law, convict without corroboration"

(Emphasis supplied)

(4) After referring to two classes of cases, one which considered that though corroboration should ordinarily be required in the case of a grown up woman it is unnecessary in the case of a child of tender years, and another class of cases, which considered that as a matter of prudence a conviction should not ordinarily be based on the uncorroborated evidence of a child witness, the Bench in *Rameshwar's case*, observed (Para 19):-

"……. the true rule is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the judge. In a jury case he must tell the jury of it and in a non-jury case he must show that it is present to his mind by indicating in his judgment. But he should also point out that corroboration can be dispensed with if, in the particular circumstances of the case before him, either the jury, or, when there is no jury, he himself, is satisfied that it is safe to do so. The rule, which according to the cases, has hardened into one of law, is not that corroboration is essential before there can be a conviction, but that the necessity of corroboration as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge and in jury cases, must find a place in the charge, before a conviction without corroboration can be sustained. The tender years of the child, coupled with other circumstances appearing in the case, such as, for example, it's demeanor, unlikelihood of tutoring and so forth, may render corroboration unnecessary, but that is a question of fact in each case. The only rule in India is that this rule of prudence must be present to the mind and be understood and appreciated by the court. There is no rule of practice that there must, in every case, by corroboration before conviction can be allowed to stand"(Emphasis supplied)

(5) The Bench then turned to the nature and extent of corroboration required when it is not considered safe to dispense with it. Following the principles explained in the case of King V/s. Basker Ville, the Bench observed (Para 20):-

"Its' (of corroboration) nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear – First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice should in itself be sufficient to sustain conviction……. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.

(Para 22) Secondly, the independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime. This does not mean the corroboration as to the identity must extend to all the circumstances necessary to identify the accused with the offence. Again, all that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness's story that the accused was the one, or among those who committed the offence.

(Emphasis supplied)

Thirdly, (Para 23) the corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. But, of course, the circumstances may be such as to make it safe to dispense with the necessity of corroboration and in those special circumstances, a conviction so based would not be illegal. I say this because it was contended that the mother in the case was not an independent source.

Fourthly (Para 24) the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. Were it otherwise, many crimes which are usually committed between accomplices in secret, such as incest, offences with females or unnatural offences could never be brought to justice."

(Emphasis supplied)

(6) In dealing with the victim's statement to her mother as corroboration of her statement, the Bench observed as follows in para 26:-

"That the evidence is legally admissible as evidence of conduct is indisputable because of illustration (j) to section 8, Evidence Act in the following terms:

"The question is whether A was ravished. The facts that shortly after the alleged rape she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made are relevant"

……. "We are concerned here not only with its legal admissibility and relevancy as to conduct, but as to its admissibility for a particular purpose, namely corroboration. The answer to that is found in section 157, Evidence Act." (Emphasis supplied)

(Para 27) Section 157 states that:-

"Former statements of witness may be proved to corroborate later testimony as to same fact –

In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved." (Emphasis supplied)

"The section makes no exceptions; therefore, provided the condition prescribed, that is to say, "at about the time" etc is fulfilled, there can be no doubt that such a statement is legally admissible in India as corroboration. The weight to be attached to it is of course, another matter, and it may be that in some cases the evidentiary value of two statements emanating from the same tainted source may not be high, but in view of section 118, it's legal admissibility as corroboration cannot be questioned. To state this is, however, no more to emphasize that there is no rule of the thumb in these cases. When corroboration is produced, it also has to be weighedand in a given case, as with other evidence, even though it is legally admissible for the purpose on hand, it's weight may be nil. On the other hand, seeing that corroboration is not essential to a conviction, conduct of this kind may be more than enough, in itself, to justify acceptance of the complainant's story. It all depends on the facts of the case".

(Emphasis supplied)

In the case of Rameshwar, the girl told her mother about incident four hours after it occurred, the reason for the delay was that the mother was not at home when the girl returned home and went to sleep and when the mother returned home and asked her why she was sleeping and then the daughter told the mother about the occurrence. Both of them gave evidence on this aspect. In para 29, the Bench considered whether the statement by the girl to the mother was made "at or about the time when the fact took place" and observed:-

"…… There can be no hard and fast rule. The main test is whether the statement was made as early as can reasonably expected in the circumstances of the case and before there was opportunity for tutoring or concoction. It was suggested that the child could have complained to some women who were working in the neighbourhood, but that would not be natural in a child. She would be frightened and her first instinct would be to run home to her mother. The High Court was satisfied on these points and so am I. Consequently the matter does fall within the ambit of section 157 read with section 8 illustration (j)". (Emphasis supplied)

(7) On the question whether the mother can be regarded as an independent witness, the Bench held as follows in para 30:-

"So far as this case is concerned, I have no doubt on that score. It may be that all mothers may not be sufficiently independent to fulfill the requirements of the corroboration rule but there is no legal bar to exclude them from its operation merely on the ground of relationship. "Independent" merely means independent of source which are likely to be tainted. In the absence of enmity against the accused there is no reason why she would implicate him falsely.

(Emphasis supplied)

(8) On the question whether there is independent corroboration connecting the accused with the crime, the Bench observed in sub para 3 of para 10 as follows:-

"The only corroboration relied on for that is the previous statement of the child to the mother. That might not always be enough, but this rule can be waived in a given case just as much as the necessity for any corroboration at all. In the present case, the learned High Court judges would have acted on the uncorroborated testimony of the girl had they had not been pressed by the corroboration rule. Viewing all the circumstances, I am satisfied that the High Court was right. I am satisfied that in this case, considering the conduct of the girl and her mother from the start to the finish, no corroboration beyond the statement of the child to her mother was necessary. I am satisfied that the High Court was right in holding that was enough to make it safe to act upon her testimony".

(Emphasis supplied)

(9) The decision in *Rameshwar case* has been quoted with approval by a Constitution Bench of Supreme Court in *State of Bihar vs. Basawan Singh* , a three judge bench decision in*Madho Ram and another vs. The State of U.P.* and two judge benches in *Sidheswar Ganguly vs. State of W.B*, *Gurucharan Singh Vs. State of Haryana* , *Bharwada Bhogin bhai Hirjibhai vs. State of Gujarat*, *Sheikh Zakir vs. State of Bihar* and *WahidKhan vs. State of M.P.* and other decisions.

(10) Many a time, apart from the testimony of the rape victim, evidence of close relations (say for example, mother) or of a close friend or teacher to whom the rape victim narrated the incident is relied on by the prosecution as evidence of conduct or for corroboration. In*Brahma Swaroop and another vs. State of U.P.* which was not a case of rape, the Supreme Court indicated that the relationship of the witnesses to the party or parties is not a factor which affects the credibility of the witness and a relation would not conceal the actual culprit and make an allegation against an innocent person. The Supreme Court observed further as follows:-

"A party has to lay down a factual foundation and prove by leading impeccable evidence in respect of false implication. However, in such cases, the court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible evidence"

The Supreme Court, in paragraph 21 of *Brahma Swaroop case* relied on a number of earlier decisions of the court in support of the above proposition. Such a comment on the evidence of a witness related to the victim or an injured must apply also to the evidence of a friend of the victim or injured.

(11) In Bhajan Singh and others V/s. State of Haryana, (which was not a case of rape) the court observed in para 21:-

"The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present at the time of occurrence.Thus, the testimony of an injured witness is accorded a special status in law. Such a witness comes with a built in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone.Convincing evidence is required to discredit an injured witness. Thus, the evidence of an injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein".

(Emphasis supplied)

In enunciating the above proposition, the court relied on a number of earlier decisions of the court. Dealing with minor discrepancies, the court observed in para 30 as follows:-

"It is a settled legal position that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, may not prompt the court to reject the evidence in its' entirety. Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradiction. Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, would not of itself prompt the court to reject the evidence on minor variations and discrepancies. After exercising care and caution and sifting through the evidence to separate the truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are found to occur in the statements of witnesses"

(Emphasis supplied)

(12) In Siddeshwara Ganguly case the trial was by jury which held the accused guilty of the offence of rape, whereupon the trial court convicted and sentenced the accused and the High Court confirmed the conviction and sentence and appeal was preferred to Supreme Court. Though the case was one of raping two girls said to be below 16 years of age, the finding was that the girl Narmaya was above 16 years and had consented to the sexual act. It was the commission of rape of Sudharani Roy which was the issue in the case. Para 9 of the judgment shows that trial Judge's charge to the jury referred to the rule of prudence regarding corroboration and right of

the jury to dispense with corroboration of the evidence of victim if it was found safe to rely on evidence of victim.

The Supreme Court observed as follows in the same para :–

"Hence, the learned sessionsJudge was fully justified in telling the jury that there was no rule of law or practice, that there must be corroboration in every case before a conviction for rape. If the jury had been apprised of the necessity, ordinarily speaking, of corroboration of the evidence of the prosecutrix, it is for the jury to decide whether or not it would convict on the uncorroborated testimony of theprosecutrix, in the particular circumstances of the case before it. In other words, the insistence on corroboration is advisable, but is not compulsory in the eye oflaw. ——— It is well established that the nature and extent of corroboration necessaryvary with the circumstances of the case. The nature of corroborative evidence should be such as to lend assurance that the evidence of the prosecutrixcan be safely acted upon".(Emphasis supplied)

(13) In State of Bihar vs. Basawan Singh, which was a case not of rape but offence under section 161 IPC, the court was required to consider the evidence of accomplices as such, namely, persons comprising members of a raiding party. The Constitution Bench was in agreement with the observation of Lord Reading in King vs. Baskar Ville 1916 (2) KB 658 to the effect that in respect of the evidence of an accomplice, all that is required is that there must be "some additional evidence rendering it probable that the story of accomplice is true and that it is reasonably safe to accept". The Bench also referred to Rameshwar's case regarding nature and extent of corroboration required when it is not safe to accept the evidence. The Bench also observed that corroboration need not be by direct evidence that accused committed the crime, and mere circumstantial evidence of his connection with the crime would be sufficient. It has to be noticed that the Constitution Bench was dealing with evidence of an accomplice.Prosecution for alleged rape of a girl above the age of consent but with her consent cannot succeed in terms of the definition of rape and but if the victim was below the age of consent, though consent has no legal force, she may be regarded as an accomplice going by the observation in Rameshwar's case. However one has to notice the clear distinction between a person who is infact an accomplice and a person who may be deemed to be an accomplice like a consenting girl below the age of consent.

(14) In Gurucharan Singh vs. State of Haryana, a girl under 16 years of age was repeatedly raped by three accused. The trial court convicted and duly sentenced them, which was upheld by the High Court. The Supreme Court dismissed the appeal preferred by one of the accused. In para 2, the court observed, dealing with the contention that the solitary statement of victim without corroboration in material particulars is not enough to sustain conviction, as follows:

"It is well settled that the prosecutrixcannot be considered as accomplice and therefore, her testimony cannot be equated with that of accomplice in a criminal case. As a rule of prudence,however, the court

normally looks for some corroboration of her testimony so as to satisfy its conscience that sheis telling the truth and that the person accused of rape on her, has not been falsely implicated".(Emphasis supplied)

Thereafter, in the same paragraph, the Bench quoted extensively from the decision inRameshwar's case. Paragraphs 11 and 12 of the judgment referred to two other decisions of the Supreme Court, including the one in the case of Sidheswar Ganguly vs. State of W.B. referred to earlier, which stated that nature of corroborative evidence should be such as to lend assurance that evidence of prosecutrix can be safely acted upon.

In para 13 Supreme Court stated that in that case the victim stated to pw4 as soon as he and his companions found her in the appellant's sugarcane field, as to how she had been abducted and how the appellant and another committed rape on her, weeping while narrating the story. Some broken piece of bangles were recovered from scene of occurrence. The Supreme Court held that the recovery of the victim and her statement to pw4 and others together with recovery of broken bangle pieces and medical evidence fully corroborated the testimony of victim, which even without corroboration seemed to be impressive enough to render it safe for sustaining the conviction. The court noted that her statement contained some exaggerations but it did not affect the truth of her testimony on the material point. Dealing with the answers elicited from her in the course of lengthy cross examination by more than one defence counsel, the court observed –

"A common village girl of less than 16 years that she is, due allowance must be made for the statement elicited from her in court during cross examination by counsel for defence".

(15) In Madhoram & another vs. State of U.P., the appellants were brothers and pw1 Shamlal had two daughters, elder daughter being married to second appellant. The first appellant Madhoram was a widower aged 42 years, his wife having died about 20 years earlier. The appellant's proposal that second daughter (victim) of pw1 aged about 19 years should be married to Madhoram having been turned down, the second appellant threatened that the victim would be compelled by force to marry Madhoram. On the day in question, the second appellant persuaded the victim to go to the temple to meet her sister, the sister was not there but Madhoram was present. She was threatened by second appellant not to leave the place but to mary Madhoram. When she refused, she was forcibly taken out of the temple by both the appellants and was raped by Madhoram repeatedly, and on succeeding days also. When the victim did not return home and after a futile search for her, the father reported the matter to the police. Dealing with the argument that corroboration is necessary, the court noted that the principles governing such a case have been clearly laid down by several decisions of the Court.

The Court observed as follows –

"It hasbeen held that the prosecutrix cannot be considered to be an accomplice. As a rule of prudence however, it has been emphasised that the Courts should normally look for some

corroboration of her testimony in order to satisfy itself that the prosecutrix is telling the truth and that aperson, accused of abduction or rape,has not been falsely implicated. The view that, as a matter of law, no conviction without corroboration was possible,has not been accepted. The only rule of law is the rule of prudence, namely the advisability of corroboration should be present in the mind of the Judge or the Jury, as the case may be. There is no rule of practice that there must in every case, be corroboration, before a conviction can be allowed to stand ——,it has also been laid down that the type of corroboration required must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence with which a person is charged".

(16) In Krishanlal vs. State of Haryana, the Court dealt with a case where the accused was convicted of offence of rape on the allegation that the victim Shashibalawas sleeping with her mother and other siblings outside the house in the hot month, the appellant along with acquitted co-accused carried her away by intimidation to a neighbouring godown belonging to another co-accused and committed rape on her and thereafter when she was nearly unconscious carried her back and placed her on cot. The next morning her mother found blood on the dress worn by her daughter and on being questioned, victim narrated incident to her. When her father who was away returned home the victim went to police station and lodged complaint.The appellant was convicted and co-accused were acquitted on the ground of reasonable doubt. The Court observed that there was case law even in those days, (that is when old English cases were being followed in British Indian Courts), which clearly spelt out the following proposition–

"The tender years of the child, coupled with other circumstances appearing in the case, such, for example as its demeanour,unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the Judge or the Jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed, to stand."

(Emphasis supplied)

The Court further observed:

"It would be impossible, indeed it would be dangerous to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with circumstances of each case and also according to the particular circumstances of the offence charged."

(17) In Rafiq vs. State of U.P., the case related to rape on a middle aged Balasevika in a welfare organization, by Rafiq and three others, while she was sleeping in a girl's school at around 2.30 a.m. The next morning the victim narrated the incident to Chief Sevika of the village and reported to the police. Appellant and others were duly charged for the offence of rape. The trial

court acquitted the others but convicted the appellant and duly sentenced him. Appeal to High Court was unsuccessful and hence the convicted accused approached the Supreme Court. It was argued before Supreme Court that the testimony of the victim was not corroborated and that there was absence of injury on her person. Appellant relied on decision in Pratap Misra vs. State of Orissa for the proposition that such absence of injury was fatal to prosecution. The Supreme Court rejected his contention in the following manner in paras 5 and 7.

"We do not agree. For one thing, PratapMisra's case (supra) laid down no inflexible axiom of law on either point. The facts and circumstances often vary from case to case, the crime situation and the myriad psychic factors, social conditions and people's life-styles may fluctuate, and so, rules of prudence relevant in one fact-situation may be inept in another. We cannot accept the argument that regardless of the specific circumstances of a crime and criminal milieu, some strands of probative reasoning which appealed to a Bench in one reported decision must mechanically be extended to other cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. Indeed, from place to place, from age to age, from varying life-styles and behavioural. complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggressed".

(Emphasis supplied)

"Hardly a sensitized judge who sees the conspectus of circumstances in its totality and rejects the testimony of a rape victim unless there are very strong circumstances militating against its veracity. None we see in this case, and confirmation of the conviction by the courts below must, therefore, be a matter of course. Judicial response to human rights cannot be blunted by legal bigotry".(Emphasis supplied)

(18) The decision in Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat was rendered in a case relating to alleged rape on two girls aged about 10 or 12 years; the trial court found appellant guilty of rape, outraging modesty of a woman and wrongful confinement. High Court sustained the conviction under sections 342 and 354, but held that there was no rape and there was only attempt to commit rape and altered the conviction under section 376 IPC to one under section 376 read with see 511 Indian Penal Code. The judgment shows that the parents of victim desired to hush up the matter and the attempt to secure public apology from accused at the instance of an alert social worker which was unsuccessful and thereafter,12 days after the occurrence, FIS was lodged. The Supreme Court after quoting the decision inRameshwar's case observed as follows in para 9 of the judgment-

"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. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We 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. 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 turnkey 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 see an escape from the neurotic prison by phantasizing 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 a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.

(5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealousy.

(7) She may do so to win sympathy of others.

(8) She may do so upon being repulsed".

(Emphasis supplied)

(19) In para 10, the Court referred to the various relevant factors which make it difficult for a girl or woman in India to make false allegations of sexual assault and that this is also true in the context of rural, urban, sophisticated and unsophisticated society. And only very rarely can one

conceivably come across an exception or two and that too possibly from amongst the urban elites. The reasons stated by the Supreme Court emphasized that the woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit such incident as she would be conscious of the danger of being ostracized or being looked down by the society including her own family members, relatives, friends and neighbours and possibly she is under the risk of losing the love and respect of her husband and near relatives if she is married and would apprehend difficulty in securing good alliance if she is unmarried . Supreme Court also referred to other reasons why a woman of rural India would be reluctant to approach police and thereafter stated in para 11 as follows:-

"When in the face of these factors, the crime is brought to light, there is a, built – in assurance, that the charge is genuine rather than fabricated". The court observed further in the same para as follows:

"On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the Court's in the western world (obeisance to which has perhaps become a habit presumably on account of the colonial hangover). We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities- factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification : Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self preservation. Or when the 'probabilities-factor' is found to be out of tune".(Emphasis supplied)

The Court declined to interfere with conviction but modified the sentence to some extent. However the court referred to the decision in *Rameshwar vs. State of Rajasthan* and followed the dictum stated therein.

(20) In *State of Maharashtra vs. Chandra Prakash kewalchand Jain* with connected appeal, a Sub Inspector of Police was convicted and sentenced by a trial court for rape on a girl aged 18 or 19 years. High Court reversed the conviction and acquitted accused. The state preferred appeal. The Supreme Court reversed the decision of High Court, restored the decision of trial court and declined even to interfere with the sentence, as the accused was a man in uniform who committed a serious crime. In the course of judgment the court observed as follows in para 16

"A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime.The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under S. 118 and her evidence must receive the same weight as is attached to an injured in cases of physical

violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to S. 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice.The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage:

"It is only in the rarest of rare cases if the Court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary".

With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation".(Emphasis supplied)

(21) The Supreme Court observed as follows in para 17 of the judgment:-

"We think it proper, having regard to the increase in the number of sex-violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the rarest of rare cases. To insist on corroboration except in the rarest of rare cases is to equate a woman 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 story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime.Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society as in some of the Western and European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those who violate the societal norms. The standard of proof to be expected by the Court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity".

(Emphasis supplied)

(22) In *Narayanamma vs. State of Karnataka and others*, which disposed of two appeals, one filed by victim of rape and other by the State, Supreme Court reversed the acquittal by the High Court and restored the conviction and sentence of the accused and others by the trial court. The prosecutrix was a girl aged 17 years on the date of commision of offence, working as a daily agricultural labourer along with other members of the family. She was raped by the accused persons. Her cries attracted the attention of a grazier pw2, on seeing whom the accused ran away. Meanwhile, her nephew, a child aged 9 years helped her to get up and made her to wear clothes. Thereafter her mother and sister came to whom she narrated the incident and they took her to the village. Meanwhile her brother also came to whom also victim narrated the incident. He took the victim and also pw2 to the police station. Dealing with the evidence of the victim the Court observed as follows:-

"(*iii*) The prosecutrix having supplied the details of the crime to her mother PW 6, the mother deposed at the trial that she was told by the prosecutrix that the three accused identified by name had committed rape on her. This the High Court termed as an exaggeration because as per her own version Muniyappa had not committed rape. In a sense, Muniyappa facilitated the commission of the crime. He was the initiator and had an active role to play and was equally guilty. The prosecutrix could not be condemned if she conveyed to her mother that he was guilty of the crime of rape committed on her. It could be a difference of perceptions. This particular aspect also does not weigh against the prosecutrix".

(23) In *State of Punjab vs. Gurumit Singh & others* the Supreme Court allowed an appeal filed under section 14 of Terrorist Affected Areas (Special Courts) Act 1984, against the acquittal of the accused of the charge of abduction and rape and convicted and sentenced the accused. The case related to rape of girl aged below 16 years of age, studying in 10th standard during the period of public examination held in local boys high school. When she was walking towards the house of her uncle after the examination, a car came from behind in which three persons were sitting, stopped near her and one of the accused alighting from the car pushed her inside the car, while another accused covered her mouth and third accused threatened to kill her in case she raised an alarm. The driver took the car away. She was taken to a building near the tubewell by one of the accused and was raped by one after the other after forcing her to drink liquor . This was again repeated at night. The driver of the car came back and took them away. She was left near the school where she was to appear for her examination. She wrote her examination and went home and told her mother. The mother repeated the story to her husband when he came home in the evening. He contacted the Sarpanch. Two sarpanchas tried to effect a compromise and failed in their attempt. Thereupon the victim and her father met the police and she made a statement to them and case was registered. The trial court disbelieved the evidence of the girl and acquitted the accused. This was confirmed by the High Court. The Supreme Court reversed the acquittal and convicted and sentenced the accused.

(24) The Supreme Court found fault with appreciation of evidence made by trial court that she did not remember the make or colour of the car, even though she had mentioned the colour in the FIS and she did not raise an alarm when she was being abducted and that the driver of the car

was not traced out by the investigator. The occurrence took place on 30.3.1994, a Panchayat was held on 1.4.1994, which was not successful and the trial court held that the FIS was lodged, after delay. Dealing with these aspects Supreme Court has stated as follows:-

"8. ……The Court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the Investigating Officer did not conduct the Investigation properly or was negligent in not being able to trace out the driver of the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an Investigating Officer could not affect the credibility of the statement of the prosecutrix. Trial Court fell in error for discrediting the testimony of the prosecutrix on that account. In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same had not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The Courts cannot over-look the fact that in sexual offences delay in the 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 prosectuion has explained that as soon as Trilok Singh PW6, father of the prosecutrix came to know from his wife, PW7 about the incident he went to the village sarpanch and complained to him. The sarpanch of the village also got in touch with the sarpanch of village Pakhowal, wherein the tubewellKotha of Ranjit Singh rape was committed, and an effort was made by the panchayats of the two villages to sit together and settle the matter. It was only when the Panchayats failed to provide any relief or render any Justice to the prosecutrix, that she and her family decided to report the matter to the police and before doing that naturally the father and mother of the prosecutrix discussed whether or not to lodge a report with the police in view of the repercussions it might have on the reputation and future prospects of the marriage etc. of their daughter.Trilok Singh PW6 truthfully admitted that he entered into consultation with his wife as to whether to lodge a report or not and the trial court appears to have misunderstood the reasons and justification for the consultation between Trilok Singh and his wife when it found that the said circumstance had rendered the version of the prosecutrix doubtful. Her statement about the manner in which she was abducted and again left near the school in the early hour of next morning has a ring of truth". (Emphasis supplied)

(25) Dealing with the manner in which the trial court appreciated the evidence of the victim, the Supreme Court stated:-

"It appears that the trial Court searched for contradictions and variations in the statement of the prosecutrix microscopically, so as to disbelieve her version. ———. The criticism by the trial Court of the evidence of the prosecutrix as to why she did not complain to the lady teachers or to other girl students when she appeared for the examination at the centre and waited till she went home and narrated the occurrence to her mother is unjustified. The conduct of the prosecutrix in this regard appears to us to be most natural. The trial Court over-looked that a girl, in a tradition bound non permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of danger of being ostracized by the society or being looked down by the society. Her not informing the teachers or her friends at the examination centre under the circumstance cannot detract from her reliability. In the normal course of human conduct this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others overs-powered by a

feeling of shame and her natural inclination would be to avoid talking about it to any one, lest the family name and honour is brought into controversy. Therefore her informing to her mother only on return to the parental house and no one else at the examination centre prior thereto is in accord with the natural human conduct of a female".

(Emphasis supplied)

(26) The Supreme Court proceeded to observe as follows:-

"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. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepencies in the statement of the prosecutrix should not, unless the discrepencies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion ? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused".(Emphasis supplied)

(27) The Supreme Court further observed:-

"The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable, Just as a witness who has sustained some injury in the occurence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. 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 overlooked 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. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity least that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. 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". (Emphasis supplied)0

(28) In *Aman Kumar vs. State of Haryana*, the trial court convicted the two appellants under section 376 IPC, for commiting rape of a girl of tender age (as stated in para 1 of judgment) and duly sentenced them. The Supreme Court altered the conviction to one under section 354 IPC and not

under section 376 simplicitor or section 376 read with section 511 Indian Penal Code and duly sentenced them. Dealing with the aspect of corroboration of evidence of victim, the Court observed as follows in para 5

"It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the Court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would suffice".(Emphasis supplied)

(29) In State of Himachal Pradesh vs. Asha Ram, Asha Ram was tried on the charge of committing rape on one of his daughters, and convicted and sentenced by the trial court. High Court reversed the conviction and acquitted the accused. State filed an appeal in the Supreme Court which restored the conviction and sentence. In para 5 of the judgment, the Court observed as follows:–

"The High Court was swayed by sheer insensitivity totally oblivious of growing menace of sex violence against the minors much less by the father. The High Court also totally overlooked the prosecution evidence, which inspired confidence and merited acceptance.It is now well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well settled principle of law that 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. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case".

(Emphasis supplied)

(30) Dealing with the allegation that the case was foisted by the mother of victim who was living separately, the court observed in para 13 as follows:-

"It is contended by the counsel for the accused that because of the strained relationship between PW3-mother of the prosecutrix and the accused, the prosecution case has been foisted against the accused at the instigation of the mother and deserves outright rejection. From the evidence it is clearly established that P.Ws. 1 and 2 despite of strained relationship between their mother and father were happily staying with the accused and there is no rhyme or reason as to why the daughter should depose falsely so as to expose her honour and dignity and also expose the whole family to the society

risking the outcasting or ostracization and condemnation by the family circle as well as by the society. No girl of self-respect and dignity who is conscious of her chastity having expectations of married life and livelihood would accuse falsely against any other person of rape, much less against her father, sacrificing thereby her chastity and also expose the entire family to shame and at the risk of condemnation and ostracization by the society. It is unthinkable to suggest that the mother would go to the extent of inventing a story of sexual assault of her own daughter and tutor her to narrate a story of sexual assault against a person who is no other than her husband and father of the girl, at the risk of bringing down their social status and spoil their reputation in the society as well as family circle to which they belong to".

(Emphasis supplied)

(31) In S. Ramakrishna vs. State, the trial Court convicted the appellant under section 376 and 342 IPC while acquitting him for the charges under section 506 IPC and 323, holding that the victim who was returning from the fields to the village was waylaid by the appellant, who committed rape on her after gagging with towel and tying hands with lungi and threatening to kill her family members in case she revealed the incident. After accused left, victim returned to village and informed her parents and thereafter went to police station to give information. The High Court confirmed the decision of trial court and this was upheld by the Supreme Court. In dealing with the prosecutrix and her evidence the Supreme Court observed in para 10.

"A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Indian Evidence Act, 1872 (in short "the Evidence Act") nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding, the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence".

(Emphasis supplied)

(32) A rape victim who gives evidence is certainly an injured witness; her mind and phyche are injured. Testimony of any witness who sustained injury at the hands an assailant in an occurrence has to be considered seriously and it has a particular status as her presence at the occurrence cannot be questioned unless there was in fact no molestation and the entire prosecution story is cooked up. No doubt, any such case which may be put forward by an accused is required to be considered carefully by the Court. If there was an incident in which a witness did sustain injury, ordinarily that witness is unlikely to falsely implicate an innocent person, since such a course of action may result in allowing the real assailant to escape; it is unlikely that an injured witness will do so, unless she has a very strong motivation to do so, which aspect, of course, will require consideration at the hands of the Court. Convincing evidence is required to discredit an injured witness. (See Brahma Swaroop V/s. State of UP, Bhajan Singh alias Harbhajan Singh V/s. State of Haryana), Mohd. Imran Khan vs. State (NCT of Delhi), Krishna Kumar Malik vs. State of Haryana. See also Alamelu vs. State .

(33) The full significance of the "rule of corroboration" has been explained by the Supreme Court in the decision referred to above. But, it can never be presumed without exception, that evidence of the victim is gospel truth. (State vs. M.K. Pandey,). To hold that her evidence has to be accepted even if her story is improbable and belies logic would be doing violence to the very principles which govern appreciation of evidence (Tameezuddin vs. NCT Delhi. Accused also has to be protected against false implication, particularly when a large number of accused are involved. While an injured witness ordinarily will not lie as regard the identity of the assailants, there is no presumption that the statement of an injured will always be true or without an embellishment or exaggeration. (S. Ramakrishna vs. State of A.P.).If in any given case, the court is of the opinion that there are some significant weaknesses in the evidence of the prosecutrix, the court would be justified in looking for corroboration. Court cannot insist that corroboration must be only of a particular nature. If the medical evidence indicates injuries, marks or colouration etc. on the body, in particular on the back or chest or the private parts, that can certainly provide ample corroboration. If the victim offered strong resistance, there could be injuries on the accused which an alert I.O. would look for if accused was apprehended without undue delay. In some cases, the state of clothes worn by either the victim or the accused could provide some degree of corroboration. There could be traces of sperm in the clothes of either or on the ground or mat. The victim could have made an oral statement to a parent, near relation or a close friend soon after the act of rape which could corroborate her version in court under Section 157 of the Indian Evidence Act. There could be a judicial or extrajudicial confession by the accused. The purpose of looking for corroboration is not that such evidence by itself should be sufficient to establish the guilt of the accused, but only to satisfy the judicial mind that despite certain weaknesses or inconsistencies or contradictions in her evidence or despite unexplained delay in lodging First Information Statement or despite any defect in investigation, it is safe to act upon the evidence of the prosecutrix and convict the accused. See also Narendra Kumar vs. State (NCT of Delhi).

Other aspects of appreciation of evidence in rape cases.

There has been devastating increase in incidents of rape. Courts need to be more cautious in appreciating evidence. Accused ought not to be acquitted on flimsy grounds. (State of U.P. vs. Mukesh AIR 2012 SCW 6042).

(34) Delay in lodging F.I. Statement (FIS):- A prompt FIS serves a purpose. Delay can lead to embellishment or afterthought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. (Thulla Kali V/s. State of T.N.). The court is bound to apply its mind to the explanation offered by the prosecution through it's witnesses, circumstances, probabilities and common course of natural events, human conduct (Section 114). (Thulla Kali V/s. State of T.N.). Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the police station, immediate availability or non-availability of a relation, friend or well wisher who is prepared to go to the police station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital or police station, reluctance of people generally to visit a police station and other relevant circumstances are to be considered. The decision in Amar Singh V/s. Balwinder Singhmay be usefully referred to.

If any explanation is offered, the same requires consideration. If an explanation is offered but found not acceptable, it is as if no explanation is offered. In such a case, it may imply that there was opportunity and possibility of anembellishment or exaggeration finding a place in the FIS and the court must look for other indications available on the record supporting such a possibility. But an argument that the version in the FIS is wholly false, i.e., not merely embellishments or exaggeration, must be based on strong circumstances, including motive for such conduct.

(35) This is much more so in cases of sexual offences, in our tradition-bound society. (Thulsidas Kanotkar V/s. State of Goa). The stigma which society attaches to a girl or woman, married or otherwise, in case she is subjected to any sexual offence discourages the readiness of people to report such offences to police. The word "delay" does not have fixed, permanent or immutable connotation. What is regarded as delay in one set of circumstances may not be regarded as such in a different set of circumstances.

(36) In State of U.P. V/s. M.K. Pandey (AIR 2009 SC 711), the Supreme Court observed that in a case of rape, absence of explanation for delayed lodging of FIS would not affect the appreciation of evidence. In State of H.P. V/s. Prem Singh , the court observed that delay in a case of sexual assault cannot be equated with delay in a case involving other offences since several factors weigh in the mind of the victim and members of her family. In a traditionbound society

like ours, particularly in rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground of delay in lodging FIS. In Satyapal V/s. State of Haryana , the court observed that in rape cases delay in lodging FIS is a natural phenomenon. See also Dildar Singh vs. State of Punjab , State of Punjab vs. Ramdev Singh , State of Punjab vs. Gurmit Singh.

(37) Delay in forwarding FIR to magistrate:-

While considering the delay in FIR reaching the jurisdictional magistrate, court has to bear in mind the credit worthiness of the ocular evidence adduced by the prosecution and see if such ocular evidence is worthy of acceptance; the element of delay in registering FIR or sending FIR to the magistrate by itself, would not in any manner weaken the prosecution case. (Balram Singh Vs. State of Punjab). Where the FIR contained only a brief statement of events, the delay in sending the FIR to court could not have been to concoct a false case against the accused. If the FIR had been cooked up after the inquest and autopsy were over, many more matters or details could have been incorporated in the FIR. The delay, in these circumstance, cannot, by itself, throw out the prosecution case in its' entirely; such delay cannot be the sole reason for discarding the prosecution version as being fabricated, if reliable evidence has been produced against the accused. Delay in sending FIR to court may provide basis for suspicion that the FIR was recorded much later, to set up a distorted version. The purpose of Section 157 Crl. Pr. Code is to ensure fair trial without there being any occasion for falsification or introduction of facts belatedly. (Sahdeo Vs. State of UP,Sunilkumar Vs. State of Rajasthan, Sarwan Singh Vs. State of Punjab, Ishwar Singh Vs. State of UP,Rabindra Manto Vs. State of Jharkhand). In a case where there was delay of four days in sending FIR to court, factors such as immediate holding of inquest, removal of deadbody to police premises, obtaining authorization by DMO to conduct autopsy during the same night etc were held to suggest spontaneity of FIR sufficient to reject plea of anti-timing of FIR. (Paramjit Singh Vs. State of Punjab). Delay in sending the FIR to court would not dislodge the other evidence. (SarveshNarain Shukla Vs. Dasroga Singh)."

(38) Defects in investigation:-

That the I.O. did not conduct investigation properly or diligently, cannot be a ground to discredit the evidence of the prosecutrix, since she had no control over the investigation agency. It was held in a case of abduction followed by rape, that failure of the I.O. to trace out the car or it's driver did not discredit the evidence given by the prosecutrix. (Gurmit Singh's Case). However, the court must ensure that there has been no serious prejudice to the accused or failure of justice as a consequence of defects in investigation. In Kashinath Mondal vs. State of W.B. absence of semen was reported due to delay in chemical examination. Supreme Court held that delay on the part of the investigator in sending vaginal swat for chemical examination did not affect the prosecution case.

(39) Injuries on prosecutrix:- In every case of alleged rape, it is the duty of the I.O. to cause the victim to be medically examined, preferably by a lady doctor. It is necessary to verify if the victim sustained injuries or marks on any part of her body and in particular, backside, breasts, face and lips, thighs, private parts including the vulva, vagina and hymen. Ordinarily, in case of sexual intercourse by use of force and compulsion, one could expect injuries on some of the parts of body indicated above, particularly in the case of young girls and unmarried women; such injuries need not occur in cases where consent of the female was obtained by practicing fraud, or on account of mistaken identity, or by instilling fear of death or of hurt or of a female of unsound mind, or affected by intoxication and the like. Presence or absence of injuries may be relevant to decide if there was penetration or if the act was consensual or not. In cases of rape referred to in Section 114A of the Evidence Act, if the victim states in her evidence before the court that she did not consent, the court shall presume that she did not consent. The presence or absence of injuries is as much relevant for the prosecution as for the accused. This may be relevant even in deciding whether there was penetration forcibly or in the case of young girls in deciding whether there was penetration at all. Even in the case of girls, absence of marks of violence on private parts or elsewhere may merely suggest want of violent resistance on the part of the victim. (Gurcharan Singh V/s. State of Haryana, Krishnalal V/s. State and O.M. Baby vs. State of Kerala). Where the victim was recovered almost after three weeks., signs of forcible intercourse would not persist for such a long period. In the case of forcible rape, it is wrong to assume that then would be some injury on external or internal parts of the victim, who according to the doctor who examined her, was habituated to sexual intercourse. (State of U.P. vs. ChoteyLal).If the girl is below 16 years of age, consent is immaterial as seen from "Sixthly" of Section 375. In the case of delayed FIS, medical examination may be belated and hence the doctor may not be in a position to observe any injuries or marks. Statements made "soon" after the occurrence to close relations or friends, if spoken to in court by the latter could provide acceptable corroboration to the evidence of the victim in cases where the court is satisfied that some corroboration is necessary. There is no likelihood of physical injury if the victim was a woman habituated to sexual intercourse. (Fateh Chand V/s. State of Haryana). Medical evidence has to be appreciated in the light of ocular evidence. (Satyapal V/s. State of Haryana).

(40) In Rafiq V/s. State of U.P, the court observed:-

"Indeed, from place to place, and from age to age, from verifying lifestyles and behavioural complexes, inferences from a given set of facts oral or circumstantial, may have to be drawn not with dead uniformity but realistic diversity test rigidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggression or the aggressed" (emphasis supplied)

The Supreme Court has confirmed conviction in several cases of rape of girls despite non-existence of injuries on the date of medical examination (Rafiq V/s. State of U.P.). See alsoState of Rajasthan vs. Noor Khan, Balwant Singh and others vs. State of Punjab).

(41) Injuries on accused: Medical examination of the accused soon after the incident can provide some evidence. Accused can be subjected to such examination under Section 53 Cr.P.C. (See also Section 54). There need not be injuries on accused in every case of rape. It depends on the force used by him and the nature and degree of resistance offered by the victim. Presence of dried seminal fluids on the persons or their clothes or at the scene should be looked for. Effusions or dried blood on the respective organs may also be looked for. Bruising and laceration of the external genitals also should be noticed. Lacerations or tears in hymen as also the male organ should be looked for.

(42) Child witness:- A child is susceptible to tutoring and hence the court must look for indications of tutoring. Yet, a child is often a witness of truth, on account of his or her innocence and incapacity for partisan motivation. A child witness satisfying the requirements of Section 118, Evidence Act is a competent witness. The question of administering oath has to be decided according to the provisions of the Oaths Act. Even a child who has not taken an oath is a competent witness. The evidence of a child witness, if found reliable, can be the basis for conviction. See MdSugalEsa vs. King EmperorAIR 1946 PC 3,Rameshwar's case. It is however necessary to scrutinize the evidence of the child carefully in view of possibility of tutoring. Dattu Ramrao Sakhare and others vs. State of Maharashtra. See alsoSuryanarayana vs. State of Karnataka, Nivrutti Pandurang Kokate and Others. State of Maharashtra, Golla Yelugu Govindu vs. State of A. P , Ratansinh Dalsukhbhai Nayak vs. State of Gujarat.

There is no legal principle that a child would not be able to recapitulate facts in his on her memory. A child is always receptive to abnormal events. It may be that a child may not remember all the details of the occurrence, but that will not detract from acceptability of her evidence. When dealing with evidence of the victim of crime who was a child, all courts should remember the words spoken in Rameshwar's case and quoted in para 4 of this paper.

(43) Witnesses from rural areas:- In appreciating evidence, court cannot judge evidence of witnesses from rural background by the same standards of exactitude and consistency as that of witnesses with urban background. (Shivaji Sahebrao Bobade and another vs. State of Maharashtra).

A rustic witness who is subjected to fatiguing, taxing and tiring cross-examination for a long to me is bound to get confused and make some inconsistent statements. Some discrepancies are bound to occur if a rustic witness is cross-examined at length. The discrepencies noticed in such a witnesses' evidence should not be blown out of proportion. To do is to ignore the hard realities of village life and give undeserved benefit to the accused. His evidence should be appreciated in its' totality. The rustic witness, as compared to an educated witness, is not expected to remember every small detail of the incident etc, more particularly when his evidence is recorded after a lapse of time. If he was related to the victim, he was bound to suffer shock. All these relevant considerations must be borne in mind while appreciating the evidence of a rustic witness. State of U.P. vs. Krishna Master.

Sakshi v. Union of India[1]

The revelent portion of the case which dealt with the recording of the evidence is cited hereunder

G.P. Mathur, J.

1. This writ petition under Article 32 of the Constitution has been filed by way of public interest litigation, by Sakshi, which is an organisation to provide legal, medical, residential, psychological or any other help, assistance or charitable support for women, in particular those who are victims of any kind of sexual abuse and/or harassment, violence or any kind of atrocity or violation and is a violence intervention center. The respondents arrayed in the writ petition are (1) Union of India; (2) Ministry of Law and Justice; and (3) Commissioner of Police, New Delhi. The main reliefs claimed in the writ petition are as under :

> A) Issue a writ in the nature of a declaration or any other appropriate writ or direction declaring inter alia that "sexual intercourse" as contained in Section 375 of the Indian Penal Code shall include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration;
>
> B) Consequently, issue a writ, order or direction in the nature of a direction to the respondents and its servants and agents to register all such cases found to be truly on investigation, offences falling within the broadened interpretation of "sexual intercourse" set out in prayer (A) aforesaid as offences under Section 375, 376 and 376A to 376D of the Indian Penal Code, 1860;
>
> C) Issue such other writ order or direction as this Hon'ble Court may deem appropriate in the present facts and circumstances.

The petition is thus restricted to a declaratory relief and consequential directions.

2. It is set out in the writ petition that the petitioner has noticed with growing concern the dramatic increase of violence, in particular sexual violence against women and children as well as the implementation of the provisions of Indian Penal Code namely Sections 377, 375/376 and 354 by the respondent authorities. The existing trend of the respondent authorities has been to treat sexual violence, other than penile/vaginal penetration, as lesser offences falling under either Section 377 or 354 of the IPC and not as a sexual offence under Section 375/376IPC. It has been found that offences such as sexual abuse of

[1]S. Rajendra Babu, C.J. and G.P. Mathur, J.[DB]; MANU/SC/0523/2004, [2004]Supp(2)SCR723, AIR2004SC3566, 2004CriLJ2881, (2004)5SCC518. Decided On: 26.05.2004. Writ Petition (Crl.) No. 33 of 1997 with SLP (Crl.) Nos. 1672-1673/2000.

minor children and women by penetration other than penile/vaginal penetration, which would take any other form and could also be through use of objects whose impact on the victims is in no manner less than the trauma of penile/vaginal penetration as traditionally understood under Section 375/376, have been treated as offences tailing under Section 354 of the IPC as outraging the modesty of a women or under Section 377 IPC as unnatural offenses.

3. The petitioner through the present petition contends that the narrow understanding and application of rape under Section 375/376 IPC only to the cases of penile/vaginal penetration runs contrary to the existing contemporary understanding of rape as an intent to humiliate, violate and degrade a woman or child sexually and, therefore, adversely affects the sexual integrity and autonomy of women and children in violation of Article 21 of the Constitution.

…

18. The main question which requires consideration is whether by a process of judicial interpretation the provisions of Section 375 IPC can be so altered so as to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration within its ambit.

…

22. It may be noted that ours is a vast and big country of over 100 crore people. Normally, the first reaction of a victim of crime is to report the incident at the police station and it is the police personnel who register a case under the appropriate Sections of the Penal Code. Such police personnel are invariably not highly educated people but they have studied the basic provisions of the Indian Penal Code and after registering the case under the appropriate sections, further action is taken by them as provided in Code of Criminal Procedure. Indian Penal Code is a part of the curriculum in the law degree and it is the existing definition of "rape" as contained in Section375 IPC which is taught to every student of law. A criminal case is initially handled by a Magistrate and thereafter such cases as are exclusively triable by Court of Session are committed the Court of Session. The entire legal fraternity of India, lawyers or Judges, have the definition as contained in Section 375 IPC engrained in their mind and the cases are decided on the said basis. The first and foremost requirement in criminal law is that it should be absolutely certain and clear. An exercise to alter the definition of rape, as contained in Section 375 IPC, by a process of judicial interpretation, and that too when there is no ambiguity in the provisions of the enactment is bound to result in good deal of chaos and confusion, and will not be in the interest of society at large.

…

31. The whole inquiry before a Court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. Section 273 Cr.P.C. merely requires the evidence to be taken in the presence of the accused. The Section, however, does not say that the evidence should be recorded in such a manner that the accused should have full view of the victim or the

witnesses. Recording of evidence by way of video conferencing *vis-a-vis* Section 273 Cr.P.C. has been held to be permissible in a recent decision of this Court in *State of Maharashtra v. Dr. Praful B Desai* MANU/SC/0268/2003 : 2003CriLJ2033 . There is major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are hand-maiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the Court to expand or enlarge the meanings of such provisions in order to elicit the truth and do justice with the parties.

32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the Presiding Officer of the Court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of Sub-section (2) of Section 327 Cr.P.C. should also apply in inquiry or trial of offences under Section 354 and 377 IPC.

33. In *State of Punjab v. Gurmit Singh* MANU/SC/0366/1996 : 1996CriLJ1728 this Court had highlighted the importance of provisions of Section 327(2) and (3) Cr.P.C. and a direction was issued not to ignore the mandate of the aforesaid provisions and to hold the trial of rape cases in camera. It was also pointed out that such a trial in camera would enable the victim of crime to be a little comfortable and answer the questions with greater ease and thereby improve the quality of evidence of a prosecutrix because there she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of the public. It was further directed that as far as possible trial of such cases may be conducted by lady Judges wherever available so that the prosecutrix can make a statement with greater ease and assist the court to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities.

34. The writ petition is accordingly disposed of with the following directions:

> (1) The provisions of Sub-section (2) of Section 327 Cr.P.C. shall, in addition to the offences mentioned in the sub-section, would also apply in inquiry or trial of offences under Sections 354 and 377 IPC.
>
> (2) In holding trial of child sex abuse or rape:

(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

These directions are in addition to those given in *State of Punjab v. Gurmit Singh.*

35. The suggestions made by the petitioners will advance the cause of justice and are in the larger interest of society. The cases of child abuse and rape are increasing at alarming speed and appropriate legislation in this regard is, therefore, urgently required. We hope and trust that the Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves.

36. Before parting with the case, we must place it on record that Ms. Meenakshi Arora put in lot of efforts and hard labour in placing the relevant material before the Court and argued the matter with commendable ability.

37. For the reasons given in WP(Crl.) No. 33 of 1997 decided today, Special Leave Petitions are dismissed.

In The High Court of Himachal Pradesh, Shimla

Dushyant Kumar v. State of Himachal Pradesh[1]

1. The petitioner has sought pre-arrest bail in FIR No. 48 of 2015, registered at Police Station Chintpurni on 2.8.2015 under Sections 376 and 313 IPC.

The respondent has produced the records of the investigation and has also filed the status report.

2. The record of the investigation reveals that the complainant is a divorcee having married in the year 1993 and divorced in the year 2014 and having three children. She came in touch with the petitioner, who too is married and is alleged to have deceived the complainant by holding out that he too have divorced. They have been in physical relationship since the year 2011 and now accused the petitioner for subjected her to sexual intercourse on the pretext of marriage. However, the record reveals that it is a classical example where the relationship between the parties has gone sour.

3. The law with regard to grant of bail is now well settled. As early as in the year 1978, the Hon'ble Supreme Court in *Gurcharan Singh vs.State (Delhi Administration) (1978) 1 SCC 118* laid the following criteria for grant of bail:

> "22. In other non-bailable cases the Court will exercise its judicial discretion in favour of granting bail subject to subsection (3) of Section 437 Cr.P.C if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person w ho is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1) CrPC and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.…
>
> 24. Section 439(1) CrPC of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), CrPC against granting of bail by the High

[1] Justice Tarlok Singh Chauhan; Cr.M.P.(M) No. 1150 of 2015. Dated: *7th August, 2015.*

> Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1) CrPC of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1) CrPC of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out."

4. The Hon'ble Apex Court in *Prasanta Kumar Sarkar versus Ashis Chatterjee and another, (2010) 14 SCC 496*, has laid down the following principles to be kept in mind, while deciding petition for bail:

> (*i*) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
> (ii) nature and gravity of the accusation;
> (iii) severity of the punishment in the event of conviction;
> (iv) danger of the accused absconding or fleeing, if released on bail;
> (v) character, behavior, means, posit ion and standing of the accused;
> (vi) likelihood of the offence being repeated;
> (vii) reasonable apprehension of the witnesses being influenced; and
> (viii) danger, of course, of justice being thwarted by grant of bail.

Thereafter, in a detailed judgment, the Hon'ble Supreme Court in *Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694*, while relying upon its decision rendered by its Constitution Bench in *Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565*, laid down the following parameters for grant of bail:

> 111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use

of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

112. The following factors and parameters can be taken into consider at ion while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable e apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

113.Arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

114.These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means

exhaustive but they are only illustrative in nature because it is difficult to clearly visualize all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the Judge concerned, after consideration of entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior courts. In consonance with the legislative intent ion we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the court of Sessions or the High Court is always available."

(Emphasis supplied)

5. In *Sanjay Chandra vs. Central Bureau of Investigation* (2012) 1 SCC 40, the Hon'ble Supreme Court made the following pertinent observations in paras 21, 22, 23, and 40 as under:-

"21. In bail applications, generally, it has been laid down from the earliest times t hat the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, `necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. 23. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un –convicted person for the purpose of giving him a taste of imprisonment as a lesson.

40. The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the

sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required."

6. Learned Additional Advocate General would then contend that the petitioner is accused of a serious offence.

7. Seriousness of the allegations or the availability of the material in support thereof is not only the considerations for declining the bail. After-all, at the pre-conviction stage, there is presumption of innocence. That apart, the object of keeping a person in custody is only to ensure his availability to face the trial and receive the sentence that may be passed. This was so held by the Hon'ble Supreme Court in its recent judgment in *Dr.Vinod Bhandari versus State of Madhya Pradesh 2015 AIR SCW 1052*, wherein it was held:

"12. It is well settled that at pre-conviction stage, there is presumption of innocence. The object of keeping a person in custody is to ensure his availability to face the trial and to receive the sentence that may be passed. The detention is not supposed to be punitive or preventive. Seriousness of the allegation or the availability of material in support thereof are not the only considerations for declining bail. Delay in commencement and conclusion of trial is a factor to be taken into account and the accused cannot be kept in custody for indefinite period if trial is not likely to be concluded within reasonable time. Reference may be made to decisions of this Court in *Kalyan Chandra Sarkar vs. Rajesh Ranjan* (2005) 2 SCC 42:(AIR 2005 SC 921), State of *U.P. vs. Amarmani Tripathi* (2005) 8 SCC 21: (AIR 2005 SC 3490), *State of Kerala vs. Raneef* (2011) 1 SCC 784: (AIR 2011 SC 340) and *Sanjay Chandra vs.CBI*(2012) 1 SCC 40 :(AIR 2012 SC 830).. 13. In Kalyan Chandra Sarkar (AIR 2005 SC 921) (supra), it was observed:

"8. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled to bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail

where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing require that such persons be released on bail, in spite of his earlier applications being rejected, the courts can do so."

14. In Amarmani Tripathi (AIR 2005 SC 3490) (supra), it was observed: 18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail *[see Prahlad Singh Bhati v.NCT, Delhi[(2001) 4 SCC 280] and Gurcharan Singh v. State (Delhi Admn.) [(1978) 1 SCC 118]*. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in *Kalyan Chandra Sarkar v. Rajesh Ranjan [(2004) 7 SCC 528]: (SCC* pp. 535-36, para 11): (at Page 1871 of AIR)

> 11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:
>
> (a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
>
> (b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See *Ram Govind Upadhyay v. Sudarshan Singh* [(2002) 3 SCC 598] and *Puran v. Rambilas* [(2001) 6 SCC 338.)

22. While a detailed examination of the evidence is to be avoided while considering the question of bail, to ensure that there is no prejudging and no prejudice, a brief examination to be satisfied about the existence or otherwise of a prima facie case is necessary. An examination of the material in this case, set out above, keeping in view the aforesaid principles, disclose prima facie, the existence of a conspiracy to which Amarmani and Madhumani were parties. The contentions of the respondents that the confessional statement of Rohit Chaturvedi is inadmissible in evidence and that that [pic]should be excluded from consideration, for the purpose of bail is untenable. This Court had negatived a somewhat similar contention in Kalyan Chandra Sarkar thus: (SCC p. 538, para 19) (at Page 1873 of AIR)

> 19. The next argument of learned counsel for the respondent is that prima facie the prosecution has failed to produce any material to implicate the respondent in the crime of conspiracy. In this regard he submitted that most of the witnesses have already turned hostile. The only other evidence available to the prosecution to connect the respondent with the crime is an alleged confession of the co-accused which according to the learned counsel was inadmissible in evidence. Therefore, he contends that the High Court was justified in granting bail since the prosecution has failed to establish even a prima facie case against the respondent. From the High Court order we do not find this as a ground for granting bail. Be that as it may, we think that this argument is too premature for us to accept. The admissibility or otherwise of the confessional statement and the effect of the evidence already adduced by the prosecution and the merit of the evidence that may be adduced hereinafter including that of the witnesses sought to be recalled are all matters to be considered at the stage of the trial.

15. *In Raneef (AIR 2011 SC 340)* (supra), it was observed:

> 15. In deciding bail applications an important factor which should certainly be taken into consideration by the court is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our Constitution, not violated in such a case? Of course this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail. In the present case the respondent has already spent 66 days in custody (as stated in Para 2 of his counter-affidavit), and we see no reason why he should be denied bail. A

> doctor incarcerated for a long period may end up like Dr. Manette in Charles Dicken's novel A Tale of Two Cities, who forgot his profession and even his name in the Bastille."

16. *In Sanjay Chandra (AIR 2012 SC 830)* (supra), it was observed:

> 21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.
>
> 24. In the instant case, we have already noticed that the "pointing finger of accusation" against the appellants is "the seriousness of the charge". The offences alleged are economic offences which have resulted in loss to the State exchequer. Though, they contend that there is a possibility of the appellants tampering with the witnesses, they have not placed any material in support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor: the other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Penal Code and the Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the constitutional rights but rather "recalibrating the scales of justice.

8. Once the prosecutrix knew that the petitioner is a married man, it was for her to restrain herself and not indulge in intimate activities. No doubt, it is the responsibility, moral and ethical both, on the part of man not to exploit any woman by compelling or inducing her for sexual relationship. But then it is ultimately the woman herself who is the protector of her own body and therefore, her prime responsibility to ensure that in the relationship, protects her own dignity and modesty. A woman is not expected to throw herself to a man and indulge him promiscuity thereby becoming a source of hilarity. It is for her to maintain her purity, chastity and virtues.

9. On the basis of records, it cannot be said that petitioner would in any manner interfere with the trial of the case and it is not eventhe allegation of the prosecution that petitioner would flee from justice. In such eventuality, it is otherwise open to the prosecution to approach this Court for cancellation of bail.

10. Accordingly, the petition is allowed and the petitioner is directed to be released on bail in FIR No. 48 of 2015, registered at Police Station Chintpurni on 1.8.2015 under Sections 376 and

313 IPC, on his furnishing personal bond in the sum of `50,000/- with one surety of the like amount to the satisfaction of Judicial Magistrate Ist Class, Una, H.P. with the following conditions:

(i) he shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(ii) he shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(iii) he shall not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(iv) he shall not leave the territory of India without prior permission of the Court.

Learned Judicial Magistrate Ist Class, Una, is directed to comply with the directions issued by the High Court, vide communication No.HHC.VIG./Misc. Instructions/93-IV.7139 dated 18.03.2013.

11. Any observation made hereinabove shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made hereinabove.

Petition stands disposed of.