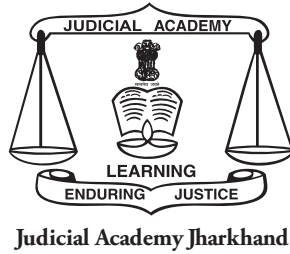


*"The day a women can walk freely on the roads at night, that day we can say that India has achieved independence"*

**- Mahatma Gandhi**



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Reading Material on  
**CRIME AGAINST WOMEN**

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## DIRECTOR'S NOTE

This study material has been brought out on the occasion of the Conference on Crime against Woman organized at Judicial Academy Jharkhand on 10th September, 2022. It contains leading judgments of the Hon'ble Supreme Court on various crimes against woman. It presents to the readers a picture of the judicial response to women related crimes in the society.

India has witnessed phenomenal growth over the last few decades but despite all the advancements, our society is still pre-dominantly patriarchal in nature and women continue to be victims of horrendous crimes. Crimes like rape, dowry death, domestic violence, kidnapping, molestation, torture, sexual harassment are prevalent in the society. The existence of such forms of crimes is an extreme manifestation of gender inequality and gender-based discrimination.

Crimes have physical and psychological impact on women which prevent the women from leading a standard life. Crime against women harm families and communities across generations and reinforce other evils prevalent in society. If left unaddressed, it poses serious consequences for current and future generations and for efforts to ensure peace, security and development. These are violations upon the human rights of the women which needs to be protected by a strong chain of justice. A woman has the right to grow as an individual and each one of us should strive to make the society a better place for women to live in.

With this note, I would like to express my heartfelt gratitude to Hon'ble Mr. Justice Shree Chandrashekhar, Judge-in-charge Judicial Academy, for his able guidance in organizing the conference and this study material. I would also like to thank and appreciate the co-operation of the Additional Directors, Administrative and other officers, Research Scholars and staff of the Academy in bringing out this publication in short time.

***Sudhanshu Kumar Shashi***  
Director  
Judicial Academy Jharkhand





RAPE





**The Chairman, Railway Board and Ors. v. Mrs. Chandrima Das and Ors.**

**2000 (2) SCC 465**

*The Chairman, Railway Board and Ors. ... Appellant(s)*

*versus*

*Mrs. Chandrima Das and Ors. ... Respondent(s)*

Decided on: **December 07, 2015**

Bench : **Hon'ble Mr. Justice R.P.Sethi** and **Hon'ble Mr. Justice S.Saghir Ahmad**

J U D G M E N T

Judgement Delivered by **Hon'ble Mr. Justice S.Saghir Ahmad**:

Mrs. Chandrima Das, a practising advocate of the Calcutta High Court, filed a petition under Article 226 of the Constitution against the Chairman, Railway Board; General Manager, Eastern Railway; Divisional Railway Manager, Howrah Division; Chief Commercial Manager, Eastern Railway; State of West Bengal through the Chief Secretary; Home Secretary, Government of West Bengal; Superintendent of Police (Railways), Howrah; Superintendent of Police, Howrah; Director General of Police, West Bengal and many other Officers including the Deputy High Commissioner, Republic of Bangladesh; claiming compensation for the victim, Smt. Hanuffa Khatun, a Bangladeshi national who was gang-raped by many including employees of the Railways in a room at Yatri Niwas at Howrah Station of the Eastern Railway regarding which G.R.P.S. Case No. 19/98 was registered on 27th February, 1998. Mrs. Chandrima Das also claimed several other reliefs including a direction to the respondents to eradicate anti-social and criminal activities at Howrah Railway Station.

The facts as noticed by the High Court in the impugned judgment are as follows:-

*“Respondents Railways and the Union of India have admitted that amongst the main accused you are employees of the railways and if the prosecution version is proved in accordance with law, they are perpetrators of the heinous crime of gang rape repeatedly committed upon the hapless victim Hanufa Khatun. It is not in dispute that Hanufa came from Bangladesh. She at the relevant time was the elected representative. She at the relevant time was the elected representative of the Union Board. She arrived at Howrah Railway Station on 26th February, 1998 at about 14.00 hours to avail Jodhpur Express at 23.00 Hours for paying a visit to Ajmer Sharif. With that intent in mind, she arrived at Calcutta on 24th February, 1998 and stayed at a hotel at 10, Sudder Street, Police Station Taltola and came to Howrah Station on the date and time aforementioned. She had, however, a wait listed ticket and so she approached a Train Ticket Examiner at the Station for confirmation of berth against her ticket. The Train Ticket Examiner asked her to wait in the Ladies Waiting room. She accordingly came to the ladies waiting room and rested there.*

*At about 17.00 hours on 26th February, 1998 two unknown persons (later identified as one Ashoke Singh, a tout who posed himself as a very influential person of the Railway and Siya Ram Singh a railway ticket broker having good acquaintance with some of the Railway Staff of Howrah Station) approached her, took her ticket and returned the same after confirming reservation in Coach No.S-3 (Berth No.17) of Jodhpur Express. At about 20.00 hours Siya Ram Singh came again to her with a boy named Kashi and told her to accompany the boy to a restaurant if she wanted to have food for the night. Accordingly at about 21.00 hours she went to a nearby eating house with Kashi and had her meal there. Soon after she had taken her meal, she vomitted and came back to the Ladies Waiting room. At about 21.00 hours Ashoke Singh along with Rafi Ahmed a Parcel Supervisor at Howrah Station came to the Ladies Niwas before boarding the train. She appeared to have some doubt initially but on being certified by the lady attendants engaged on duty at the Ladies Waiting Room about their credentials she accompanied them to Yatri Niwas. Sitaram Singh, a khalasi of electric Department of Howrah Station joined them on way to Yatri Niwas. She was taken to room No.102 on the first floor of Yatri Niwas. The room was booked in the name of Ashoke Singh against Railway Card pass No. 3638 since 25th February, 1998. In room No.102 two other persons viz. one Lalan Singh, Parcel Clerk of Howrah Railway Station and Awdesh Singh, Parcel Clearing Agent were waiting. Hanufa Khatun suspected someting amiss when Ashoke Singh forced her into the room. Awdesh Singh bolted the room from outside and stood on guard outside the room. The remaining four persons viz. Ashoke, Lalan, Rafi and Sitaram took liquor inside the room and also forcibly compelled her to consume liquor. All the four persons who were present inside the room brutally violated, Hanufa Khatun, it is said, was in a state of shock and daze. When she could recover she managed to escape from the room of Yatri Niwas and came back to the platform where again she met Siya Ram Singh and found him talking to Ashoke Singh. Seeing her plight Siya Ram Singh pretended to be her saviour and also abused and slapped Ashoke Singh. Since it was well past midnight and Jodhpur Express had already departed, Siya Ram requested Hanufa Khatun to accompany him to his residence to rest for the night with his wife and children. He assured her to help entrain Poorva Express on the following morning. Thereafter Siyaram accompanied by Ram Samiram Sharma, a friend of Siyaram took her to the rented flat of Ram Samiram Sharma at 66, Pathuriaghata Street, Police Station Jorabagan, Calcutta. There Siyaram raped Hanufa and when she protested and resisted violently Siyaram and Ram Samiran Sharma gagged her mouth and nostrils intending to kill her as a result Hanufa bled profusely. On being informed by the landlord of the building following the hue and cry raised by Hanufa Khatun, she was rescued by Jorabagan Police.”*

It was on the basis of the above facts that the High Court had awarded a sum of Rs.10 lacs as compensation for Smt. Hanuffa Khatun as the High Court was of the opinion that the rape was committed at the building (Rail Yatri Niwas) belonging to the Railways and was perpetrated by the Railway employees.

In the present appeal, we are not concerned with many directions issued by the High Court. The only question argued before us was that the Railways would not be liable to pay compensation to Smt. Hanuffa Khatun who was a foreigner and was not an Indian national. It is also contended that commission of the offence by the person concerned would not make the Railway or the Union of India liable to pay compensation to the victim of the offence. It is contended that since it was the individual act of those persons, they alone would be prosecuted and on being found guilty would be punished and may also be liable to pay fine or compensation, but having regard to the facts of this case, the Railways, or, for that matter, the Union

of India would not even be vicariously liable. It is also contended that for claiming damages for the offence perpetrated on Smt. Hanuffa Khatoon, the remedy lay in the domain of Private Law and not under Public Law and, therefore, no compensation could have been legally awarded by the High Court in a proceeding under Article 226 of the Constitution and, that too, at the instance of a practising advocate who, in no way, was concerned or connected with the victim.

We may first dispose of the contention raised on behalf of the appellants that proceedings under Article 226 of the Constitution could not have been legally initiated for claiming damages from the Railways for the offence of rape committed on Smt. Hanuffa Khatoon and that Smt. Hanuffa Khatoon herself should have approached the Court in the realm of Private Law so that all the questions of fact could have been considered on the basis of the evidence adduced by the parties to record a finding whether all the ingredients of the commission of “tort” against the person of Smt. Hanuffa Khatoon were made out, so as to be entitled to the relief of damages. We may also consider the question of locus standi as it is contended on behalf of the appellants that Mrs. Chandrima Das, who is a practicing Advocate of the High Court of Calcutta, could not have legally instituted these proceedings.

The distinction between “Public Law” and “Private Law” was considered by a Three-Judge Bench of this Court in *Common Cause, A Regd. Society vs. Union of India & Ors.* (1999) 6 SCC 667 = AIR 1999 SC 2979 = (1999) 5 JT 237, in which it was, inter alia, observed as under :

*“Under Article 226 of the Constitution, the High Court has been given the power and jurisdiction to issue appropriate Writs in the nature of Mandamus, Certiorari, Prohibition, Quo-Warranto and Habeas Corpus for the enforcement of Fundamental Rights or for any other purpose. Thus, the High Court has jurisdiction not only to grant relief for the enforcement of Fundamental Rights but also for “any other purpose” which would include the enforcement of public duties by public bodies. So also, the Supreme Court under Article 32 has the jurisdiction to issue prerogative Writs for the enforcement of Fundamental Rights guaranteed to a citizen under the Constitution.*

*Essentially, under public law, it is the dispute between the citizen or a group of citizens on the one hand and the State or other public bodies on the other, which is resolved. This is done to maintain the rule of law and to prevent the State or the public bodies from acting in an arbitrary manner or in violation of that rule. The exercise of constitutional powers by the High Court and the Supreme Court under Article 226 or 32 has been categorised as power of “judicial review”. Every executive or administrative action of the State or other statutory or public bodies is open to judicial scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of Fundamental Rights guaranteed by the Constitution. With the expanding horizon of Article 14 read with other Articles dealing with Fundamental Rights, every executive action of the Govt. or other public bodies, including Instrumentalities of the Govt., or those which can be legally treated as “Authority” within the meaning of Article 12, if arbitrary, unreasonable or contrary to law, is now amenable to the writ jurisdiction of this Court under Article 32 or the High Courts under Article 226 and can be validly scrutinised on the touchstone of the Constitutional mandates.”*

The earlier decision, namely, *Life Insurance Corporation of India vs. Escorts Limited & Ors.* 1985 Supp. (3) SCR 909 = (1986) 1 SCC 264 = AIR 1986 SC 1370, in which it was observed as under:

*“Broadly speaking, the Court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances.”*

was relied upon.

Various aspects of the Public Law field were considered. It was found that though initially a petition under Article 226 of the Constitution relating to contractual matters was held not to lie, the law underwent a change by subsequent decisions and it was noticed that even though the petition may relate essentially to a contractual matter, it would still be amenable to the writ jurisdiction of the High Court under Article 226. The Public Law remedies have also been extended to the realm of tort. This Court, in its various decisions, has entertained petitions under Article 32 of the Constitution on a number of occasions and has awarded compensation to the petitioners who had suffered personal injuries at the hands of the officers of the Govt. The causing of injuries, which amounted to tortious act, was compensated by this Court in many of its decisions beginning from Rudul Sah vs. State of Bihar 1983(3) SCR 508 = (1983) 4 SCC 141 = AIR 1983 SC 1086. [See also : Bhim Singh vs. State of Jammu & Kashmir (1985) 4 SCC 577 = AIR 1986 SC 494; People’s Union for Democratic Rights vs. State of Bihar, 1987 (1) SCR 631 = (1987) 1 SCC 265 = AIR 1987 SC 355; People’s Union for Democratic Rights Thru. Its Secy. vs. Police Commissioner, Delhi Police Headquarters, (1989) 4 SCC 730 = 1989 (1) SCALE 599; SAHELI, A Woman’s Resources Centre vs. Commissioner of Police, Delhi (1990) 1 SCC 422 = 1989 (Supp.) SCR 488 = AIR 1990 SC 513; Arvinder Singh Bagga vs. State of U.P. (1994) 6 SCC 565 = AIR 1995 SC 117; P. Rathinam vs. Union of India (1989) Supp. 2 SCC 716; In Re: Death of Sawinder Singh Grower (1995) Supp. (4) SCC 450 = JT (1992) 6 SC 271 = 1992 (3) SCALE 34; Inder Singh vs. State of Punjab (1995) 3 SCC 702 = AIR 1995 SC 1949; D.K. Basu vs. State of West Bengal (1997) 1 SCC 416 = AIR 1997 SC 610].

In cases relating to custodial deaths and those relating to medical negligence, this Court awarded compensation under Public Law domain in Nilabati Behera vs. State of Orissa (1993) 2 SCC 746 = 1993 (2) SCR 581 = AIR 1993 SC 1960; State of M.P. vs. Shyam Sunder Trivedi (1995) 4 SCC 262 = 1995 (3) SCALE 343; People’s Union for Civil Liberties vs. Union of India (1997) 3 SCC 433 = AIR 1997 SC 1203 and Kaushalya vs. State of Punjab (1996) 7 SCALE (SP) 13; Supreme Court Legal Aid Committee vs. State of Bihar (1991) 3 SCC 482; Dr. Jacob George vs. State of Kerala (1994) 3 SCC 430 = 1994 (2) SCALE 563; Paschim Bangal Khet Mazdoor Samity vs. State of West Bengal & Ors. (1996) 4 SCC 37 = AIR 1996 SC 2426; and Mrs. Manju Bhatia vs. N.D.M.C. (1997) 6 SCC 370 = AIR 1998 SC 223 = (1997) 4 SCALE 350.

Having regard to what has been stated above, the contention that Smt. Hanuffa Khatoon should have approached the civil court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution, cannot be accepted. Where public functionaries are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law.

In the instant case, it is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved. Smt. Hanuffa Khatoon was a victim of rape. This Court in *Bodhisatwa vs. Ms. Subdhra Chakroborty* (1996) 1 SCC 490 has held “rape” as an offence which is violative of the Fundamental Right of a person guaranteed under Article 21 of the Constitution. The Court observed as under :

*“Rape is a crime not only against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. Rape is therefore the most hated crime. It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21.”*

Rejecting, therefore, the contention of the learned counsel for the appellants that the petition under Public Law was not maintainable, we now proceed to his next contention relating to the locus standi of respondent, Mrs. Chandrima Das, in filing the petition.

The main contention of the learned counsel for the appellants is that Mrs. Chandrima Das was only a practising advocate of the Calcutta High Court and was, in no way, connected or related to the victim, Smt. Hanuffa Khatoon and, therefore, she could not have filed a petition under Article 226 for damages or compensation being awarded to Smt. Hanuffa Khatoon on account of the rape committed on her. This contention is based on a misconception. Learned counsel for the appellants is under the impression that the petition filed before the Calcutta High Court was only a petition for damages or compensation for Smt. Hanuffa Khatoon. As a matter of fact, the reliefs which were claimed in the petition included the relief for compensation. But many other reliefs as, for example, relief for eradicating anti-social and criminal activities of various kinds at Howrah Railway Station were also claimed. The true nature of the petition, therefore, was that of a petition filed in public interest.

The existence of a legal right, no doubt, is the foundation for a petition under Article 226 and a bare interest, may be of a minimum nature, may give locus standi to a person to file a Writ Petition, but the concept of “Locus Standi” has undergone a sea change, as we shall presently notice. In *Dr. Satyanarayana Sinha vs. S. Lal & Co. Pvt. Ltd.*, AIR 1973 SC 2720 = (1973) 2 SCC 696, it was held that the foundation for exercising jurisdiction under Article 32 or Article 226 is ordinarily the personal or individual right of the petitioner himself. In writs like Habeas Corpus and Quo Warranto, the rule has been relaxed and modified.

In *S.P. Gupta & Ors. vs. Union of India & Ors.*, AIR 1982 SC 149 = (1981) Supp. SCC 87, the law relating to locus standi was explained so as to give a wider meaning to the phrase. This Court laid down that

*“practising lawyers have undoubtedly a vital interest in the independence of the judiciary; they would certainly be interested in challenging the validity or constitutionality of an action taken by the State or any public authority which has the effect of impairing the independence of the judiciary.” It was further observed that “lawyer’s profession was an essential and integral part of the judicial system; they could figuratively be described as priests in the temple of justice. They have, therefore, a special interest in preserving the integrity and independence of the judicial system; they are equal partners with the Judges in the administration of justice. The lawyers, either in their individual capacity or as representing some Lawyers’ Associations have the locus standi to challenge the circular letter*

*addressed by the Union Law Minister to the Governors and Chief Ministers directing that one third of the Judges of the High Court should, as far as possible, be from outside the State.”*

In the context of Public Interest Litigation, however, the Court in its various Judgments has given widest amplitude and meaning to the concept of locus standi. In People’s Union for Democratic Rights and Ors. vs. Union of India & Ors., AIR 1982 SC 1473 = (1982) 3 SCC 235, it was laid down that Public Interest Litigation could be initiated not only by filing formal petitions in the High Court but even by sending letters and telegrams so as to provide easy access to Court. (See also: Bandhua Mukti Morcha vs. Union of India & Ors., AIR 1984 SC 802 = 1984 (2) SCR 67 = (1984) 3 SCC 161 and State of Himachal Pradesh vs. Student’s Parent Medical College, Shimla & Ors., AIR 1985 SC 910 = (1985) 3 SCC 169 on the right to approach the Court in the realm of Public Interest Litigation). In Bangalore Medical Trust vs. B.S. Muddappa and Ors., AIR 1991 SC 1902 = 1991 (3) SCR 102 = (1991) 4 SCC 54, the Court held that the restricted meaning of aggrieved person and narrow outlook of specific injury has yielded in favour of a broad and wide construction in the wake of Public Interest Litigation. The Court further observed that public-spirited citizens having faith in the rule of law are rendering great social and legal service by espousing causes of public nature. They cannot be ignored or overlooked on technical or conservative yardstick of the rule of locus standi or absence of personal loss or injury. There has, thus, been a spectacular expansion of the concept of locus standi. The concept is much wider and it takes in its stride anyone who is not a mere “busy-body”.

Having regard to the nature of the petition filed by respondent Mrs. Chandrima Das and the relief claimed therein it cannot be doubted that this petition was filed in public interest which could legally be filed by the respondent and the argument that she could not file that petition as there was nothing personal to her involved in that petition must be rejected.

It was next contended by the learned counsel appearing on behalf of the appellants, that Smt. Hanuffa Khatoon was a foreign national and, therefore, no relief under Public Law could be granted to her as there was no violation of the Fundamental Rights available under the Constitution. It was contended that the Fundamental Rights in Part III of the Constitution are available only to citizens of this country and since Smt. Hanuffa Khatoon was a Bangladeshi national, she cannot complain of the violation of Fundamental Rights and on that basis she cannot be granted any relief. This argument must also fail for two reasons; first, on the ground of Domestic Jurisprudence based on Constitutional provisions and secondly, on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights, 1948, which has the international recognition as the “Moral Code of Conduct” having been adopted by the General Assembly of the United Nations. We will come to the question of Domestic Jurisprudence a little later as we intend to first consider the principles and objects behind Universal Declaration of Human Rights, 1948, as adopted and proclaimed by the United Nations General Assembly Resolution of 10th December, 1948. The preamble, inter alia, sets out as under:

*“Whereas recognition of the INHERENT DIGNITY and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*

*Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.*

*Whereas it is essential to promote the development of friendly relations between nations.*

*Whereas the people of the United Nations have in the Charter affirmed their faith in fundamental human rights, IN THE DIGNITY AND WORTH OF THE HUMAN PERSON AND IN THE EQUAL RIGHTS OF MEN AND WOMEN and have determined to promote social progress and better standards of life in larger freedom. Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.*

*Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.”*

Thereafter, the Declaration sets out, inter alia, in various Articles, the following:

*“Article 1 -- All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*

*Article 2 -- Every one is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, NATIONAL OR SOCIAL ORIGIN, PROPERTY, BIRTH OR OTHER STATUS.*

*Furthermore, NO DISTINCTION SHALL BE MADE ON THE BASIS OF THE POLITICAL, JURISDICTIONAL OR INTERNATIONAL STATUS OF THE COUNTRY OR TERRITORY to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty.*

*Article 3 -- Everyone has the right to life, liberty and security of person.*

*Article 5 -- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

*Article 7 -- All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*

*Article 9 -- No one shall be subjected to arbitrary arrest, detention or exile.”*

*Apart from the above, the General Assembly, also while adopting the Declaration on the Elimination of Violence against Women, by its Resolution dated 20th December, 1993, observed in Article 1 that, “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” In Article 2, it was specified that, “violence against women shall be understood to encompass, but not be limited to:*

- (a) Physical, sexual and psychological violence occurring in the family including battering, sexual abuse of female children in the household, dowry-related violence, marital rape,*

*female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;*

- (b) *Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;*
- (c) *Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”*

In Article 3, it was specified that “women are entitled to the equal enjoyment and protection of all human rights, which would include, inter alia,:

- (a) the right to life,
- (b) the right to equality, and
- (c) the right to liberty and security of person.

The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the above words in those Declarations and Covenants have to be such as would help in effective implementation of those Rights. The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence. Lord Diplock in *Salomon v. Commissioners of Customs and Excise* [1996] 3 All ER 871 said that there is a, prima facie, presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations. So also, Lord Bridge in *Brind v. Secretary of State for the Home Department* [1991] 1 All ER 720, observed that it was well settled that, in construing any provision in domestic legislation which was ambiguous in the sense that it was capable of a meaning which either conforms to or conflicts with the International Convention, the courts would presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it.

The domestic application of international human rights and norms was considered by the Judicial Colloquia (Judges and Lawyers) at Bangalore in 1988. It was later affirmed by the Colloquia that it was the vital duty of an independent judiciary to interpret and apply national constitutions in the light of those principles. Further Colloquia were convened in 1994 at Zimbabwe, in 1996 at Hong Kong and in 1997 at Guyana and in all those Colloquia, the question of domestic application of international and regional human rights specially in relation to women, was considered. The Zimbabwe Declaration 1994, inter alia, stated :

“Judges and lawyers have duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women.” But this situation may not really arise in our country.

Our Constitution guarantees all the basic and fundamental human rights set out in the Universal Declaration of Human Rights, 1948, to its citizens and other persons. The chapter dealing with the Fundamental Rights is contained in Part III of the Constitution. The purpose of this Part is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the political parties who, by virtue of their majority, may come to form the Govt. at the Centre or in the State.

The Fundamental Rights are available to all the “citizens” of the country but a few of them are also available to “persons”. While Article 14, which guarantees equality before law or the equal protection of laws within the territory of India, is applicable to “person” which would also include the “citizen” of the country and “noncitizen” both, Article 15 speaks only of “citizen” and it is specifically provided therein that there shall be no discrimination against any “citizen” on the ground only of religion, race, caste, sex, place of birth or any of them nor shall any citizen be subjected to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment, or the use of wells, tanks, bathing ghats, roads and places of public resort on the aforesaid grounds. Fundamental Right guaranteed under Article 15 is, therefore, restricted to “citizens”. So also, Article 16 which guarantees equality of opportunity in matters of public employment is applicable only to “citizens”. The Fundamental Rights contained in Article 19, which contains the right to “Basic Freedoms”, namely, freedom of speech and expression; freedom to assemble peaceably and without arms; freedom to form associations or unions; freedom to move freely throughout the territory of India; freedom to reside and settle in any part of the territory of India and freedom to practise any profession, or to carry on any occupation, trade or business, are available only to “citizens” of the country. The word “citizen” in Article 19 has not been used in a sense different from that in which it has been used in Part II of the Constitution dealing with “citizenship”. [See: *State Trading Corporation of India Ltd. vs. The Commercial Tax Officer and Others*, AIR 1963 SC 1811 = 1964 (4) SCR 99]. It has also been held in this case that the words “all citizens” have been deliberately used to keep out all “non-citizens” which would include “aliens”. It was laid down in *Hans Muller of Nuremburg vs. Superintendent Presidency Jail Calcutta*, AIR 1955 SC 367 (374) = 1955 (1) SCR 1284, that this Article applies only to “citizens”. In another decision in *Anwar vs. State of J & K*, AIR 1971 SC 337 = 1971 (1) SCR 637 = (1971) 3 SCC 104, it was held that non-citizen could not claim Fundamental Rights under Article 19. In *Naziranbai vs. State*, AIR 1957 M.B. 1 and *Lakshmi Prasad & Anr. vs. Shiv Pal & Others*, AIR 1974 Allahabad 313, it was held that Article 19 does not apply to a “foreigner”. The Calcutta High Court in *Sk. Md. Soleman vs. State of West Bengal and Another*, AIR 1965 Calcutta 312, held that Article 19 does not apply to a Commonwealth citizen.

In *Anwar vs. State of J & K*, AIR 1971 SC 337 = 1971 (1) SCR 637 = (1971) 3 SCC 104 (already referred to above), it was held that the rights under Articles 20, 21 and 22 are available not only to “citizens” but also to “persons” which would include “non-citizens”.

Article 20 guarantees right to protection in respect of conviction for offences. Article 21 guarantees right to life and personal liberty while Article 22 guarantees right to protection against arbitrary arrest and detention. These are wholly in consonance with Article 3, Article 7 and Article 9 of the Universal Declaration of Human Rights, 1948.

The word “LIFE” has also been used prominently in the Universal Declaration of Human Rights, 1948. [See: Article 3 quoted above]. The Fundamental Rights under the Constitution are almost in consonance with the Rights contained in the Universal Declaration of Human Rights as also the Declaration and the Covenants of Civil and Political Rights and the Covenants of Economic, Social and Cultural Rights, to which India is a party having ratified them, as set out by this Court in *Kubic Darusz vs. Union of India & Ors.* (1990) 1 SCC 568 = AIR 1990 SC 605. That being so, since “LIFE” is also recognised as a basic human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on that word by this Court in its various decisions relating to Article 21 of the Constitution. The meaning of the word “life” cannot be narrowed down. According to the tenor of the language used in Article 21, it will

be available not only to every citizen of this country, but also to a “person” who may not be a citizen of the country.

Let us now consider the meaning of the word “LIFE” interpreted by this Court from time to time. In *Kharak Singh vs. State of U.P.*, AIR 1963 SC 1295 = 1964 (1) SCR 332, it was held that the term “life” indicates something more than mere animal existence. [See also : *State of Maharashtra vs. Chandrabhan Tale*, AIR 1983 SC 803 = 1983 (3) SCR 337 = (1983) 3 SCC 387]. The inhibitions contained in Article 21 against its deprivation extends even to those faculties by which life is enjoyed. In *Bandhua Mukti Morcha vs. U.O.I.*, AIR 1984 SC 802 = 1984 (2) SCR 67 = (1984) 3 SCC 161, it was held that the right to life under Article 21 means the right to live with dignity, free from exploitation. [See also: *Maneka Gandhi vs. U.O.I.*, AIR 1978 SC 597 = 1978 (2) SCR 621 = (1978) 1 SCC 248 and *Board of Trustees of the Port of Bombay vs. Dilip Kumar Raghavendranath Nadkarni*, AIR 1983 SC 109 = 1983 (1) SCR 828 = (1983) 1 SCC 124].

On this principle, even those who are not citizens of this country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives in accordance with the Constitutional provisions. They also have a right to “Life” in this country. Thus, they also have the right to live, so long as they are here, with human dignity. Just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the life of the persons who are not citizens.

The Rights guaranteed under Part III of the Constitution are not absolute in terms. They are subject to reasonable restrictions and, therefore, in case of noncitizen also, those Rights will be available subject to such restrictions as may be imposed in the interest of the security of the State or other important considerations. Interest of the Nation and security of the State is supreme. Since 1948 when the Universal Declaration was adopted till this day, there have been many changes - political, social and economic while terrorism has disturbed the global scenario. Primacy of the interest of Nation and the security of State will have to be read into the Universal Declaration as also in every Article dealing with Fundamental Rights, including Article 21 of the Indian Constitution.

It has already been pointed out above that this Court in *Bodhisatwa’s* case (supra) has already held that “rape” amounts to violation of the Fundamental Right guaranteed to a woman under Article 21 of the Constitution.

Now, *Smt. Hanuffa Khatoon*, who was not the citizen of this country but came here as a citizen of Bangladesh was, nevertheless, entitled to all the constitutional rights available to a citizen so far as “Right to Life” was concerned. She was entitled to be treated with dignity and was also entitled to the protection of her person as guaranteed under Article 21 of the Constitution. As a national of another country, she could not be subjected to a treatment which was below dignity nor could she be subjected to physical violence at the hands of Govt. employees who outraged her modesty. The Right available to her under Article 21 was thus violated. Consequently, the State was under the Constitutional liability to pay compensation to her. The judgment passed by the Calcutta High Court, therefore, allowing compensation to her for having been gang-raped, cannot be said to suffer from any infirmity.

Learned counsel for the appellants then contended that the Central Govt. cannot be held vicariously liable for the offence of rape committed by the employees of the Railways. It was contended that the liability under the Law of Torts would arise only when the act complained of was performed in the course of official duty and since rape cannot be said to be an official act, the Central Govt. would not be liable even under the Law of

Torts. The argument is wholly bad and is contrary to the law settled by this Court on the question of vicarious liability in its various decisions.

In *State of Rajasthan vs. Mst. Vidhyawati* AIR 1962 SC 933, it was held that the Govt. will be vicariously liable for the tortious act of its employees. This was a case where a claim for damages was made by the heirs of a person who died in an accident caused by the negligence of the driver of a Govt. vehicle. Reference may also be made to the decisions of this Court in *State of Gujarat vs. Memon Mahomed Haji Hasan* AIR 1967 SC 1885 and *Smt. Basava Kom Dyamogouda Patil vs. State of Mysore* AIR 1977 SC 1749. These principles were reiterated in *N. Nagendra Rao & Co. vs. State of A.P.* AIR 1994 SC 2663 = (1994) 6 SCC 205 and again in *State of Maharashtra vs. Kanchanmala Vijaysing Shirke*, 1995 ACJ 1021 (SC) = (1995) 5 SCC 659 = JT 1995 (6) SC 155. Reliance placed by the counsel for the appellants on the decision of this Court in *Kasturi Lal Ralia Ram Jain vs. State of U.P.* AIR 1965 SC 1039 = 1965 (1) SCR 375 cannot help him as this decision has not been followed by this Court in the subsequent decisions, including the decisions in *State of Gujarat vs. Memon Mahomed Haji Hasan* and *Smt. Basava Kom Dyamogouda Patil vs. State of Mysore* (supra). The decision in *Kasturi Lal's* case was also severely criticised by Mr. Seervai in his prestigious book - *Constitutional Law of India. A Three- Judge Bench* of this Court in *Common Cause, A Regd. Society vs. Union of India* (1999) 6 SCC 667 also did not follow the decision in *Kasturi Lal's* case (supra) and observed that the efficacy of this decision as a binding precedent has been eroded.

The theory of Sovereign power which was propounded in *Kasturi Lal's* case has yielded to new theories and is no longer available in a welfare State. It may be pointed out that functions of the Govt. in a welfare State are manifold, all of which cannot be said to be the activities relating to exercise of Sovereign powers. The functions of the State not only relate to the defence of the country or the administration of justice, but they extend to many other spheres as, for example, education, commercial, social, economic, political and even marital. These activities cannot be said to be related to Sovereign power.

Running of Railways is a commercial activity. Establishing Yatri Niwas at various Railway Stations to provide lodging and boarding facilities to passengers on payment of charges is a part of the commercial activity of the Union of India and this activity cannot be equated with the exercise of Sovereign power. The employees of the Union of India who are deputed to run the Railways and to manage the establishment, including the Railway Stations and Yatri Niwas, are essential components of the Govt. machinery which carries on the commercial activity. If any of such employees commits an act of tort, the Union Govt., of which they are the employees, can, subject to other legal requirements being satisfied, be held vicariously liable in damages to the person wronged by those employees. *Kasturi Lal's* decision, therefore, cannot be pressed in aid. Moreover, we are dealing with this case under Public Law domain and not in a suit instituted under Private Law domain against persons who, utilising their official position, got a room in the Yatri Niwas booked in their own name where the act complained of was committed.

No other point was raised before us. The appeal having no merit is dismissed with the observation that the amount of compensation shall be made over to the High Commissioner for Bangladesh in India for payment to the victim, Smt. Hanuffa Khatoun. The payment to the High Commissioner shall be made within three months. There will be no order as to costs.

□□□

**Deelip Singh and Dilip Kumar v. State of Bihar**

**(2005) 1 SCC 88**

Appeal (crl.) 44 of 2004

*Dileep Singh and Dilip Kumar. ... Appellant(s)*

*versus*

*State of Bihar. ... Respondent(s)*

Decided on: **November 03, 2004**

Bench : **Hon'ble Mr. Justice P. Venkatarama Reddi** and **Hon'ble Mr. Justice P. P. Naolekar**

**J U D G M E N T**

Judgement Delivered by **Hon'ble Mr. Justice P. Venkatarama Reddi**:

The appellant has been charged and convicted under Section 376 IPC for committing rape of a minor girl (figured as PW12 in this case) in the month of February, 1988. The IIIrd Additional Sessions Judge of Katihar sentenced him to rigorous imprisonment for a period of ten years. On appeal, the High Court upheld the conviction but modified the sentence to seven years. Aggrieved thereby, the present appeal is filed by the accused.

Facts:

The victim girl lodged a complaint to the police on 29.11.1988 i.e., long after the alleged act of rape. By the date of the report, she was pregnant by six months. Broadly, the version of the victim girl was that she and the accused were neighbours and fell in love with each other and one day, the accused forcibly raped her and later consoled her saying that he would marry her, that she succumbed to the entreaties of the accused to have sexual relations with him, on account of the promise made by him to marry her and therefore continued to have sex on several occasions. After she became pregnant, she revealed the matter to her parents. Even thereafter the intimacy continued to the knowledge of the parents and other relations who were under the impression that the accused would marry the girl but the accused avoided to marry her and his father took him out of the village to thwart the bid to marry. The efforts made by the father to establish the marital tie failed and therefore she was constrained to file the complaint after waiting for sometime.

The prosecution adduced evidence in the form of school certificate and medical expert's opinion to establish that by the date of the commission of criminal act, the victim girl was aged less than 16 years in which case her consent becomes immaterial. It is on this aspect the attention was focussed more by the prosecution.

The trial Court accepted the prosecution case in this regard and found that the girl was aged less than 16 years at the relevant point of time. The High Court affirmed this finding. The trial Court also recorded an alternative finding that she was forcibly raped on the first occasion and after that incident the accused went on making false promises to marry her. It was therefore held that either there was no consent or the consent

was involuntary. Thus, according to the trial Court, it was a case of having sexual intercourse against the will of the victim girl or without her consent. If so, irrespective of the age of the girl, the offence is deemed to be committed. As regards this latter aspect, the High Court did not enter into any discussion.

Before proceeding to discuss the crucial points, it would be apposite to refer to the contents of the report given by the victim girl to the officer-in-charge of Manihari police station on the basis of which the FIR (Ext.1) was registered on 25.10.1988. At this stage, we would like to observe that her version as per the deposition given in the Court was somewhat different, especially in regard to the manner in which the sexual relationship was developed and the first sexual act was resorted to. To the extent necessary, this aspect will be referred to at a later stage. The following is the substance of the report (marked as Ext. 3/2) given to the police on 25.10.1988:

The informant and the accused were neighbours. The accused, by his gestures and behaviour, tried to seduce her. Whenever there was opportunity, he used to come to her house and used to cut jokes and have fun with her in spite of her protests. On one occasion, a watch was given to her as a gift. The accused went on telling that he wanted to marry her but she expressed her disinclination. However, one day, she yielded to the persuasion of the accused and had sexual contact with the accused and the same has been going on from the month of February, 1988. The accused allured her with promise of marriage and continued to have intercourse with her on account of which she conceived. During the second or third month of pregnancy, she informed her parents about it. Her father talked to the accused and asked him to marry his daughter. The accused accepted before the villagers that he was responsible for the pregnancy and he was ready to marry her. However, the father of the accused did not agree and proclaimed that the marriage will not take place under any circumstances. The efforts made by her father by convening a panchayat etc., did not yield any result. Later on, the informant came to know that the father of the accused Gopi Singh with the help of other villagers took away the accused to an unknown place. Thereafter, she was advised to file the case by her father and other elders. On the registration of the case, the charge sheet was filed not only against the present appellant but also his father and others who were alleged to have abducted the accused to prevent the marriage. However, no charge was framed against them. The appellant is the sole accused who faced the trial.

The victim girl was sent for medical examination to CAS, Sadar Hospital, Katihar on 28.11.1988. PW14\027the Doctor who along with other doctors examined her, deposed that by the date of examination, she had pregnancy of six months duration. The main purpose of sending her for medical examination appears to be to assess her age. PW14 gave the opinion, on the basis of his own examination and the examination of the Dental Surgeon and the X-rays taken by the Radiologist that her age was between 16 and 17 years. The Investigating Officer has not been examined in this case.

Age of victim:

The question of age of the victim girl is the first and foremost aspect that needs to be considered in the present appeal. On this question we are unable to concur with the finding of the trial Court as affirmed by the High Court. In our view, the finding as reached by the trial Court is based on no evidence or evidence which is doubtful. The prosecution wanted to prove her age by filing the school transfer certificate through PW13. The certificate is Ext. P4. It was purportedly issued by the Headmaster of the Primary/ Secondary School, Nawabganj. Her date of birth, as recorded in the admission register, is stated to be 4.2.1974. The date of admission is mentioned as 22.2.1980 and the date of leaving the school as 31.12.1981. It is mentioned in column 5 that the admission was given on the basis of declaration of the father i.e. PW11. By the time

she left the school, she passed II Class. The date of issuance of the certificate was 7.1.1991 i.e. after the trial commenced. No explanation is forthcoming as to why the Investigation Officer did not obtain the certificate in the course of investigation and why the certificate was not produced by the father of the girl (PW11). Apparently, the age was given on the basis of the declaration made by the father. If so, the father was the best witness to speak about her age. However, he did not say a word about her age.

If this certificate had been filed beforehand or if PW11 had said anything about her age, the defence counsel would have been in a position to question the father about the correctness of his declaration. That is one aspect. The other and more important aspect is that the certificate (Ext.P4) has no evidentiary value inasmuch as it is not properly proved by a witness who is competent to speak to the relevant facts connected with the issuance and custody of the certificate. The Headmaster or the staff of the school has not been examined.

The two witnesses examined to prove this document are PWs 13 and 15, whose evidence, in our view, is really worthless. The certificate was produced by PW13, who is said to be a clerk in Court (Mujeeb). It was marked subject to objection raised by the defence. Who applied for it and how he came in possession of it has not been explained. Though he stated in the chief examination that the certificate was issued by the Headmaster of Nawabganj School, in cross-examination, he frankly stated that he could not say whose signature was there on the certificate. He further stated that he had never gone to the school. PW15\027an Advocate's clerk, is another witness examined by prosecution to prove Ext.4. He stated in the chief-examination that the school leaving certificate related to victim girl and it was in the handwriting of the Headmaster Akhileshwar Thakur. In cross-examination, he admitted that he did not see the certificate earlier and he met the Headmaster of the school 10 or 15 years back. He also stated that the signature was illegible. Thus the evidence of PWs 13 & 15 does not throw any light on the authenticity or the genuineness of the certificate. Obviously, they did not have any knowledge of the issuance of the certificate. The original register was not before the Court. The certificates have not come from proper custody. In the circumstances, the certificate should have been eschewed from consideration. However the trial Court and the High Court acted on it without demur and rested their conclusions on this document. If we exclude Ext.P4 from consideration, the Court is left with the evidence of the Medical Officer, PW14, according to whose assessment the age of the girl was 16-17 years. The defence is entitled to rely on the higher side of the age given by the Doctor. If so, the victim girl would be aged more than 16 years when the alleged offence took place in February, 1988. At the time of examination in the Court, it appears that the Court assessed the age as 17, without any further elaboration. It is not safe to rely on such estimate.

For all these reasons we are of the view that the finding that the victim girl was less than 16 years of age on the date of the first sexual intercourse which the appellant had committed, cannot be sustained. If so, Clause sixthly of Section 375 which says "with or without her consent, when she is under 16 years of age", is not attracted.

Whether accused guilty under clause first of Section 375: The next question is whether the appellant had sexual intercourse with the victim girl against her will (vide first Clause of Section 375). The expression 'against the will' seems to connote that the offending act was done despite resistance and opposition of the woman. On this aspect, the trial court did believe the version of the informant\027victim without much of discussion. In reaching this factual finding, the trial Court failed to analyse and evaluate the evidence of PW12\027the victim girl. The High Court merely affirmed the trial Court's finding on this point. We should, therefore, scrutinize her evidence and examine whether it would, beyond reasonable doubt, lead to the conclusion

of the accused having had sexual contact against her will. Though in the FIR, the version of forcible sexual intercourse has not been put forward, in the deposition before the Court, PW12 tried to build up this plea. According to PW12, the first act of rape took place in the wheat field of her father. This is how she described the incident:

“In the field, once getting a chance, Dilip Singh forcibly raped me. Dilip Singh told, ‘you marry me’, when I was weeping. He said weeping is useless and we shall marry. He promised me of marriage and raped me several times.” She then stated that after she became pregnant, she revealed to her mother about the rape. Later on, the accused became ready to marry her but his father and others took him away from the village. She also stated that the accused time and again told her that they will have a ‘court marriage’ (means, registered marriage). In substance, what she deposed was that the first sexual intercourse took place against her will, though she became a consenting party later on. The first thing to be noticed is that in the report which she admittedly gave to the police, this version was not given by her and she did not complain of forcible rape. That apart, the version of rape in the wheat field seems to be highly doubtful when tested in the light of her statements in the cross-examination. She stated in paragraph 14 that “one day, while talking, he pulled me down and forcibly raped me. This incident occurred at 12.00 in the night”. That means, according to her version, the first incident of rape took place on the wheat field at 12.00 in the midnight. It is highly doubtful whether they would go to the wheat fields at that hour. Moreover, in cross-examination, she makes a further improvement by stating that at the time of first incident of rape at midnight, when she started shouting, the accused gagged her mouth. One more thing which affects the credibility of her version is her statement in the cross-examination that when the accused kept on making gestures, she went to the house of the accused and lodged her protest with his Bhabhi. It is most unlikely that such unwilling person will go to a secluded place in the company of the accused at an odd time in the night and take the risk of being sexually assaulted. In any case, if the rape was committed by the accused much against her will, she would not have volunteered to submit to his wish subsequent to the alleged first incident of rape. She admitted that the accused used to talk to her for hours together and that was within the knowledge of her parents and brother. This statement also casts an element of doubt on her version that she was subjected to sexual intercourse in spite of her resistance. Above all, the version given by her in the Court is at variance with the version set out in the FIR. As already noticed, she categorically stated in the first information report that she ‘surrendered before him’ in view of his repeated promises to marry. In short, her version about the first incident of rape bristles with improbabilities, improvements and exaggerations. It is a different matter that she became a consenting party under the impact of his promise to marry her. That aspect, we will examine later. But, what we would like to point out at this juncture is, it is not safe to lend credence to the version of PW12 that she was subjected to rape against her will in the first instance even before the appellant held out the promise to marry. We cannot, therefore, uphold the finding of the trial Court that the girl was raped forcibly on the first occasion and that the talk of marriage emerged only later. The finding of the trial Court in this respect is wholly unsustainable. Whether clause secondly (without consent) is attracted:

The last question which calls for consideration is whether the accused is guilty of having sexual intercourse with PW12 ‘without her consent’ (vide Clause secondly of Section 375 IPC). Though will and consent often interlace and an act done against the will of a person can be said to be an act done without consent, the Indian Penal Code categorizes these two expressions under separate heads in order to be as comprehensive as possible. What then is the meaning and content of the expression ‘without her consent’? Whether the consent given by a woman believing the man’s promise to marry her is a consent which excludes the offence of rape? These are the questions which have come up for debate directly or incidentally.

The concept and dimensions of 'consent' in the context of Section 375 IPC has been viewed from different angles. The decided cases on the issue reveal different approaches which may not necessarily be dichotomous. Of course, the ultimate conclusion depends on the facts of each case. Indian Penal Code does not define 'consent' in positive terms, but what cannot be regarded as 'consent' under the Code is explained by Section 90. Section 90 reads as follows:

*"90. Consent known to be given under fear or misconception | A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows or has reason to believe, that the consent was given in consequence of such fear or misconception; |"*

Consent given firstly under fear of injury and secondly under a misconception of fact is not 'consent' at all. That is what is enjoined by the first part of Section 90. These two grounds specified in Section 90 are analogous to coercion and mistake of fact which are the familiar grounds that can vitiate a transaction under the jurisprudence of our country as well as other countries.

The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the Court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the Court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology. Section 90 cannot, however be construed as an exhaustive definition of consent for the purposes of the Indian Penal Code. The normal connotation and concept of 'consent' is not intended to be excluded. Various decisions of the High Court and of this Court have not merely gone by the language of Section 90, but travelled a wider field, guided by the etymology of the word 'consent'. In most of the decisions in which the meaning of the expression 'consent' under the Indian Penal Code was discussed, reference was made to the passages occurring in Stroud's Judicial Dictionary, Jowitt's Dictionary on English Law, Words & Phrases | Permanent Edition and other legal Dictionaries. Stroud defines consent as "an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side". Jowitt, while employing the same language added the following:

*"Consent supposes three things: a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, mediated imposition, circumvention, surprise or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind."*

In Words & Phrases |Permanent Edition, Volume 8A, the following passages culled out from certain old decisions of the American Courts are found:

*“adult female’s understanding of nature and consequences of sexual act must be intelligent understanding to constitute ‘consent’.*

*Consent within penal law, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. “*

It was observed by B.P. Singh, J. speaking for the Court in Uday Vs. State of Karnataka [2003 (2) Scale 329], “the Courts in India have, by and large, adopted these tests to discover whether the consent was voluntary or whether it was vitiated so as not to be legal consent”. There is a good analysis of the expression ‘consent’ in the context of Section 375 IPC by Tekchand, J. in Rao Harnarain Singh Vs. State [AIR 1958 Punjab 123]. The learned Judge had evidently drawn inspiration from the above passages in the law dictionaries. The observation of the learned Judge that “there is a difference between consent and submission and every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent”, is quite apposite. The said proposition is virtually a repetition of what was said by Coleridge, J. in Regina vs Day in 1841 as quoted in Words and Phrases (Permanent Edition) at page 205. The following remarks in Harnarain’s case are also pertinent: “Consent is an act of reason accompanied by deliberation, a mere act of helpless resignation in the face of inevitable compulsion, non resistance and passive giving in cannot be deemed to be Consent.”

The passages occurring in the above decision were either verbatim quoted with approval or in condensed form in the subsequent decisions: vide In Re : Anthony [AIR 1960 Madras 308], Gopi Shankar Vs. State [AIR 1967 Raj. 159], Bhimrao Vs. State of Maharashtra [1975 Mah. L.J. 660], Vijayan Pillai Vs. State of Kerala [1989 (2) K.L.J. 234]. All these decisions have been considered in a recent pronouncement of this Court in Uday Vs. State of Karnataka. The enunciation of law on the meaning and content of the expression ‘consent’ in the context of penal law as elucidated by Tekchand, J. in Harnarain’s case (which in turn was based on the above extracts from law Dictionaries) has found its echo in the three Judge Bench decision of this Court in State of H.P. Vs. Mango Ram [(2000) 7 SCC 224]. K.G. Balakrishnan, J. speaking for the Court stated thus:

*“Submission of the body under the fear or terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.”*

On the facts, it was held that there was resistance by the prosecutrix and there was no voluntary participation in the sexual act. That case would therefore fall more appropriately within Clause first of Section 375. We shall turn our attention to the cases which dealt with the specific phraseology of Section 90, IPC. We have an illuminating decision of the Madras High Court rendered in 1913 in Re: N. Jaladu [ILR 36 Madras 453] in which a Division Bench of that Court considered the scope and amplitude of the expression ‘misconception of fact’ occurring in Section 90 in the context of the offence of kidnapping under Section 361 IPC. The 2nd accused in that case obtained the consent of the girl’s guardian by falsely representing that the object of taking her was for participating in a festival. However, after the festival was over, the 2nd accused took her to a temple in another village and married her to the 1st accused against her will. The question arose whether the guardian gave consent under a misconception of fact. While holding that there was no consent, Sundara Ayyar J. speaking for the Bench observed thus:

*“We are of opinion that the expression ‘under a misconception of fact’ is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act illustration (d) that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married. In considering a similar statute, it was held in England in R. v. Hopkins 1842, Car & M 17, 254 that a consent obtained by fraud would not be sufficient to justify the taking of a minor. See also Halsbury’s Laws of England, Volume 9, page 623. In Stephen’s Digest of the Criminal Law of England (sixth edition, page 217), the learned author says with reference to the law relating to “abduction of girls under sixteen” “thus .. If the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person.” .. Although in cases of contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of Section 90, IPC is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence.”*

This decision is an authority for the proposition that a misrepresentation as regards the intention of the person seeking consent, i.e. the accused, could give rise to the misconception of fact. This view of the Madras High Court was accepted by a Division Bench of Bombay High Court in Purshottam Mahadev vs. State of Bombay [AIR 1963 Bombay 74]. Applying that principle to a case arising under Section 375, consent given pursuant to a false representation that the accused intends to marry, could be regarded as consent given under misconception of fact. On the specific question whether the consent obtained on the basis of promise to marry which was not acted upon, could be regarded as consent for the purpose of Section 375 IPC, we have the decision of Division Bench of Calcutta High Court in Jayanti Rani Panda vs. State of West Bengal [1984 Crl.L.J. 1535]. The relevant passage in this case has been cited in several other decisions. This is one of the cases referred to by this Court in Uday (supra) approvingly. Without going into the details of that case, the crux of the case can be discerned from the following summary given at para 7:

*“Here the allegation of the complainant is that the accused used to visit her house and proposed to marry her. She consented to have sexual intercourse with the accused on a belief that the accused would really marry her. But one thing that strikes us is . why should she keep it a secret from her parents if really she had belief in that promise. Assuming that she had believed the accused when he held out a promise, if he did at all, there is no evidence that at that time the accused had no intention of keeping that promise. It may be that subsequently when the girl conceived the accused might have felt otherwise. But even then the case in the petition of complainant is that the accused did not till then back out. Therefore it cannot be said that till then the accused had no intention of marrying the complainant even if he had held out any promise at all as alleged.”*

The discussion that follows the above passage is important and is extracted hereunder:

*“The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the*

*act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. S. 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her.” (emphasis supplied)*

The learned Judges referred to the decision of Chancery Court in *Edgomtgm vs. Fotz,airoce* (1885) 29 Ch.D 459 and observed thus:

*“This decision lays down that a misstatement of the intention of the defendant in doing a particular act may be a misstatement of fact, and if the plaintiff was misled by it, an action of deceit may be founded on it. The particular observation at p. 483 runs to the following effect: “There must be a misstatement of an existing fact.” Therefore, in order to amount to a misstatement of fact the existing state of things and a misstatement as to that becomes relevant. In the absence of such evidence Sec. 90 cannot be called in aid in support of the contention that the consent of the complainant was obtained on a misconception of fact.”*

After referring to the case law on the subject, it was observed in *Uday*, supra at paragraph 21:

*“It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.”*

The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without anything more will not give rise to ‘misconception of fact’ within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 Clause secondly. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of *Jayanti Rani Panda*, supra which was approvingly referred to in *Uday’s case*, (supra). The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end “unless the Court can be assured that from the very inception, the accused never really intended to marry her”. In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement

of the intention of the defendant in doing a particular act would tantamount to a misstatement of fact and an action of deceit can be founded on it. This is also the view taken by the Division Bench of the Madras High Court in Jaladu's case, supra (vide passage quoted supra). By making the solitary observation that "a false promise is not a fact within the meaning of the Code", it cannot be said that this Court has laid down the law differently. The observations following the aforesaid sentence are also equally important. The Court was cautious enough to add a qualification that no strait jacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in Uday's case as a whole, we do not understand the Court laying down a broad proposition that a promise to marry could never amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused's intention to marry cannot be ruled out.

Having discussed the legal aspects bearing on the interpretation of the term 'consent' with special reference to Section 90 IPC, we must now turn our attention to the factual aspects of the case related to consent. Is it a case of passive submission in the face of psychological pressure exerted or allurements made by the accused or was it a conscious decision on the part of the prosecutrix knowing fully the nature and consequences of the act she was asked to indulge in? Whether the tacit consent given by the prosecutrix was the result of a misconception created in her mind as to the intention of the accused to marry her? These are the questions which have to be answered on an analysis of the evidence. The last question raises the allied question, whether the promise to marry, if made by the accused, was false to his knowledge and belief from the very inception and it was never intended to be acted upon by him. As pointed out by this Court in Uday's case the burden is on the prosecution to prove that there was absence of consent. Of course, the position is different if the case is covered by Section 114-A of Evidence Act. Consent or absence of it could be gathered from the attendant circumstances. The previous or contemporaneous acts or the subsequent conduct can be legitimate guides. Whether on the basis of the evidence adduced by the prosecution, it is reasonably possible to infer the lack of consent on the part of the prosecutrix is the ultimate point to be decided.

A close scrutiny of evidence of the prosecutrix PW12 is what is called for, there being no other evidence in the case which could throw light on the point at issue. First, we must exclude from consideration that part of her version which accuses the appellant of forcible sexual indulgence on the first occasion. We have already discussed this aspect and rejected her version as unreliable. Therefore, we have to address ourselves to the twin questions (1) whether there was voluntary participation in the sexual act quite mindful and conscious of what she was doing and its possible consequences and (2) whether the victim girl was misled by the false promise of the accused to marry her and therefore agreed to have sexual contact with him. In a way, these two aspects overlap and are interconnected. Coming to the first question, it is not easy to find a dividing line between submission and consent - a distinction which was pointed out by Coleridge J., reiterated by Tekchand J. in the Punjab decision and further reiterated by this Court in the two decisions referred to supra, except in the situation contemplated by clause fifthly of Section 375. Yet, the evidence has to be carefully scanned. It is fairly clear from the evidence of the victim PW12 that the predominant reason which weighed with her in agreeing for sexual intimacy with the accused was the hope generated in her about the prospect of marriage with the accused. That she came to the decision to have a sexual affair only after being convinced that the accused would marry her, is quite clear from her evidence which is in tune with her earliest version in the first information report. There is nothing in her evidence to demonstrate that without any scope for deliberation, she succumbed to the psychological pressure exerted or allurements made by the accused in a weak moment. Nor does her evidence indicate that she was incapable of understanding the nature and implications of the act which she consented to. On the other hand, the scrutiny of evidence of PW12 gives a

contra indication. According to PW12, she did not like accused making passionate gestures and therefore, she went to the house of the accused and made a complaint to his 'Bhabhi'. Though she promised to restrain him, the accused continued to do so. Her further version is that she was not willing to marry the accused; even then the accused used to come to the courtyard of her house many a time and it was within the knowledge of her parents and brother that the accused used to talk to her for hours. She used to accompany him whenever he wanted. Another statement of significance is that she tried to resist the talk of marriage by telling the accused that marriage was not possible because they belonged to different castes. However, she agreed to marry him after she was raped and under the impression that he would marry, she did not complain to anybody. These statements do indicate that she was fully aware of the moral quality of the act and the inherent risk involved and that she considered the pros and cons of the act. The prospect of the marriage proposal not materializing had also entered her mind. Thus, her own evidence reveals that she took a conscious decision after active application of mind to the things that were happening. Incidentally, we may point out that the awareness of the prosecutrix that the marriage may not take place at all in view of the caste barrier was an important factor that weighed with the learned Judges in Uday's case in holding that her participation in the sexual act was voluntary and deliberate.

The remaining question is whether on the basis of the evidence on record, is it reasonably possible to hold that the accused with the fraudulent intention of inducing her to sexual intercourse, made a false promise to marry? We have no doubt that the accused did hold out the promise to marry her and that was the predominant reason for the victim girl to agree to the sexual intimacy with him. PW12 was also too keen to marry him as she said so specifically. But we find no evidence which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. No circumstances emerging from the prosecution evidence establish this fact. On the other hand, the statement of PW-12 that 'later on', the accused became ready to marry her but his father and others took him away from the village would indicate that the accused might have been prompted by a genuine intention to marry which did not materialize on account of the pressure exerted by his family elders. It seems to be a case of breach of promise to marry rather than a case of false promise to marry. On this aspect also, the observations of this Court in Uday's case at paragraph 24 comes to the aid of the appellant.

We reach the ultimate conclusion that the findings of the trial court as affirmed by the High Court are either perverse or vitiated by non-consideration of material evidence and relevant factors emerging from the prosecution evidence. We cannot, therefore, sustain the conviction.

In the result, the conviction and sentence is set aside and the appeal is allowed.

With this verdict, the appellant, no doubt extricates himself from the clutches of the penal law by getting the benefit of doubt on charge levelled against him. But, we cannot ignore the reprehensible conduct of the appellant, who by promising to marry the victim woman, persuaded her to have sexual relations and caused pregnancy. The act of the accused left behind her a trail of misery, ignominy and trauma. The only solace is that she married subsequently. We are informed that the female child born out of the illicit relationship is now living with her married mother and she is about 14 year old now. Though there is no evidence to establish beyond reasonable doubt that the appellant made a false or fraudulent promise to marry, there can be no denial of the fact that the appellant did commit breach of the promise to marry, for which the accused is prima facie accountable for damages under civil law. When we apprised the appellant's counsel of our prima facie view point on this aspect and elicited his response on passing a suitable order in exercise of power vested in

this Court under Article 142 of the Constitution, the learned counsel took time to get instructions. We are now informed that the appellant is prepared to pay a sum of Rs.50,000 by way of monetary compensation irrespective of acquittal. Though the said amount is not an adequate compensation, we are not inclined to call upon the appellant to pay more for more than one reason: firstly, the appellant has been in jail for about two years by now; secondly, we are informed that the accused belongs to a backward class and his family is not affluent though they have some agricultural lands; lastly, the incident took place about 15 years back and in the supervening period, the prosecutrix as well as the appellant married and we are told that he has two children. In these circumstances, we accept the offer of the appellant. The appellant's counsel has brought a Demand Draft for Rs.50,000 drawn in favour of the Chief Judicial Magistrate, Sahibganj. The Draft is handed over just now to the Court Officer. The concerned Registrar of this Court shall send the Draft to the C.J.M., Sahibganj for being credited to his account in the first instance. The C.J.M. shall take immediate steps to summon the prosecutrix whose name and address shall be furnished by the counsel for the appellant in the course of the day to the Registrar of this Court. Out of the amount of Rs.50,000, a sum of Rs.10,000 shall be paid over to the prosecutrix in cash if she makes a request and the remaining amount of Rs.40,000 shall be kept in a fixed deposit in a Bank in the name of the minor girl namely Miss Sangeeta Kumari with the prosecutrix as her guardian. The accrued interest shall be paid to the prosecutrix once in two years. The amount of Rs. 40,000/- with remaining interest thereon shall be disbursed to the girl after she attains the majority by getting an account opened in a Bank in her name. However, for the purpose of meeting the imminent needs of the minor girl, the C.J.M. can permit the amount to be paid over to the guardian (prosecutrix) either partly or in whole depending on the genuine and reasonable requirements concerning the maintenance of the child. The C.J.M. shall submit a report to the Registrar of this Court on the action taken in this regard within two months. A translated copy of the part of the judgment starting from page 37 shall be furnished to the prosecutrix by the CJM. The CJM may appoint a counsel under the legal aid scheme to assist the prosecutrix and the girl whenever necessary in connection with the implementation of this order. Accordingly, the order is passed in the interests of justice in exercise of powers vested in this Court under Article 142 of the Constitution.

□□□

**State of Madhya Pradesh v. Balu**

**(2005) 1 SCC 108**

Appeal (crl.) 1273 of 2004

(Arising out of S.L.P. (Crl) No. 2151 of 2004)

*State of Madhya Pradesh. ... Appellant(s)*

*versus*

*Balu ... Respondent(s)*

Decided on: **November 05, 2004**

Bench : **Hon'ble Mr. Justice N. Santosh Hegde** and **Hon'ble Mr. Justice S.B. Sinha**

**J U D G M E N T**

Judgement Delivered by **Hon'ble Mr. Justice N. Santosh Hegde:**

Heard learned counsel for the parties.

Leave granted.

The State of Madhya Pradesh has preferred this appeal for enhancement of sentence awarded by the High Court of Judicature at Madhya Pradesh in Criminal No. 952 of 1990 dated 7th of August, 2003.

The learned Sessions Judge who tried the sessions case No. 36 of 1989 in which the respondent herein was accused of having committed rape of one Kusumbai, having found the accused guilty and after hearing the accused on the question of sentence convicted the respondent for an offence punishable under Section 376 of IPC and awarded a sentence of 7 years rigorous imprisonment and fine of Rs. 1,000/- and in default to undergo further sentence of rigorous imprisonment for a period of one year.

In an appeal filed against the said conviction and sentence the High Court by the impugned order while confirming the conviction reduced the sentence of imprisonment to a period already undergone which on the date of the judgment was about 10 months.

It is the prosecution case that, on 15th of June, 1988 at about 8.00 o'clock in the morning in the village of Dhadhari the respondent herein committed rape on Kusumbai who according to the prosecution was a minor. A complaint in regard to this incident was lodged with the Police Station, Civil Lines, Chhatarpur, on the very same day, which was registered as Crime No. 63/88 under Section 376 of the IPC. The victim - PW 2 was examined by PW 6-Dr. Indira Gupta, who opined that the victim was subjected to sexual intercourse within a period of 24 hours before her examination. PW 6 also recorded reasons for said conclusion. PW 2-the victim in her statement before the court stated that on the date of incident when she was going to work, near a deserted field the appellant dragged her and committed rape on her consequent to which her cloth as well as

the respondent's underwear were blood stained. She stated that while committing rape the accused had put a towel in her mouth so that she could not shout.

PW 1-Dr. K.L. Wadi who examined the victim-PW2, with reference to her age, after perusing her X-ray opined that for reasons given by him in his evidence the victim appeared 13 years of age but he also stated, in reply to a question in cross examination, that it was possible that the said age may vary upto 3 years.

PW 4 - father of the victim and PW 3-mother of the victim have stated in their evidence that immediately after the incident the victim had complained to them, therefore, they proceeded to the Police Station with the victim and lodged a complaint with PW 5-the Investigating Officer who after recording the complaint took the blood stained cloths of the victim and sent the same for chemical examination and sent her also for medical examination. PW 5 also stated that he arrested the respondent-accused on the very next day and recovered his stained underwear which was also sent for chemical examination and which confirmed that it contained blood stains.

Though the defence challenged the age of the victim, the learned Sessions Judge after considering the material on record and other evidence held that the victim was less than 16 years of age at the time of incident. He also negated the contention that there was consent on the part of the victim and, hence, found the respondent guilty of the offence punishable under Section 376 and awarded the sentence as stated above.

In the appeal filed as against the said conviction and sentence, it is seen from the impugned judgment that the learned counsel appearing for the respondent did not challenge findings of conviction and addressed arguments only in regard to the sentence awarded on the ground that the same was excessive because the respondent at the time of incident was aged only 17 years and further being an illiterate villager coming from a rural area ought to be dealt with leniently. Accepting the said submission advanced on behalf of the respondent the High Court considered it to be a fit case for reducing the sentence to a period already undergone which as noticed above was about 10 months.

Shri R.P. Gupta, learned senior counsel appearing for the appellant- State contended that the High Court was wholly wrong and did not even take into consideration the mandatory requirement of law while reducing the sentence to a period of 10 months for an offence of rape that too committed on a minor girl. He submitted that the judgment in question suffers from lack of application of mind and the sentence awarded is wholly disproportionate not only to the mandate of Statute but also to the nature and gravity of the offence committed by the respondent.

Shri B.K. Pal, learned counsel appearing for the respondent strongly supported the judgment of the High Court by contending that the respondent-accused was aged only 17 years at the time of the incident and was an illiterate villager, hence a severe sentence as contemplated under Section 376 would be counter productive. He also submitted that the respondent-accused as well as the victim are since married and have their respective families, therefore, a compassionate view should be taken, more so in the background of the fact that the incident in question had occurred nearly sixteen years back. He alternatively submitted that the Trial Court has erred in coming to the conclusion that the prosecution has established the alleged offence beyond a reasonable doubt against the respondent-accused and that the High Court erred in not going into that question even though he did not dispute that his counter-part, did not challenge the finding on the conviction. He pointed out that from the material on record, it is seen that the victim was above 16 years of age and the fact that there was no injury on her body would indicate that the sexual intercourse if any was with

the consent of the victim, hence the respondent could not have been convicted for an offence under Section 376 of IPC. He also submitted that the Trial Court did not consider the explanation given by the accused in his statement recorded under Section 313 of Cr. PC wherein he had stated that there was an animosity between the family of the victim and the accused. He also submitted that the respondent was not subjected to any medical examination, therefore, it cannot be said that the respondent was responsible for having committed an offence punishable under Section 376 of the IPC.

From the impugned judgment of the High Court it is noticed that the learned counsel representing the respondent had not challenged conviction of the respondent before the High Court and had addressed arguments only in regard to quantum of sentence. Be that as it may, and without expressing any opinion on the applicability of Section 377 (3) of the Code of Criminal Procedure to proceedings under Article 136 of the Constitution but with a view to satisfy ourselves as to the correctness of the conviction recorded by the Trial Court against the respondent, we have perused the records in the light of the arguments addressed by the learned counsel for the respondent. From the evidence produced by the prosecution, it is clear that the incident in question occurred on 15th of June, 1988 and a complaint in this regard was lodged promptly with the Police Station, Civil Lines, Chhatarpur on the very same day and the victim PW2 was sent for medical examination on the same day. PW 6- the Doctor who examined the victim opined that victim was subjected to sexual intercourse within a period of 24 hours before her examination. The said Doctor has also recorded reasons for such conclusion. PW 1- Dr. K.L. Wadi who examined the victim with reference to her age after perusing her X-rays opined that the victim PW 2 appeared to be 13 years of age but he in the cross examination did say that his opinion might vary upto 3 years. Taking advantage of this possible variation an argument was addressed on behalf of the respondent that the victim was above 13 years of age. The Trial Court, in our opinion, rightly rejected this contention of the respondent herein. The prosecution during the course of investigation had seized the clothes worn by the victim as well as the underwear worn by the respondent which also on examination by the Serologist was found to contain blood which also supported the prosecution case that the respondent had sexual intercourse with the victim. PW 2 who knew the respondent prior to the incident had no difficulty in identifying the respondent as the person who committed rape on her, also stated that the respondent had covered her mouth with a towel to prevent her from shouting for help. Having perused the evidence like the trial court, we also find no reasons to disbelieve her evidence. Hence, the so called consent alternatively pleaded by the counsel for the respondent cannot be accepted. The argument of non-consideration of the statement of the accused recorded under Section 313 Cr.P.C. to the effect that there was animosity between the family of the victim and the accused is liable to be rejected because one of the defences of the accused is that there was consent on the part of the victim to have sex with him. These two stands being self-contradictory, cannot be accepted.

Thus, having considered the material on record and having heard the arguments addressed on behalf of the parties, we find no merit in the argument of the learned counsel for the respondent that the Trial Court erroneously convicted the respondent.

Having satisfied ourselves as to the correctness of the conviction of the appellant by the trial court, we will now consider the question of sentence. Section 376 IPC imposes an obligation on the court convicting the accused of that offence to impose a minimum sentence of 7 years. However, an exception is made for adequate and special reasons to be recorded in the judgment. Thus the Court can impose a sentence of less than 7 years but for good reasons.

By the impugned judgment the High Court assigned the following reasons for reducing the sentence imposed by the Sessions Court from 7 years to 10 months :

*“Then, at the time of commission of offence the appellant is stated to be aged 19 years whereas in the estimation of the Trial Court, he was 17 years of age. The appellant is illiterate villager coming from rural area, therefore, it appears a fit case to reduce the sentence of imprisonment to the period already undergone”.*

None of the reasons mentioned therein can be construed as either adequate or special reasons to reduce the minimum mandatory period of sentence for an offence punishable under Section 376 IPC. The High Court does not seem to have applied its mind to the gravity of the offence. Having found that the appellant has committed rape of a minor, to reduce the sentence on the ground that the accused was either 17 years or 19 years of age or that the accused is an illiterate villager coming from a rural area is neither adequate nor special reason contemplated under Section 376 IPC. We think the sentence of 10 months imprisonment for an offence punishable under Section 376 is ridiculously low and does not commensurate with the gravity of the crime. The sympathy shown by the High Court is wholly misplaced and is likely to send wrong signals. In these circumstances, we think the High Court has grossly erred from reducing the sentence imposed by the Sessions Court to a period of 10 months which the respondent had already undergone.

A 3-Judge Bench of this Court in the case of State of Karnataka v. Krishnappa (2000 4 SCC 75) while considering the question of reduction of sentence in a rape case observed thus :

*“The approach of the High Court in this case, to say the least, was most casual and inappropriate. There are no good reasons given by the High Court to reduce the sentence, let alone “special or adequate reasons”. The High Court exhibited lack of sensitivity towards the victim of rape and the society by reducing the substantive sentence in the established facts and circumstances of the case. The courts are expected to properly operate the sentencing system and to impose such sentence for a proved offence, which may serve as a deterrent for the commission of like offences by others.” (emphasis supplied).*

Herein, we may also usefully refer to the observations of this Court in the case of T.K. Gopal alias Gopi v. State of Karnataka (2000 6 SCC 168) wherein it was held :

*“The question of sentence in such cases was considered by Krishna Iyer, J. in Phul Singh v. State of Haryana (1979 4 SCC 413) in which he observed that sentencing efficacy in cases of lust-loaded criminality cannot be simplistically assumed by award of long incarceration, for, often that remedy aggravates the malady. He further observed that a hypersexed homo sapien cannot be rehabilitated by humiliating or harsh treatment. In that case it was found that the appellant was a young man of 22 years with no criminal antecedents save the offence of rape committed by him. The learned Judge thought that given correctional courses through meditational therapy and other measures, his erotic aberrations may wither away, particularly as the appellant had a reasonable prospect of shaping into a balanced person. But, this theory was not followed in later decisions as it was found that in spite of devices having been employed and adopted within the jail premises so as to reform the offenders, there was negligible improvement in the commission of crime. Crime, instead of declining, had increased and, today, it has assumed dangerous proportions. While one person is reformed and moves out of jail, another offender is born. Consequently, in two recent decisions, relating to the offence of rape, one rendered by the present Chief Justice of India and the other by brother Lahoti,*

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*the sentence was enhanced in State of Karnataka v. Krishnappa (2000 4 SCC 75) while in the other case, namely, State of Rajasthan v. N.K. (2000 5 SCC 30) the order of acquittal passed by the High Court was set aside and substituted by an order of conviction."*

In view of the above, we think it appropriate to set aside the impugned order of the High Court, allow this appeal and restore the sentence awarded by the trial court and direct the respondent to surrender to the authorities and serve out the sentence awarded to him by the trial court.

The appeal is allowed.

□□□

**Vishnu @Undrya v. State of Maharashtra**

(2006) 1 SCC 283

Appeal (crl.) 1112-1113 of 1999

*Vishnu @Undrya ... Appellant(s)*

*versus*

*State of Maharashtra ... Respondent(s)*

Decided on: **November 24, 2005**

Bench : **Hon'ble Mr. Justice H. K. Sema** and **Hon'ble Mr. Justice Tarun Chatterjee**

**J U D G M E N T**

Judgement Delivered by **Hon'ble Mr. Justice H. K. Sema**:

The sole appellant was put to trial under Section 376/366 IPC. He was convicted by the Trial Court and sentenced to two years R.I. on each count. He was also directed to pay a fine of Rs. 1000/- and in default further sentence of 3 months R.I. Aggrieved thereby, two appeals were preferred before the High Court. Appeal No. 147/84 was preferred by the accused against his conviction. Appeal No. 356/84 was preferred by the State for enhancement of the sentence. The High Court, by a common order, dismissed the appeal filed by the accused and allowed the appeal filed by the State. The sentence of the appellant was enhanced to 5 years R.I. and a fine of Rs. 1000/- and in default further R.I. for 3 months. Aggrieved thereby, the present appeals have been filed by special leave. The factual matrix may be noted briefly:

The prosecutrix Kumari Pushpa at the relevant time was residing with her parents Pandurang PW-1 and Vimal PW-13 at Khar Danda, Mumbai. The accused was known to the prosecutrix as they were residing in the same locality. The accused was also a friend of the maternal uncle of the prosecutrix. She used to visit her maternal uncle's house where she used to meet the accused. Pandurang, father of the prosecutrix was admitted at K.E.M. Hospital for treatment of his eyes. The prosecutrix used to take food and tea to the hospital for her father.

On 10th July, 1980, the prosecutrix had gone to the hospital at about 11.00 A.M. carrying food and tea for her father. She left the hospital at about 3.30 P.M. While she was coming out of the gate of the K.E.M. hospital, the accused who was a taxi driver met her at the gate and inquired as to where she was going. The prosecutrix told the accused that she was on her way to her residence. The accused told her that he had his own taxi and he would drop her at her residence at Danda. Upon such offer, the prosecutrix got into the taxi. When the taxi came to the Linking Road Junction, the accused told her that his wife was admitted in Nanawati Hospital and he would go and see his wife in the hospital and thereafter he would drop her at her residence. The accused then took the taxi to a small hotel representing that it was Nanawati Hospital. The accused took her inside the room of the hotel, bolted the room from inside and committed rape on her by threatening that in case of her shouting, she would be finished. Both of them came out of the hotel room and the accused dropped her home at 5.45 P.M. in his own taxi.

The prosecutrix reached home bleeding profusely from her private parts. After half an hour, she became unconscious. Her mother Vimal PW-13 and her brother Eknath took her in a taxi to Bhabha Hospital. She was examined by Dr. Dilip Chaniary PW-12 of Bhabha Hospital. After she regained consciousness at about 10.00 P.M. she narrated the incident to her mother that she was raped at about 5 P.M. and told that she was bleeding from her vagina since 5.30 P.M.

PW-15, S.I. Bagal, who was attached to Bandra Police Station was intimated about the incident on telephone. PW-15, alongwith a Police Constable, reached Bhabha Hospital for inquiry. He contacted the prosecutrix in the ward. He also questioned her about the incident and recorded her statement. He also recorded the statements of her mother Vimal and brother Eknath. He further made inquiry about the age of the girl from the brother and mother of the prosecutrix. Thereafter, he went to the school where she studied last and collected the school leaving certificate from Khar Upper Municipal School on 11th July, 1980. PW-15 did not register any case presumably thinking that the age recorded in the school leaving certificate was more than 16 years and she was a consenting party to sex. He was of the view that there was not enough material to register a case. He also stated that he called the accused for further inquiry on 3-4 occasions but did not think it necessary to register the offence or to carry further investigations. The conduct of PW-15, S.I. Bagal has been commented upon and deprecated by both the Trial Court and the High Court, which we may refer at an appropriate stage, if need be. May be for any reason, best known to him, PW-15, S.I. Bagal did not register the offence, but we are shocked to note that in a grievous offence like rape being reported to the police, the concerned police officer did not register the case despite the fact that the prosecutrix had categorically stated that the accused had forcible sexual intercourse with her which no doubt would lead to the losing of confidence of the public in the police establishment.

When the matter stood thus, an unexpected development had taken place. PW-5, Kashinath, a friend of the father of the prosecutrix informed Pandurang (PW-1) in the K.E.M. Hospital about the incident. He was shocked to hear the same and after confirming the same from his wife Vimal and daughter Pushpa, against the medical advice, he got himself discharged from the hospital on 9th September, 1980 and made an application dated 23rd September, 1980 to the Commissioner of Police, copies of which were also sent to the Prime Minister of India and the Chief Minister of the State. After receiving the application dated 23rd September, 1980, the Commissioner of Police forwarded the papers to A.C.P. Rodrigues who took away the investigations from S.I. Bagal and directed PW-14, S.I. Parab to re-investigate the matter.

During the course of investigation, S.I. Parab recorded the statements of the witnesses including the prosecutrix and her parents and collected relevant documents. It is revealed from the documents collected by him that Pushpa's (prosecutrix) date of birth was 29th November, 1964 and she was below 16 years of age at the time of commission of offence on 10.7.1980. The accused was arrested on 3rd November, 1980 and during interrogation, the accused took them to the Marwadi hotel at Juhu where the prosecutrix was taken by him. The panchanama was drawn vide Exh. 7. After close of the investigation, a prima facie case was established and a chargesheet against the accused under Sections 366/376 IPC and Section 57 of the Bombay Children Act was filed before the Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Bombay. Thereafter, the case was committed to Sessions. Before the Sessions Court, the prosecution examined as many as 14 witnesses and led documentary evidence with regard to the establishment of the age of the prosecutrix and after the conclusion of the trial, the accused was convicted and sentenced as stated above. We have heard Mr. U. U. Lalit, learned senior counsel for the appellant and Mr. Sushil Karanjkar, learned counsel for the respondent at length.

Before us the learned Senior counsel for the appellant strenuously urged that there are two date of births of the prosecutrix, one 29.11.1964 (recorded in the date of birth register of the Bombay Greater Municipal Corporation and register of Kashibai Hospital, Santa Cruz, Bombay, where Pushpa was born); and second 29.6.1963 (the date of birth recorded in the school leaving certificate of Khar Upper Municipal School) which have created a doubt and are capable of two opinions one in favour of the accused and the other against the accused; the one in favour of the accused should be accepted and the accused be acquitted by giving him the benefit of doubt. He further contended that since the sexual intercourse is consensual, therefore, unless it is established that the prosecutrix is below the age of 16 years, the accused is not liable to be punished in view of the definition of `rape` under Section 375 of IPC namely, clause sixthly. This submission deserves outright rejection.

The question whether the date of birth of the prosecutrix is 29th November, 1964 or 29th June, 1963 is no more in controversy. The date of birth of the prosecutrix, as of 29.11.1964, has been recorded concurrently by both the Trial Court and the High Court on consideration of the evidence of PW-1, Pandurang, father of the prosecutrix and PW-13, Vimal, mother of the prosecutrix, corroborated by the age of the prosecutrix recorded in the date of birth register of Greater Bombay Municipal Corporation and the register of Kashibai Hospital, Santa Cruz, where the prosecutrix was born. The evidence of PW-1 and PW-13, father and mother of the prosecutrix supported by contemporaneous documents/registers produced by the prosecution like date of birth register in Bombay Municipal and the date of birth register in the hospital where the prosecutrix was born and the evidence of the doctor clearly establish that the prosecutrix was born on 29.11.1964. Therefore, this question need not detain us any longer in view of the observations of this Court in the case of *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat AIR 1983 Supreme Court 753*, this Court held at para 5 page SC-755:

*“A concurrent finding of fact cannot be reopened in an appeal by special leave unless it is established: (1) that the finding is based on no evidence or (2) that the finding is perverse, it being such as no reasonable person could have arrived at even if the evidence was taken at its face value or (3) the finding is based and built on inadmissible evidence, which evidence, if excluded from vision, would negate the prosecution case or substantially discredit or impair it or (4) some vital piece of evidence which would tilt the balance in favour of the convict has been overlooked, disregarded, or wrongly discarded.”*

The present is not a case of such a nature which would warrant our interference. That apart, what was recorded by the High Court is worthy to be noted. In paragraph 13, the High Court has noted as under: “At the outset, it is required to be noted that the finding recorded by the trial court that Pushpa was less than 16 years of age on the date of the commission of the offence is not at all challenged by Mr. Samant.”

Noticing the aforesaid observation of the High Court, this Court while issuing notice on 19.7.99, noted as under:

*“Learned counsel for the petitioner contends that even though the counsel for the petitioner in the High Court did not challenge the age shown in the Birth Register, there are materials for indicating that the said date cannot be accepted as a correct one. He invited our attention to the date of birth shown in the School Leaving Certificate. According to the counsel if that is to be given credence the prosecutrix would be far above the age of 16 years on the date of occurrence. Question of consent*

*will very much depend upon the exact date of birth of the prosecutrix. In the light of this we feel it necessary to examine the record.” (emphasis supplied)*

It is because of that observation we allowed the learned counsel for the appellant to make submissions on the question of date of birth. We have also perused the entire records.

*The school certificate which has been relied upon by the accused is marked Exh. 37, the translated copy of which reads: “Khar-Danda Higher Secondary Marathi School Birth date of ex-student of said school Pushpala Pandurang Satrange, as per school Register is twenty ninth June, Nineteen Sixty-three 29.6.1963.*

*Submitted dt. 11.7.80.*

*Sd/-  
For Principal Khar Danda Higher Secondary Marathi School.”*

On a bare perusal of the certificate, it is noticed that it is not an authenticated copy and no one has been examined to prove the age of the prosecutrix recorded in the school certificate. PW-1, Pandurang is the father of the prosecutrix. He has stated that his daughter Puspha (prosecutrix) was born on 29.11.1964. He has also stated that Pushpa was born at Kashibai Hospital, Santa Cruz, Bombay. This witness was subjected to lengthy cross-examination but his statement that the prosecutrix was born on 29.11.1964 remained unimpeached. In fact, in the cross-examination, this witness clarified that the date of birth given in the school was incorrect and he further clarified that the correct date of birth of Pushpa is 29.11.1964. It is a common knowledge that very often parents furnish incorrect date of birth to the school authorities to make up the age in order to secure admission for their children. Therefore, we do not see any infirmity in the statement of the witness, who is the father of the prosecutrix, stating that the prosecutrix was born on 29.11.1964. PW-13, Vimal is the mother of the prosecutrix. She has also stated that her daughter, Pushpa (prosecutrix) was born in Kashibai Hospital, Santa Cruz, Bombay on 29.11.1964. To prove this, the prosecution has examined Dr. Shashikant Awasare, who is one of the proprietors of Dr. Kashibai Nursing Home, Santacruz (West), Mumbai. He has produced the registers for the year 1964. He has also produced the entry at Sr. No. 293, Exh. 18. The entry shows that Vimal PW.13 gave birth to a female child on 29th November, 1964. The prosecution has also produced a Certificate of Birth Registry of Municipal Corporation of Greater Bombay which shows the registration of a female child of Pandurang PW.1 and Vimal PW-13 and the date of birth is shown as 29.11.1964. To prove this the prosecution has produced on record the birth register Book No. 24 of Municipal Corporation of Greater Bombay showing entries from 4th November, 1964 to 5th February, 1965. The entry at Sr. No. 542 dated 16th January, 1965 is in respect of the birth of the female child to Vimal and the birth date is shown as 29th November, 1964. These two unimpeachable documents clearly corroborate the statements of PW.1 and PW.13 in all material particulars that the prosecutrix was born on 29th November, 1964. Men may lie but the documents do not. These two unimpeachable documents clearly establish the fact that PW.4, Pushpa was born on 29th November, 1964. Therefore, she was below 16 years of age on 10.7.1980 and her consent, if any, is immaterial under clause sixthly of the definition of ‘rape’ under Section 375 IPC.

Mr. Lalit referred us to the evidence of Dr. Bhimrao PW-10. Dr. Bhimrao was the medical officer, Police Hospital Nagpada, before whom the prosecutrix was produced on 3.11.80 for medical examination. According to him, she had fourteen teeth (7/7) in upper jaw and thirteen teeth in lower jaw. The doctor opined, among

others, that her hymen showed old healed tears at 3-9 O'clock position. For the determination of the age of the prosecutrix, PW-10. - Dr. Bhimrao has stated as under:

*"I x-rayed for ossification test. I took her x-rays of wrist, elbows and shoulder joint. Elbow joint is united which unite at the age of 13/14 years. The wrist joint is united which unites at the age of 16/17 yrs. The shoulder joint is united which unites at the age of 18 years. From physical findings and ossification test and secondary sex characteristics I am of the opinion that the age of the girl Pushpa was 18-19 years with error of margin 6 months on either side. From the finding of internal examination of external genitals I am of the opinion that the said girl was subjected to sexual intercourse. Notes of examination prepared by me. It bears my signature and also of Dr. Gawane."*

It is urged before us by Mr. Lalit that the determination of the age of the prosecutrix by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of age should be accepted. We are unable to accept this contention for the reasons that the expert medical evidence is not binding on the ocular evidence. The opinion of the medical officer is to assist the court as he is not a witness of fact and the evidence given by the medical officer is really of an advisory character and not binding on the witness of fact. In the case of Madan Gopal Kakkad v. Naval Dubey and Anr. (1992) 3 SCC 204 this Court has considered a similar question and pointed out in paragraph 34 at page SCC 221 as under:

*"34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court."*

We are of the opinion that this contention of the counsel for the appellant will be of no assistance in the face of evidence of fact from the mouth of PW-1 father and PW-13 mother, well corroborated by the register of the date of birth of Bombay Greater Municipal Corporation and the evidence of Dr. Shashikant Awasare, who is one of the proprietors of Dr. Kashibai Nursing Home, Santa Cruz (West), Mumbai, produced by him which shows that PW-4 Pushpa was born on 29.11.64. In the case of determination of date of birth of the child, the best evidence is of the father and the mother. In the present case, the father and the mother PW-1 and PW-13 categorically stated that PW-4 the prosecutrix was born on 29.11.64, which is supported by the unimpeachable documents, as referred to above in all material particulars. These are the statements of facts. If the statements of facts are pitted against the so called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. Even as per the doctor's opinion in the ossification test for determination of age, the age varies. In the present case, therefore, the ossification test cannot form the basis for determination of the age of the prosecutrix on the face of witness of facts tendered by PW-1 and PW-13, supported by unimpeachable documents. Normally, the age recorded in the school certificate is considered to be the correct determination of age provided the parents furnish the correct age of the ward at the time of admission and it is authenticated. In the present case, as already noted, the parents had admitted to have given an incorrect date of birth of their daughter, presumably with a view to make up the age to secure admission in the school. Apart from this, as noticed earlier, the school certificate collected by PW-

15 S.I. Bagal was not an authenticated document. No body was produced to prove the date of birth recorded in the school certificate. The date of birth recorded in the school certificate as 29.6.63 is, therefore, belied by the unimpeachable evidence of PWs.- 1 & 13 and contemporaneous documents like date of birth register of Greater Bombay Municipal Corporation and the register of the Nursing Home where the prosecutrix was born and proved by Dr. Shashikant Awasare, as noted above.

Besides aforesaid, looking into the statement of PW-4 Pushpa (prosecutrix), we are clearly of the view that the prosecutrix had been ravished sexually by force and against her wishes. This is what the prosecutrix stated before the Court:

*"I know accused Vishnu who is sitting in the dock. Accused is residing in our locality. Accused used to visit my maternal uncle's place. P.W.3 Tulsidas is my maternal uncle. Two or three months prior to the incident my father was admitted in K.E.M. Hospital for the treatment of his eyes. I used to go to see my father at K.E.M. Hospital. I used to go to serve food and tea to my father at hospital. On 10/7/80 I reached the hospital at about 11 a.m. I served my father food and tea and I left hospital at about 3.30 p.m. Then I came to the gate of K.E.M. Hospital. Accused met me at gate. Accused asked me to where I was going. I told him I was going home. Then accused represented to me that he had got his own taxi and he also further represented that he would leave me at my residence at Danda. Then I sat with him in his taxi. We both were alone in the taxi. Accused was driving the taxi. We came to Linking Road Junction that time he was taking the taxi towards other side of Danda. I told him I was getting late then he represented to me that as his wife (my aunty) was in Nanawati Hospital, he would see her and drop me at my residence. I do not know the name of the wife of the accused. I refused to accompany him in the hospital, he told me that within 5 minutes he would leave me at my residence. I requested him to first drop me at Khar Danda. Accused drove taxi towards Juhu side.*

*Accused stopped the taxi near on chawl and represented to me that it was Nanawati Hospital. I also felt that it was hospital so I got down. Then he took me in one room. He closed the door of that room. He threatened me to finish if I shout. Then he made me lie down on the cot. He removed my skirt and underwear and had forcible sexual intercourse with me. He put his private part in my private part forcibly. He had a sexual intercourse with me against my consent. Then we came out of that hotel from that room. Then he dropped me at my residence at about 5.45 p.m. in his taxi."*

This witness was subjected to lengthy cross-examination. The trend of the entire cross-examination is on the line of consensual sex, which has been denied by the prosecutrix.

The accused in Section 313 Cr.P.C. statement has completely denied that he had any sexual intercourse with the prosecutrix. Question No. 19 (page 154 of original record) was put to him about the statement of the prosecutrix regarding forcible intercourse with her on the fateful day, to which he replied, "This is false". Question No. 64 (page 167 of original record) was put to him as to whether he wished to say anything more in his defence, to which he replied, "I am innocent and falsely involved in this case." How he was falsely implicated has not been explained. The statement of the prosecutrix, in our view, is quite natural, inspires confidence and merits acceptance. In the traditional non-permissive bounds of society of India, no girl or woman of self respect and dignity would depose falsely implicating somebody of ravishing her chastity by sacrificing and jeopardizing her future prospect of getting married with suitable match. Not only she would be sacrificing her future prospect of getting married and having family life, but also would invite the wrath

of being ostracized and outcast from the society she belongs to and also from her family circle. From the statement of the prosecutrix, it is revealed that the accused induced her to a hotel by creating an impression that his wife was admitted in the hospital and that he would see her first and then drop the prosecutrix at her residence whereas, in fact, she was not admitted in the hospital. On the pretext of going to Nanawati hospital, he took her to a hotel, took her inside a room, closed the door of the room, threatened her to finish her if she shouted and then forcibly ravished her sexually. In our view, a clear case of rape, as defined under Section 375 clause thirdly of IPC has been established against the accused. It is now a well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence.

We now say something about PW-15, S.I. Bagal, who refused to register an offence and on whom both the Trial Court and the High Court have commented, and in our view correctly. The Trial Court in paragraph 34 of the Judgment observed as under:

*“It is a pathetic situation, when the citizen is confronted with the dishonest police officer. I am constrained to observe that the investigation done by S.I. Bagal P.W.15, is not only suspicious but also dishonest and out and out in favour of the accused. I am making this observation with responsibility. I have scrutinized carefully the 3 statements recorded by S.I. Bagal they are very cryptic and favourable to the accused. He did not care to ascertain the correct age of the victim girl, in a kidnapping and rape case. He did not register an offence against the accused. I fail to understand as to what interrogation of the accused he has done. He has obtained the signature on the statement of P.W.4 Pushpa and Eknath and right hand thumb impression on the statement of Smt. Vimal for what reason, I do not understand, on three statements. At least he could have registered the offence for kidnapping after taking extract of birth from the school. If he wanted to ascertain the correct date from her father Pandurang and he was aware that P.W.1 Pandurang was in K.E.M. Hospital and he wanted to obtain Hospital record, but he never cared to visit K.E.M. Hospital and to record the statement of Pandurang. He was trying to shift the burden on the Senior P.I. Sharma. Merely, he had produced these three statements in a routine manner before P.I. Sharma, on the next day. There is no guarantee that he had faithfully recorded statements of all these three witnesses. The reading of the three statements clearly indicates that those are completely in favour of the accused. The entire conduct of S.I. Bagal in the investigation has a smell of suspicion and dishonesty.”*

The High Court also observed about the conduct of PW-15, S.I. Bagal as under:

*“In the present case, the investigation conducted by S.I. Bagal was completely defective and casual. He has not even registered the offence. The learned trial Judge has observed that the attitude of S.I. Bagal was completely dishonest and partial to the accused. On closer scrutiny of the record, we are inclined to agree with the observations of the learned Judge. We have reason to believe that S.I. Bagal deliberately refused to register the offence in order to help the accused at the costs of the prosecutrix. But despite this deficiency, the prosecution has successfully proved the offence of rape. We have, therefore, no hesitation in confirming the conviction recorded by the trial court under Section 376 of the IPC.”*

In the facts and circumstances of this case, the comments made by the Trial Court and the High Court about the manner in which S.I. Bagal conducted the first investigation are well justified. In the premises aforesaid, we see no infirmity in the well-merited concurrent findings recorded by two courts below. The appeals are

*Crime Against Women*

dismissed. The appellant is on bail. His bail bonds and surety stand cancelled. He is directed to be taken into custody forthwith to serve out the remaining part of sentence. Compliance report should be sent to this Court within one month.

□□□

**Santhosh Moolya and Anr. v. State of Karnataka**

**AIR 2010 SC 2247**

Criminal Appeal No. 479 of 2009

*Santhosh Moolya and Anr. ...Appellant(s)*

*versus*

*State of Karnataka ...Respondent(s)*

Decided on: **April 26, 2010**

Bench : **Hon'ble Mr. Justice P. Sathasivam** and **Hon'ble Mr. Justice R. M. Lodha**

**J U D G M E N T**

Judgement Delivered by **Hon'ble Mr. Justice P. Sathasivam:**

- 1) This appeal is filed against the final judgment and order dated 13.03.2008 passed by the High Court of Karnataka at Bangalore in Criminal Appeal No. 1498 of 2007 whereby the High Court dismissed the appeal filed by the appellants accused affirming the conviction and sentence passed by the Additional District and Sessions Judge, Dakshina Kannada, Mangalore dated 1/3.9.2007 in S.C. No. 13 of 2005.
- 2) **Background facts in a nutshell are as under:**

On 02.06.2004, two sisters (both victims of rape), who were working in the quarry of one Subhash Jain- PW-4, after completing their work, were waiting for the bus near Sampige of Puttige Village by the side of the road to go to their residence in Badaga Mijaru Village, Ashwathapura, Santhakatte. At about 6.00 p.m., the appellants came there in an autorickshaw which was driven by Santhosh Moolya (A-1) and stopped the auto in front of the victims asking them to get into the auto as they were also going towards Ashwathapura side. Surendra Gowda (A-2) was already sitting in the auto. Both the sisters sat by his side. It was raining at that time. After some time, leaving the main road, the appellant moved the auto towards a kutchra road. Both the victims asked them as to where the auto was being taken. By that time, the accused stopped the auto at a lonely place and pulled both the victims out of the auto and after covering their mouth with hands, threatened to kill them if they gave rise to any shouting. Thereafter, both the victims were made to lie on the ground and their clothes were removed. Santhosh Moolya, A-1 raped the elder sister and Surendra Gowda, A-2 raped the younger sister. While leaving the place, both the accused threatened the victims not to inform any one about the incident and also allow them to do the similar act in future failing which they would be killed. After sometime, the victims managed to get up and put on their clothes and walked towards their house and informed the incident to their mother (PW-14). On the next day, they informed the incident to one Nonayya Gowda, PW-5 a worker of the quarry, who, in turn, informed Subhash Jain (PW-4), who told them to file a complaint but they hesitate to file the complaint. On 14.07.2004, at about 4.30 p.m., Yamuna (PW-1) gave statement before the Sub-Inspector of Police, Moodbiri Police Station and that

was reduced to writing by Ithappa, P.S.I. PW- 13 and registered as Crime No. 62/2004 for the offence under Sections 376 & 506 read with Section 34 of I.P.C. C.P.I. of Mulki, who is PW-16, investigated the case. PW-16 sent the victims to Medical Officer, Moodgidri for medical examination and on the same day at about 10 p.m., the police arrested both the accused persons. On the next day, i.e. on 15.07.2004, PW-16 visited the scene of offence and prepared the Panchnama (Ex. P2) and recorded the statements and sent the accused for medical examination to the Government Hospital and thereafter, they were produced before J.M.F.C. Karkala. On the same day, PW-16 seized the clothes of the victims and the Auto. On 21.08.2004, PW-16 received certificate of two victims of sexual assault. PW-16 completed the investigation and filed the charge sheet on 05.09.2004. The III Addl. Civil Judge (Jr. Dn.) and J.M.F.C., Karkala on 07.02.2005 took cognizance of the offence punishable under Sections 376 and 506 read with 34 of I.P.C. and registered the case in C.C. No. 537 of 2004 and committed the same to the Sessions Court, Mangalore as the offence alleged against the accused are triable by the Court of Sessions. The prosecution examined 16 witnesses. The trial Judge, on 01/03.09.2007, passed an order convicting and sentencing both the accused to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.10,000/- and, in default, to suffer rigorous imprisonment for three months for offence punishable under Section 376 of I.P.C. and further held to undergo rigorous imprisonment for three months for offence punishable under Section 506(2) I.P.C. Aggrieved by the conviction and sentence passed by the trial Court, both the accused preferred an appeal before the High Court. The learned single Judge of the High Court, by order dated 13.03.2008, dismissed the appeal affirming the conviction and sentence passed by the trial Judge. Hence, the appellants have filed this appeal by way of special leave.

3) We have heard Mr. Vijay Kumar, learned amicus curiae appearing for the appellants-accused and Mr. Sanjay R. Hegde, learned counsel appearing for the State.

4) **Contentions:**

Learned amicus curiae, after taking us through the materials placed by the prosecution and the decision of the trial Judge as well as of the High Court, submitted that in view of inordinate delay in lodging complaint i.e. FIR was registered after 42 days of alleged incident, in the absence of proper explanation, the conviction and sentence cannot be sustained. He further submitted that in view of the contradiction in the evidence of PWs 1 and 2, it is not safe to rely on their testimony and convict the accused. Finally, he submitted that the evidence of doctors i.e., PWs 7 and 8 does not support the claim of PWs 1 and 2/alleged victims, in that event, it would not be proper to convict the accused under Section 376 IPC. On the other hand, learned counsel appearing for the State submitted that taking note of the evidence of victims PWs 1 and 2 and the acceptable explanation offered by them for the delay in lodging complaint as well as their family circumstances and of the fact that they received threat from the accused, they did not make a formal complaint immediately after the incident. According to him, inasmuch as the delay was properly explained by the prosecution, the courts below are justified in convicting and sentencing the accused for offence under Section 376. He further pointed out the alleged contradictions are rather negligible or minimal. He further pointed out that in view of the assertion of the victims PWs 1 and 2, the prosecution claim cannot be thrown out. According to him, since both the Courts have accepted the case of prosecution, there is no valid ground for interference by this Court.

5) **Discussion on merits:**

The victims are sisters and both of them explained how they suffered at the hands of the accused. PW 1 is the elder sister. In her evidence, she has deposed that on 02.06.2004 she and her younger sister PW 2 after completing their work were waiting near the bus stop at Sampige in order to go to their place at Ashwathapura. The second accused – A-2 came in an auto-rickshaw which was driven by A1. She explained that they know both the accused since they were also doing quarry work under their employer. According to PW 1, Santhosh Moolya – A-1 asked them to get into the auto because they were also going to their place i.e. Ashwathapura. Believing his statement, PW 1 and her sister PW 2 entered the autorickshaw and A-2 seated next to them. She further explained that after traveling sometime in the main road auto went off in a kutchra road and it was stopped after some distance. It was drizzling at that time. She further added that A-1 pulled her out of the auto and A-2 pulled her sister. Both of them were prevented from raising their voice since the accused covered their mouth and forced both of them to lie down on the ground. By threat, they made both PWs 1 and 2 to lie on the ground and removed their clothes and they were made naked. She narrated that thereafter, A1 had a forcible intercourse with her and A2 with her sister PW 2.

6) While narrating what had happened after forcible intercourse by A1 and A2, PW1 explained that both she and her sister tried to escape from the clutches of the two accused but they could not succeed since there was no one to help them and added to it both the accused threatened that if they inform the incident to anyone they would kill them. PW 1 further explained that she and her sister had injuries on their body and also in their private parts. Their clothes were torn and with great difficulty on reaching home, they informed their mother about the incident. In the same way, PW 2 also explained and narrated how she suffered and raped at the hands of A2.

7) It is further seen from the evidence of PWs 1 and 2 that on reaching their home, apart from informing their mother, they also informed about the incident to one Nonayya Gowda PW5 who, in turn, informed their owner Subhash Jain PW 4. PW 1 explained that though PW 4 asked them to make a complaint, because of the threat posed by A-1 and A-2 and out of fear they did not inform the incident to the police and after gaining confidence and courage, finally a complaint (Ex. P1) was lodged with the police on 14.07.2004. Though there was a delay of 42 days in lodging complaint to the police, PWs 1 and 2, in their evidence, explained that all their family members including themselves are uneducated, no male members in their family for their assistance and they settled in the present village to eke out their livelihood. Admittedly, on the date of the incident, they were working in quarry owned by PW 4 and while returning from their workplace by force A-1 and A-2 committed rape of PWs 1 and 2. The mother of PWs 1 and 2 was examined as PW 14. She also corroborated the assertion of PWs 1 and 2 about their illiteracy and fear due to the threat call of A1 and A2. In those circumstances, the evidence of PWs 1 and 2 and their complaint Ex.P1 cannot be rejected as unacceptable. In a case of rape, particularly, the victims are illiterate, uneducated, their statements have to be accepted in toto without further corroboration. In *State of Punjab vs. Gurmit Singh and Others*, (1996) 2 SCC 384 speaking for the Bench Dr. A.S. Anand, J. (as His Lordship then was) has observed thus:

*“... 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 discrepancies in the statement of the prosecutrix should not, unless the discrepancies 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. The evidence of a victim of sexual assault stands almost on a 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 occurrence, 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 lest 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. ... .."*

- 8) Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. [Vide Rajinder @ Raju vs. State of H.P., JT 2009 (9) SC 9]
- 9) In *Sohan Singh and Another vs. State of Bihar*, (2010) 1 SCC 68, this Court has observed as under:

*"When FIR by a Hindu lady is to be lodged with regard to commission of offence like rape, many questions would obviously crop up for consideration before one finally decides to lodge the FIR. It is difficult to appreciate the plight of the victim who has been criminally assaulted*

*in such a manner. Obviously, the prosecutrix must have also gone through great turmoil and only after giving it a serious thought, must have decided to lodge the FIR."*

- 10) From the evidence of PW 1, PW 2, owner of the quarry PW 4 and mother of the victim PW-14, we are satisfied that though there was a delay of 42 days in lodging the complaint, the same was properly explained by the victims and the other witnesses. In addition to the same, we have also noticed that except the victims, no male member is available in their family to help them. In fact they came to the village where the incident occurred to eke out their livelihood. Further, PWs 1 and 2 asserted that after committing rape A-1 and A-2 threatened that they would kill them if they inform anyone. All these material aspects were duly considered by the trial Court and accepted by the High Court. We concur with the same.
- 11) Coming to the discrepancies in the evidence of PWs 1 and 2, as rightly pointed out by the prosecution and accepted by both the Courts below, they are negligible in nature and it had not affected their grievance, hence we reject the said contention also.
- 12) It was argued that the doctors PWs 7 and 8 did not notice any injury on the private part of PWs 1 and 2. It is relevant to note that due to threat from A1 and A2, coupled with illiteracy and poverty, the two victims were not taken to the doctor immediately after the incident but they were taken after a month and 14 days. In such circumstances, as rightly observed by the trial Court and the High Court, it is unlikely that any sign of sexual intercourse will be feasible by examining the private part of the victims. Added to it, PW 1 happens to be a married woman and having children which indicates that she is accustomed to sexual intercourse and in view of the same, it would be difficult to expect the doctor, who examined after quite sometime, to indicate the sign of sexual intercourse. The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. As observed earlier, there is no reason to disbelieve the statement of the victims PWs 1 and 2. On the other hand, their oral testimony which is found to be cogent, reliable, convincing and trustworthy has to be accepted. Further, both the Courts have rightly accepted the statement of prosecutrix.
- 13) In the light of the above discussion, we are in agreement with the conclusion arrived at by the trial Court as well as the High Court. Consequently, we dismiss the appeal as devoid of any merit.

□□□

**Vijay @Chinee v. State of Madhya Pradesh**

**(2010) 8 SCC 191**

Criminal Appeal No. 660 of 2008

*Vijay @Chinee ...Appellant(s)*

*versus*

*State of Madhya Pradesh ...Respondent(s)*

Decided on: **July 27, 2010**

Bench : **Hon'ble Mr. Justice P. Sathasivam** and **Hon'ble Mr. Justice Dr. B. S. Chauhan**

**J U D G M E N T**

Judgement Delivered by **Hon'ble Mr. Justice Dr. B. S. Chauhan:**

1. This appeal has been preferred against the judgment and order dated 5.9.2006 passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 15/1991 by which it had affirmed the judgment of the Trial Court i.e. Additional Sessions Judge, Sihore, Camp Katni dated 14.12.1990 in Sessions Case No. 85/1989, wherein the appellant had been convicted under Section 376/34 of the Indian Penal Code, 1860 (hereinafter called as 'IPC') and sentenced to undergo 10 years' RI along with fine of Rs.500/-. In the event of default in payment of fine, the appellant would further undergo RI for three months. A part of the fine imposed on the appellant and his co-accused was directed to be paid to the prosecutrix Asha @ Gopi as compensation.
2. Facts and circumstances giving rise to this appeal are that on 6.12.1988, an FIR under Section 376/34 IPC was registered against the appellant and six others at Police Station Katni, District Jabalpur, on the information of one Asha @ Gopi that she had been subjected to gang rape by the appellant and six others at about 6.00 p.m. on the said date. The police after recording the FIR, sent the prosecutrix to the hospital at Katni for medical examination. The appellant was arrested on 7.12.1988 and subjected to medical tests along with the other accused on 8.12.1988. After the completion of the investigation, the police filed a charge sheet against the appellant and six others. As they denied the charges, refuted the prosecution story and pleaded innocence, all of them were put to trial.
3. The Trial Court after concluding the proceedings vide judgment and order dated 14.12.1990 convicted all the accused persons including the appellant herein for committing gang rape and sentenced each of them to 10 years' RI and fine of Rs.500/- each.
4. Aggrieved by the said judgment and order dated 14.12.1990 passed by the Sessions Court, the appellant and other accused preferred Appeal Nos. 15/1991, 3/1991, 1185/1990 and 1194/1990 before the High Court of Madhya Pradesh at Jabalpur. The High Court vide impugned judgment and order dated 5.9.2006 dismissed the appeal of the appellant and one other co-accused, Raju @

Ramakant. One accused, namely Anil, died during the pendency of the said appeal. The High Court acquitted the remaining four accused. Hence, this appeal by the appellant herein.

5. Shri Anip Sachthey, learned counsel appearing for the appellant has submitted that the prosecutrix was a major and it was a case of consent. He has further submitted that conviction cannot be based on the sole deposition of the prosecutrix. There is no other evidence to corroborate her version. The prosecutrix's statement suffers from material discrepancies. On the date of examination of the prosecutrix no physical injury was found on her person or on her private parts. The prosecutrix had given a most improbable and unacceptable version of events that the appellant continued to rape her for about two hours. Then one another accused raped her for about an hour. Also, in spite of the fact that the appellant and others had been arrested on the next date of the incident, the Investigating Officer did not conduct the Test Identification Parade. The prosecutrix was examined on the next day i.e. on 7.12.1988 by Dr. Rupa Lalwani, Medical Officer (PW-3), and the said Medical Officer referred her for a Radiological Test to determine her age, but the report of the said test has never been brought on record. Thus, an adverse inference is to be drawn against the prosecution. The appeal deserves to be allowed. The appellant had falsely been enroped in the crime.
6. On the other hand, Shri Siddhartha Dave along with Ms. Vibha Datta Makhija, learned counsel appearing for the State of M.P., vehemently opposed the appeal contending that the prosecutrix was a minor on the date of the incident. The non-production of the report of the Radiological test and not holding the Test Identification Parade would not discredit the investigation or the prosecution case. The non-existence of any injury on the person of the prosecutrix cannot be a ground to dis-believe her version. The prosecutrix had such a social background that she did not have any sense of time, duration etc. and, thus, she was not able to give a precise account of each activity of the incident. She had lost her father; and was an uneducated, rustic villager, who came from a very poor family. The discrepancies in the statement of the witnesses or the prosecutrix are such that the same are not sufficient to demolish the prosecution's case. In a rape case, an accused can be convicted on the sole testimony of the prosecutrix. The appeal lacks merit and is liable to dismissed.
7. We have considered the rival submissions made by learned counsel for the parties and perused the record. 8. Before we proceed to examine the impugned judgments of the courts below and facts of the case, it may be desirable to refer to the settled legal principles which have to be applied in the instant case.

## LEGAL ISSUES:

### Sole Evidence of Prosecutrix :

9. In State of Maharashtra Vs. Chandraprakash Kewalchand Jain AIR 1990 SC 658, this Court held that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Court observed as under :-

*"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 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 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.”

10. In State of U.P. Vs. Pappu @Yunus & Anr. AIR 2005 SC 1248, this Court held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion. Absence of injury on the prosecutrix may not be a factor that leads the court to absolve the accused. This Court further held that there can be conviction on the sole testimony of the prosecutrix and in case, the court is not satisfied with the version of the prosecutrix, it can seek other evidence, direct or circumstantial, by which it may get assurance of her testimony. The Court held as under :-

*“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 do.”*

11. In State of Punjab Vs. Gurmit Singh & Ors. AIR 1996 SC 1393, this Court held that in cases involving sexual harassment, molestation etc. the court is duty bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for

sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof.

The Court observed as under :-

*“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 or 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.....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 discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case... .. Seeking corroboration of her statement before replying upon the same as a rule, in such cases, amounts to adding insult to injury... .. 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 courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”*

12. In State of Orissa Vs. Thakara Besra & Anr. AIR 2002 SC 1963, this Court held that rape is not mere a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.
13. In State of Himachal Pradesh Vs. Raghubir Singh (1993) 2 SCC 622, this Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be

recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity.

14. A similar view has been reiterated by this Court in Wahid Khan Vs. State of Madhya Pradesh (2010) 2 SCC 9, placing reliance on earlier judgment in Rameshwar Vs. State of Rajasthan AIR 1952 SC 54.
15. Thus, the law that emerges on the issue is to the effect that statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.

#### **Test Identification Parade:**

16. Holding of the Test Identification Parade is not a substantive piece of evidence, yet it may be used for the purpose of corroboration; for believing that a person brought before the Court is the real person involved in the commission of the crime. However, the Test Identification Parade, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of the accused can be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant. (Vide State of H.P. Vs. Lekh Raj AIR 1999 SC 3916).
17. In Malkhan Singh Vs. State of M.P. AIR 2003 SC 2669, this Court has observed as under:

*“It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine.”*

18. In Mulla & Anr. Vs. State of Uttar Pradesh (2010) 3 SCC 508, this court (one of us, Hon'ble P. Sathasivam, J.) placed reliance on Matru@Girish Chandra Vs. The State of Uttar Pradesh AIR 1971 SC 1050; and Santokh Singh Vs. Izhar Hussain & Anr. AIR 1973 SC 2190, wherein it had been held that the Tests Identification Parades do not constitute substantive evidence. They are primarily meant for the purpose of providing the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines. The Test Identification Parade can only be used as corroboration of the statement in Court. The necessity for holding the Test Identification Parade can arise only when the accused persons are not previously known to the witnesses. The test is done to check the veracity of the witnesses. The court further observed as under :-

*“The evidence of test identification is admissible under Section 9 of the Indian Evidence Act. The Identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in Court. There is no provision in the Cr.P.C. entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in Court.”*

19. Thus, it is evident from the above, that the Test Identification is a part of the investigation and is very useful in a case where the accused are not known before hand to the witnesses. It is used only to corroborate the evidence recorded in the court. Therefore, it is not substantive evidence. The actual evidence is what is given by the witnesses in the court.

Discrepancies and inconsistencies in depositions of witnesses:

20. It is settled legal proposition 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.
21. In State of Rajasthan Vs. Om Prakash AIR 2007 SC 2257, while dealing with a similar issue, this Court held that

*“irrelevant details which do not in any way corrode the credibility of a witness cannot be levelled as omissions or contradictions.”*

22. In State of U.P. Vs. M.K. Anthony AIR 1985 SC 48, this Court laid down certain guidelines in this regard, which require to be followed by the courts in such cases. The Court observed as under :-

*“While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechanical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer.”*

23. In State Vs. Saravanan & Anr. AIR 2009 SC 152, while dealing with a similar issue, this Court observed as under :-

*“...while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. Further, on the general tenor of the evidence given by the witness, the trial court upon appreciation of evidence forms an opinion about the credibility thereof, in*

*the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of. Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, that itself would not prompt the court to reject the evidence on minor variations and discrepancies.”*

24. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting the evidence to separate 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 bound to occur in the statements of witnesses (vide *Sohrab & Anr. Vs. The State of M.P.* AIR 1972 SC 2020; *Bharwada Bhogini Bhai Hirji Bhai Vs. State of Gujarat* AIR 1983 SC 753; *Prithu @ Prithi Chand & Anr. Vs. State of Himachal Pradesh* (2009) 11 SCC 588; and *State of U.P. Vs. Santosh Kumar & Ors.* (2009) 9 SCC 626).
25. Thus, in view of the above, the law on the point can be summarised to be that the evidence of the witnesses must be read as a whole and the cases are to be considered in totality of the circumstances and while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, should not be taken into consideration as they cannot form grounds to reject the evidence as a whole.

### **Injury on the person of the Prosecutrix**

26. In the case of *Gurcharan Singh Vs. State of Haryana* AIR 1972 SC 2661, this Court has held that

*“the absence of injury or mark of violence on the private part on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on the part of the prosecutrix. Further absence of violence or stiff resistance in the present case may as well suggest helpless, surrender to the inevitable due to sheer timidity. In any event, her consent would not take the case out of the definition of rape”*

27. In *Devinder Singh & Ors. Vs. State of Himanchal Pradesh* AIR 2003 SC 3365, a similar issue was considered by this Court and the court took into consideration the relevant evidence wherein rape was alleged to have been committed by five persons. No injury was found on the body of the prosecutrix. There was no matting on the pubic hair with discharge and no injury was found on the genital areas. However, it was found that prosecutrix was used to sexual intercourse. This Court held that the fact that no injury was found on her body only goes to show that she did not put up resistance.

### **Determination of Age**

28. As per Modi's Medical Jurisprudence and Toxicology, 23rd Edn., the age of a person can be determined by examining the teeth (Dental Age), Height, Weight, General appearance (minor signs) i.e. secondary

sex characters, ossification of bones and producing the birth and death/school registers etc. However, for determining the controversy involved in the present case, only a few of them are relevant.

### **Teeth- (Dental - Age)**

29. So far as permanent teeth are concerned, eruption generally takes place between 6-8 years. The following table shows the average age of eruption of the permanent teeth :-

Central incisors - 6th to 8th year

Lateral incisors - 7th to 9th year

Canines - 11th to 12th year

Second Molars - 12th to 14th year

Third Molars or Wisdom Teeth - 17th to 25th year

In total, there are 32 teeth on full eruption of permanent teeth.

### **Secondary Sex Characters**

30. The growth of hair appears first on the pubis and then in the axillae (armpits). In the adolescent stage, the development of the pubic hair in both sexes follows the following stages :-

- a) One of the first signs of the beginning of puberty is chiefly on the base of penis or along labia, when there are few long slightly pigmented and curled or straight downy hair;
- b) The hair is coarser, darker and more curled, and spread sparsely over the junction of pubis;
- c) More or less like an adult, but only a smaller area is covered, no hair on the medial surface of thighs;

The development of the breasts in girls commences from 13 to 14 years of age; however, it is liable to be affected by loose habits and social environments. During adolescence, the hormone flux acts and the breasts develop through the following stages:

- i) Breasts and papilla are elevated as a small mound, and there is enlargement of areolar diameter.
- ii) More elevation and enlargement of breast and areola, but their contours are not separate.
- iii) Areola and papilla project over the level of the breast.
- iv) Adult stage – only the papilla projects and the areola merges with the general contour of the breast.

### **Evidence of Rustic/ illiterate villager**

31. In *Dimple Gupta (minor) Vs. Rajiv Gupta*, (2007) 10 SCC 30, this Court held that a person coming from altogether different background and having no education may not be able to give a precise account of the incident. However, that cannot be a ground to reject his testimony. The court observed that in a case like rape, “it is impossible to lay down with precision the chain of events, more particularly, when illiterate villagers with no sense of time are involved.”

A similar view has been re-iterated by this Court in *Virendra @ Buddhu & Anr. Vs. State of U.P.* (2008) 16 SCC 582.

32. The case requires to be considered in the light of the aforesaid settled legal propositions.

Shri Anip Sachthey, learned counsel for the appellant, submitted that the prosecutrix was a major on the date of incident and that it was a clear case of consent. The Trial Court as well as the High Court examined the issue involved herein very minutely. Dr. Rupa Lalwani (PW-3), who had examined the prosecutrix on 7.12.1988, has stated that in the examination she found that there were in all 28 teeth in both the jaws; her breast had developed a little; the armpit hairs were in its initial stage; but there were pubic hair present around her vagina. On the basis of this, she opined that at relevant time, prosecutrix was aged between 12 and 14 years. As the statement of Dr. Rupa Lalwani (PW-3) makes it clear that the prosecutrix Asha @ Gopi had very little developed breast and the growth of her armpit hair was at its initial/first stage, the Court believed that she was below 16 years of age. Undoubtedly, Asha @ Gopi, the prosecutrix had stated in her deposition that she was sent for a Radiological Test to Jabalpur and she could not explain as to why the report of the Radiological Test could not be produced before the Trial Court. In fact, the circumstances under which the report of the Radiological Test could not be produced before the Trial Court, would have been explained only by the Investigating Officer. Unfortunately, there is nothing on record to show that the defence had put any such question to the I.O. during his examination before the Trial Court. In our opinion, the I.O. was the only competent person to throw light on the issue of the non-production of the report of the Radiological Test and in the facts and circumstances of this case, no adverse inference can be drawn against the prosecution in this issue. More so, the prosecution had no control over prosecuting agency. Same remains the position for not holding the Test Identification Parade in this case.

33. Dr. Rupa Lalwani (PW-3) had stated that hymen of the prosecutrix was found completely torn and fresh blood was oozing out of it and she further opined that the vagina of a girl becomes loose even after one intercourse and two fingers can easily enter into her vagina. She had further opined that loosening of vagina and entering two fingers into vagina of a girl cannot give presumption that the girl was habituated to sexual intercourse.
34. Under Section 114-A of the Indian Evidence Act, 1872, which was inserted by way of amendment in the year 1988, there is a clear and specific provision that where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped, and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.
35. Asha @Gopi, the prosecutrix had been consistent throughout in her statement that intercourse was against her wishes and that there was no consent as she had forcibly been caught and threatened and thereafter, she had been subjected to gang rape. In view of the above, we are of the view that the Courts below reached the correct conclusion that the prosecutrix was a minor. Be that as it may, there is nothing on record to establish the consent of the prosecutrix in this case.
36. The medical examinations of the appellant and other accused were also conducted soon after their arrest on the next day and it was found that the appellant and others were fit and competent to perform sexual intercourse. There is nothing on record to contradict or disprove the statement of the

prosecutrix that the appellant and others took her behind the Railway School and when she cried out, one of the accused showed her a knife and in the meanwhile, accused Vijay, the appellant pressed her mouth and raped her. Thereafter, the other accused persons raped her turn by turn and all of them ran away when the police reached there.

37. Shri Sachthey, learned counsel for the appellant, would point out the discrepancies between the statement of the prosecutrix and the other evidence on record. In the Court, she stated that she had gone to work at a business place for sorting apples and when she went to answer the call of nature, the accused met her and took her near the school and raped her. This statement was inconsistent with her version in the FIR, wherein, it was mentioned that when she was going to get her chappals repaired, she was forcibly taken by the accused to the school and was raped. There was also a contradiction in her statement regarding the dress she was wearing at that time as at one stage, she had stated that she was wearing sari, but at another stage, she stated that she was wearing a frock and vest. Shri Sachthey further submitted that as per the prosecutrix, the appellant had sexual intercourse with her for two hours and one other accused had it for about one hour. Such a course is wholly unnatural and improbable and, therefore, the evidence given by the prosecutrix cannot be held to be reliable.
38. We have considered the contradictions, inconsistencies and discrepancies pointed out by Shri Anip Sachthey, however, they are immaterial for the reason that the Trial Court as well as the High Court have considered these aspects and came to the conclusion that none of those contradictions goes to the root of the case. Admittedly, the prosecutrix was at the place of the incident and the appellant and other accused had intercourse with her. Even if it is presumed that she was major, there is nothing on record to show that she had given her consent. There is nothing on record to show that she had some basic education or had a sense of time and place. Such improvements have to be ignored as they do not go to the root of the case. The Trial Court has recorded the following findings in this regard:
- “(1) Her father is not alive. All these facts clearly prove that she was uneducated, poor and helpless child labour and, therefore, minor contradictions only given by her are very natural. ... .. All depends upon the observance and memory of an individual.*
- (2) The level of understanding of the prosecutrix is very-very low. It appears that in fact she wants to clarify that invariably one may not believe or presume that her consent was there in the gang rape and perhaps therefore she tried to give such a statement... ..This clearly demonstrates that a testimony and understanding is of a very low level and on the same basis she has been stating about her age also.”*
39. The High Court has considered the discrepancies in her statement as to whether she was going to get her chappal repaired or was easing herself and came to the conclusion that such contradictions had no material bearing on the prosecution’s case as “the fact remains that at that time she was going through that area.”
40. There are concurrent findings of fact by both the courts below. The courts below have applied settled principles of law in the correct perspective which we have explained hereinabove.
41. We do not find any force in the submissions made by Shri Anip Sachthey, learned counsel appearing for the appellant, that the instant case was squarely covered by the judgment of this Court in Sunil Vs.

State of Haryana (2010) 1 SCC 742, wherein in a similar case, for non-production of the report of Radiological Test, an adverse inference was drawn against the prosecution and the appellant therein had been acquitted. In the said case, this Court had relied upon the judgment in Sukhwant Singh Vs. State of Punjab (1995) 3 SCC 367, wherein it has been held as under:

*“...failure to produce the expert opinion before the trial Court in such cases affects the creditworthiness of the prosecution case to a great extent.”*

42. The facts of the case are quite distinguishable. In the said case, the basic issue was merely as to whether the prosecutrix was a minor. The prosecutrix was examined by Dr. Sadhna Verma (PW-1), and found that her Secondary Sex Characters were well developed. She carried out a local examination and in her opinion, the prosecutrix was major. The report reads :

*“Labia majora was well developed. Pubic hair was present. Carunculae myrtiformes was present. Vagina admitting two fingers. Uterus was normal and retroverted, furnaces free. For her age verification, she was referred to dental surgeon and radiologist opinion.”*

43. The report of the Medical Officer in the said case was quite contrary. That was a case under Sections 363, 366-A and 376 IPC and in her statement under Section 164 of Code of Criminal Procedure, 1973, the prosecutrix had stated that she was in love with the appellant therein and she had always been a consenting party. This Court itself, after appreciating the statement of Dr. Sadhna Verma (PW1), came to the conclusion that the prosecutrix therein was major. Thus, it is evident that the ratio of the said judgment has no application in the instant case.
44. If we examine the whole case in the totality of the circumstances and consider that an illiterate rustic village girl having no sense/estimate/assessment of time and place, found herself apprehended by the appellant and his accomplices and forced to surrender under the threat to life, it is quite possible that she could not even raise hue and cry. She had no option except to surrender. It appears to be a case of non-resistance on the part of the prosecutrix because of fear and the conduct of the prosecutrix cannot be held to be unnatural.
45. There is no dispute regarding the place of occurrence and the incident that occurred. The defence could not establish that it was a case of consent. FIR had been lodged most promptly. Appellant and other accused were arrested on the next day. The prosecutrix as well as the appellant and other accused were medically examined on the next day. The appellant or any other accused was not known to the prosecutrix. No reason could be there for which the prosecutrix would have enroped them falsely. Definitely, it could not be a case of consent by the prosecutrix, even if it is assumed that she was major. The discrepancies in the statement of the prosecutrix have to be ignored as explained hereinbefore.
46. There is no material on record on the basis of which, this Court may take a different view or conclusion from the courts below. We do not find any force in this appeal, which is accordingly dismissed.

□□□

**Nipun Saxena and Anr. v.  
Union of India, Ministry of Home Affairs and Ors.**

**(2019) 2 SCC 703**

Writ Petition(s)(Civil) No(s).565/2012

With

W.P.(CrI.) No. 1/2013 (PIL-W), W.P.(C) No. 22/2013 (PIL-W), W.P.(C) No. 148/2013 (PIL-W),  
SLP(CrI.)...CRLMP No. 16041/2014 (II-A), W.P.(C) No. 568/2012 (PIL-W)

*Nipun Saxena and Anr. ...Appellant(s)*

*versus*

*Union of India, Ministry of Home Affairs and Ors. ...Respondent(s)*

Decided on: **December 11, 2018**

Bench : **Hon'ble Mr. Justice Madan B. Lokur** and **Hon'ble Mr. Justice Deepak Gupta**

**J U D G M E N T**

Judgement Delivered by **Hon'ble Mr. Justice Deepak Gupta**

Hon'ble Mr. Justice Deepak Gupta pronounced the judgment of the Bench comprising Hon'ble Mr. Justice Madan B. Lokur and His Lordship on the issue of interpretation of Section 23 of the POCSO Act, Section 3 of the Contempt of Courts Act and Section 228 A of IPC.

Delay condoned in SLP.

In terms of the signed reportable judgment, the following directions have been issued:

1. No person can print or publish in print, electronic, social media, etc. the name of the victim or even in a remote manner disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large.
2. In cases where the victim is dead or of unsound mind the name of the victim or her identity should not be disclosed even under the authorization of the next of the kin, unless circumstances justifying the disclosure of her identity exist, which shall be decided by the competent authority, which at present is the Sessions Judge.
3. FIRs relating to offences under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of IPC and offences under POCSO shall not be put in the public domain.
4. In case a victim files an appeal under Section 372 CrPC, it is not necessary for the victim to disclose his/her identity and the appeal shall be dealt with in the manner laid down by law.

5. The police officials should keep all the documents in which the name of the victim is disclosed, as far as possible, in a sealed cover and replace these documents by identical documents in which the name of the victim is removed in all records which may be scrutinised in the public domain.
6. All the authorities to which the name of the victim is disclosed by the investigating agency or the court are also duty bound to keep the name and identity of the victim secret and not disclose it in any manner except in the report which should only be sent in a sealed cover to the investigating agency or the court.
7. An application by the next of kin to authorise disclosure of identity of a dead victim or of a victim of unsound mind under Section 228A(2)(c) of IPC should be made only to the Sessions Judge concerned until the Government acts under Section 228A(1)(c) and lays down a criteria as per our directions for identifying such social welfare institutions or organisations.
8. In case of minor victims under POCSO, disclosure of their identity can only be permitted by the Special Court, if such disclosure is in the interest of the child.
9. All the States/Union Territories are requested to set up at least one 'one stop centre' in every district within one year from today.
44. A copy of this judgment be sent to the Registrar General of all the High Courts so that the same can be placed before the Chairpersons of the Juvenile Justice Committee of all the High Courts for issuance of appropriate orders and directions and also to ensure that sincere efforts are made to set up one stop centres in every district.
45. In view of the above, we dispose of these petitions as far as issues dealt with hereinabove are concerned."

□□□

**Ms. X v. The State of Jharkhand and Ors**

**(2021) 2 SCC 598**

Writ Petition (Civil) No.1352 of 2019

*Ms. X ... Appellant(s)*

*versus*

*The State of Jharkhand and Ors ... Respondent(s)*

Decided on: **January 20, 2021**

Bench : **Hon'ble Mr. Justice Ashok Bhushan, Hon'ble Mr. Justice R. Subhash Reddy**  
and **Hon'ble Mr. Justice M.R. Shah**

**J U D G M E N T**

Judgement Delivered by **Hon'ble Mr. Justice Ashok Bhushan:**

1. This writ petition has been filed by a rape victim invoking the jurisdiction of this Court Under Article 32 of the Constitution.
2. This Court entertained the writ petition and while issuing notice on 29.11.2020 passed the following order:

*Issue notice.*

*Mr. Tapesk Kumar Singh, learned standing counsel for the State of Jharkhand, accepts notice on behalf of Respondent/State.*

*Let the Respondent/State file an affidavit giving details of all proceedings initiated by the Petitioner or against her and the status of those proceedings.*

*We, however, observe that the Respondent No. 3/Home Secretary shall also ensure that the concerned police authorities are instructed to ensure protection of the Petitioner.*

*List after four weeks.*

3. A counter-affidavit has been filed on behalf of the State of Jharkhand to which rejoinder has also been filed by the Petitioner. The Petitioner has also filed certain additional documents.
4. From the pleadings of the parties following facts emerged:

*The Petitioner claims to be a Scheduled Tribe in the State of Jharkhand. The Petitioner was born on 24.12.1984. On 31.03.1998, Petitioner was taken away by one Basant Yadav. Petitioner's father, Rajender Badaik, lodged a complaint.*

*Basant Yadav was apprehended on 02.04.1998. Father of the Petitioner and Police of the concerned Police Station got the marriage of the Petitioner solemnised with Basant Yadav. After one year of the marriage, one son was born, named Manish Yadav. Petitioner filed a complaint as well as case for maintenance against her husband, Basant Yadav.*

5. The Petitioner obtained divorce from Basant Yadav and the custody of son was given to Basant Yadav. On 08.06.2002, Petitioner went to Dultonganj on asking of Basant Yadav to meet her son on which date she was raped by one Mohd. Ali and three other Accused. Case No. 162 of 2002 Under Section 376/34 read with Section 3(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was registered in which Accused, Mohd. Ali was apprehended and put on trial.
6. The Petitioner lodged an FIR against the DY. Inspector General of Police on 02.08.2005 Under Section 376, 376(2)(a) Indian Penal Code and Section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 on which on 03.08.2005 Case No. 304 of 2005 was registered. The Petitioner also lodged an FIR against an Inspector General of Police on which Sessions Trial No. 257/2006 was registered. Certain other criminal cases got registered by the Petitioner against different persons, some of which were filed Under Section 376 Indian Penal Code. In the Sessions Trial 11 of 2006, the Accused Mohd. Ali was convicted on 15.02.2014 with 10 years RI.
7. In the FIR lodged against Dy. Inspector General of Police final report was submitted which was accepted by the Court on 06.08.2007 insofar as FIR lodged against Inspector General of Police, Sessions Judge acquitted the Inspector General of Police by judgment and order dated 23.12.2017 against which criminal appeal has been filed in the High Court of Jharkhand. A criminal case was also lodged against the Petitioner.
8. The Petitioner's case in the writ petition is that she being the rape victim, whose identity was disclosed by the media and after knowing that the Petitioner is a rape victim, no one is ready to give her accommodation even on rent. The Petitioner in the writ petition invoked jurisdiction of this Court in the matter of rehabilitation of the Petitioner. The Petitioner also prays for direction to the Respondent to protect the Petitioner and her children's life. The Petitioner after divorce from her first husband got married to one Rajesh Kujur with whom a son was also born. The Petitioner has also lodged criminal case being No. 56/2004 against her husband Rajesh Kujur which resulted in acquittal.
9. The Petitioner has also filed a copy of the legal notice dated 09.08.2019 which was sent by the landlord of the Petitioner asking the Petitioner to vacate the premises on the ground of non-payment of rent. The Petitioner sent a letter dated 05.12.2019 stating that the landlord had sealed the house on 04.12.2019.
10. In the counter-affidavit by the State, the State has given a tabular chart containing status of 7 criminal cases which were initiated by the Petitioner. In paragraph 7 one of the cases mentioned in the chart is the case filed against Mohd. Ali, Mohd. Ali was convicted on 15.02.2014 Under Section 376(2)(g) Indian Penal Code and Section 3(1) (xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. In other criminal cases either the Accused were acquitted or trial is pending in some cases. In two FIRs lodged by the Petitioner, in the year 2018 Under Section 354A(ii) as well

as Under Section 376, 448 and 506 Indian Penal Code respectively the investigation is said to be going on.

11. The Petitioner has appeared in person. Shri Tapesh Kumar Singh, learned Counsel has appeared for the State of Jharkhand.
12. The Petitioner submits that due to the Petitioner being rape victim she is not getting any help from family friends or society. She, with three children, has no means of survival and she is not able to give education to her children. The administration, media and society has compelled the Petitioner to lead a life with no security, no job and no shelter in future.
13. Shri Tapesh Kumar, learned Counsel appearing for the State submits that the Petitioner has lodged various FIRs alleging rape against several persons. It is submitted that against the Petitioner also an FIR was lodged at Palamau Sadar Police Case No. 194 of 2002 for the commission of the offences Under Section 25(1-b) a of Arms Act, on the basis of a written report submitted by the Assistant Sub-Inspector of Police in which charge-sheet has also been filed. It is submitted that since 02.10.2019 an armed Lady Constable, namely, Suman Surin has been deputed with the writ Petitioner for her security.
14. It is further submitted that the State has taken care of making security arrangement of the Petitioner and in pursuance of the order dated 06.01.2020 another security personnel has been deputed with the writ Petitioner. learned Counsel, however, submits that the Police authority may be permitted to review the security from time to time to take appropriate measures in that regard. Shri Singh further submits that the Petitioner is in a habit of making false allegations against several persons and officers. A complaint has recently been submitted making allegations of offences Under Section 376 Indian Penal Code. It is submitted that the Petitioner has vacated the earlier accommodation of Subodh Thakur.
15. We have heard the Petitioner in person as well as learned Counsel appearing for the State.
16. There can be no denial that the Petitioner is a rape victim. Even if we do not take into consideration other criminal cases filed by the Petitioner Under Section 376 Indian Penal Code, in Case No. 162/2002 where allegation of rape was made on 08.06.2002 the Accused, Mohd. Ali has been convicted Under Section 376(2)(g) Indian Penal Code for 10 years RI. The Petitioner being a rape victim deserves treatment as rape victim by all the authorities.
17. A rape victim suffers not only a mental trauma but also discrimination from the society. We may refer to the judgment of this Court in Nipun Saxena and Anr. v. Union of India and Ors., (2019) 2 SCC 703, wherein following observations were made by this Court:
  12. *A victim of rape will face hostile discrimination and social ostracization in society. Such victim will find it difficult to get a job, will find it difficult to get married and will also find it difficult to get integrated in society like a normal human being. ....*

18. The Petitioner herself has brought on record few orders passed in Writ Petition (Cr.) No. 229 of 2014 (Padma @ Shushma Badaik v. The State of Jharkhand and Ors.) filed by the Petitioner before the High Court of Jharkhand where in the order dated 12/11.09.2015 statement on behalf of the Counsel for the State was recorded by the High Court that State is ready to provide free education to the children of the writ Petitioner. Following is the statement recorded by the High court on 12/11.09.2015:

*Counsel for the State has submitted that State is ready to provide free education to the children of the writ Petitioner. If she will give her consent, her children shall be admitted in the Govt. Boarding School at Gumla and the expenses shall be borne by the Government.*

19. The Petitioner has two sons and one daughter. Manish Yadav appears to have been born after one year of the marriage which took place in the year 1998, eldest son, thus, as on date is major, two children of the Petitioner are still minor.
20. On an inquiry by the Court as to which authority is to ensure that the minor children of the Petitioner are provided free education, learned Counsel submitted that it is Deputy Commissioner, Ranchi who can take the appropriate measures to ensure that the minor children of the Petitioner are provided free education. learned Counsel for the State has submitted that education upto the age of 14 years in the State of Jharkhand is free which is provided by the State. We, thus, are of the view that Deputy Commissioner shall take appropriate steps to ensure that minor children of the Petitioner are provided free education in any Government Institution at Ranchi.
21. The Petitioner has also raised grievance regarding her identity which has been disclosed by the media. The Petitioner has annexed certain materials along with writ petition and the additional documents. Section 228-A of the Indian Penal Code which has been inserted in the Indian Penal Code by Amendment Act 43 of 1983 with effect from 25.12.1983 makes disclosure of the identity of the victim is an offence. Section

*228-A is as follows:*

*Section 228A. Disclosure of identity of the victim of certain offences etc.--(1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence Under Section 376, Section 376A, Section 376B, Section 376C or Section 376D is alleged or found to have been committed (hereafter in this Section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.*

*(2) Nothing in Sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is--*

*(a) by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or*

- (b) *by, or with the authorisation in writing of, the victim; or*
- (c) *where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim:*

*Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation.*

*Explanation.--For the purposes of this Sub-section, "recognised welfare institution or organisation" means a social welfare institution or organisation recognised in this behalf by the Central or State Government.*

- (3) *Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in Sub-section (1) without the previous permission of such Court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.*

*Explanation.--The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this section.*

- 22. This Court in *Nipun Saxena and Anr.* (supra) has occasion to consider Section 228- A wherein this Court in para 50.1 has issued following directions:

**50.1.** *No person can print or publish in print, electronic, social media, etc. the name of the victim or even in a remote manner disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large.*

- 23. The law with regard to Section 228A is well established, all including the media, both print and electronic have to follow the law.
- 24. With regard to the payment of compensation to the Petitioner as a rape victim, along with additional documents the Petitioner has brought on record materials to indicate that the decision was taken by the District Legal Services Authority, Ranchi to pay compensation of Rs. 1,00,000/- by letter dated 06.03.2017. The letter of the Secretary, District Legal Services Authority, Ranchi has been brought on record by the Petitioner herself. The grant of compensation has been considered under the Jharkhand Victim Compensation Scheme, 2012 as amended in 2016.
- 25. There is a statutory scheme already enforced in the State of Jharkhand framed Under Section 357A of the Code of Criminal Procedure Code, 1973, which provides procedure for grant of compensation. The Petitioner had already made application to seek compensation under the above Scheme and payment of compensation has already been made.
- 26. The next grievance which has been highlighted by the Petitioner is the Petitioner's inability to get any rented accommodation in Ranchi due to she being a rape victim. In the counter-affidavit filed by the State, it is clear that the Petitioner has lived at several/different places but due to the dispute with the landlord she has to leave the premises. There are various Central as well as State Schemes

for providing residential accommodation to persons living below poverty line and other deserving cases, the Deputy Commissioner, Ranchi may consider the case of the Petitioner for allotment of any housing accommodation under Prime Minister Awas Yojna or any other Scheme of the Centre or the State.

27. In view of the foregoing discussion, we dispose of this writ petition with the following directions:

- (1) The Deputy Commissioner, Ranchi is directed to take measure to ensure that minor children of the Petitioner are provided free education in any of the Government Institutions in District Ranchi where the Petitioner is residing till they attain the age of 14 years.
- (2) The Deputy Commissioner, Ranchi may also consider the case of the Petitioner for providing house under Prime Minister Awas Yojna or any other Central or State Scheme in which Petitioner could be provided accommodation.
- (3) The Senior Superintendent of Police, Ranchi and other competent authority shall review the Police security provided to the Petitioner from time to time and take such measures as deem fit and proper.
- (4) The District Legal Services Authority, Ranchi on representation made by the Petitioner shall render legal services to the Petitioner as may be deemed fit to safeguard the interest of the Petitioner.

□□□





ASSAULT WITH INTENT  
TO OUTRAGE  
THE MODESTY OF WOMAN





**Rupan Deol Bajaj and Ors. v. Kanwar Pal Singh Gill and Ors.**

**AIR 1996 SC 309**

(arising out of S.L.P. (Cr.) No. 1361 of 1989) B.R. Bajaj V. State of Punjab & Ors.

*Rupan Deol Bajaj and Ors. ...Appellant(s)*

*versus*

*Kanwar Pal Singh Gill and Ors. ...Respondent(s)*

Decided on: **October 12, 1995**

Bench : **Hon'ble Mr. Justice M. K. Mukherjee** and **Hon'ble Mr. Justice A. S. Anand**

J U D G M E N T

Judgement Delivered by **Hon'ble Mr. Justice M. K. Mukherjee**:

Special leave granted. Heard the learned counsel appearing for the parties.

These two appeals have been heard together as they arise out of one and the same incident. Facts leading to these appeals and relevant for their disposal are as under :

On July 29, 1988, Mrs. Rupan Deol Bajaj, an Officer of the Indian Administrative Service (I.A.S) belonging to the Punjab Cadre and then working as the Special Secretary, Finance, lodged a complaint with the Inspector General of Police, Chandigarh Union Territory alleging commission of offences under Sections 341, 342, 352, 354, and 509 of the Indian Penal Code ("IPC" for short) by Mr. K.P.S. Gill, the Director General of Police, Punjab on July 18, 1988 at a dinner party. Treating that complaint as the First Information Report (FIR) a case was registered by the Central Police Station, Sector 17, Chandigarh and investigation was taken up. Thereafter on November 22, 1988, her husband Mr. B.R. Bajaj, who also happens to be a senior I.A.S. officer of the Punjab Cadre, lodged a complaint in the Court of the Chief Judicial Magistrate for the same offences, alleging, inter alia, that Mr. Gill being a high- ranking Police Officer the Chandigarh Police had neither arrested him in connection with the case registered by the Police on his wife's complaint nor conducted investigation in a fair and impartial manner and apprehending that the Police would conclude the investigation by treating the case as untraced he was filing the complaint. On receipt of the complaint the Chief Judicial Magistrate transferred it to a Judicial Magistrate for disposal and the latter, in view of the fact that an investigation by the Police was in progress in relation to the same offences, called for a report from the Investigating Officer in accordance with Section 210 of Code of Criminal Procedure ("Cr.P.C." for short). In the meantime - on December 16, 1988 to be precise - Mr. Gill moved the High Court by filing a petition under Section 482 Cr. P.C. for quashing the F.I.R. and the complaint. On that petition an interim order was passed staying the investigation into the F.I.R. lodged by Mrs. Bajaj, but not the proceedings initiated on the complaint of Mr. Bajaj. Resultantly, the learned Judicial Magistrate proceeded with the complaint case and examined the complainant and the witnesses produced by him. Thereafter, Mr. Bajaj moved an application before the learned Magistrate for summoning Mr. Y.S. Ratra, an I.A.S. Officer of the Government of Punjab and Mr. J.F. Rebeiro, Adviser to the Governor

of Punjab for being examined as witnesses on his behalf and for producing certain documents, which was allowed. Instead of appearing personally, the above two Officers sought for exemption from appearance; and the District Attorney, after producing the documents, filed an application claiming privilege under Sections 123/124 of the Evidence Act in respect of them. The learned Magistrate rejected the prayer of the above two officers and also rejected, after going through the documents, the claim of privilege, being of the opinion that the documents did not concern the affairs of the State. Assailing the order of the learned Magistrate rejecting the claim of privilege, the State of Punjab filed a Criminal Revision Petition which was allowed by the High Court by its Order dated January 24, 1989. The petition earlier filed by Mr. Gill under Section 482 Cr. P.C. came up for hearing before the High Court thereafter and was allowed by its order dated May 29, 1989 and both the F.I.R. and the complaint were quashed. The above two orders of the High Court are under challenge in these appeals at the instance of Mr. and Mrs. Bajaj. Of the two appeals we first proceed to consider the merits of the one preferred against quashing of the F.I.R. and the complaint (arising out of SLP (Crl.) No. 2358 of 1989) for, in case it fails, the other appeal {arising out of SLP (Crl.) No. 1361 of 1989} would, necessarily, be infructuous.

On perusal of the impugned judgment we find that the following reasons weighed with the High Court in quashing the F.I.R.:-

- (i) the allegations made therein do not disclose any cognizable offence;
- (ii) the nature of harm allegedly caused to Mrs. Bajaj did not entitle her to complain about the same in view of Section 95 IPC;
- (iii) the allegations are unnatural and improbable;
- (iv) the Investigating Officer did not apply his mind to the allegations made in the F.I.R., for had he done so, he would have found that there was no reason to suspect commission of a cognizable offence, which was the 'sine qua non' for starting an investigation under Section 157 Cr. P.C.; and
- (v) there was unreasonable and unexplained delay of 11 days in lodging the F.I.R.

As regards the complaint of Mr. Bajaj, the High Court observed that the allegations were almost identical with some improvements made therein.

Mrs. Indira Jaisingh, the learned counsel appearing in support of the appeals strongly criticised the impugned judgment and contended that in exercise of its powers under Section 482 Cr. P.C., the High Court should not have interfered with the statutory powers of the police to investigate into cognizable offences and quashed the F.I.R. specially when the allegations made in the F.I.R. unmistakably constituted offences under the Indian Penal Code and that this unjustifiable interference was in clear violation of the principles laid down by this Court in a number of decisions. She next contended that the finding of the High Court that the allegations made in the F.I.R. attracted the provisions of Section 95 IPC was patently wrong as in a case where the modesty of a woman is involved, the said section cannot have any manner of application. She next contended that the story given out in the F.I.R. was neither improbable nor unreliable as the High Court thought of. As regards the delay in lodging the F.I.R., Mrs. Jaisingh submitted that a satisfactory explanation for the delay had been given in the F.I.R. itself. This apart, she submitted, the delay of 11 days in lodging an F.I.R., could not, by any stretch of imagination, be made a ground for quashing it. She lastly submitted that the High Court was wholly

unjustified in taking exception to the police officer's registering the F.I.R. and initiating the investigation for, once it was found that the F.I.R. disclosed cognizable offence, it was the statutory obligation of the police to investigate into the same. According to Mrs. Jaisingh. the High Court committed grave injustice and illegality by quashing the F.I.R. and the complaint.

Mr. Tulsi, the learned Additional Solicitor General, appearing for Mr. Gill on the other hand submitted that the impugned judgment of the High Court was a well considered and well reasoned one so far as it held that the F.I.R. did not disclose any cognizable offence, that the allegations made therein being trivial attracted the provisions of Section 95 IPC and that the allegations were improbable. He, however, in fairness, conceded that the last two reasons canvassed by the High Court to quash the F.I.R. could not be sustained.

The question under what circumstances and in what categories of cases the High Court can quash an F.I.R. or a complaint in exercise of its powers under Article 226 of the Constitution of India or under Section 482 Cr.P.C. has had been engaging the attention of this Court for long. Indeed, the learned counsel for the parties invited our attention to some of those decisions. We need not, however, refer to them as in *State of Haryana Vs. Bhajan Lal* 1992 Supp (1) SCC 335 this Court considered its earlier decisions, including those referred to by the learned counsel, and answered the above question as under:

*"In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and of cases by way of illustration wherein such power process of any court or otherwise to secure the lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*

- (1) *Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*
- (2) *Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.*
- (3) *Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*
- (4) *Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.*
- (5) *Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*

- (6) *Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*
- (7) *Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.*

*We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases;*

*that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice.”*  
*(emphasis supplied)*

In the context of the reasons given by the High Court for quashing the F.I.R. and the complaint and the respective stands of the learned counsel for the parties in relation thereto, we have to ascertain whether the case presented before us comes under categories (1), (3) and (5) above. Besides, it raises the applicability of Section 95 IPC. Since the answers to the above three questions have to be found out from the F.I.R. itself we need to look into the contents thereof.

It is first stated therein that in the evening of July 18, 1988 Mrs. Bajaj accompanied by her husband had gone to the residence of Shri S.L. Kapur, a colleague of theirs, in response to an invitation for dinner. Reaching there at or about 9 P.M. they found 20/25 couples present including Mr. Gill, who had come without his wife, and some other senior Government officers (named in the F.I.R.). The party had been arranged in the lawn at the back of the house and as per tradition in Indian homes, the ladies were sitting segregated in a large semi-circle and the gentlemen in another large semi-circle with the groups facing each other. With the above preface comes Mrs. Bajaj's account of the incident in question, which reads as under:-

*“Around 10.00 P.M. Dr. P.N. Chutani and Shri K.P.S. Gill walked across to the circle of the ladies and joined them occupying the only two vacant chairs available, almost on opposite sides of the semi-circle. Shri K.P.S. Gill took a vacant chair about 5 to 6 chairs to the left of where I was sitting. Slowly, all the ladies sitting to the right and left of him, got up, and started leaving and going into the house. I was talking to Mrs. Bijlani and Mrs. K.P. Bhandari, sitting on my right, and did not notice, or come to know, that those ladies were getting up and vacating their chairs because he had misbehaved with them. Shri K.P.S. Gill called out to me where I was sitting and said, “Mrs. Bajaj come and sit here, I want to talk to you about something.” I got up from my chair to go and sit next to him. When I was about to sit down, he suddenly pulled the cane chair on which I was going to sit close to his chair and touching his chair. I felt a little surprised. I put the chair back at its original place and about to sit down again when he repeated his action pulling the chair close to his chair. I realised that something was very wrong and without sitting down I immediately left and went back and sat in my original place between the other ladies. Mrs. Bijlani, Mrs. K.P. Bhandari, Mrs. Paramjit Singh and Mrs. Shukla Mahajan were occupying seats on my right and Mrs. Nehra was sitting to the left of me at that time.*

*After about 10 minutes Shri K.P.S. Gill got up from his seat and came and stood straight but so close that his legs were about four inches from my knees. He made an action with the crook of his finger asking me to stand and said, "You get up. You come along with me." I strongly objected to his behaviour and told him, "Mr. Gill How dare you! You are behaving in an obnoxious manner, go away from here". Whereupon he repeated his words like a command and said, "You get up! Get up immediately and come along with me." I looked to the other ladies, all the ladies looked shocked and speechless. I felt apprehensive and frightened, as he had blocked my way and I could not get up from my chair without my body touching his body. I then immediately drew my chair back about a foot and half and quickly got up and turned to get out of the circle through the space between mine and Mrs. Bijlani's chair. Whereupon he slapped me on the posterior. This was done in the full presence of the ladies, and guests.*

Mrs. Bajaj has then detailed her immediate reaction to the incident followed by the steps she took to apprise the Chief Secretary, the Adviser to the Governor and the Governor of Punjab of the incident. She concluded her narration with the following words:

*"Ordinarily, my complaint to a Police Officer (Shri J.F. Ribeiro) is enough to be considered as an FIR and he had duly apprised the Governor, Punjab, and the Administrator of the Chandigarh, Union Territory, at the earliest occasion. Since I understand that the matter has not yet percolated down from the Governor to lead to the registration a case, I am formally lodging an F.I.R. with the authorities of the Chandigarh Administration lest there is any problem about jurisdiction of the Police Officer later."*

Sequentially summarised the statements and allegations as contained in the earlier quoted three paragraphs of the F.I.R. would read thus:

- (i) Around 10 P.M. Dr. CHutani and Shri Gill walked across to and set in the ladies' circle;
- (ii) Mrs. Bajaj, who was then talking to Mrs. Bijlani and Mrs. Bhandari, was requested by Mr. Gill to come and sit near him as he wanted to talk to her about something;
- (iii) Responding to his such request when Mrs. Bajaj went to sit in a chair next to him Mr. Gill suddenly pulled that chair close to his chair;
- (iv) Felling a bit surprised, when she put that chair at its original place and was about to sit down, Mr. Gill again pulled his chair closer;
- (v) Realising something was wrong she immediately left the place and went back to sit with the ladies;
- (vi) After about 10 minutes Shri Gill came and stood in front of her so close that his legs were about 4" from her knees;
- (vii) He then by an action with the crook of his finger asked her to "get up immediately" and come along with him;
- (viii) When she strongly objected to his behaviour and asked him to go away from there he repeated his earlier command which shocked the ladies present there;

- (ix) Being apprehensive and frightened she tried to leave the place but could not as he had blocked her way;
- (x) Finding no other alternative when she drew her chair back and turned backwards, he slapped her on the posterior in the full presence of the ladies and guests.

Coming now to the moot point as to whether the above allegations constitute any or all of the offences for which the case was registered, we first turn to Section 354 and 509 IPC, both of which relate to modesty of woman. These Sections read as under:

**“354.** *Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”*

**“509.** *Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.”*

Since the word ‘modesty’ has not been defined in the Indian Penal Code we may profitably look into its dictionary meaning. According to Shorter Oxford English Dictionary (Third Edition) modesty is the quality of being modest and in relation to woman means “womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct”. The word ‘modest’ in relation to woman is defined in the above dictionary as “decorous in manner and conduct; not forward or lewd; shamefast”. Webster’s Third New International Dictionary of the English language defines modesty as “freedom from coarseness, indelicacy or indecency; a regard for propriety in dress, speech or conduct”. In the Oxford English Dictionary (1933 Ed) the meaning of the word ‘modesty’ is given as “womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions”.

In *State of Punjab vs. Major Singh* (AIR 1967 Sc 63) a question arose whether a female child of seven and a half months could be said to be possessed of ‘modesty’ which could be outraged. In answering the above question Mudholkar J., who along with Bachawat J. spoke for the majority, held that when any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that must fall within the mischief of Section 354 IPC. Needless to say, the ‘common notions of mankind’ referred to by the learned Judge have to be gauged by contemporary societal standards. The other learned Judge (Bachawat J.) observed that the essence of a woman’s modesty is her sex and from her very birth she possesses the modesty which is the attribute of her sex. From the above dictionary meaning of ‘modesty’ and the interpretation given to that word by this Court in *Major Singh’s* case (supra) it appears to us that the ultimate test for ascertaining whether modesty has been outraged is, is the action of the offender such as could be perceived as one which is capable of shocking the sense of decency of a woman. When the above test is applied in the present case, keeping in view the total fact situation, it cannot but be held that the alleged act of Mr. Gill in slapping Mrs. Bajaj on her posterior amounted to ‘outraging of her modesty’ for it was not only an affront to the normal sense of feminine decency but also an affront to the dignity of the lady - “sexual overtones” or not, notwithstanding.

It was however strenuously urged by Mr. Tulsi, that even if it was assumed that Mr. Gill had outraged the modesty of Mrs. Bajaj still no offence under Section 354 IPC could be said to have been committed by him for the other ingredient of the offence, namely, that he intended to do so was totally lacking. He urged that the culpable intention of the offender in committing the act is the crux of the matter and not the consequences thereof. To buttress his contention he invited our attention to the following passage from the judgment of this Court in *Hitendra Vishnu Thakur vs. State of Maharashtra (1994) 4 SCC 602*: (one of us, namely Anand, J. was a party) “Thus the true ambit and scope of Section 3 (1) is that no conviction under Section 3 (1) of TADA can be recorded unless the evidence led by the prosecution establishes that the offence was committed with the intention as envisaged by Section 3 (1) by means of the weapons etc. as enumerated in the section and was committed with the motive as postulated by the said section. Even at the cost of repetition, we may say that where it is only the consequence of the criminal act of an accused that terror, fear or panic is caused, but the crime was not committed with the intention as envisaged by Section 3 (1) to achieve the objective as envisaged by the section, an accused should not be convicted for an offence under Section 3 (1) of TADA. To bring home a charge under Section 3 (1) of the Act, the terror or panic etc. must be actually intended with a view to achieve the result as envisaged by the said section and not be merely an incidental fall out or a consequence of the criminal activity. Every crime, being a revolt against the society, involves some violent activity which results in some degree of panic or creates some fear or terror in the people or a section thereof, but unless the panic, fear or terror was intended and was sought to achieve either of the objectives as envisaged in Section 3 (1), the offence would not fall *stricto sensu* under TADA.”

It is undoubtedly correct that if intention or knowledge is one of the ingredients of any offence, it has got to be proved like other ingredients for convicting a person. But, it is also equally true that those ingredients being states of mind may not be proved by direct evidence and may have to be inferred from the attending circumstances of a given case. Since, however, in the instant case we are only at the incipient stage we have to ascertain, only *prima facie*, whether Mr. Gill by slapping Mrs. Bajaj on her posterior, in the background detailed by her in the FIR, intended to outrage or knew it to be likely that he would thereby outrage her modesty, which is one of the essential ingredients of Section 354 IPC. The sequence of events which we have detailed earlier indicates that the slapping was the finale to the earlier overtures of Mr. Gill, which considered together, persuade us to hold that he had the requisite culpable intention. Even if we had presumed he had no such intention he must be attributed with such knowledge, as the alleged act was committed by him in the presence of a gathering comprising the elite of the society - as the names and designations of the people given in the FIR indicate. While on this point we may also mention that there is nothing in the FIR to indicate, even remotely, that the indecent act was committed by Mr. Gill, accidentally or by mistake or it was a slip. For the reasons aforesaid, it must also be said that, - apart from the offence under Section 354 IPC - an offence under Section 509 IPC has been made out on the allegations contained in the FIR as the words used and gestures made by Mr. Gill were intended to insult the modesty of Mrs. Bajaj.

That brings us to the other offences, namely, under Sections 352, 341, 342 IPC. We need not however take notice of the offence under Section 352 IPC for the offence under Section 354 IPC includes the ingredients of the former. In other words, Section 352 IPC constitutes a minor offence in relation to the other. Regarding the offence of wrong confinement punishable under Section 342 IPC there is not any iota of material in the FIR; and so far as the offence under Section 341 IPC is concerned, the only allegation relating to the same is that Mr. Gill stood in front of Mrs. Bajaj in such a manner that she had to move backward. From such act alone it

cannot be said that he 'wrongfully restrained' her within the meaning of Section 339 IPC to make him liable under Section 341 IPC.

Now that we have found that the allegations made in the FIR, prima facie, disclose offences under Section 354 and 509 IPC, we may advert to the applicability of Section 95 IPC thereto. The Section reads as follows:

*"Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm".*

In dealing with the above Section in *Veeda Menezes vs. Yusuf Khan* (AIR 1966 SC 1773) a three Judge Bench of this Court observed that the object of framing the Section was to exclude from the operation of the Indian Penal Code those cases which from the imperfection of language may fall within the letter of the law but are not within its spirit and are considered, and for the most part dealt with by the courts, as innocent. In other words, the Section is intended to prevent penalisation of negligible wrongs or of offences of trivial character. In interpreting the expression 'harm' appearing in the Section this Court said that it is wide enough to include physical injury as also injurious mental reaction. As regards the applicability of the Section in a given case, this Court observed as follows:-

*"Whether an act which amounts to an offence is trivial would undoubtedly depend upon the nature of the injury, the position of the parties, the knowledge or intention with which the offending act is done, and other related circumstances. There can be no absolute standard or degree of harm which may be regarded as so slight that a person of ordinary sense and temper would not complain of the harm. It cannot be judged solely by the measure of physical or other injury the act causes". (emphasis supplied)*

Viewed in the light of the above principles we are of the opinion that Section 95 IPC has no manner of application to the allegations made in the F.I.R. On perusal of the FIR we have found that Mr. Gill, the top most official of the State Police, indecently behaved with Mrs. Bajaj, a Senior lady IAS Officer, in the presence of a gentry and in spite of her raising objections continued with his such behaviour. If we are to hold, on the face of such allegations that, the ignominy and trauma to which she was subjected to was so slight that Mrs. Bajaj, as a person of ordinary sense and temper, would not complain about the same, sagacity will be the first casualty. In that view of the matter we need not delve into the contention of Mrs. JaiSingh, - much less decide - that Section 95 IPC cannot have any manner of application to an offence relating to modesty of woman as under no circumstances can it be trivial.

In recording its third reason for quashing the FIR the High Court observed as under:

*"In the present case there were 48 more persons present; 24 ladies and equal number of gentlemen. It sounds both unnatural and unconscionable that the petitioner (Mr. Gill) would attempt or dare to outrage the modesty of the author of the First Information Report in their very presence inside the residential house of Financial Commissioner (Home)."*

We are constrained to say that in making the above observations the High Court has flagrantly disregarded - unwittingly we presume - the settled principle of law that at the stage of quashing an FIR or complaint the High Court is not justified in embarking upon an enquiry as to the probability, reliability or genuineness of

the allegations made therein. Of course as has been pointed out in Bhajan Lal's case (supra) an F.I.R. or a complaint may be quashed if the allegations made therein are so absurd and inherently improbable that no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused but the High Court has not recorded such a finding, obviously because on the allegations in the FIR it was not possible to do so. For the reasons aforesaid we must hold that the High Court has committed a gross error of law in quashing the FIR and the complaint. Accordingly, we set aside the impugned judgment and dismiss the petition filed by Mr. Gill in the High Court under Section 482 Cr.P.C.

The consequential direction that is to ordinarily follow from the above order is mandates to the police to investigate into the FIR and to the learned Magistrate, who was in seining of the complaint case, to proceed with it in accordance with Section 210 Cr. P.C. but then we find from the records placed before us by Mr. Sanghi, the learned counsel appearing for the Chandigarh Administration, that before the High Court was moved by Mr. Gill through his petition under Section 482 Cr.P.C. and the interim order staying investigation of the case registered on the F.I.R. was passed thereon, the police had completed the investigation and sent the papers relating thereto to the Legal Rememberancer-cum-Director of Prosecution ('LR' for short) for his opinion. After his opinion was received the investigating officer prepared the 'police (final) report' on November 22, 1988 and forwarded it, through the Senior Superintendent of Police, Chandigarh Administration (S.S.P) on November 28, 1988 to the 'Ilaka' Magistrate stating that the evidence on record did not substantiate the accusations of the complainant (Mrs. Bajaj). The learned Magistrate, in his turn, accepted the report on December 9, 1989 and ordered that the case be filed with accused as 'untraced'. In the context of the fact that the High Court had, in the meantime quashed the F.I.R. the above order was wholly unnecessary and redundant but, now that we have revived the F.I.R. and the complaint it also revives. That necessarily means, that if we allow the above order to stand one course left open to us is, in view of our earlier findings, to direct the Magistrate to proceed with the complaint in accordance with the provisions of Section 210 (3) Cr.P.C., but having regard to the police report and the manner in which it was dealt with and ultimately accepted, we consider it necessary to set aside the order treating the police case as "untraced".

From the records we find that while forwarding the police papers to the 'Ilaka' Magistrate on November 28, 1988, the S.S.P. recommended that the case might be filed 'as untraced' as requested by the local police in the final report. The papers however, do not appear to have been dealt with till July 17, 1989 when the Chief Judicial Magistrate entertained an application filed by Mrs. Bajaj in connection therewith wherein she stated that in Criminal Miscellaneous Petition No. 9041-M of 1988 (registered on the petition filed by Mr. Gill under Section 482 Cr.P.C.) the State had filed an affidavit averring that the police had submitted its report under Section 173 Cr.P.C. and prayed for a direction upon the prosecution to intimate the date of the filing of the report and give her an opportunity to inspect the same. Interestingly and surprisingly enough, the Chief Judicial Magistrate was none other than the L.R. who had earlier given the opinion that the accusations of the complainant (Mrs. Bajaj) were not substantiated from the evidence collected during investigation. Indeed, it is under the influence of the above opinion that the police report was submitted as would be evident from the report itself wherein the Investigating Officer has stated "all the statements of witnesses were sent to the L.R. who, vide letter No. LD-88/7163 dated 21.11.88, found that evidence on record do not substantiate the accusations of the complainant" (as translated into english). It is difficult to believe that the learned Chief Judicial Magistrate was not aware of the fact that he had himself opined that no case for going to the trial was made out against Mr. Gill and therefore, it was expected that in the interest of justice and fair play he would have declined to deal with the case in his capacity as the Chief Judicial Magistrate. Instead of so doing, he passed an order on that application on July 19, 1989 directing issuance of notice. This was followed by another order

dated July 22, 1989 whereby he directed that the application be listed on August 8, 1989 awaiting report. On the date so fixed he passed his next order which indicates that the report was received on that day and placed on record. It is not understood, which report the learned Magistrate was referring to for if it is to be read in the context of the prayer made by Mrs. Bajaj in her application dated July 17, 1989 it would necessarily mean the 'police report' but as already noticed, the affidavit filed by the State in the High Court and the prayer of the Senior Superintendent of the Police dated November 28, 1988 clearly indicate that it had been sent to the Court much earlier. It can, therefore, be legitimately inferred that the formal order regarding the receipt of the police report was belatedly made on August 8, 1989. Be that as it may, it appears that even thereafter the same learned Chief Judicial Magistrate continued to deal with the matter till September 16, 1989 when he made the following order:

*"The matter concerning State vs. K.P.S. Gill was being dealt with by me when I was Legal Remembrancer, Chandigarh Administration, Chandigarh. Accordingly, the papers produced by the prosecution alongwith all other relevant papers pending in this court are entrusted to the Court of Sh. A.K. Suri, JMIC, Chandigarh, for further proceedings in accordance with law.*

*Sh. A.S. Chahal, advocate, who is appearing on behalf of Mrs. Rupan Deol Bajaj, complainant has been directed to appear before that court on 18.9.1989 for further proceedings. Papers be sent to that court immediately".*

It passes our comprehension as to how an Officer (L.R.) who had given the opinion to submit a police report in favour of Mr. Gill could entertain the request of the police for accepting the same while acting in his judicial capacity. More surprising and disquieting is the fact that he continued to deal with the matter till he realised that it would not be appropriate on his part to go any further. We need not, however, dilate on this aspect of the matter any further for in any case the order of the transferee Magistrate on the police report cannot be sustained inasmuch as he has not given any reason whatsoever for its acceptance though, it appears, the parties were heard on that question for days together, obviously to comply with the law laid down by this Court in *Bhagwant Singh vs. Commissioner of Police AIR 1985 SC 1285*.

In *Abhinandan Jha vs. Dinesh Mishra (AIR 1968 SC 117)* the question arose whether a Magistrate to whom a report under Section 173 (1) Cr. P.C. had been submitted to the effect that no case had been made out against the accused, could direct the police to file a charge-sheet on his disagreeing with that report. In answering the question this Court first observed that the use of the words 'may take cognizance of any offence' in sub-section (1) of Section 190 Cr.P.C. imports the exercise of 'judicial discretion' and the Magistrate who receives the report under Section 173 Cr.P.C. will have to consider the said report and judicially take a decision whether or not to take cognizance of the offence. The Court then held, in answering the question posed before it, that the Magistrate had no jurisdiction to direct the police to submit a charge-sheet but it was open to the Magistrate to agree or disagree with the police report. If he agreed with the report that there was no case made out for issuing process to the accused he might accept the report and close the proceedings. If he came to the conclusion that further investigation was necessary he might make an order to that effect under Section 156(3). It was further held that if ultimately the Magistrate was of the opinion that the facts set out in the police report constituted an offence he could take cognizance thereof, notwithstanding contrary opinion of the police expressed in the report.

Since at the time of taking cognizance the Court has to exercise its judicial discretion it necessarily follows that if in a given case - as the present one - the complainant, as the person aggrieved raises objections to the acceptance of a police report which recommends discharge of the accused and seeks to satisfy the Court that a case for taking cognizance was made out, but the Court overrules such objections, it is just and desirable that the reasons therefor be recorded. Necessity to give reasons which disclose proper appreciation of the issues before the Court needs no emphasis. Reasons introduce clarity and minimise changes of arbitrariness. That necessarily means that recording of reasons will not be necessary when the Court accepts such police report without any demur from the complainant. As the order of the learned Magistrate in the instant case does not contain any reason whatsoever, even though it was passed after hearing the objections of the complainant it has got to be set aside and we do hereby set it aside. Consequent thereupon, two course are left open to us; to direct the learned Magistrate to hear the parties afresh on the question of acceptance of the police report and pass a reasoned order or to decide for ourselves whether it is a fit case for taking cognizance under Section 190 (1)

(b) Cr.P.C. Keeping in view the fact that the case is pending for the last seven years only on the threshold question we do not wish to take the former course as that would only delay the matter further. Instead thereof we have carefully looked into the police report and its accompaniments keeping in view the following observations of this Court in H.S. Bains vs. State AIR 1980 SC 1883, with which we respectfully agree:

*“The Magistrate is not bound by the conclusions arrived at by the police even as he is not bound by the conclusions arrived at by the complainant in a complaint. If a complainant states the relevant facts in his complaint and alleges that the accused is guilty of an offence under Section 307 Indian Penal Code the Magistrate is not bound by the conclusion of the complainant. He may think that the facts disclose an offence under S. 324, I.P.C. only and he may take cognizance of an offence under Section 324 instead of Section 307. Similarly if a police report mentions that half a dozen persons examined by them claim to be eye witnesses to a murder but that for various reasons the witnesses could not be believed, the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses. He may prefer to ignore the conclusions of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statements of the witnesses as revealed by the police report.” (emphasis supplied)*

Our such exercise persuades us to hold that the opinion of the Investigating Officer that the allegations contained in the F.I.R. were not substantiated by the statements of witnesses recorded during investigation is not a proper one for we find that there are sufficient materials for taking cognizance of the offences under Sections 354 and 509 I.P.C. We, however, refrain from detailing or discussing those statements and the nature and extent of their corroboration of the F.I.R. lest they create any unconscious impression upon the trial Court, which has to ultimately decide upon their truthfulness, falsity or reliability, after those statements are translated into evidence during trial. For the self same reasons we do not wish to refer to the arguments canvassed by Mr. Sanghi, in support of the opinion expressed in the police (final) report and our reasons in disagreement thereto.

On the conclusions as above we direct the learned Chief Judicial Magistrate, Chandigarh to take cognizance upon the police report in respect of the offences under Sections 354 and 509 IPC and try the case himself in accordance with law. We make it abundantly clear that the learned Magistrate shall not in any way be influenced by any of the observations made by us relating to the facts of the case as our task was confined to

the question whether a 'prima facie case' to go to the trial was made out or not whereas the learned Magistrate will have to dispose of the case solely on the basis of the evidence to be adduced during the trial. Since both the offences under Sections 354 and 509 IPC are tribal in accordance with Chapter XX of the Criminal Procedure Code we direct the learned Magistrate to dispose of the case, as expeditiously as possible, preferably within a period of six months from the date of communication of this order. In view of our above directions and the provisions of Section 210 (2) Cr.P.C. the complaint case instituted by Mr. Bajaj for the self same offences loses its independent existence thereby rendering the other appeal which arose out of that case, redundant, though we are of the opinion, prima facie, that the claim of privilege, on the basis of the affidavit of the Chief Secretary, was not sustainable.

In the result the appeal No. 1183/95 arising out of SLP (Crl.) No.2358 of 1989 filed by Mr. and Mrs. Bajaj is allowed and the other appeal No.1184/95 arising out of SLP (Crl.) No.1361 of 1989 is dismissed as infructuous.

Before we part with this judgment we wish to mention that in the course of his arguments, Mr. Sanghi, suggested that the matter may be given a quietus if Mr. Gill was to express regret for his alleged misbehaviour. That is a matter for the parties to consider for the offences in question are compoundable with the permission of the Court.

□□□



ACID ATTACK





**Laxmi v. Union Of India & Ors**

**AIR 2015 SC 3662**

Writ Petition (C) No. 129 of 2006

*Laxmi ... Appellant(s)*

*versus*

*Union of India & Ors. ... Respondent(s)*

Decided on: **April 10, 2015**

Bench : **Hon'ble Mr. Justice Madan B. Lokur** and **Hon'ble Mr. Justice Uday Umesh Lalit**

O R D E R

Pursuant to our order dated 06.02.2015, the Ministry of Home Affairs has filed an affidavit dated 8th April, 2015.

We have heard learned counsel for the parties in considerable detail. A meeting was convened by the Secretary in the Ministry of Home Affairs, Government of India and the Secretary in the Ministry of Health and Family Welfare, Government of India with all the Chief Secretaries/their counterparts in the States/Union Territories on 14.03.2015.

From the affidavit, the provisional figures for 2014 indicate that there were 282 acid attacks in all the States. The majority of acid attacks were in the States of Uttar Pradesh (185), Madhya Pradesh (53) and Gujarat(11).

As far as the Union Territories are concerned, Delhi is the only Union Territory where acid attacks have taken place and the total number of such attacks in the year 2014 provisionally is 27.

In all, therefore, 309 acid attacks are said to have taken place provisionally in the year 2014.

As mentioned in our order dated 06.02.2015, with the amendment to the Indian Penal Code, nothing survives in the first prayer made by the petitioner.

The second and third prayers relate to the cost of treatment of the acid attack victims and application of Section 357C of the Code of Criminal Procedure, 1973, which was inserted by an Amendment Act in 2013 with effect from 03.02.2013.

In the meeting convened by the Secretary in the Ministry of Home Affairs and the Secretary in the Ministry of Health and Family Welfare on 14.03.2015, it has been noted that a Victim Compensation Scheme has already been notified in almost all the States and Union Territories. However, we are told today that the Victim Compensation Scheme has been notified in all States and Union Territories.

We have gone through the chart annexed along with the affidavit filed by the Ministry of Home Affairs and we find that despite the directions given by this Court in *Laxmi Vs. Union of India* [(2014) 4 SCC 427], the minimum compensation of Rs.3,00,000/- (Rupees three lakhs only) per acid attack victim has not been fixed in some of the States/Union Territories. In our opinion, it will be appropriate if the Member Secretary of the State Legal Services Authority takes up the issue with the State Government so that the orders passed by this Court are complied with and a minimum of Rs.3,00,000/- (Rupees three lakhs only) is made available to each victim of acid attack.

From the figures given above, we find that the amount will not be burdensome so far as the State Governments/ Union Territories are concerned and, therefore, we do not see any reason why the directions given by this Court should not be accepted by the State Governments/Union Territories since they do not involve any serious financial implication.

We also direct the Member Secretary of the State Legal Services Authority to obtain a copy of the Victim Compensation Scheme from the concerned State/Union Territory and to give it wide and adequate publicity in the State/Union Territory so that each acid attack victim in the States/Union Territories can take the benefit of the Victim Compensation Scheme.

Insofar as the proper treatment, aftercare and rehabilitation of the victims of acid attack is concerned, the meeting convened on 14.03.2015 notes unanimously that full medical assistance should be provided to the victims of acid attack and that private hospitals should also provide free medical treatment to such victims. It is noted that there may perhaps be some reluctance on the part of some private hospitals to provide free medical treatment and, therefore, the concerned officers in the State Governments should take up the matter with the private hospitals so that they are also required to provide free medical treatment to the victims of acid attack.

The decisions taken in the meeting read as follows:

- The States/UTs will take a serious note of the directions of the Supreme Court with regard to treatment and payment of compensation to acid attack victims and to implement these directions through the issue of requisite orders/notifications.
- The private hospitals will also be brought on board for compliance and the States/UTs will use necessary means in this regard. No hospital/clinic should refuse treatment citing lack of specialized facilities.
- First-aid must be administered to the victim and after stabilization, the victim/patient could be shifted to a specialized facility for further treatment, wherever required.
- Action may be taken against hospital/clinic for refusal to treat victims of acid attacks and other crimes in contravention of the provisions of Section 357C of the Code of Criminal Procedure, 1973.

We expect the authorities to comply with these decisions. Although it is not made clear in the meeting held on 14.03.2015, what we understand by free medical treatment is not only provision of physical treatment to the victim of acid attack but also availability of medicines, bed and food in the concerned hospital.

We, therefore, issue a direction that the State Governments/Union Territories should seriously discuss and take up the matter with all the private hospitals in their respective State/Union Territory to the effect that the private hospitals should not refuse treatment to victims of acid attack and that full treatment should be provided to such victims including medicines, food, bedding and reconstructive surgeries.

We also issue a direction that the hospital, where the victim of an acid attack is first treated, should give a certificate that the individual is a victim of an acid attack. This certificate may be utilized by the victim for treatment and reconstructive surgeries or any other scheme that the victim may be entitled to with the State Government or the Union Territory, as the case may be.

In the event of any specific complaint against any private hospital or government hospital, the acid attack victim will, of course, be at liberty to take further action.

With regard to the banning of sale of acid across the counter, we direct the Secretary in the Ministry of Home Affairs and Secretary in the Ministry of Health and Family Welfare to take up the matter with the State Governments/Union Territories to ensure that an appropriate notification to this effect is issued within a period of three months from today. It appears that some States/Union Territories have already issued such a notification, but, in our opinion, all States and Union Territories must issue such a notification at the earliest.

The final issue is with regard to the setting up of a Criminal Injuries Compensation Board. In the meeting held on 14.03.2015, the unanimous view was that since the District Legal Services Authority is already constituted in every district and is involved in providing appropriate assistance relating to acid attack victims, perhaps it may not be necessary to set up a separate Criminal Injuries Compensation Board. In other words, a multiplicity of authorities need not be created.

In our opinion, this view is quite reasonable. Therefore, in case of any compensation claim made by any acid attack victim, the matter will be taken up by the District Legal Services Authority, which will include the District Judge and such other co-opted persons who the District Judge feels will be of assistance, particularly the District Magistrate, the Superintendent of Police and the Civil Surgeon or the Chief Medical Officer of that District or their nominee. This body will function as the Criminal Injuries Compensation Board for all purposes.

A copy of this order be sent to learned counsel appearing for the Secretary in the Ministry of Home Affairs and the Secretary in the Ministry of Health and Family Welfare for onward transmission and compliance to the Chief Secretary or their counterparts in all the States and Union Territories.

The Chief Secretary will ensure that the order is sent to all the District Magistrates and due publicity is given to the order of this Court. A copy of this order should also be sent to the Member Secretary of NALSA for onward transmission and compliance to the Member Secretary of the State Legal Services Authority in all the States and Union Territories. The Member Secretary of the State Legal Services Authority will ensure that it is forwarded to the Member Secretary of each District Legal Services Authority who will ensure that due publicity is given to the order of this Court.

The writ petition is disposed of in the above terms.

□□□

**Parivartan Kendra v. Union of India and others**

**(2016) 3 SCC 571**

Writ Petition (Civil) No. 867 of 2013

*Parivartan Kendra ... Appellant(s)*

*versus*

*Union of India and others ... Respondent(s)*

Decided on: **December 07, 2015**

Bench : **Hon'ble Mr. Justice M. Y. Eqbal** and **Hon'ble Mr. Justice C. Nagappan**

**J U D G M E N T**

Judgement Delivered by **Hon'ble Mr. Justice M. Y. Eqbal**:

By way of present writ petition filed in public interest under Article 32 of the Constitution of India, the petitioner – a registered NGO seeks to highlight the plight of the acid attack victims and the inadequacy how the compensation payable to the victims as per the orders of the Apex Court in Laxmi vs. Union of India (in Writ Petition (Crl.) No.129 of 2006). Petitioner also highlights the lack of a legal guarantee to free medical care, rehabilitative services or adequate compensation under the Survivor Compensation Schemes.

2. The petitioner highlighting the plight of two dalit girls of Bihar, who were attacked around midnight of October 21, 2012 by four assailants who threw acid on the face and bodies of the girls while they were sleeping on their rooftops. It is alleged that these young assailants used to harass the elder sister on the streets, market and in the auto rickshaw while she was going to computer classes or to work. This victim wanted to be a computer engineer and used to go to college regularly and supported her family working as a daily wage worker. However, these assailants used to make sexual advances towards her, pass lewd comments, and also used to pull her dupatta. They terrorized her and her family members by roaming near her house on their motorcycles, tore the curtains of their house and told her that if she did not heed to their demands and agree to have sexual relations with them they would damage and destroy her face.
3. In the aforesaid midnight, while both sisters were sleeping, assailants Anil Rai, Ghanshyam Rai, Badal and Raja climbed upon the roof and Anil covered the elder sister's mouth so that she could not scream and Ghanshyam and Raja held her legs so that she could not move. When Anil Rai was pouring the acid on her body and face, the acid also fell on her sister's body and burnt her arm. After the attack, these men did not make any effort to flee as they wanted to stay and enjoy the moment. As the acid started burning the girls, the girls started screaming and crying waking up their parents, who rushed to the rooftop. Upon this, the assailants fled. The victims were rushed to the Patna Medical College and Hospital. According to the petitioner, the doctors arrived only the next morning and did not give them proper treatment and the family had to buy all the medicines on their own. Thereafter, victims'

family was given Rs.2,42,000/- from the Government of Bihar for the treatment of both. It has been contended by the petitioner that till the filing of this writ petition more than Rs. 5 lakhs had already been spent on their treatment and still the victims require more treatment.

4. It has been submitted by the petitioner that proper and adequate treatment was not given to the victim. The Patna Hospital waited for more than a month to conduct elder sister's grafting surgeries. Three grafting surgeries were performed on the elder sister. It is claimed that all these three surgeries were not performed properly and that the Hospital staff and doctors mistreated the victim and their family as they belonged to a lower caste. With the help of the petitioner- Society, the victim was transferred to Safdarjung Hospital, Delhi on 5th April, 2013, where she finally received proper treatment. It has been further contended by the petitioner that the Police also arrested the four perpetrators a month after the attack in November, 2012 in response to intense pressure from social organizations and the media. On 8.2.2013, the IG of Police had made a statement in an interview that the statement of the victim would be taken under Section 164 of the Criminal Procedure Code. However, according to the petitioner, no such statement had been taken till filing of the writ petition. The victim and her family are, therefore, appalled by the treatment they have received at the hands of the Patna Hospital, the Police and the Government of Bihar.
5. By way of present writ petition, the petitioner has sought justice, compensation and restoration of dignity of the survivors of the acid attack, and also the assurance that these horrific events are not repeated elsewhere. It is contended that despite orders and directions of the Apex Court in Laxmi's case (supra), acid is still readily available to most of the population in India and the acid attackers are living with impunity, and the victims are not in a position to afford basic care or services. Since buying acid is simple, it is being used to settle most minor disputes. An acid attack survivor needs surgeries throughout his/her lifetime with each surgery costing around Rs.3 lakhs. It has been further pleaded by the petitioner that this crime is mainly committed in four countries of the world, namely, Bangladesh, Pakistan, Cambodia and India. All the other three countries have engaged in paving the way to an effective remedy for the survivors of the victims. Petitioner contends that Bangladesh passed a law in 2002, which is much stronger law than the Indian Law as Indian Law neither effectively address the gravity of acid attacks nor does it adequately help the acid attack survivors.
6. The petitioner submits that the failure of the States to provide compensation under Survivor Compensation Schemes have caused the survivors to be isolated from all sections of society as they are unable to leave their house because of their disfigurements. The compensation of Rs. 3 Lakh does not cover the entire expenses incurred by an acid attack victim. The petitioner further contends that the Union of India has not developed any standard treatment and management guidelines; public health facilities etc., to treat acid attack victims. The petitioner has sought development of comprehensive rehabilitation scheme for acid attack survivors i.e., housing, education and employment.
7. The petitioner has prayed for issuance of writ of mandamus to the State of Bihar to reimburse Rs. 5 lakh to the victim's family which is the amount spent on her treatment so far and for any other expenditure incurred on the treatment of the minor sister, and to provide compensation of at least Rs.10 Lakhs to the victims' family in lieu of their pain and suffering. The petitioner has also inter alia prayed for issuance of writ of mandamus or directions to develop a standard treatment and management guidelines for the treatment and handling of acid attack victims by constituting a panel of experts; to

direct all private hospitals to provide free treatment in acid attack cases and to have pictorial displays with the first aid and primary care protocols and guidelines to neutralize the acid and stabilize the survivor in the all Public Health Centres, subcentres and government hospitals. Petitioner has also prayed for inclusion of acid attacks in the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and to reform educational programs in primary school to understand the gravity of violence against women.

8. We have heard Mr. Colin Gonsalves, learned senior counsel appearing for the petitioner, and learned counsel appearing for the Union of India, State of Bihar and other States.
9. Before we proceed further, we would like to go through the orders passed by the Apex Court in the case of W.P. (Crl.) No. 129 of 2006 titled as Laxmi vs. Union of India, dealing with a similar case of acid attack victim. On 18.07.2013, this Court passed the following order:

*“6. The Centre and States/Union Territories shall work towards making the offences under the Poison Act, 1919 cognizable and non-bailable.*

*7. In the States/Union Territories, where rules to regulate sale of acid and other corrosive substances are not operational, until such rules are framed and made operational, the Chief Secretaries of the concerned States/Administrators of the Union Territories shall ensure the compliance of the following directions with immediate effect:*

- (i) Over the counter, sale of acid is completely prohibited unless the seller maintains a log/register recording the sale of acid which will contain the details of the person(s) to whom acid(s) is/are sold and the quantity sold. The log/register shall contain the address of the person to whom it is sold.*
- (ii) All sellers shall sell acid only after the buyer has shown:
  - a) a photo ID issued by the Government which also has the address of the person.*
  - b) specifies the reason/purpose for procuring acid.**
- (iii) All stocks of acid must be declared by the seller with the concerned Sub-Divisional Magistrate (SDM) within 15 days.*
- (iv) No acid shall be sold to any person who is below 18 years of age.*
- (v) In case of undeclared stock of acid, it will be open to the concerned SDM to confiscate the stock and suitably impose fine on such seller up to Rs. 50,000/-*
- (vi) The concerned SDM may impose fine up to Rs. 50,000/- on any person who commits breach of any of the above directions.*

8. *The educational institutions, research laboratories, hospitals, Government Departments and the departments of Public Sector Undertakings, who are required to keep and store acid, shall follow the following guidelines:*
  - (i) *A register of usage of acid shall be maintained and the same shall be filed with the concerned SDM.*
  - (ii) *A person shall be made accountable for possession and safe keeping of acid in their premises.*
  - (iii) *The acid shall be stored under the supervision of this person and there shall be compulsory checking of the students/personnel leaving the laboratories/place of storage where acid is used.*
9. *The concerned SDM shall be vested with the responsibility of taking appropriate action for the breach/default/violation of the above directions.*
10. *Section 357A came to inserted in the Code of Criminal Procedure, 1973 by Act 5 of 2009 w.e.f. 31.12.2009. Inter alia, this Section provides for preparation of a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.*
11. *We are informed that pursuant to this provision, 17 States and 7 Union Territories have prepared 'Victim Compensation Scheme' (for short "Scheme"). As regards the victims of acid attacks the compensation mentioned in the Scheme framed by these States and Union Territories is un-uniform. While the State of Bihar has provided for compensation of Rs. 25,000/- in such scheme, the State of Rajasthan has provided for Rs. 2 lakhs of compensation. In our view, the compensation provided in the Scheme by most of the States/ Union Territories is inadequate. It cannot be overlooked that acid attack victims need to undergo a series of plastic surgeries and other corrective treatments. Having regard to this problem, learned Solicitor General suggested to us that the compensation by the States/ Union Territories for acid attack victims must be enhanced to at least Rs. 3 lakhs as the after care and rehabilitation cost. The suggestion of learned Solicitor General is very fair.*
12. *We, accordingly, direct that the acid attack victims shall be paid compensation of at least 3 lakhs by the concerned State Government/Union Territory as the after care and rehabilitation cost. Of this amount, a sum of Rs. 1 lakh shall be paid to such victim within 15 days of occurrence of such incident (or being brought to the notice of the State Government/ Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance sum of ` 2 lakhs shall be paid as expeditiously as may be possible and positively within two months thereafter. The Chief Secretaries of the States and the Administrators of the Union Territories shall ensure compliance of the above direction."*
10. *On 3rd December, 2013, in Laxmi's case (supra), when the affidavit of State of Haryana was placed before the Bench, in which it stated that the Government of Haryana is in the process of framing a scheme for full medical treatment, short term as well as long term, for specialised plastic surgery,*

corrective surgeries, providing specialised psychological treatment to the acid victims to help them to come out of the horror and trauma of the acid attack and their rehabilitation, this Court directed the Chief Secretaries of the States (other than Haryana) and the administrators of the Union Territories to file affidavit and indicate to this Court, the State's view in bearing 100% cost of treatment of the acid victims in line with the decision taken by the Government of Haryana and also with regard to framing of scheme on the lines of Haryana Government for medical treatment at specialised hospitals having facility for plastic surgery, corrective surgery and psychological as well as other treatment to the acid victims. This Court further directed the Chief Secretaries of the States and Administrators of the Union Territories to issue necessary instructions to the Police Stations within their respective State/Union Territory that as and when an FIR is lodged with the police relating to acid attack, the concerned Police Station will send a communication to the jurisdictional S.D.M. about receipt of such information. Upon receipt of such information, the jurisdictional S.D.M. shall then make inquiry into the procurement of acid by the wrong doer and take appropriate action in the matter.

11. While disposing of the writ petition of Laxmi versus Union of India, this Court inter alia held, thus:-

*“10. We have gone through the chart annexed along with the affidavit filed by the Ministry of Home Affairs and we find that despite the directions given by this Court in Laxmi v. Union of India (2014) 4 SCC 427], the minimum compensation of Rs. 3,00,000/- (Rupees three lakhs only) per acid attack victim has not been fixed in some of the States/Union Territories. In our opinion, it will be appropriate if the Member Secretary of the State Legal Services Authority takes up the issue with the State Government so that the orders passed by this Court are complied with and a minimum of Rs. 3,00,000/- (Rupees three lakhs only) is made available to each victim of acid attack.*

*11. From the figures given above, we find that the amount will not be burdensome so far as the State Governments/Union Territories are concerned and, therefore, we do not see any reason why the directions given by this Court should not be accepted by the State Governments/Union Territories since they do not involve any serious financial implication.*

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*13. Insofar as the proper treatment, aftercare and rehabilitation of the victims of acid attack is concerned, the meeting convened on 14.03.2015 notes unanimously that full medical assistance should be provided to the victims of acid attack and that private hospitals should also provide free medical treatment to such victims. It is noted that there may perhaps be some reluctance on the part of some private hospitals to provide free medical treatment and, therefore, the concerned officers in the State Governments should take up the matter with the private hospitals so that they are also required to provide free medical treatment to the victims of acid attack.*

*14. The decisions taken in the meeting read as follows:*

- The private hospitals will also be brought on board for compliance and the States/UTs will use necessary means in this regard.*

## *Crime Against Women*

- *No hospital/clinic should refuse treatment citing lack of specialized facilities.*
- *First-aid must be administered to the victim and after stabilization, the victim/patient could be shifted to a specialized facility for further treatment, wherever required.*
- *Action may be taken against hospital/clinic for refusal to treat victims of acid attacks and other crimes in contravention of the provisions of Section 357C of the Code of Criminal Procedure, 1973.*

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17. *We, therefore, issue a direction that the State Governments/Union Territories should seriously discuss and take up the matter with all the private hospitals in their respective State/Union Territory to the effect that the private hospitals should not refuse treatment to victims of acid attack and that full treatment should be provided to such victims including medicines, food, bedding and reconstructive surgeries.*
18. *We also issue a direction that the hospital, where the victim of an acid attack is first treated, should give a certificate that the individual is a victim of an acid attack. This certificate may be utilized by the victim for treatment and reconstructive surgeries or any other scheme that the victim may be entitled to with the State Government or the Union Territory, as the case may be.*
19. *In the event of any specific complaint against any private hospital or government hospital, the acid attack victim will, of course, be at liberty to take further action.*
20. *With regard to the banning of sale of acid across the counter, we direct the Secretary in the Ministry of Home Affairs and Secretary in the Ministry of Health and Family Welfare to take up the matter with the State Governments/Union Territories to ensure that an appropriate notification to this effect is issued within a period of three months from today. It appears that some States/Union Territories have already issued such a notification, but, in our opinion, all States and Union Territories must issue such a notification at the earliest.*
21. *The final issue is with regard to the setting up of a Criminal Injuries Compensation Board. In the meeting held on 14.03.2015, the unanimous view was that since the District Legal Services Authority is already constituted in every district and is involved in providing appropriate assistance relating to acid attack victims, perhaps it may not be necessary to set up a separate Criminal Injuries Compensation Board. In other words, a multiplicity of authorities need not be created.*
22. *In our opinion, this view is quite reasonable. Therefore, in case of any compensation claim made by any acid attack victim, the matter will be taken up by the District Legal Services Authority, which will include the District Judge and such other co-opted persons who the District Judge feels will be of assistance, particularly the District Magistrate, the Superintendent of Police and the Civil Surgeon or the Chief Medical Officer of that District*

*or their nominee. This body will function as the Criminal Injuries Compensation Board for all purposes.”*

12. The above mentioned direction given by this Court in Laxmi's case (supra) is a general mandate to the State and Union Territory and is the minimum amount which the State shall make available to each victim of acid attack. The State and Union Territory concerned can give even more amount of compensation than Rs.3,00,000/- as directed by this Court. It is pertinent to mention here that the mandate given by this Court in Laxmi's case nowhere restricts the Court from giving more compensation to the victim of acid attack, especially when the victim has suffered serious injuries on her body which is required to be taken into consideration by this court. In peculiar facts, this court can grant even more compensation to the victim than Rs. 3,00,000/-.
13. We have come across many instances of acid attacks across the country. These attacks have been rampant for the simple reason that there has been no proper implementation of the regulations or control for the supply and distribution of acid. There have been many cases where the victims of acid attack are made to sit at home owing to their difficulty to work. These instances unveil that the State has failed to check the distribution of acid falling into the wrong hands even after giving many directions by this Court in this regard. Henceforth, a stringent action be taken against those erring persons supplying acid without proper authorization and also the concerned authorities be made responsible for failure to keep a check on the distribution of the acid.
14. When we consider the instant case of the victims, the very sight of the victim is traumatizing for us. If we could be traumatized by the mere sight of injuries caused to the victim by the inhumane acid attack on her, what would be the situation of the victim be, perhaps, we cannot judge. Nonetheless we cannot be oblivious of the fact of her trauma. 15. From perusal of the record of the case, it is found that elder sister suffered 28 % burns on her body and 90% on her face, owing to the alleged brutal attack on her. Due to the acid attack, the victim had undergone several surgeries, and has to undergo many more corrective and curative surgeries for her treatment.
16. Admittedly, three skin grafting surgeries were conducted by the PMCH but they were all improperly conducted as testified at Sarfdarjung Hospital. The victim, was brought to Delhi by the petitioner and in Delhi some skin grafting surgeries were again conducted at the Sarfdarjung Hospital for Neck, Lips, Eyes, Nose, Arm, Forehead and Ear. Further skin grafting surgeries were also conducted at Fortis Hospital for Neck, Lips, Nose, Eye and Arm. In the opinion of victim's doctor also, she would be required to undergo multiple corrective and curative operations and medical support for the rest of her life. Victim would be required to have corrective and curative surgeries for Neck, Lips, Eyes, Nose, Arm, Forehead, Ears, Breasts and Elbow. Apart from the above medical conditions/treatment, which she is required to undergo, there are many other consequences, which an acid attack brings out in the life of the victim.
17. Considering the plight of the victim we can sum up that:
  - the likeliness of the victim getting a job which involves physical exertion of energy is very low.
  - the social stigma and the pain that she has to go through for not being accepted by the society cannot be neglected. Furthermore, the general reaction of loathing which she would have

to encounter and the humiliation that she would have to face throughout her life cannot be compensated in terms of money.

- as a result of the physical injury, the victim will not be able to lead a normal life and cannot dream of marriage prospects.
- since her skin is fragile due to the acid attack she would have to take care of it for the rest of her life. Therefore, the after care and rehabilitation cost that has to be incurred will have huge financial implications on her and her family.

**18.** On perusal of various contentions and evidence, we find it imperative to mention that even after this Court having passed an order dated 06.02.2013 directing the Union of India and States to implement compensation payable to acid attack victims by creation of a separate fund, only 17 States have been notified of the Victim Compensation Schemes (VSC). Out of which 7 states and 4 Union territories have not initiated the VSC. Even in those States where the Scheme has been implemented a meager compensation ranging between Rs.25,000/- to Rs. 2 lakhs is provided for medical care. And many States have not provided any compensation for rehabilitation at all. In the present case, the Govt. of Bihar has fixed a pitiable amount of Rs.25,000/- for the victims of acid attack.

**19.** The Guidelines issued by orders in the Laxmi's case are proper, except with respect to the compensation amount. We just need to ensure that these guidelines are implemented properly. Keeping in view the impact of acid attack on the victim on his social, economical and personal life, we need to enhance the amount of compensation. We cannot be oblivious of the fact that the victim of acid attack requires permanent treatment for the damaged skin. The mere amount of Rs. 3 lakhs will not be of any help to such a victim. We are conscious of the fact that enhancement of the compensation amount will be an additional burden on the State. But prevention of such a crime is the responsibility of the State and the liability to pay the enhanced compensation will be of the State. The enhancement of the Compensation will act in two ways:-

1. It will help the victim in rehabilitation;
2. It will also make the State to implement the guidelines properly as the State will try to comply with it in its true spirit so that the crime of acid attack can be prevented in future.

**20.** Having regard to the problems faced by the victims, this Court in the case of Laxmi v. Union of India & Ors by an order dated 18.07.2013, enhanced the compensation, stating that, "at least Rs.3 Lakhs must be paid to the victims of acid attacks by the concerned Government". Therefore, a minimum of Rs.3 Lakhs is to be awarded by the Government to each victim of acid attack. In the present case, a minimum amount of Rs. 6 Lakhs has to be awarded to the sisters.

**21.** In peculiar facts of the case, we are of the view that victim Chanchal deserves to be awarded a compensation more than what has been prescribed by this Court in the Laxmi's case (supra). Though in this case we are not issuing any guidelines different from the guidelines issued in Laxmi's case, we should not forget that the younger sister was also injured by the acid attack. Although her degree of sufferance is not as that of the elder one, but she also requires treatment and rehabilitation. It is to be noted that this Court in Laxmi's case (supra) doesn't put a bar on the Govt. to award compensation

limited to Rs.3 Lakhs. The State has the discretion to provide more compensation to the victim in the case of acid attack as per Laxmi's case guidelines. It is also to be noticed that this Court has not put any condition in Laxmi's case as to the degree of injuries which a victim has suffered due to acid attack. In the instant case, the victim's father has already spent more than Rs. 5 lakhs for the treatment of the victim. In consideration of the severity of the victim's injury, expenditure with regard to grafting and reconstruction surgery, physical and mental pain, etc., we are of the opinion that the victim (Chanchal) should be compensated to a tune of at least Rs. 10 Lakhs. Suffice it to say that the compensation must not only be awarded in terms of the physical injury, we have also to take note of victim's inability to lead a full life and to enjoy those amenities which is being robbed of her as a result of the acid attack. Therefore, this Court deems it proper to award a compensation of Rs. 10 lakhs and accordingly, we direct the concerned Government to compensate the victim Chanchal to a tune of Rs. 10 Lakhs, and in light of the Judgment given in Laxmi's case we direct the concerned State Government of Bihar to compensate the main victim's sister, Sonam to a tune of Rs. 3 Lakhs. Of the Total amount of Rs. 13 Lakhs, a sum of Rs. 5 lakhs shall be paid to the victim and her family within a period of one month and the remaining sum of Rs. 8 lakhs shall be paid to the victims within a period of three months from the date of this order. Furthermore, the State shall upon itself take full responsibility for the treatment and rehabilitation of the victims of acid attack as per the Guidelines provided in Laxmi's case, (2015) 5 SCALE 77, vide order dated 10.4.2015.

22. Disposing of the present writ petition, we additionally direct all the States and Union Territories to consider the plight of such victims and take appropriate steps with regard to inclusion of their names under the disability list.

□□□



# DOWRY DEATH





**Satvir Singh and Ors. v. State of Punjab and Anr.**

**AIR 2001 SC 2828**

Appeal (crl.) 1319 of 1998, Appeal (crl.) 123 of 1999

*Satvir Singh and Ors. ....Appellant(s)*

*versus*

*State of Punjab and Anr.... Respondent(s)*

Decided on: **September 27, 2001**

Bench : **Hon'ble Mr. Justice K.T. Thomas** and **Hon'ble Mr. Justice S.N. Variava**

J U D G M E N T

Judgement Delivered by **Hon'ble Mr. Justice K.T. Thomas**:

A young mother of two kids, who is a double graduate, ran into the rail in front of a running train to end her life as well as her miseries once and for all. She was driven to that action on account of the cruel treatments suffered by her at her nuptial home. But the destiny also was cruel to her as the locomotive which she desired to be her destroyer, instead of snuffing her life out in a trice, converted her into a veritable vegetable. She lost her left hand from shoulder joint and got her spinal cord ruptured. She turned into a paraplegic. She herself described her present plight as a living corpse. Thus the miseries she longed to end transformed into a monstrous dimension clutching her as long as she is alive.

Her husband, father-in-law and mother-in-law (the appellants before us) were convicted by the Sessions Court under Section 116 read with Section 306 IPC, besides Section 498A. On the first count they were sentenced to rigorous imprisonment for two and a half years and a fine of Rs.10,000/- each, and on the second count they were sentenced to imprisonment for two years and a fine of Rs.5,000/- each. When the appellants filed an appeal before the High Court in challenge of the said conviction and sentence the victim also made a motion before the same High Court as she felt that condign punishment has not been meted out to the guilty persons. Both were disposed of by the impugned judgment delivered by a single Judge of the High Court of Punjab and Haryana. The findings made by the Sessions Court were concurred with by the High Court. However, an alteration was made by substituting Section 306 IPC with Section 304B IPC to be read with Section 116 IPC. Commensurate alteration was made in the quantum of sentence by escalating it to RI for five years each.

It was during the wee hours of 17.6.1996 that Tejinder Pal Kaur (PW-5) ran in front of a train. The events which culminated in the said tragedy have been set out by the prosecution like this:

Tejinder Pal Kaur (PW-5) daughter of Narender Singh (PW-6) obtained B.A. degree and B.Ed. degree before her marriage. On 15.11.1992 she was given in marriage to Satvir Singh (A-1), a businessman, and thenceforth

she was living in her husband's house. Devinder Singh (A-2) and Paramjit Kaur (A-3) who are the parents of Satvir Singh (A-1) were also living in the same house. Though dowry was given at the time of marriage the appellants started harassing the bride after about 4 or 5 months of the wedding for not giving a car and a house as part of the dowry. They used to hurl taunts on her pertaining to the subject, including telling her that she had brought rags instead of wedding costumes. After about a year a male child was born to her and about one and a half years thereafter she gave birth to another male child.

In the month of November 1995 her father Narender Singh (PW-6) paid Rs.20,000/- to her husband Satvir Singh presumably for appeasing him so that he would desist from causing any harassment to Tejinder Pal Kaur. But that appeared to be only a modicum of pelf for abating the shower of abuses heaped up on the housewife.

The immediate cause for the tragic episode happened on the night of 16.6.1996. When food was served to Satvir Singh (A-1) in the night, it was noticed that one of the items in the meals (salad) contained excessive salt. (According to PW-5 the salt was added to the salad by her mother-in-law). After tasting the salad Satvir Singh became furious and he unleashed abuses on his wife and then he was profusely supported by his mother and later they were reinforced by his father. They went to the extent of suggesting to her why not end your life in front of one of the trains as many such trains are running nearby.

On 17.6.1996 Tejinder Pal Kaur (PW-5) left the house all alone at about 4 A.M. and reached the railway line yonder, expecting the arrival of a train from Jalandhar. Within 15 minutes the expected train arrived and Tejinder Pal Kaur, standing on the track, was run over by that train. What happened thereafter need not be narrated in detail over again except pointing out that she was devastatingly maimed, yet survived. There is practically no dispute that she went to the railway track on that morning and in an attempt to end her life she allowed the train to pass over her. As the doctors expressed the opinion that the testimonial capacity of Tejinder Pal Kaur (PW-5) was not seriously impaired prosecution examined her as the prime witness in the case. The trial court and the High Court believed her testimony. There is no reason to dissent from the finding regarding reliability of her evidence.

At the outset we may point out that on the aforesaid facts no offence linked with Section 306 IPC can be found against any of the appellants. The said section penalises abetment of suicide. It is worded thus: If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. It is a unique legal phenomenon in the Indian Penal Code that the only act, the attempt of which alone will become an offence. The person who attempts to commit suicide is guilty of the offence under Section 309 IPC whereas the person who committed suicide cannot be reached at all. Section 306 renders the person who abets the commission of suicide punishable for which the condition precedent is that suicide should necessarily have been committed. It is possible to abet the commission of suicide. But nobody would abet a mere attempt to commit suicide. It would be preposterous if law could afford to penalise an abetment to the offence of mere attempt to commit suicide.

Learned Sessions Judge went wrong in convicting the appellants under section 116 linked with Section 306 IPC. The former is abetment of offence punishable with imprisonment - if offence be not committed. But the crux of the offence under Section 306 itself is abetment. In other words, if there is no abetment there is

no question of the offence under Section 306 coming into play. It is inconceivable to have abetment of an abetment. Hence there cannot be an offence under Section 116 read with Section 306 IPC. Therefore, the High Court was correct in altering the conviction from the penalising provisions fastened with the appellants by Sessions Court.

Now, we have to see whether the appellants can be convicted under Section 511 read with Section 304B IPC. For that purpose it is necessary to extract Section 511 as under:

*511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.- Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with such fine as is provided for the offence, or with both.*

The above section is the solitary provision included in the last chapter of the IPC under the title Of Attempts to Commit Offences. It makes attempt to commit an offence punishable. The offence attempted should be one punishable by the Code with imprisonment. The conditions stipulated in the provision for completion of the said offence are: (1) The offender should have done some act towards commission of the main offence. (2) Such an attempt is not expressly covered as a penal provision elsewhere in the Code. Thus, attempt on the part of the accused is sine qua non for the offence under Section 511. Before considering the question as to what is meant by doing any act towards the commission of the offence as an inevitable part of the process of attempt, we may point out that the last act attributed to the accused in this case is that they asked Tejinder Pal Kaur (PW-5) to go to the rail track and commit suicide. That act of the accused is alleged to have driven the young lady to proceed to the railway line on the next morning to be run over by the train. Assuming that the said act was perpetrated by the appellants and that the said act could fall within the ambit of attempt to commit the offence under section 304B it has to be considered whether there is any other express provision in the Code which makes such act punishable. For this purpose we have to look at Section 498A which has been added to the IPC by Act 46 of 1983. That provision makes cruelty (which a husband of a woman or his relative subjects her to) as a punishable offence. One of the categories included in the explanation to the said section (by which the word cruelty is defined) is thus:

- (a) *Any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman;*

Thus, if the act of the accused asking Tejinder Pal Kaur (PW-5) to go and commit suicide had driven her to proceed to the railway track for ending her life then it is expressly made punishable under Section 498A IPC. When it is so expressly made punishable the act involved therein stands lifted out of the purview of Section 511 IPC. The very policy underlying in Section 511 seems to be for providing it as a residuary provision. The corollary, therefore, is that the accused, in this case, cannot be convicted under Section 511 on account of the acts alleged against him.

Now, we have to consider whether the High Court was correct in convicting the appellants under Section 116 read with Section 304B IPC. Shri R.S. Cheema, learned senior counsel for the appellants advanced two contentions against it. First is that Section 304B cannot apply to a case of suicide at all, whether it is sequel to cruelty or harassment with the demand for dowry or not. Second is that the concept of abetment of an offence under Section 304-B is inconceivable in the absence of death of a woman within the statutory period mentioned in that provision. In elaborating the first contention learned senior counsel submitted that Section 306 IPC is now intended to cover all cases of suicide in view of Section 113A of the Evidence Act (which was brought in by Act 46 of 1983).

Both the contentions are fallacious. The essential components of Section 304B are: (i) Death of a woman occurring otherwise than under normal circumstances, within 7 years of marriage. (ii) Soon before her death she should have been subjected to cruelty and harassment in connection with any demand for dowry. When the above ingredients are fulfilled, the husband or his relative, who subjected her to such cruelty or harassment, can be presumed to be guilty of offence under Section 304B. To be within the province of the first ingredient the provision stipulates that where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances. It may appear that the former limb which is described by the words death caused by burns or bodily injury is a redundancy because such death would also fall within the wider province of death caused otherwise than under normal circumstances. The former limb was inserted for highlighting that by no means death caused by burns or bodily injury should be treated as falling outside the ambit of the offence. In the present context it is advantageous to read Section 113A of the Evidence Act. It is extracted below:

**113A.** *Presumption as to abetment of suicide by a married woman.- When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.*

Learned senior counsel submitted that since the word cruelty employed therein is a virtual importation of that word from Section 498A IPC, the offence envisaged in Section 306 IPC is capable of enveloping all cases of suicide within its ambit, including dowry related suicide. According to him, the second limb of the Explanation to Section 498A which defines the word cruelty is sufficient to clarify the position. That limb reads thus:

***For the purpose this section, cruelty means-***

**(b)** *harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.*

At the first blush we thought that there was force in the said contention but on a deeper analysis we found that the contention is unacceptable. Section 306 IPC when read with Section 113A of the Evidence Act has

only enabled the court to punish a husband or his relative who subjected a woman to cruelty (as envisaged in Section 498A IPC) if such woman committed suicide within 7 years of her marriage. It is immaterial for Section 306 IPC whether the cruelty or harassment was caused soon before her death or earlier. If it was caused soon before her death the special provision in Section 304B IPC would be invocable, otherwise resort can be made to Section 306 IPC.

No doubt Section 306 IPC read with Section 113A of the Evidence Act is wide enough to take care of an offence under Section 304B also. But the latter is made a more serious offence by providing a much higher sentence and also by imposing a minimum period of imprisonment as the sentence. In other words, if death occurs otherwise than under normal circumstances within 7 years of the marriage as a sequel to the cruelty or harassment inflicted on a woman with demand of dowry, soon before her death, Parliament intended such a case to be treated as a very serious offence punishable even upto imprisonment for life in appropriate cases. It is for the said purpose that such cases are separated from the general category provided under Section 306 IPC (read with Section 113A of the Evidence Act) and made a separate offence.

We are, therefore, unable to concur with the contention that if the dowry related death is a case of suicide it would not fall within the purview of Section 304B IPC at all. In *Smt. Shanti and anr. vs. State of Haryana* {1991(1) SCC 371} and in *Kans Raj vs. State of Punjab and ors.* {2000(5) SCC 207} this Court has held that suicide is one of the modes of death falling within the ambit of Section 304B IPC.

Now we have to consider whether the appellants are liable to be punished under Section 116 linked with section 304B IPC. We have already noted above that according to the learned senior counsel for the appellants there is no question of considering Section 304B unless death of a woman had occurred. In the present case, death did not occur. Before considering that contention we may delve into the question whether *Tejinder Pal Kaur (PW-5)* was subjected to cruelty or harassment in connection with the demand for dowry soon before her death, on a hypothetical assumption that her attempt to commit suicide had succeeded.

Prosecution, in a case of offence under Section 304B IPC cannot escape from the burden of proof that the harassment or cruelty was related to the demand for dowry and also that such cruelty or harassment was caused soon before her death. The word dowry in Section 304B has to be understood as it is defined in Section 2 of the Dowry Prohibition Act, 1961. That definition reads thus:

*In this Act, dowry means any property or valuable security given or agreed to be given either directly or indirectly-*

- (a) by one party to marriage to the other party to the marriage; or*
- (b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;*

*at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.*

Thus, there are three occasions related to dowry. One is before the marriage, second is at the time of marriage and the third is at any time after the marriage. The third occasion may appear to be an unending period. But

the crucial words are in connection with the marriage of the said parties. This means that giving or agreeing to give any property or valuable security on any of the above three stages should have been in connection with the marriage of the parties. There can be many other instances for payment of money or giving property as between the spouses. For example, some customary payments in connection with birth of a child or other ceremonies are prevalent in different societies. Such payments are not enveloped within the ambit of dowry. Hence the dowry mentioned in Section 304B should be any property or valuable security given or agreed to be given in connection with the marriage.

It is not enough that harassment or cruelty was caused to the woman with a demand for dowry at some time, if Section 304B is to be invoked. But it should have happened soon before her death. The said phrase, no doubt, is an elastic expression and can refer to a period either immediately before her death or within a few days or even a few weeks before it. But the proximity to her death is the pivot indicated by that expression. The legislative object in providing such a radius of time by employing the words soon before her death is to emphasise the idea that her death should, in all probabilities, have been the aftermath of such cruelty or harassment. In other words, there should be a perceptible nexus between her death and the dowry related harassment or cruelty inflicted on her. If the interval elapsed between the infliction of such harassment or cruelty and her death is wide the court would be in a position to gauge that in all probabilities the death would not have been the immediate cause of her death. It is hence for the court to decide, on the facts and circumstances of each case, whether the said interval in that particular case was sufficient to snuff its cord from the concept soon before her death.

Applying the said principle in this case we have to refer to the evidence of the prosecution to know whether the findings made by the High Court on the facts warrant interference. PW-5 Tejinder Pal Kaur in her evidence said that 4 or 5 months after her marriage, she was ill-treated on the ground of insufficiency of dowry and then she reported the matter to her father. But PW-5 did not say one word in her evidence regarding any other ill treatment relating to dowry thereafter. It is true, she said in her evidence that in November 1995, a sum of Rs.20,000/- was paid by her father. But neither PW-5 (Tejinder Pal Kaur) nor PW-6 (Narendra Singh) testified that the said amount was paid as part of the dowry or in connection with the marriage. We cannot overlook two important events which had happened in the family during the said long interregnum of three years. One is the birth of the elder son on 12.11.1993 and the other is the birth of the second son on 10.6.1995. We have to bear in mind the payment of Rs.20,000/- was made five months after the birth of the second son. Even PW-6 had no case that his daughter was subjected to any ill treatment in connection with the demand for dowry on any day after she reported to him about the demand for further dowry way back in the early 1993 months. All amounts paid by the in-laws of the husband of a woman cannot become dowry.

Shri U.R. Lalit, learned senior counsel for Tejinder Pal Kaur (PW-5) contended that payment of Rs.20,000/- in November 1995 should be presumed as part of the three year old demand for further dowry. When the very participants in the deliberations have no such case it is not proper for the court to make an incriminating presumption against the accused on a very crucial ingredient of the offence, more so when it is quite possible to draw a presumption the other way around as well.

Thus, there is dearth of evidence to show that Tejinder Pal Kaur (PW-5) was subjected to cruelty or harassment connected with the demand for dowry, soon before the attempt to commit suicide. When the position is such it is an unnecessary exercise on our part to consider whether Section 116 IPC can ever be linked with the offence under Section 304B IPC.

We, therefore, conclude that appellants cannot be convicted under Section 116 IPC either by linking it with Section 306 or with Section 304B. Hence the conviction and sentence passed on them under Section 116 IPC is set aside.

We have no reason to interfere with the conviction passed on the appellants under Section 498A IPC. We do confirm the same. We are told that first appellant Satvir Singh (A-1) has undergone the substantial portion of the sentence of imprisonment imposed on him and the remaining appellants have also undergone a long period of imprisonment by now in connection with this case. But we feel that the fine portion of the sentence imposed on the appellants is too insufficient, particularly when such fine was intended to be disbursed as compensation to PW-5. In our view PW-5 Tejinder pal Kaur should get at least three lakhs of rupees as compensation from the appellants. We are told that A-2 Devinder Singh and A-3 Paramjit Kaur have now become aged as both have crossed the age of 70. We therefore, modify the sentence under Section 498A IPC in the following terms:

The sentence of imprisonment imposed on the appellants shall stand reduced to the period which they have already undergone. We enhance the fine part of the sentence for the offence under Section 498A IPC, to Rs. one lakh each for all the three appellants. They shall remit the fine amount in the trial court, within three months from today, failing which each of the defaulter shall undergo imprisonment for a further period of nine months. The appeals are disposed of in the above terms.

□□□

**Reema Aggarwal v. Anupam and Ors.**

**AIR 2004 SC 1418**

Appeal (crl.) 25 of 2004

(Arising out of SLP (Crl.) No. 3169 of 2003)

*Reema Aggarwal ... Appellant(s)*

*versus*

*Anupam and Ors.... Respondent(s)*

Decided on: **January 08, 2004**

Bench : **Hon'ble Mr. Justice Doraiswamy Raju** and **Hon'ble Mr. Justice Arijit Pasayat**

J U D G M E N T

Judgement Delivered by **Hon'ble Mr. Justice Arijit Pasayat**:

Leave granted.

Parties to a marriage tying nuptial knot are supposed to bring about the union of souls. It creates a new relationship of love, affection, care and concern between the husband and wife. According to Hindu Vedic philosophy it is sanskar a sacrament; one of the sixteen important sacraments essential to be taken during one's lifetime. There may be physical union as a result of marriage for procreation to perpetuate the lineal progeny for ensuring spiritual salvation and performance of religious rites, but what is essentially contemplated is union of two souls. Marriage is considered to be a junction of three important duties i.e. social, religious and spiritual. A question of intricate complexity arises in this appeal where factual scenario has very little role to play.

Filtering out unnecessary details, the factual position is as follows:

On 13.7.1998 information was received from Tagore Hospital, Jalandhar that Reema Aggarwal the appellant had been admitted on having consumed poisonous substance. On reaching hospital, ASI Charanjit Singh obtained opinion of the doctor regarding her fitness to make a statement. Appellant stated before Investigating Officer that she was married to Anupam the respondent no.1 on 25.1.1998 and after the marriage, she was harassed by her husband-respondent no.1, mother-in-law, father-in-law and brother-in-law (respondents 2, 3 and 4) respectively for not bringing sufficient and more dowry. It was also disclosed that it was the second marriage of both the appellant and respondent no.1. On the date of incident at about 5.00 p.m. all the four accused persons forced her to take something to put an end her life and forcibly put some acidic substance in her mouth. She started vomiting and was taken to the hospital in an unconscious state. The first information report was registered accordingly and on completion of investigation the charge sheet was placed and charges were framed for offences punishable under Sections 307 and 498-A of the Indian Penal Code, 1860 (for short

the 'IPC'). Accused persons pleaded innocence. Seven witnesses were examined to further the prosecution version.

Before the trial Court the accused persons put the plea that charge under Section 498-A was thoroughly misconceived as both Sections 304-B and 498-A IPC pre-suppose valid marriage of the alleged victim-woman with the offender- husband. It was required to be shown that the victim-woman was the legally married wife of the accused. Since it was admitted that the appellant had married during the lifetime of the wife of respondent no.1, what happened to his first marriage remained a mystery. Prosecution has failed to establish that it stood dissolved legally. Prosecution having failed to bring any material record in that regard, Section 498-A had no application. Reliance was placed on a decision of the Madhya Pradesh High Court in Ramnarayan & Ors. v. State of M.P. (1998 (3) Crimes 147 M.P.) The Trial Court held that the accusations, so far as Section 307 is concerned, were not established and in view of the legal position highlighted by the accused persons vis-à-vis Section 498-A the charge in that regard was also not established. Accordingly the accused persons were acquitted.

The State of Punjab filed an application for grant of leave to appeal which was disposed of by the Division Bench of the Punjab and Haryana High Court with the following order:

*"We have heard the learned counsel for the appellant and with his assistance, have gone through the finding recorded by the learned trial Court. In our considered opinion, the finding recorded by the learned trial Court cannot be held to be erroneous or that there was no perverse appreciation of evidence. Leave to appeal declined.*

*Appeal is also dismissed."*

In view of the dismissal of the State's application for grant of leave, criminal revision application which was filed by the appellant before the High Court was dismissed with the following orders:-

*"Vide our separate order of even date in Crl. Misc. No. 580 MA of 2002, we have not granted permission to the State to file the appeal. In these circumstances, there is no merit in this criminal revision which is hereby dismissed."*

In support of the appeal, learned counsel for the appellant submitted that the High Court was not justified to dispose of the application for grant of leave as well as the revision filed by the appellant by such cryptic orders. Important questions of law are involved. In fact, various High Courts have taken view different from the one taken by the Madhya Pradesh High Court in Vungarala Yedukondalu v. State of Andhra Pradesh (1988 CrL.L.J. 1538 (DB)) and State of Karnataka v. Shivaraj (2000 CrL.L.J 2741). The Andhra Pradesh High Court and the Karnataka High Court have taken different view. According to him the expressions "husband" and "woman" appearing in Section 498-A IPC are to be read in a manner so as to give full effect to the purpose for which Section 498-A was brought into the statute. The restricted meaning as given by the Madhya Pradesh High Court in Ramnarayan case (supra) does not reflect the correct position of law. On the other hand, contrary view expressed by the Karnataka and Andhra Pradesh High Courts reflect the correct view.

In response, learned counsel for the respondents submitted that to constitute a marriage in the eye of law it has first to be established that the same was a valid marriage. Strong reliance was placed on *Bhaurao Shankar Lokhande and Anr. v. The State of Maharashtra and Anr.* (AIR 1965 SC 1564) in that context. Reference was also made to Sections 5(i), 11 and 16 of Hindu Marriage Act, 1955 (for short the 'Marriage Act') to contend that the stipulations of conditions of valid marriage, the circumstances in which the marriage becomes void and the protection given to children of void and voidable marriage respectively makes the position clear that wherever the legislature wanted to provide for contingencies flowing from void or voidable marriages, it has specifically done so. It is latently evident from Section 16 of the Marriage Act. There is no such indication in Section 498-A IPC. The language used is "husband or relative of the husband". Marriage is a legal union of one man and woman as husband and wife and cannot extend to a woman whose marriage is void and not a valid marriage in the eye of law.

The marriages contracted between Hindus are now statutorily made monogamous. A sanctity has been attributed to the first marriage as being that which was contracted from a sense of duty and not merely for personal gratification. When the fact of celebration of marriage is established it will be presumed in the absence of evidence to the contrary that all the rites and ceremonies to constitute a valid marriage have been gone through. As was said as long as 1869 "when once you get to this, namely, that there was a marriage in fact, there would be a presumption in favour of there being a marriage in law". (See *Inderun Valungyooly v. Ramaswamy* (1869 (13) MIA 141.) So also where a man and woman have been proved to have lived together as husband and wife, the law will presume, until contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage. (See *Sastry Velaider v. Sembicutty* (1881 (6) AC 364) following *De Thoren v. Attorney General* (1876 (1) AC 686) and *Piers v. Piers* (L.R.(2) H.L.C. 331). Where a marriage is accepted as valid by relations, friends and others for a long time it cannot be declared as invalid. In *Lokhande's case* (supra), it was observed by this Court "The bare fact that man and woman live as husband and wife it does not at any rate normally give them the status of husband and wife even though they may hold themselves before the society as husband and wife and the society treats them as husband and wife". These observations were cited with approval in *Surjit Kaur v. Garja Singh and Ors.* (AIR 1994 SC 135). At first blush, it would seem that these observations run counter to the long catena of decisions noted above. But on closer examination of the facts of those cases it is clear that this Court did not differ from the views expressed in the earlier cases. In *Lokhande's case* (supra), this Court was dealing with a case of prosecution for bigamy. The prosecution had contended that second marriage was *gandharva* form of marriage and no ceremonies were necessary and, therefore, did not allege or prove that any customary ceremonies were performed. In that background, it was held that even in the case of *gandharva* marriages, ceremonies were required to be performed. To constitute bigamy under Section 494 IPC, the second marriage had to be a valid marriage duly solemnized and as it was not so solemnized it was not a marriage at all in the eye of law and was therefore invalid. The essential ingredient constituting the offence of Bigamy is the "marrying" again during the lifetime of husband or wife in contrast to the ingredients of Section 498A which, among other things, envisage subjecting the woman concerned to cruelty. The thrust is mainly "marrying" in Section 494 IPC as against subjecting of the woman to cruelty in Section 498A. Likewise, the thrust of the offence under Section 304B is also the "Dowry Death". Consequently, the evil sought to be curbed are distinct and separate from the persons committing the offending acts and there could be no impediment in law to liberally construe the words or expressions relating to the persons committing the offence so as to rope in not only those validly married but also any one who has undergone some or other form of marriage and thereby assumed for himself the position of husband to live, cohabit and exercise authority as such husband over another woman. As the prosecution had set up a plea of *gandharva* marriage and had failed to prove the performance of ceremonies, it

was not open to fall back upon the presumption of a valid marriage. It was further held that there was no such presumption if the man was already married. In Surjit Singh's case (*supra*) the stand was that the marriage was in Karewa form. This Court held that under the custom of Karewa marriage, the widow could marry the brother or a relation of the husband. But in that case the man was a stranger. Further even under that form of marriage certain ceremonies were required to be performed which were not proved. Dealing with the contention relating to presumption, reference was made to Lokhande's case (*supra*). As the parties had set up a particular form of marriage which turned out to be invalid due to absence of proof of having undergone the necessary ceremonies related to such form of marriage, the presumption of long cohabitation could not be invoked.

The presumption may not be available in a case, for example, where the man was already married or there was any insurmountable obstacle to the marriage, but presumption arises if there is strong evidence by documents and conduct. Above position has been highlighted in Mayne's Hindu Law and Usage.

The question as to who would be covered by the expression 'husband' for attracting Section 498A does present problems. Etymologically, in terms of the definition of "husband" and "marriage" as given in the various Law Lexicons and dictionaries the existence of a valid marriage may appear to be a *sine qua non* for applying a penal provision. In *Smt. Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav and Anr.* (AIR 1988 SC 644) a woman claimed maintenance under Section 125 of the Code of Criminal Procedure, 1973 (in short the 'Cr.P.C.'). This Court applied the provision of the Marriage Act and pointed out that same was a law which held the field after 1955, when it was enacted and Section 5 lays down that for a lawful marriage the necessary condition that neither party should have a spouse living at the time of the marriage is essential and marriage in contravention of this condition therefore is null and void. The concept of marriage to constitute the relationship of 'husband' and 'wife' may require strict interpretation where claims for civil rights, right to property etc. may follow or flow and a liberal approach and different perception cannot be an anathema when the question of curbing a social evil is concerned.

The question of origin of dowry or dos has been the subject of study by theoreticians. Mayne says that it was a contribution by the wife's family, or by the wife herself, intended to assist the husband in bearing the expenses of the conjugal household (Mayne on "Early History of Institution" page 319). While dos or dowry previously belonged to husband, his right over it being unrestricted, all the property of the wife not included in the dowry was called her "paraphra" and was her absolute property over which her husband had no control. (See Banerjee on 'Marriage and Stridhan' 345) In *Pratibha Rani v. Suraj Kumar and Anr.* (AIR 1985 SC 628) after tracing out the history of stridhan it was held that wife is the absolute owner of such property under Section 27 of the Marriage Act. Property presented to the husband and wife at or about the time of marriage belongs to them jointly.

The Dowry Prohibition Act, 1961 (in short the 'Dowry Act') was introduced to combat the ever-increasing menace of dowry. The avowed object is prohibition on giving and taking of dowry. Section 2 defines "dowry". Section 4 provides the penalty for demanding "dowry", while Section 5 is a significant provision making agreement for giving or taking dowry to be void. Section 6 is another provision which reflects statutory concern for prevention of dowry, be it taking or giving. It is provided therein that pending transfer of the dowry, the person who received the dowry holds it in trust for benefit of the woman. Amendment to Section 2 by Amendment Act 43 of 1986 has made the provision clear and demand made after the marriage is a part of

dowry, in view of addition of words “at or before or after the marriage”. (See State of H.P. v. Nikku Ram (AIR 1996 SC 67)).

The definition of the term ‘dowry’ under Section 2 of the Dowry Act shows that any property or valuable security given or “agreed to be given” either directly or indirectly by one party to the marriage to the other party to the marriage “at or before or after the marriage” as a “consideration for the marriage of the said parties” would become ‘dowry’ punishable under the Dowry Act. Property or valuable security so as to constitute ‘dowry’ within the meaning of the Dowry Act must, therefore, be given or demanded “as consideration for the marriage.”

Section 4 of the Dowry Act aims at discouraging the very “demand” of “dowry” as a ‘consideration for the marriage’ between the parties thereto and lays down that if any person after the commencement of the Act, “demands”, directly or indirectly, from the parents or guardians of a ‘bride’ or ‘bridegroom’, as the case may be, any ‘dowry’ he shall be punishable with imprisonment or with fine or within both. Thus, it would be seen that Section 4 makes punishable the very demand of property or valuable security as a consideration for marriage, which demand, if satisfied, would constitute the graver offence under Section 3 of the Act punishable with higher imprisonment and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry whichever is more.

The definition of the expression ‘dowry’ contained in Section 2 of the Dowry Act cannot be confined merely to be ‘demand’ of money, property or valuable security’ made at or after the performance of marriage. The legislature has in its wisdom while providing for the definition of ‘dowry’ emphasized that any money, property or valuable security given, as a consideration for marriage, ‘before, at or after’ the marriage would be covered by the expression ‘dowry’ and this definition as contained in Section 2 has to be read wherever the expression ‘dowry’ occurs in the Act. Meaning of the expression ‘dowry’ as commonly used and understood is different than the peculiar definition thereof under the Act. Under Section 4, mere demand of ‘dowry’ is sufficient to bring home the offence to an accused. Thus, any ‘demand’ of money, property or valuable security made from the bride or her parents or other relatives by the bridegroom or his parents or other relatives or vice-versa would fall within the mischief of ‘dowry’ under the Act where such demand is not properly referable to any legally recognized claim and is relatable only to the consideration of marriage. Marriage in this context would include a proposed marriage also more particularly where the non- fulfilment of the “demand of dowry” leads to the ugly consequence of the marriage not taking place at all. The expression “dowry” under the Dowry Act has to be interpreted in the sense which the statute wishes to attribute to it. The definition given in the statute is the determinative factor. The Dowry Act is a piece of social legislation which aims to check the growing menace of the social evil of dowry and it makes punishable not only the actual receiving of dowry but also the very demand of dowry made before or at the time or after the marriage where such demand is referable to the consideration of marriage. Dowry as a quid pro quo for marriage is prohibited and not the giving of traditional presents to the bride or the bridegroom by friends and relatives. Thus, voluntary presents given at or before or after the marriage to the bride or the bridegroom, as the case may be, of a traditional nature, which are given not as a consideration for marriage but out of love, affection or regard, would not fall within the mischief of the expression ‘dowry’ made punishable under the Dowry Act.

Aryan Hindus recognised 8 forms of marriage, out of which four were approved, namely, Brahma, Daiva, Arsha and Prajapatya. The dis-approved forms of marriages were Gandharva, Asura, Rakshasa and Paisacha.

In the Brahma form of marriage, some amounts had to be spent by father/guardian, as the case may be, to go ultimately to the spouses. The origin of dowry may be traced to this amount either in cash or kind.

The concept of “dowry” is intermittently linked with a marriage and the provisions of the Dowry Act apply in relation to marriages. If the legality of the marriage itself is an issue further legalistic problems do arise. If the validity of the marriage itself is under legal scrutiny, the demand of dowry in respect of an invalid marriage would be legally not recognizable. Even then the purpose for which Sections 498A and 304B-IPC and Section 113B of the Indian Evidence Act, 1872 (for short the ‘Evidence Act’) were introduced cannot be lost sight of. Legislations enacted with some policy to curb and alleviate some public evil rampant in society and effectuate a definite public purpose or benefit positively requires to be interpreted with certain element of realism too and not merely pedantically or hyper technically. The obvious objective was to prevent harassment to a woman who enters into a marital relationship with a person and later on, becomes a victim of the greed for money. Can a person who enters into a marital arrangement be allowed to take a shelter behind a smokescreen to contend that since there was no valid marriage the question of dowry does not arise? Such legalistic niceties would destroy the purpose of the provisions. Such hairsplitting legalistic approach would encourage harassment to a woman over demand of money. The nomenclature ‘dowry’ does not have any magic charm written over it. It is just a label given to demand of money in relation to marital relationship. The legislative intent is clear from the fact that it is not only the husband but also his relations who are covered by Section 498A. Legislature has taken care of children born from invalid marriages. Section 16 of the Marriage Act deals with legitimacy of children of void and voidable marriages. Can it be said that legislature which was conscious of the social stigma attached to children of void and voidable marriages closed eyes to plight of a woman who unknowingly or unconscious of the legal consequences entered into the marital relationship. If such restricted meaning is given, it would not further the legislative intent. On the contrary, it would be against the concern shown by the legislature for avoiding harassment to a woman over demand of money in relation to marriages. The first exception to Section 494 has also some relevance. According to it, the offence of bigamy will not apply to “any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction”. It would be appropriate to construe the expression ‘husband’ to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerce her in any manner or for any of the purposes enumerated in the relevant provisions Sections 304B/498A, whatever be the legitimacy of the marriage itself for the limited purpose of Sections 498A and 304B IPC. Such an interpretation, known and recognized as purposive construction has to come into play in a case of this nature. The absence of a definition of ‘husband’ to specifically include such persons who contract marriages ostensibly and cohabit with such woman, in the purported exercise of his role and status as ‘husband’ is no ground to exclude them from the purview of Section 304B or 498A IPC, viewed in the context of the very object and aim of the legislations introducing those provisions.

In Chief Justice of A.P. v. L.V.A. Dixitulu (1979 (2) SCC 34), this Court observed:

*“The primary principle of interpretation is that a constitutional or statutory provision should be construed “according to the intent of they that made it” (Coke).*

*Normally, such intent is gathered from the language of the provision. If the language or the phraseology employed by the legislation is precise and plain and thus by itself proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequences that may follow. But if the words used in the provision are imprecise, protean or evocative or can reasonably bear*

*meanings more than one, the rule of strict grammatical construction ceases to be a sure guide to reach at the real legislative intent. In such a case, in order to ascertain the true meaning of the terms and phrases employed, it is legitimate for the Court to go beyond the arid literal confines of the provision and to call in aid other well-recognised rules of construction, such as its legislative history, the basic scheme and framework of the statute as a whole, each portion throwing light, on the rest, the purpose of the legislation, the object sought to be achieved, and the consequences that may flow from the adoption of one in preference to the other possible interpretation.*

In *Kehar Singh v. State (Delhi Admn.)* (AIR 1988 SC 1883), this Court held:

*“...But, if the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature rational meaning. We then examine every word, every section and every provision. We examine the Act as a whole. We examine the necessity which gave rise to the Act. We look at the mischiefs which the legislature intended to redress. We look at the whole situation and not just one-to-one relation. We will not consider any provision out of the framework of the statute. We will not view the provisions as abstract principles separated from the motive force behind. We will consider the provisions in the circumstances to which they owe their origin. We will consider the provisions to ensure coherence and consistency within the law as a whole and to avoid undesirable consequences.*

In *District Mining Officer v. Tata Iron & Steel Co.* (JT 2001 (6) SC 183), this Court stated:

*“The legislation is primarily directed to the problems before the legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of thing, it is impossible to anticipate fully in the varied situations arising in future in which the application of the legislation in hand may be called for the words chosen to communicate such indefinite referents are bound to be in many cases, lacking in charity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words, the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed”.*

The suppression of mischief rule made immortal in *Heydon's case* (3 Co Rep 7a 76 ER 637) can be pressed into service. With a view to suppress the mischief which would have surfaced had the literal rule been allowed to cover the field, the *Heydon's Rule* has been applied by this Court in a number of cases, e.g. *Bengal Immunity Co. Ltd., v. State of Bihar and Ors.* (AIR 1955 SC 661), *Goodyear India Ltd. v. State of Haryana and Anr.* (AIR 1990 SC 781), *P.E.K. Kalliani Amma and Ors. v. K. Devi and Ors.* (AIR 1996 SC 1963) and *Ameer Trading Corporation Ltd., v. Shapporji Data Processing Ltd.* (2003 (8) Supreme 634).

The judgments of High Courts taking a view contrary to the one expressed above, cannot be considered to lay down the correct position of law.

In *Reserve Bank of India etc. etc. v. Peerless General Finance and Investment Co. Ltd. and others etc. etc.* (1987 (1) SCC 424) while dealing with the question of interpretation of a statute, this Court observed:

*“Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.”*

In *Seaford Court Estates Ltd. v. Asher* (1949) 2 All ER 155 (CA), Lord Denning, advised a purposive approach to the interpretation of a word used in a statute and observed:

*“The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give ‘force and life’ to the intention of the legislature.....A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in this texture of it, they would have straightened it out? He must then do so as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases.”* (underlined for emphasis)

These aspects were highlighted by this Court in *S. Gopal Reddy v. State of A.P.* (1996 (4) SCC 596).

Whether the offences are made out is a matter of trial. The High Court was not justified in summarily rejecting the application for grant of leave. It has a duty to indicate reasons when it refuses to grant leave. Any casual or summary disposal would not be proper. (See *State of Punjab v. Bhag Singh* (2003 (8) Supreme 611). In the circumstances, we set aside the impugned order of the High Court and remit the matter back to the High Court for hearing the matter on merits as according to us points involved require adjudication by the High Court. The appeal is allowed to the extent indicated.



**Rajinder Singh v. State of Punjab**

**AIR 2015 SC 1359**

Criminal Appeal No. 2321 OF 2009

*Rajinder Singh ...Appellant(s)*

*versus*

*State of Punjab...Respondent(s)*

Decided on: **February 26, 2015**

Bench : **Hon'ble Mr. Justice T.S. Thakur, Hon'ble Mr. Justice R.F. Nariman**  
and **Hon'ble Mr. Justice Prafulla C. Pant**

J U D G M E N T

Judgement Delivered by **Hon'ble Mr. Justice R.F. Nariman:**

1. The facts of this case raises questions relating to one of the two great social evils practiced against the women of this country for centuries. In the facts presented before us, a young woman consumes pesticide having been driven to do so by repeated demands being made on her for money by the family into which she is supposed to merge her identity. Sati and dowry deaths have plagued this nation for centuries. Sati - the practice of sending a widow to her husband's funeral pyre to burn in it - was first outlawed under British Rule in 1829 and 1830 under the Governor Generalship of Lord William Bentinck in the Bengal, Madras and Bombay Presidencies. General Sir Charles Napier, the Commander-in-Chief of the British Forces in India between 1859 and 1861, is supposed to have said to the Hindu Priests who complained to him about the prohibition of Sati that "the burning of widows is your custom but in my country, when a man burns a woman alive, we hang them and confiscate all their property. Let us both, therefore, act in accordance with our national customs."
2. It took free India many years before the Commission of Sati (Prevention) Act, 1987 was passed by Parliament setting down various offences relating to the commission of Sati and the trial of such offences by special courts. In this appeal, however, we are confronted with the other major problem, namely, dowry deaths. Parliament responded much earlier so far as the prohibition of dowry is concerned by enacting the Dowry Prohibition Act, 1961 under which minimum sentences were prescribed as penalty for the giving or taking of dowry. The specific menace of dowry deaths, however, was tackled by the introduction of a new provision in 1986 - Section 304B in the Penal Code together with another new provision Section 113B of the Evidence Act. These two Sections read 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."*

*"113-B. Presumption as to dowry death.-When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.*

*Explanation.*-For the purposes of this section, "dowry death" shall have the same meaning as in Section 304-B of Indian Penal Code (45 of 1860)."

3. Coming back to the facts of the present appeal, a young woman, namely, Salwinder Kaur was married to the appellant Rajinder Singh sometime in the year 1990. On 31st August, 1993, within four years of the marriage, Salwinder Kaur consumed Aluminium Phosphide, which is a pesticide, as a result of which her young life was snuffed out. On the same day, an FIR was lodged against the husband, his older brother and the older brother's wife. The trial court after examining the evidence of the prosecution and the defence, acquitted the appellant's older brother and his wife but convicted the appellant under Section 304B and sentenced him to undergo rigorous imprisonment for seven years, which is the minimum sentence that can be pronounced on a finding of guilt under the said Section. This was done after examining in particular the evidence of PW.2 - Karnail Singh, the father of the deceased woman, PW-3 - Gulzar Singh, his elder brother and PW-4 - Balwinder Singh, Sarpanch of the village. The High Court of Punjab and Haryana confirmed the conviction and the sentence vide the impugned judgment.
4. For the purpose of this appeal it is sufficient to set out the dead woman's father's evidence which has been accepted by the two courts below.

*"I have three daughters and two sons, Paramjit Kaur, Manjit Kaur and Salwinder Kaur are my daughters. Salwinder Kaur my daughter was married to Rajinder Singh r/o Bathwala. She was married to Rajinder Singh four years prior to her death. After one year of the marriage, my daughter came to me and told that her husband Rajinder Singh, the brother-in-law Davinder Singh and Gurmit Kaur, present in court, are demanding money for constructing a house. She also informed me that they were quarrelling with her for the said demand of money. At the time of marriage of my daughter, I had given sufficient dowry according to my status. I told my daughter that at that moment I am not in possession of money. However, I gave she-buffalo to my daughter for taking the same to her in-laws' house and asked her to pull on with the parents-in-law. After 7/8 months, when my daughter was*

again ill-treated by the accused, she came to me and again demanded money. The accused, present in court, were demanding and compelling my daughter to back with a promise that I would visit her shortly and on the following day, I alongwith my brother Gulzar Singh, the then Sarpanch Balwinder Singh and Ex-Sarpanch Hazura Singh went to the house of the accused in village Bathawals. On arrival at the house of the accused, the accused, present in court, along with father-in-law of my daughter were present at their house. Harjinder Singh, my son-in-law along with Gurmit Kaur and Davinder Singh were also present. I requested all of them not to quarrel with my daughter on account of demand of money. I also assured the accused that I would pay them the said amount at the time of harvesting the crop. The accused insisted about the demand of money. My daughter Salwinder Kaur visited my house 15 days prior to her death. I again pacified my daughter that I would definitely pay the amount after harvesting the crop. Salwinder Kaur was not happy for not getting the money from me. She was maltreated by the accused. After the death of Salwinder Kaur, member panchayat Harbhajan Singh of V. Bathwala and Davinder Singh accused came to my house and informed that my daughter has died after consuming some poisonous substance and I was asked to accompany them for cremating the dead body.”

5. We have heard learned counsel for the parties. Counsel for the appellant relied upon the cross-examination of Karnail Singh which is set out hereinbelow:-

*“I do not know if Devinder Singh had separate portion. My daughter had come to me for the first time 5/6 months after her marriage, but she did not make any complaint to me regarding the conduct of the accused persons. She complained to me only after about a year and she had told me that they wanted to build a joint house and asked her to bring money for that purpose. I however did not give any money to her for this purpose. No written complaint was ever made to the panchayat. I never talked about it to Balwinder Singh. It is incorrect to suggest that no demand of money was ever made from my daughter or that I have deposed falsely.”*

6. Based on this, learned counsel argued that the link required between the demand made being connected with the marriage was snapped as also the fact that since initially, the complaints were made at long intervals, no offence under Section 304B could be said to be made out. Counsel for the State of Punjab reiterated the findings of both courts and argued in support of the judgment of the High Court.
7. The primary ingredient to attract the offence under Section 304B is that the death of a woman must be a “dowry death”. “Dowry” is defined by Section 2 of the Dowry Prohibition Act, 1961, which reads as follows:

“2. Definition of “dowry”.-In this Act, “dowry” means any property or valuable security given or agreed to be given either directly or indirectly-

- (a) by one party to a marriage to the other party to the marriage; or
- (b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before [or any time after the marriage]

*[in connection with the marriage of the said parties, but does not include] dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.*

*Explanation I.- [\*\*\*] Explanation II.-The expression "valuable security" has the same meaning as in Section 30 of the Indian Penal Code (45 of 1860)."*

8. A perusal of this Section shows that this definition can be broken into six distinct parts.
  - 1) Dowry must first consist of any property or valuable security
    - the word "any" is a word of width and would, therefore, include within it property and valuable security of any kind whatsoever.
  - 2) Such property or security can be given or even agreed to be given. The actual giving of such property or security is, therefore, not necessary.
  - 3) Such property or security can be given or agreed to be given either directly or indirectly.
  - 4) Such giving or agreeing to give can again be not only by one party to a marriage to the other but also by the parents of either party or by any other person to either party to the marriage or to any other person. It will be noticed that this clause again widens the reach of the Act insofar as those guilty of committing the offence of giving or receiving dowry is concerned.
  - 5) Such giving or agreeing to give can be at any time. It can be at, before, or at any time after the marriage. Thus, it can be many years after a marriage is solemnised.
  - 6) Such giving or receiving must be in connection with the marriage of the parties. Obviously, the expression "in connection with" would in the context of the social evil sought to be tackled by the Dowry Prohibition Act mean "in relation with" or "relating to".
9. The ingredients of the offence under Section 304B have been stated and restated in many judgments. There are four such ingredients and they are said to be:
  - (a) death of a woman must have been caused by any burns or bodily injury or her death must have occurred otherwise than under normal circumstances;
  - (b) such death must have occurred within seven years of her marriage;
  - (c) soon before her death, she must have been subjected to cruelty or harassment by her husband or any relative of her husband; and
  - (d) such cruelty or harassment must be in connection with the demand for dowry.
10. This has been the law stated in the following judgments:

Ashok Kumar v. State of Haryana, (2010) 12 SCC 350 at pages 360-361; Bachni Devi & Anr. v. State of Haryana, (2011) 4 SCC 427 at 431, Pathan Hussain Basha v. State of A.P., (2012) 8 SCC 594 at 599, Kulwant Singh & Ors. v. State of Punjab, (2013) 4 SCC 177 at 184-185, Surinder Singh v. State of Haryana, (2014) 4 SCC 129 at 137, Raminder Singh v. State of Punjab, (2014) 12 SCC 582 at 583, Suresh Singh v. State of Haryana, (2013) 16 SCC 353 at 361, Sher Singh v. State of Haryana, 2015 1 SCALE 250 at 262.

11. This Court has spoken sometimes with divergent voices both on what would fall within “dowry” as defined and what is meant by the expression “soon before her death”. In Appasaheb v. State of Maharashtra, (2007) 9 SCC 721, this Court construed the definition of dowry strictly, as it forms part of Section 304B which is part of a penal statute. The court held that a demand for money for defraying the expenses of manure made to a young wife who in turn made the same demand to her father would be outside the definition of dowry. This Court said:

*“A demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a demand for dowry as the said word is normally understood. The evidence adduced by the prosecution does not, therefore, show that any demand for “dowry” as defined in Section 2 of the Dowry Prohibition Act was made by the appellants as what was allegedly asked for was some money for meeting domestic expenses and for purchasing manure.” (at page 727)*

12. This judgment was distinguished in at least four other judgments (see: Bachni Devi v. State of Haryana (2011) 4 SCC 427 at pages 432 to 434; Kulwant Singh & Ors. v. State of Punjab, (2013) 4 SCC 177 at page 185; Surinder Singh v. State of Haryana (2014) 4 SCC 129 at pages 139 to 141 and Raminder Singh v. State of Punjab (2014) 12 SCC 582 at page 586. The judgment was, however, followed in Vipin Jaiswal v. State of Andhra Pradesh, (2013) 3 SCC 684 at pages 687-688.
13. In order to arrive at the true construction of the definition of dowry and consequently the ingredients of the offence under Section 304B, we first need to determine how a statute of this kind needs to be interpreted. It is obvious that Section 304B is a stringent provision, meant to combat a social evil of alarming proportions. Can it be argued that it is a penal statute and, should, therefore, in case of ambiguity in its language, be construed strictly?
14. The answer is to be found in two path-breaking judgments of this Court. In M. Narayanan Nambiar v. State of Kerala, 1963 Supp. (2) SCR 724, a Constitution Bench of this Court was asked to construe Section 5(1)(d) of the Prevention of Corruption Act, 1947. In construing the said Act, a penal statute, Subba Rao, J. stated:

*“The preamble indicates that the Act was passed as it was expedient to make more effective provisions for the prevention of bribery and Corruption. The long title as well as the preamble indicate that the Act was passed to put down the said social evil i.e. bribery and corruption by public servant. Bribery is form of corruption. The fact that in addition to the word “Bribery” the word “corruption” is used shows that the legislation was intended to combat also other evil in addition to bribery. The existing law i.e. Penal Code was found insufficient to eradicate or even to control the growing evil of bribery and corruption corroding the public service of our country. The provisions broadly include the existing offences under Sections*

161 and 165 of the Indian Penal Code committed by public servants and enact a new rule of presumptive evidence against the accused. The Act also creates a new offence of criminal misconduct by public servants though to some extent it overlaps on the pre-existing offences and enacts a rebuttable presumption contrary to the well known principles of Criminal Jurisprudence. It also aims to protect honest public servants from harassment by prescribing that the investigation against them could be made only by police officials of particular status and by making the sanction of the Government or other appropriate officer a pre-condition for their prosecution. As it is a socially useful measure conceived in public interest, it should be liberally construed so as to bring about the desired object, i.e. to prevent corruption among public servants and to prevent harassment of the honest among them.

A decision of the Judicial Committee in *Dyke v. Elliott*, cited by the Learned Counsel as an aid for construction neatly states the principle and therefore may be extracted: Lord Justice James speaking for the Board observes at page 191:

*“No-doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a casus omissus, that the thing is so clearly within the mischief that it must have been intended to be included if thought of. On the other hand, the person charged has a right to say that the thing charged although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed like any other instrument, according to the fair commonsense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.”*

*In our view this passage, if we may say so, restates the rule of construction of a penal provision from a correct perspective.”*

15. In *Standard Chartered Bank v. Directorate of Enforcement*, (2005) 4 SCC 530 at page 547, another Constitution Bench, 40 odd years later, was faced with whether a corporate body could be prosecuted for offences for which the sentence of imprisonment is mandatory. By a majority of 3:2, the question was answered in the affirmative. Balakrishnan, J. held:

“23. The counsel for the appellant contended that the penal provision in the statute is to be strictly construed. Reference was made to *Tolaram Relumal v. State of Bombay* [(1955) 1 SCR 158 : 1954 Cri LJ 1333], SCR at p. 164 and *Girdhari Lal Gupta v. D.H. Mehta* [(1971) 3 SCC 189 : 1971 SCC (Cri) 279]. It is true that all penal statutes are to be strictly construed in the sense that the court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. All penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment. Here, the

*legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted. It is sheer violence to common sense that the legislature intended to punish the corporate bodies for minor and silly offences and extended immunity of prosecution to major and grave economic crimes.*

24. The distinction between a strict construction and a more free one has disappeared in modern times and now mostly the question is “what is true construction of the statute?” A passage in Craies on Statute Law, 7th Edn. reads to the following effect:

*“The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules. ‘All modern Acts are framed with regard to equitable as well as legal principles.’ ‘A hundred years ago,’ said the court in Lyons’ case [Lyons v. Lyons, 1858 Bell CC 38 : 169 ER 1158], ‘statutes were required to be perfectly precise and resort was not had to a reasonable construction of the Act, and thereby criminals were often allowed to escape. This is not the present mode of construing Acts of Parliament. They are construed now with reference to the true meaning and real intention of the legislature.’”*

At p. 532 of the same book, observations of Sedgwick are quoted as under:

*“The more correct version of the doctrine appears to be that statutes of this class are to be fairly construed and faithfully applied according to the intent of the legislature, without unwarrantable severity on the one hand or unjustifiable lenity on the other, in cases of doubt the courts inclining to mercy.”*

16. Concurring with Balakrishnan, J., Dharmadhikari, J. added:

*“36. The rule of interpretation requiring strict construction of penal statutes does not warrant a narrow and pedantic construction of a provision so as to leave loopholes for the offender to escape (see Murlidhar Meghraj Loya v. State of Maharashtra [(1976) 3 SCC 684 : 1976 SCC (Cri) 493]). A penal statute has to also be so construed as to avoid a lacuna and to suppress mischief and to advance a remedy in the light of the rule in Heydon’s case [(1584) 3 Co Rep 7a : 76 ER 637]. A common-sense approach for solving a question of applicability of a penal statute is not ruled out by the rule of strict construction. (See State of A.P. v. Bathu Prakasa Rao [(1976) 3 SCC 301 : 1976 SCC (Cri) 395] and also G.P. Singh on Principles of Statutory Interpretation, 9th Edn., 2004, Chapter 11, Synopsis 3 at pp. 754 to 756.)”*

17. And Arun Kumar, J., concurring with both the aforesaid Judges, followed two earlier decisions of this Court as follows:-

*“49. Another three-Judge Bench of this Court in a judgment in Balram Kumawat v. Union of India [(2003) 7 SCC 628] to which I was a party, observed in the context of principles of statutory interpretation: (SCC p. 635, para 23) “23. Furthermore, even in relation to a penal statute any narrow and pedantic, literal and lexical construction may not always be*

given effect to. The law would have to be interpreted having regard to the subject-matter of the offence and the object of the law it seeks to achieve. The purpose of the law is not to allow the offender to sneak out of the meshes of law. Criminal jurisprudence does not say so.”

50. In *M.V. Javali v. Mahajan Borewell & Co.* [(1997) 8 SCC 72 : 1997 SCC (Cri) 1239] this Court was considering a similar situation as in the present case. Under Section 278-B of the Income Tax Act a company can be prosecuted and punished for offence committed under Section 276-B; sentence of imprisonment is required to be imposed under the provision of the statute and a company being a juristic person cannot be subjected to it. It was held that the apparent anomalous situation can be resolved only by a proper interpretation of the section. The Court observed: (SCC p. 78, para 8) “8. Keeping in view the recommendations of the Law Commission and the above principles of interpretation of statutes we are of the opinion that the only harmonious construction that can be given to Section 276-B is that the mandatory sentence of imprisonment and fine is to be imposed where it can be imposed, namely on persons coming under categories (ii) and (iii) above, but where it cannot be imposed, namely on a company, fine will be the only punishment.”

18. In keeping with these principles, in *K. Prema S. Rao and another v. Yadla Srinivasa Rao and others*, (2003) 1 SCC 217, this Court said:

*“The legislature has by amending the Penal Code and the Evidence Act made penal law more strident for dealing with and punishing offences against married women.”*

19. In *Reema Aggarwal v. Anupam*, (2004) 3 SCC 199, in construing the provisions of the Dowry Prohibition Act, in the context of Section 498A, this Court applied the mischief rule made immortal by Heydon’s case and followed Lord Denning’s judgment in *Seaford Court Estates Ltd. v. Asher*, where the learned Law Lord held:

*“He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give ‘force and life’ to the intention of the legislature.”* (at page 213) The Court gave an expansive meaning to the word ‘husband’ occurring in Section 498A to include persons who entered into a relationship with a woman even by feigning to be a husband. The Court held:

*“....It would be appropriate to construe the expression ‘husband’ to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerce her in any manner or for any of the purposes enumerated in the relevant provisions Sections 304B/498A, whatever be the legitimacy of the marriage itself for the limited purpose of Sections 498A and 304B IPC. Such an interpretation, known and recognized as purposive construction has to come into play in a case of this nature. The absence of a definition of ‘husband’ to specifically include such persons who contract marriages ostensibly and cohabit with such woman, in the purported exercise of his role and status as ‘husband’ is no ground to exclude them from the purview of Section 304B*

or 498A IPC, viewed in the context of the very object and aim of the legislations introducing those provisions.” (at page 210)

20. Given that the statute with which we are dealing must be given a fair, pragmatic, and common sense interpretation so as to fulfill the object sought to be achieved by Parliament, we feel that the judgment in Appasaheb’s case followed by the judgment of Kulwant Singh do not state the law correctly. We, therefore, declare that any money or property or valuable security demanded by any of the persons mentioned in Section 2 of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise. Coming now to the other important ingredient of Section 304B - what exactly is meant by “soon before her death”?

21. This Court in Surinder Singh v. State of Haryana (2014) 4 SCC 129, had this to say:

“17. Thus, the words “soon before” appear in Section 113-B of the Evidence Act, 1872 and also in Section 304-B IPC. For the presumptions contemplated under these sections to spring into action, it is necessary to show that the cruelty or harassment was caused soon before the death. The interpretation of the words “soon before” is, therefore, important. The question is how “soon before”? This would obviously depend on the facts and circumstances of each case. The cruelty or harassment differs from case to case. It relates to the mindset of people which varies from person to person. Cruelty can be mental or it can be physical. Mental cruelty is also of different shades. It can be verbal or emotional like insulting or ridiculing or humiliating a woman. It can be giving threats of injury to her or her near and dear ones. It can be depriving her of economic resources or essential amenities of life. It can be putting restraints on her movements. It can be not allowing her to talk to the outside world. The list is illustrative and not exhaustive. Physical cruelty could be actual beating or causing pain and harm to the person of a woman. Every such instance of cruelty and related harassment has a different impact on the mind of a woman. Some instances may be so grave as to have a lasting impact on a woman. Some instances which degrade her dignity may remain etched in her memory for a long time. Therefore, “soon before” is a relative term. In matters of emotions we cannot have fixed formulae. The time-lag may differ from case to case. This must be kept in mind while examining each case of dowry death.

18. In this connection we may refer to the judgment of this Court in Kans Raj v. State of Punjab [(2000) 5 SCC 207 : 2000 SCC (Cri) 935] where this Court considered the term “soon before”. The relevant observations are as under: (SCC pp. 222- 23, para 15)

“15. ... ‘Soon before’ is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term ‘soon before’ is not synonymous with the term ‘immediately before’ and is opposite of the expression ‘soon after’ as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has

*to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be 'soon before death' if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough."*

*Thus, there must be a nexus between the demand of dowry, cruelty or harassment, based upon such demand and the date of death. The test of proximity will have to be applied. But, it is not a rigid test. It depends on the facts and circumstances of each case and calls for a pragmatic and sensitive approach of the court within the confines of law."*

22. In another recent judgment in *Sher Singh v. State of Haryana*, 2015 (1) SCALE 250, this Court said:

*"We are aware that the word 'soon' finds place in Section 304B; but we would prefer to interpret its use not in terms of days or months or years, but as necessarily indicating that the demand for dowry should not be stale or an aberration of the past, but should be the continuing cause for the death under Section 304B or the suicide under Section 306 of the IPC. Once the presence of these 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." (at page 262)*

23. We endorse what has been said by these two decisions. Days or months are not what is to be seen. What must be borne in mind is that the word "soon" does not mean "immediate". A fair and pragmatic construction keeping in mind the great social evil that has led to the enactment of Section 304B would make it clear that the expression is a relative expression. Time lags may differ from case to case. All that is necessary is that the demand for dowry should not be stale but should be the continuing cause for the death of the married woman under Section 304B.

24. At this stage, it is important to notice a recent judgment of this Court in *Dinesh v. State of Haryana*, 2014 (5) SCALE 641 in which the law was stated thus:

*"The expression "soon before" is a relative term as held by this Court, which is required to be considered under the specific circumstances of each case and no straight jacket formula can be laid down by fixing any time of allotment. It can be said that the term "soon before" is synonyms with the term "immediately before". The determination of the period which can come within term "soon before" is left to be determined by courts depending upon the facts and circumstances of each case." (at page 646)*

25. We hasten to add that this is not a correct reflection of the law. “Soon before” is not synonymous with “immediately before”.
26. The facts of this appeal are glaring. Demands for money were made shortly after one year of the marriage. A she-buffalo was given by the father to the daughter as a peace offering. The peace offering had no effect. The daughter was ill-treated. She went back to her father and demanded money again. The father, then, went along with his brother and the Sarpanch of the village to the matrimonial home with a request that the daughter be not ill-treated on account of the demand for money. The father also assured the said persons that their money demand would be fulfilled and that they would have to wait till the crops of his field are harvested. Fifteen days before her death, Salwinder Kaur again visited her parents’ house on being maltreated by her new family. Then came death by poisoning. The cross-examination of the father of Salwinder Kaur has, in no manner, shaken his evidence. On the facts, therefore, the concurrent findings recorded by both the courts below are upheld. The appeal is dismissed.

□□□



TRAFFICKING





**Vishal Jeet v. Union of India and Ors.**

**(1990) 3 SCC 318**

Writ Petition (Criminal) No. 421 of 1989. (Under Article 32 of the Constitution of India).

*Vishal Jeet. ... Appellant(s)*

*versus*

*Union of India and Ors..... Respondent(s)*

Decided on: **May 02, 1990**

Bench : **Hon'ble Mr. Justice S.R. Pandian** and **Hon'ble Mr. Justice K. Jayachandra Reddy**

JUDGMENT:

The Judgment delivered by **Hon'ble Mr. Justice S.R. Pandian**:

This writ petition under Article 32 of the Constitution of India at the instance of an Advocate is filed by way of a Public Interest Litigation seeking issuance of certain directions, directing the Central Bureau of Investigation (1) to institute an enquiry against those police officers under whose jurisdiction Red Light areas as well Devadasi and Jogin traditions are flourishing and to take necessary action against such erring police officers and law breakers; (2) to bring all the inmates of the red light areas and also those who are engaged in 'flesh trade' to protective homes of the respective States and to provide them with proper medical aid, shelter, education and training in various disciplines of life so as to enable them to choose a more dignified way of life and (3) to bring the children of those prostitutes and other children found begging in streets and also the girls pushed into 'flesh trade' to protective homes and then to rehabilitate them. The averments made in the writ petition on the basis of which these directions are prayed for can be summarised thus:

Many unfortunate teen-aged female children (hereinafter referred to as 'the children') and girls in full bloom are being sold in various parts of the country, for paltry sum even by their parents finding themselves unable to maintain their children on account of acute poverty and unbearable miseries and hoping that their children would be engaged only in household duties or manual labour. But those who are acting as pimps or brokers in the 'flesh trade' and brothel keepers who hunt for these teenaged children and young girls to make money either purchase or kidnap them by deceitful means and unjustly and forcibly inveigle them into 'flesh trade'. Once these unfortunate victims are taken to the dens of prostitutes and sold to brothel keepers, they are shockingly and brutally treated and confined in complete seclusion in a tiny claustrophobic room for several days without food until they succumb to the vicious desires of the brothel keepers and enter into the unethical and squalid business of prostitution. These victims though unwilling to lead this obnoxious way of life have no other way except to surrender themselves retreating into silence and submitting their bodies to all the dirty customers including even sexagenarians with plastic smile.

The petitioner has cited certain lurid tales of sex with sickening details alleged to have been confessed by some children and girls either escaped or rescued from such abodes of ill-fame. After giving a brief note on Devadasi

system and Jogan tradition, the petitioner states that this system and tradition which are still prevailing in some parts of the country should be put to an end. The ultimate plea of the petitioner is that the young children and girls forcibly pushed into 'flesh trade' should be rescued and rehabilitated. With this petition, the petitioner has filed 9 affidavits said to have been sworn by 9 girls who claim to be living in the brothel houses, pleading for rescue and a list of names of 9 girls who are mortally afraid to swear the affidavits. Be it noted that no counter has been filed by any one of the respondents.

The matter is one of great importance warranting a comprehensive and searching analysis and requiring a humanistic rather than a purely legalistic approach from different angles. The questions involved cause considerable anxiety to the Court in reaching a satisfactory solution in eradicating such sexual exploitation of children. We shall now examine this problem and address ourselves to the merits of the prayers.

No denying the fact that prostitution always remains as a running sore in the body of civilisation and destroys all moral values. The causes and evil effects of prostitution maligning the society are so notorious and frightful that none can gainsay it. This malignity is daily and hourly threatening the community at large slowly but steadily making its way onwards leaving a track marked with broken hopes. Therefore, the necessity for appropriate and drastic action to eradicate this evil has become apparent but its successful consummation ultimately rests with the public at large.

It is highly deplorable and heart-rending to note that many poverty stricken children and girls in the prime of youth are taken to 'flesh market' and forcibly pushed into the 'flesh trade' which is being carried on in utter violation of all canons of morality, decency and dignity of humankind. There cannot be two opinions--indeed there is none--that this obnoxious and abominable crime committed with all kinds of unthinkable vulgarity should be eradicated at all levels by drastic steps.

Article 23 which relates to Fundamental Rights in Part of the Constitution and which has been put under the caption 'Right against exploitation' prohibits 'traffic in human beings and begat and other similar forms of labour' and provides that any contravention of Article 23(1) shall be an offence punishable in accordance with law. The expression 'traffic in human beings' is evidently a very wide expression including the prohibition of traffic in women for immoral or other purposes. Article 35(a)(ii) of the Constitution reads that notwithstanding anything in this Constitution, Parliament shall have, and the legislature of a State shall not have, power to make laws for prescribing punishment for those acts which are declared to be offences under this part. The power of legislation, under this article, is given to the Parliament exclusively, for, otherwise the laws relating to fundamental rights would not have been uniform throughout the country. The power is specifically denied to the state legislatures. In implementation of the principles underlying Article 23(1) the Suppression of Immoral Traffic in Women & Girls Act, 1956 (SITA for short) has been enacted under Article 35 with the object of inhibiting or abolishing the immoral traffic in women and girls.

In this connection, it is significant to refer Article 39 which relates to 'Directive Principles of State Policy' under Part IV of the Constitution. Article 39 particularises certain objectives. Clause (f) of Article 39 was substituted by Forty-Second Amendment Act, 1976. Among the objectives mentioned under Clauses (e) and (f) of Article 39, we will confine ourselves only to certain relevant objectives under those two clauses which are sufficient for the purpose of this case. One of the objectives under clause (e) of Article 39 is that the State should, in particular, direct its policy towards securing that the tender age of children are not abused. One of the objectives under clause (f) is that the State should, in particular, direct its policy towards securing

that childhood and youth are protected against exploitation and against moral and material abandonment. These objectives reflect the great anxiety of the Constitution makers to protect and safeguard the interests and welfare of the children of our country. The Government of India has also, in pursuance of these constitutional provisions of clauses (e) and (f) of Article 39, evolved a national policy for the welfare of the children.

It will be apposite to make reference to one of the principles, namely, principle No. (9) formulated by the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on November 20, 1959. The said principle reads thus:

*“The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.”*

Before the adoption of SITA, there were enactments in some of the states for suppression of immoral traffic, but they were not uniform nor were they found to be adequately effective. Some states did not have any law on the subject. With the growing danger in society to healthy and decent living with morality, the world public opinion congregated at New York in a convention for suppression of traffic in persons for exploitation for immoral purposes. Pursuant to the signing of that convention on May 9, 1950, our Parliament has passed an Act called “Suppression of Immoral Traffic in Women and Girls Act, 1956 which is now changed as “The Immoral Traffic (Prevention) Act, 1956” to which certain drastic amendments are introduced by the Amendment Acts of 46 of 1978 and 44 of 1986. This Act aims at suppressing the evils of prostitution in women and girls and achieving a public purpose viz. to rescue the fallen women and girls and to stamp out the evils of prostitution and also to provide an opportunity to these fallen victims so that they could become decent members of the society. Besides the above Act, there are various provisions in the Indian Penal Code such as Sections 866-A (dealing with procuration of minor girl), 366-B (dealing with offence of importation of girl from foreign country), 372 (dealing with selling of minor for purposes of prostitution etc. ) and 373 (dealing with the offence of buying minor for purposes of prostitution etc.). The Juvenile Justice Act, 1986 which provides for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles contains a specific provision namely Section 13 which empowers a police officer or any other person or organisation authorised by the State Government in this behalf to take charge of any neglected juveniles and bring them before the Board constituted under this Act which Board under section 15 has to hold an enquiry and make such orders in relation to the neglected juveniles as it may deem fit.

In spite of the above stringent and rehabilitative provisions of law under various Acts, it cannot be said that the desired result has been achieved. It cannot be gainsaid that a remarkable degree of ignorance or callousness or culpable indifference is manifested in uprooting this cancerous growth despite the fact that the day has arrived imperiously demanding an objective multi-dimensional study and a searching investigation into the matter relating to the causes and effects of this evil and requiring most rational measures to weed out the vices of illicit trafficking. This malady is not only a social but also a socioeconomic problem and, therefore, the measures to be taken in that regard should be more preventive rather than punitive.

In our view, it is neither practicable and possible nor desirable to make a roving enquiry through the CBI throughout the length and breadth of this country and no useful purpose will be served by issuing any such direction, as requested by the petitioner. Further, this malignity cannot be eradicated either by banishing, branding, scourging or inflicting severe punishment on these helpless and hapless victims most of whom are unwilling participants and involuntary victims of compelled circumstances and who, finding no way to escape,

are weeping or wailing throughout. This devastating malady can be suppressed and eradicated only if the law enforcing authorities in that regard take very severe and speedy legal action against all the erring persons such as pimps, brokers and brothel keepers. The Courts in such cases have to always take a serious view of this matter and inflict consign punishment on proof of such offences. Apart from legal action, both the Central and the State Government who have got an obligation to safeguard the interest and welfare of the children and girls of this country have to evaluate various measures and implement them in the right direction.

Bhagwati, J. (as he then was) in *Lakshmi Kant Pandey v. Union of India*, [1984] 2 SCC 244 while emphasizing the importance of children has expressed his view thus: “It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a ‘supremely important national asset’ and the future wellbeing of the nation depends on how its children grow and develop.”

We, after bestowing our deep and anxious consideration on this matter feel that it would be appropriate if certain directions are given in this regard. Accordingly, we make the following directions:

1. All the State Governments and the Governments of Union Territories should direct their concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference.
2. The State Governments and the Governments of Union Territories should set up a separate Advisory Committee within their respective zones consisting of the secretary of the Social Welfare Department or Board, the Secretary of the Law Department, sociologists, criminologists, members of the women’s organisations, members of Indian Council of Child Welfare and Indian Council of Social Welfare as well the members of various voluntary social organisations and associations etc., the main objects of the Advisory Committee being to make suggestions of:
  - (a) the measures to be taken in eradicating the child prostitution, and
  - (b) the social welfare programmes to be implemented for the care, protection, treatment, development and rehabilitation of the young fallen victims namely the children and girls rescued either from the brothel houses or from the vices of prostitution.
3. All the State Governments and the Governments of Union Territories should take steps in providing adequate and rehabilitative homes manned by well-qualified trained social workers, psychiatrists and doctors.
4. The Union Government should set up a committee of its own in the line, we have suggested under direction No.(2) the main object of which is to evolve welfare programmes to be implemented on the national level for the care, protection, rehabilitation etc. etc. of the young fallen victims namely the children and girls and to make suggestions of amendments to the existing laws or for enactment of any new law, if so warranted for the prevention of sexual exploitation of children.
5. The Central Government and the Governments of States and Union Territories should devise a machinery of its own for ensuring the proper implementation of the suggestions that would be made by the respective committees.

6. The Advisory Committee can also go deep into devadasi system and Jogin tradition and give their valuable advice and suggestions as to what best the Government could do in that regard.
7. The copies of the affidavits and the list containing the names of 9 girls are directed to be forwarded to the Commissioner of Police, Delhi for necessary action. We may add that we are not giving an exhaustive list of the members for the constitution of the committee. Therefore, it is open to the concerned Government to include any member or members in the committee as it deems necessary. We hope and trust that the directions given by us will go a long way towards eradicating the malady of child prostitution, Tevadasi system and Jogin tradition and will also at the same time protect and safeguard the interests of the children by preventing of the sexual abuse and exploitation. So far as the remaining prayer regarding rehabilitation of the children of prostitutes is concerned, we understand that a similar issue is raised in a separate writ petition bearing W.P. No. 824/88 pending before this Court and this Court is seized of the matter and also has given an interim direction on 15.11.1989 for setting up a committee to go into the question from various angles of the problems taking into consideration the different laws relevant to the matter and to submit its report. (Vide *Gaurav Jain v. Union of India and Others*, AIR 1990 SC 292. Therefore, we are not expressing any opinion on this prayer regarding the rehabilitation of the children of prostitutes.

With the above directions, the Writ Petition is disposed of.

T.N.A.

Petition disposed of.



**Gaurav Jain v. Union of India and Ors.**

**(1997) 8 SCC 114**

Criminal Appeal No. 2321 OF 2009

*Gaurav Jain ... Appellant(s)*

*versus*

*Union of India and Ors. ... Respondent(s)*

Decided on: **July 09, 1997**

Bench : **Hon'ble Mr. Justice K. Ramaswamy** and **Hon'ble Mr. Justice D. P. Wadhwa**

WITH

WRIT PETITION (CRL.) NOS. 745-54 of 1990

O R D E R

This writ petition under Article 32 of the Constitution was filed by Mr. Gaurav Jain, advocate of this Court as public interest litigation after he had read a report appearing in the 'India Today' a national magazine. of July 11, 1988. The petitioner had prayed as under:

*"In the circumstances, it is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to:-*

- a) issue an appropriate writ, in the nature of mandamus, order or direction, directing the respondents to provide separate schools with vocational training, hostels, with the medical check-up facilities in each respondent state and union territory and such other places where this Hon'ble Court may direct, for the children of prostitutes, upto the age of sixteen years to rescue them, from falling into the infernal existence and the same immoral and deproved way of life by inducing in the vice profession of prostitution, dimps, drug-pushers and bootleggers and other hazardous employments:*
- b) pass my other order/orders which this Hon'ble Court may does fit and proper in the circumstances of the case."*

By order dated February 20, 1989 the petitioner was directed "to suitably amend the writ petition and confine claim in the petition to the relief of setting up of juvenile homes as provided under Section 9 of the Juvenile Justice Act, 1986." Then on the next date, that is, March 13, 1989 the prayer for amendment was allowed and it was directed that prayer in the writ petition shall stand substituted "by what has now been indicated in the application for amendment".

By order dated November 15, 1989 while the court noted submission of Mr. V.C. Mahajan, advocate of the petitioner that separate schools and hostels be provided for the children of the prostitutes, the court did not find itself inclined to accept such a submission. The Court was of the view that segregating prostitutes children

by locating separate schools and providing separate hostels would not be in the interest of such children. The Court by this very order constituted a Committee headed by Mr. V.C. Mahahan, Senior Advocate to consider the problems faced by the children of the prostitutes. This order of the Court is reported in 1990 Supp. 3CC 709. This Committee examined the matter keeping the following objects in view:

- “i) Viability of having separate schools and hostels.*
- ii) existing laws relating to the target group, and*
- iii) possibility of evolving a scheme for these children, workable at the national level.”*

The Committee has since submitted its report. In its report the committee has made various recommendations for the rehabilitation of the children of prostitutes. I do not find that the question of eradication of prostitution was an issue involved in these proceedings or subject matter of Committee’s deliberations. The committee in its report which runs into over 100 pages has only referred in two paragraphs, while examining target group, as to who are the prostitutes. Apart from this I do not find there is any discussion in the report of the Committee towards eradication of prostitution. As to what should be the scheme to be evolved to eradicate prostitution, i.e. the source itself; the basics; and what succour and sustenance can be provided to the fallen victims of flesh trade was not a question agitated in the proceedings. Certainly no one can dispute that evil of prostitution must be curbed. It is the mandate of the Constitution which prohibits traffic in human beings. Keeping that object in view and in pursuance to International Conventions for the Suppression of Traffic in persons and of the Exploitation of the Prostitution of others signed at New York on May 9, 1950. the Parliament enacted the Suppression of Immoral Traffic in Women and Girls Act, 1956. The Act was amended in 1978 to make good some inadequacies in the implementation of the Act and in the light of the experience gained during the period the Act was being implemented. Despite the amendments of the Act it was felt that enforcement of the Act had not been effective enough to deal with the problems of immoral traffic in all its dimensions. Suggestions had been made to Government by voluntary organisations working for women, advocacy groups and various individuals urging the enlargement of the scope of the Act, to make penal provisions more stringent and to provide for certain minimum standards for correctional treatment and rehabilitation of the victims. The Act was, therefore, further amended in 1986 making it more wide based. The Act is now called as Immoral Traffic (Prevention) Act. 1956. I need not detail other objects of the Act as all the discussions would not be relevant in these proceedings. I am not entering into the scope and width of public interest litigation but when the issue has not been squarely raised, concerned parties not informed, pleadings being not there, it may not be correct to embark upon that task and to give interpretation of the law applicable thereto and that to without hearing the parties when the issue is so profound certainly involving hearing of the Union of India and State Governments with respect to their problems.

Thus considering the substratum of the judgment prepared by my learned brother relating to children of the prostitutes and establishment of the juvenile homes I would concur with the directions being issued by him in his order, I would, however, record my respectful dissent on the question of prostitution and the directions proposed to be issued on that account and also, in the circumstances of the case, what my learned brother has to say on the directions proposed to be issued referring to the provisions of Article 142 and 145(S) of the Constitution.

□□□





# SEXUAL HARASSMENT AT WORKPLACE





**Vishaka and Ors. v. State of Rajasthan and Ors**

**AIR 1997 SC 3011**

*Vishaka and Ors.. ...Appellant(s)*  
*versus*  
*State of Rajasthan and Ors.....Respondent(s)*

Decided on: **August 13, 1997**

Bench : **Hon'ble Mr. Justice J. S. Verma, C.J.I., Hon'ble Mr. Justice Sujata V. Manohar**  
and **Hon'ble Mr. Justice B. N. Kirpal**

J U D G M E N T:

Judgment delivered by: **Hon'ble Mr. Justice J. S. Verma, C.J.I.**

This Writ Petition has been filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon. With the increasing awareness and emphasis on gender justice, there is increase in the effort to guard such violations; and the resentment towards incidents of sexual harassment is also increasing. The present petition has been brought as a class action by certain social activists and NGOs with the aim of focussing attention towards this societal aberration, and assisting in finding suitable methods for realisation of the true concept of 'gender equality'; and to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation.

The immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of social worker in a village of Rajasthan. That incident is the subject matter of a separate criminal action and no further mention of it, by us, is necessary. The incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate; and the urgency for safeguards by an alternative mechanism in the absence of legislative measures. In the absence of legislative measures, the need is to find an effective alternative mechanism to fulfil this felt and urgent social need.

Each such incident results in violation of the fundamental rights of 'Gender Equality' and the 'Right of Life and Liberty'. It is clear violation of the rights under Articles 14, 15 and 21 of Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1) (g) 'to practice any profession or to carry out any occupation, trade or business'. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women. This class action under Article 32 of the Constitution is for this reason. A writ of mandamus in such a situation, if it is to be effective, needs to be accompanied by directions for prevention; as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation

of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.

The notice of the petition was given to the State of Rajasthan and the Union of India. The learned Solicitor General appeared for the Union of India and rendered valuable assistance in the true spirit of a Law Officer to help us find a proper solution to this social problem of considerable magnitude. In addition to Ms. Meenakshi Arora and Ms. Naina Kapur who assisted the Court with full commitment, Shri Fali S. Nariman appeared as Amicus Curiae and rendered great assistance. We place on record our great appreciation for every counsel who appeared in the case and rendered the needed assistance to the Court which has enabled us to deal with this unusual matter in the manner considered appropriate for a cause of this nature.

Apart from Article 32 of the Constitution of India, we may refer to some other provision which envisage judicial intervention for eradication of this social evil. Some provisions in the Constitution in addition to Articles 14, 19(1)(g) and 21, which have relevance are:

Article 15:

*“15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.-*

- (1) The State shall not discriminate against any citizen on only of religion, race, caste, sex, place of birth or any of them.*
- (2) xxx xxxx xxxx*
- (3) Nothing in this article shall prevent the State from making any special provision for women and children.*
- (4) xxx xxxx xxx”*

Article 42:

*“42. Provision for just and humane conditions of work and maternity relief - The State shall make provision for securing just and humane conditions of work and for maternity relief.”*

Article 51A:

*“51A. Fundamental duties. - It shall be the duty of every citizen of India, -*

- (a) to abide by the Constitution and respect its ideals and institutions, ...*  
*xxx xxxx xxxx*
- (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;*

xxx xxxx xxx”

Before we refer to the international conventions and norms having relevance in this field and the manner in which they assume significance in application and judicial interpretation, we may advert to some other provisions in the Constitution which permit such use. These provisions are:

Article 51 :

**“51.** *Promotion of international peace and security - The State shall endeavour to -*

xxx xxxx xxx

(c) *foster respect for international law and treaty obligations in the dealings of organised people with one another;*

*and*

xxx xxxx xxx

Article 253 :

**“253.** *Legislation for giving effect to international agreements - Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.”*

*Seventh Schedule :*

*“List I - Union List:*

xxx xxxx xxx

**14.** *Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.*

xxx xxxx xxx”

In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51 (c) and enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power

to make laws. The executive power of the Union is, therefore, available till the parliament enacts to expressly provide measures needed to curb the evil.

Thus, the power of this Court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirements as a logical concomitant of the constitutional scheme. The exercise performed by the Court in this matter is with this common perception shared with the learned Solicitor General and other members of the Bar who rendered valuable assistance in the performance of this difficult task in public interest.

The progress made at each hearing culminated in the formulation of guidelines to which the Union of India gave its consent through the learned Solicitor General, indicating that these should be the guidelines and norms declared by this Court to govern the behaviour of the employers and all others at the work places to curb this social evil.

Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose.

The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of the Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

*“Objectives of the Judiciary:*

- 10.** *The objectives and functions of the Judiciary include the following:*
  - (a)** *to ensure that all persons are able to live securely under the Rule of Law;*
  - (b)** *to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and*
  - (c)** *to administer the law impartially among persons and between persons and the State.”*

Some provisions in the ‘Convention on the Elimination of All Forms of Discrimination against Women’, of significance in the present context are:

Article 11:

- “1.** *States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on basis of equality of men and women, the same rights, in particular:*

(a) *The right to work as an inalienable right of all human beings;*

*xxx xxxx xxx*

(f) *The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.*

*xxx xxxx xxx*”

Article 24 :

*“States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognised in the present Convention.”*

The general recommendations of CEDAW in this context in respect of Article 11 are :

*“Violence and equality in employment:*

- 22. Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the work place.*
- 23. Sexual harassment includes such unwelcome sexually determined behavior as physical contacts and advance, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints procedures and remedies, including compensation, should be provided.*
- 24. States should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the work place.”*

The Government of India has ratified the above Resolution on June 25, 1993 with some reservations which are not material in the present context. At the Fourth World Conference on Women in Beijing, the Government of India has also made a official commitment, inter alia, to formulate and operationalize a national policy on women which will continuously guide and inform action at every level and in every sector; to set up a Commission for Women’s Rights to act as a public defender of women’s human rights; to institutionalise a national level mechanism to monitor the implementation of the Platform for Action. We have, therefore, no hesitation in placing reliance on the above for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in our Constitution.

The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to compass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of Judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to

international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in *Minister for Immigration and Ethnic Affairs vs. Tech.* 128 ALR 535, has recognised the concept of legitimate expectation of its observance in the absence of contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.

In *Nilabati Behera vs. State of Orissa* 1993(2) SCC 746, a provision in the ICCPR was referred to support the view taken that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right, as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.

In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution.

The GUIDELINES and NORMS prescribed herein are as under:-

HAVING REGARD to the definition of 'human rights' in Section 2(d) of the Protection of Human Rights Act, 1993, TAKING NOTE of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time, It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:

**1. Duty of the Employer or other responsible persons in work places and other institutions:**

It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

**2. Definition:**

For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

- a) physical contact and advances;
- b) a demand or request for sexual favours;
- c) sexually coloured remarks;

- d) showing pornography;
- e) any other unwelcome physical verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

**3. Preventive Steps:**

All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

- (a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.
- (b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.
- (c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.
- (d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

**4. Criminal Proceedings:**

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

**5. Disciplinary Action:**

Where such conduct amounts to mis-conduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

**6. Complaint Mechanism:**

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

**7. Complaints Committee:**

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women.

Further, to prevent the possibility of any under pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the government department concerned of the complaints and action taken by them. The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

**8. Workers' Initiative:**

Employees should be allowed to raise issues of sexual harassment at workers meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

**9. Awareness:**

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in suitable manner.

**10. Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.**

**11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.**

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These Writ Petitions are disposed of, accordingly.



## Apparel Export Promotion Council v. A.K. Chopra

AIR 1999 SC 625

*Apparel Export Promotion Council ... Appellant(s)*

*versus*

*A.K. Chopra.... Respondent(s)*

Decided on: **January 20, 1999**

Bench : **Hon'ble Mr. Justice Dr. A. S. Anand, C.J.I., and Hon'ble Mr. Justice V. N. Khare**

### J U D G M E N T :

Judgment delivered by: **Hon'ble Mr. Justice Dr. A. S. Anand, C.J.I.**

Special Leave granted. Does an action of the superior against a female employee which is against moral sanctions and does not withstand test of decency and modesty not amount to sexual harassment? Is physical contact with the female employee an essential ingredient of such a charge? Does the allegation that the superior tried to molest a female employee at the place of work, not constitute an act unbecoming of good conduct and behaviour expected from the superior? These are some of the questions besides the nature of approach expected from the law courts to cases involving sexual harassment which come to the forefront and require our consideration. Reference to the facts giving rise to the filing of the present Appeal by Special Leave at this stage is appropriate : The respondent was working as a Private Secretary to the Chairman of the Apparel Export Promotion Council, the appellant herein. It was alleged that on 12.8.1988, he tried to molest a woman employee of the Council, Miss X (name withheld by us) who was at the relevant time working as a Clerk-cum-Typist. She was not competent or trained to take dictations. The respondent, however, insisted that she go with him to the Business Centre at Taj Palace Hotel for taking dictation from the Chairman and type out the matter. Under the pressure of the respondent, she went to take the dictation from the Chairman. While Miss X was waiting for the Director in the room, the respondent tried to sit too close to her and despite her objection did not give up his objectionable behaviour. She later on took dictation from the Director. The respondent told her to type it at the Business Centre of the Taj Palace Hotel, which is located in the Basement of the Hotel. He offered to help her so that her typing was not found fault with by the Director. He volunteered to show her the Business Centre for getting the matter typed and taking advantage of the isolated place, again tried to sit close to her and touch her despite her objections. The draft typed matter was corrected by Director (Finance) who asked Miss X to retype the same. The respondent again went with her to the Business Centre and repeated his overtures. Miss X told the respondent that she would leave the place if he continued to behave like that. The respondent did not stop. Though he went out from the Business Centre for a while, he again came back and resumed his objectionable acts. According to Miss X, the respondent had tried to molest her physically in the lift also while coming to the basement but she saved herself by pressing the emergency button, which made the door of the lift to open. On the next day, that is on 16th August, 1988 Miss X was unable to meet the Director (Personnel) for lodging her complaint against the respondent as he was busy. She succeeded in meeting him only on 17th August, 1988 and apart from narrating the whole incident to him orally submitted

a written complaint also. The respondent was placed under suspension vide an order dated 18th August, 1988. A charge-sheet was served on him to which he gave a reply denying the allegations and asserting that the allegations were imaginary and motivated. Shri J.D. Giri, a Director of the Council, was appointed as an Enquiry Officer to enquire into the charges framed against the respondent. On behalf of the management with a view to prove the charges as many as six witnesses were examined including Miss X. The respondent also examined seven witnesses. The Enquiry Officer after considering the documentary and oral evidence and the circumstances of the case arrived at the conclusion that the respondent had acted against moral sanctions and that his acts against Miss X did not withstand the test of decency and modesty. He, therefore, held the charges levelled against the respondent as proved. The Enquiry Officer in his report recorded the following, amongst other, findings : 8.1. Intentions of Shri A.K. Chopra were ostensibly manifested in his actions and behaviour; Despite reprimands from Miss X he continued to act against moral sanctions; 8.2. Dictation and subsequent typing of the matter provided Shri A.K. Chopra necessary opportunity to take Miss X to the Business Centre a secluded place. Privacy in the Business Centre room made his ulterior motive explicit and clear; 8.3. Any other conclusion on technical niceties which Shri A.K. Chopra tried to purport did not withstand the test of decency and modesty.

The Enquiry Officer concluded that Miss X was molested by the respondent at Taj Palace Hotel on 12th August, 1988 and that the respondent had tried to touch her person in the Business Centre with ulterior motives despite reprimands by her. The Disciplinary Authority agreeing with the report of the Enquiry Officer, imposed the penalty of removing him from service with immediate effect on 28th June, 1989. Aggrieved, by an order of removal from service, the respondent filed a departmental appeal before the Staff Committee of the appellant. It appears that there was some difference of opinion between the Members of the Staff Committee and the Chairman of the Staff Committee during the hearing, but before any decision could be arrived at by the Staff Committee, the respondent, on the basis of some unconfirmed minutes of the Staff Committee meeting, filed a Writ Petition in the High Court inter alia challenging his removal from service. On January 30, 1992, the Writ Petition was allowed and respondent Nos. 1 and 3, therein, were directed to act upon the decision of the Staff Committee, assuming as if the decision, as alleged, had been taken at the 34th Meeting of the Staff Committee on 25th July, 1990. The appellant challenged the judgment and order of the High Court dated 30th January, 1992, through Special Leave Petition (Civil) No.3204 of 1992 in this Court. While setting aside the judgment and order of the High Court dated 30th January, 1992, a Division Bench of this Court opined : We have been taken through the proceedings of the meeting starting from 33rd meeting upto 38th meeting by both the learned Counsel appearing for the respective parties. Considering the same it appears to us that the alleged decision taken on the said Agenda No.5 in the 33rd and 34th meeting is in dispute and final decision on the same has not yet been taken and the alleged resolution on the said Item No.5 still awaits ratification. In that view of the matter, the High Court was wrong in deciding the disputed question of fact in favour of Respondent No.1. We, therefore set aside the impugned order of the Delhi High Court as according to us the final decision on the resolution taken on the said Agenda No.5 has not yet been finally ratified. We are not inclined to consider the other questions sought to be raised in this appeal and the said questions are kept open. In view of the pendency of the matter for a long time, we direct the appellant company to convene the meeting of Staff Committee as early as practicable but not exceeding two months from today so that the question of ratification of the resolution on the said Agenda No.5 taken in the meeting of the Staff Committee is finally decided.

Pursuant to the above directions, the Staff Committee met again and considered the entire issue and came to the conclusion that the order passed by the Director General terminating the services of the respondent on

28th June, 1989 was legal, proper and valid. The appeal was dismissed and the removal of the respondent for causing sexual harassment to Miss X was upheld. The respondent, thereupon, filed Writ Petition No.352 of 1995 in the High Court, challenging his removal from service as well as the decision of the Staff Committee dismissing his departmental appeal. The learned Single Judge allowing the Writ Petition opined that ... the petitioner tried to molest and not that the petitioner had in fact molested the complainant. The learned Single Judge, therefore, disposed of the Writ Petition with a direction that the respondent be reinstated in service but that he would not be entitled to receive any back wages. The appellant was directed to consider the period between the date of removal of the respondent from service and the date of reinstatement as the period spent on duty and to give him consequential promotion and all other benefits. It was, however, directed that the respondent be posted in any other office outside Delhi, at least for a period of two years. The appellant being aggrieved by the order of reinstatement filed Letters Patent Appeal No.27 of 1997 before the Division Bench of the High Court. The respondent also filed Letters Patent Appeal No.79 of 1997 claiming back wages and appropriate posting. Some of the lady employees of the appellant on coming to know about the judgment of the learned Single Judge, directing the reinstatement of the respondent, felt agitated and filed an application seeking intervention in the pending L.P.A. The Division Bench vide judgment and order dated 15th July, 1997, dismissed the L.P.A. filed by the appellant against the reinstatement of the respondent. The Division Bench agreed with the findings recorded by the learned Single Judge that the respondent had tried to molest and that he had not actually molested Miss X and that he had not managed to make the slightest physical contact with the lady and went on to hold that such an act of the respondent was not a sufficient ground for his dismissal from service. Commenting upon the evidence, the Division Bench observed :

We have been taken in detail through the evidence/deposition of Miss X. No part of that evidence discloses that A.K. Chopra even managed to make the slightest physical contact with the lady. The entire deposition relates that A.K. Chopra tried to touch her. As we have said that no attempts made, allegedly by A.K. Chopra, succeeded in making physical contact with Miss X, even in the narrow confines of a Hotel lift. To our mind, on such evidence as that was produced before the Enquiry Officer, it is not even possible to come to a conclusion that there is an attempt to molest as there have been no physical contact. There being no physical contact between A.K. Chopra and Miss X, there cannot be any attempt to tried to molest on the part of A.K. Chopra. (Emphasis ours) Aggrieved by the judgment of the Division Bench, the employer- appellant has filed this appeal by special leave. We have heard learned counsel for the parties and perused the record. The Enquiry Officer has found the charges established against the respondent. He has concluded that the respondent was guilty of molestation and had tried to physically assault Miss X. The findings recorded by the Enquiry Officer and the Disciplinary Authority had been confirmed by the Appellate Authority (the Staff Committee) which admittedly had co-extensive powers to re-appreciate the evidence as regards the guilt as well as about the nature of punishment to be imposed on the respondent. The Staff Committee while dealing with the question of punishment has observed : Shri Chopra has also mentioned in his appeal that the penalty on him was harsh and disproportionate to the charge levelled against him. On this, the Staff Committee observed that no lenient view would be justified in a case of molestation of a woman employee when the charge was fully proved. Any lenient action in such a case would have a demoralizing effect on the working women. The Staff Committee, therefore, did not accept the plea of Shri Chopra that a lenient view be taken in his case.

The learned Single Judge, did not doubt the correctness of the occurrence. He did not disbelieve the complainant. On a re- appreciation of the evidence on the record, the learned Single Judge, however, drew his own inference and found that the respondent had tried to molest but since he had not actually molested the complainant, therefore, the action of the respondent did not warrant removal from service. The learned Single Judge while

directing the reinstatement of the respondent observed : 15. In the totality of facts and circumstances, ends of justice would meet if the petitioner is reinstated in service but he would not be entitled to any back wages. The Council shall consider this period as on duty and would give him consequential promotion to the petitioner. He shall be entitled to all benefits except back wages. The petitioner shall be posted in any other office outside Delhi, at least for a period of two years.” (Emphasis ours) The Division Bench of the High Court also while dismissing the L.P.A. filed by the appellant did not doubt the correctness of the occurrence. It also concluded that since the respondent had not actually molested Miss X and had only tried to assault her and had not managed to make any physical contact with her, a case of his removal from service was not made out. Both the learned Single Judge and the Division Bench did not doubt the correctness of the following facts : 1. That Miss X was a subordinate employee while the respondent was the superior officer in the organization; 2. That Miss X was not qualified to take any dictation and had so told the respondent; 3. That the respondent pressurized her to come with him to Taj Palace Hotel to take dictation despite her protestation, with an ulterior design; 4. That the respondent taking advantage of his position, tried to molest Miss X and in spite of her protestation, continued with his activities which were against the moral sanctions and did not withstand the test of decency and modesty; 5. That the respondent tried to sit too close to Miss X with ulterior motives and all along Miss X kept reprimanding him but to no avail; 6. That the respondent was repeating his implicit unwelcome sexual advances and Miss X told him that if he continued to behave in that fashion, she would leave that place; 7. That the respondent acted in a manner which demonstrated unwelcome sexual advances, both directly and by implication; 8. That action of the respondent created an intimidated and hostile working environment in so far as Miss X is concerned.

The above facts are borne out from the evidence on the record and on the basis of these facts, the departmental authorities keeping in view the fact that the actions of the respondent were considered to be subversive of good discipline and not conducive to proper working in the appellant Organization where there were a number of female employees, took action against the respondent and removed him from service. The High Court appears to have over-looked the settled position that in departmental proceedings, the Disciplinary Authority is the sole Judge of facts and in case an appeal is presented to the Appellate Authority, the Appellate Authority has also the power/and jurisdiction to re-appreciate the evidence and come to its own conclusion, on facts, being the sole fact finding authorities. Once findings of fact, based on appreciation of evidence are recorded, the High Court in Writ Jurisdiction may not normally interfere with those factual findings unless it finds that the recorded findings were based either on no evidence or that the findings were wholly perverse and/or legally untenable. The adequacy or inadequacy of the evidence is not permitted to be canvassed before the High Court. Since, the High Court does not sit as an Appellate Authority, over the factual findings recorded during departmental proceedings, while exercising the power of judicial review, the High Court cannot normally speaking substitute its own conclusion, with regard to the guilt of the delinquent, for that of the departmental authorities. Even insofar as imposition of penalty or punishment is concerned, unless the punishment or penalty imposed by the Disciplinary or the Departmental Appellate Authority, is either impermissible or such that it shocks the conscience of the High Court, it should not normally substitute its own opinion and impose some other punishment or penalty. Both the learned Single Judge and the Division Bench of the High Court, it appears, ignored the well-settled principle that even though Judicial Review of administrative action must remain flexible and its dimension not closed, yet the Court in exercise of the power of judicial review is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonably supported by evidence and have been arrived at through proceedings which cannot be faulted with for procedural illegalities or irregularities which vitiate the process by which the decision was arrived at. Judicial Review, it must be remembered, is directed not against the decision, but is

confined to the examination of the decision-making process. Lord Halton in *Chief Constable of the North Wales Police v. Evans*, (1982) 3 All ER 141, observed : The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches, on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court.

Judicial Review, not being an appeal from a decision, but a review of the manner in which the decision was arrived at, the Court while exercising the power of Judicial Review must remain conscious of the fact that if the decision has been arrived at by the Administrative Authority after following the principles established by law and the rules of natural justice and the individual has received a fair treatment to meet the case against him, the Court cannot substitute its judgment for that of the Administrative Authority on a matter which fell squarely within the sphere of jurisdiction of that authority. It is useful to note the following observations of this Court in *Union of India v. Sardar Bahadur*, (1972) 4 SCC 618 : Where there are some relevant materials which the authority has accepted and which materials may reasonably support the conclusion that the officer is guilty, it is not the function of the High Court exercising its jurisdiction under Article 226 to review the materials and to arrive at an independent finding on the materials. If the enquiry has been properly held the question of adequacy or reliability of the evidence cannot be canvassed before the High Court.

After a detailed review of the law on the subject, this Court while dealing with the jurisdiction of the High Court or Tribunal to interfere with the disciplinary matters and punishment in *Union of India v. Parma Nanda*, (1989) 2 SCC 177, opined : We must unequivocally state that the jurisdiction of the Tribunal to interfere with the disciplinary matters or punishment cannot be equated with an appellate jurisdiction. The Tribunal cannot interfere with the findings of the Enquiry Officer or Competent Authority where they are not arbitrary or utterly perverse. It is appropriate to remember that the power to impose penalty on a delinquent officer is conferred on the competent authority either by an Act of Legislature or Rules made under the proviso to Article 309 of the Constitution. If there has been an enquiry consistent with the rules and in accordance with principles of natural justice what punishment would meet the ends of justice is a matter of exclusively within the jurisdiction of the competent authority. If the penalty can lawfully be imposed and is imposed on the proved misconduct, the Tribunal has no power to substitute its own discretion for that of the authority.

In *B.C. Chaturvedi v. Union of India*, (1995) 6 SCC 749, this Court opined : The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to reappreciate them evidence or the nature of punishment. In a Disciplinary Enquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal.

Further it was held :

A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate

authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof. ( Emphasis supplied)

Again in *Government of Tamil Nadu and another v. A. Rajapandian*, 1995(1) SCC 216, this Court opined : It has been authoritatively settled by string of authorities of this Court that the Administrative Tribunal cannot sit as a court of appeal over a decision based on the findings of the inquiring authority in disciplinary proceedings. Where there is some relevant material which the disciplinary authority has accepted and which material reasonably supports the conclusion reached by the disciplinary authority, it is not the function of the Administrative Tribunal to review the same and reach different finding than that of the disciplinary authority. The Administrative Tribunal, in this case, has found no fault with the proceedings held by the inquiring authority. It has quashed the dismissal order by re-appreciating the evidence and reaching a finding different than that of the inquiring authority. (Emphasis ours) In the established facts and circumstances of this case, we have no hesitation to hold, at the outset, that both the learned Single Judge and the Division Bench of the High Court fell into patent error in interfering with findings of fact recorded by the departmental authorities and interfering with the quantum of punishment, as if the High Court was sitting in appellate jurisdiction. From the judgments of the learned Single Judge as well as the Division Bench, it is quite obvious that the findings with regard to an unbecoming act committed by the respondent, as found by the Departmental Authorities, were not found fault with even on re-appreciation of evidence. The High Court did not find that the occurrence as alleged by the complainant had not taken place. Neither the learned Single Judge nor the Division Bench found that findings recorded by the Enquiry Officer or the Departmental Appellate Authority were either arbitrary or even perverse. As a matter of fact, the High Court found no fault whatsoever with the conduct of Enquiry. The direction of the learned Single Judge to the effect that the respondent was not entitled to back wages and was to be posted outside the city for at least two years, which was upheld by the Division Bench, itself demonstrates that the High Court believed the complainants case fully for otherwise neither the withholding of back wages nor a direction to post the respondent outside the city for at least two years was necessary. The High Court in our opinion fell in error in interfering with the punishment, which could be lawfully imposed by the departmental authorities on the respondent for his proven misconduct. To hold that since the respondent had not actually molested Miss X and that he had only tried to molest her and had not managed to make physical contact with her, the punishment of removal from service was not justified was erroneous. The High Court should not have substituted its own discretion for that of the authority. What punishment was required to be imposed, in the facts and circumstances of the case, was a matter which fell exclusively within the jurisdiction of the competent authority and did not warrant any interference by the High Court. The entire approach of the High Court has been faulty. The impugned order of the High Court cannot be sustained on this ground alone. But there is another aspect of the case which is fundamental and goes to the root of the case and concerns the approach of the Court while dealing with cases of sexual harassment at the place of work of female employees. The High Court was examining disciplinary proceedings against the respondent and was not dealing with criminal trial of the respondent. The High Court did not find that there was no evidence at all of any kind of molestation or assault on the person of Miss X. It appears that the High Court re-appreciated the evidence while exercising power of judicial review and gave meaning to the expression molestation as if it was dealing with a finding in a criminal trial. Miss X had used the expression molestation in her complaint in a general sense and during her evidence she has explained what she meant. Assuming for the sake of argument that the respondent did not manage to establish any physical contact with Miss X, though the statement of management witness Suba Singh shows that the respondent had put his hand on the hand of Miss X when he surprised them in the Business Centre, it did not mean that the respondent had not made any objectionable overtures with sexual overtones. From the entire tenor of the cross-

examination to which Miss X was subjected to by the respondent, running into about 17 typed pages and containing more than one hundred & forty questions and answers in cross-examinations, it appears that the effort of respondent was only to play with the use of the expressions molestation and physical assault by her and confuse her. It was not the dictionary meaning of the word molestation or physical assault which was relevant. The statement of Miss X before the Enquiry Officer as well as in her complaint unambiguously conveyed in no uncertain terms as to what her complaint was. The entire episode reveals that the respondent had harassed, pestered and subjected Miss X, by a conduct which is against moral sanctions and which did not withstand the test of decency and modesty and which projected unwelcome sexual advances. Such an action on the part of the respondent would be squarely covered by the term sexual harassment. The following statement made by Miss X at the enquiry : When I was there in the Chairmans room I told Mr. Chopra that this was wrong and he should not do such things. He tried to persuade me by talking. .... I tried to type the material but there were so many mistakes. He helped me in typing. There he tried to blackmail me. .... He tried to sit with me. In between he tried to touch me..... Mr. Chopra again took me to the Business Centre. Thereafter again he tried. I told him I will go out if he does like this. Then he went out. Again he came back. In between he tried. (Emphasis supplied) unmistakably shows that the conduct of the respondent constituted an act unbecoming of good behaviour, expected from the superior officer. Repeatedly, did Miss X state before the Enquiry Officer that the respondent tried to sit close to her and touch her and that she reprimanded him by asking that he should not do these things. The statement of Miss Rama Kanwar, the management witness to the effect that when on 16th August she saw Miss X and asked her the reason for being upset, Miss X kept on weeping and told her she could not tell being unmarried, she could not explain what had happened to her. The material on the record, thus, clearly establishes an unwelcome sexually determined behaviour on the part of the respondent against Miss X which was also an attempt to outrage her modesty. Any action or gesture, whether directly or by implication, aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of sexual harassment. The evidence on the record clearly establishes that the respondent caused sexual harassment to Miss X, taking advantage of his superior position in the Council. Against the growing social menace of sexual harassment of women at the work place, a three Judge Bench of this Court by a rather innovative judicial law making process issued certain guidelines in *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241, after taking note of the fact that the present civil and penal laws in the country do not adequately provide for specific protection of woman from sexual harassment at places of work and that enactment of such a legislation would take a considerable time. In *Vishakas case* (supra), a definition of sexual harassment was suggested. Verma, J., (as the former Chief Justice then was), speaking for the three-Judge Bench opined : 2. Definition : For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as: (a) physical contact and advances; (b) a demand or request for sexual favours; (c) sexually-coloured remarks; (d) showing pornography; (e) any other unwelcome physical, verbal or non- verbal conduct of sexual nature.

Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the victims employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

An analysis of the above definition, shows that sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her. There is no gainsaying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty the two most precious Fundamental Rights guaranteed by the Constitution of India. As early as in 1993 at the ILO Seminar held at Manila, it was recognized that sexual harassment of woman at the work place was a form of gender discrimination against woman. In our opinion, the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse and the courts are under a constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate. The message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) and the Beijing Declaration which directs all State parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. Article 7 recognises her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate working environment. These international instruments cast an obligation on the Indian State to gender sensitise its laws and the Courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. This Court has in numerous cases emphasised that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law. [See with advantage *Prem Sankar v. Delhi Administration*, AIR 1980 SC 1535; *Mackinnon Mackenzie and Co. v. Audrey D Costa*, (1987) 2 SCC 469 JT 1987 (2) SC 34; *Sheela Barse v. Secretary, Childrens Aid Society*, (1987) 3 SCC 50 at p.54; *Vishaka & others v. State of Rajasthan & Ors.*, JT 1997 (7) SC 392; *Peoples Union for Civil Liberties v. Union of India & Anr.*, JT 1997 (2) SC 311 and *D.K. Basu & Anr. v. State of West Bengal & Anr.*, (1997) 1 SCC 416 at p.438]. In cases involving violation of human rights, the Courts must for ever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. In the instant case, the High Court appears to have totally ignored the intent and content of the International Conventions and Norms while dealing with the case. The observations made by the High Court to the effect that since the respondent did not actually molest Miss X but only tried to molest her and, therefore, his removal from service was not warranted rebel against realism and lose their sanctity and credibility. In the instant case, the behaviour of respondent did not cease to be outrageous for want of an actual assault or touch by the superior officer. In a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression molestation. They must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated in the background of the entire case. Where

the evidence of the victim inspires confidence, as is the position in the instant case, the courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity. Sympathy in such cases in favour of the superior officer is wholly misplaced and mercy has no relevance. The High Court overlooked the ground realities and ignored the fact that the conduct of the respondent against his junior female employee, Miss X, was wholly against moral sanctions, decency and was offensive to her modesty. Reduction of punishment in a case like this is bound to have demoralizing effect on the women employees and is a retrograde step. There was no justification for the High Court to interfere with the punishment imposed by the departmental authorities. The act of the respondent was unbecoming of good conduct and behaviour expected from a superior officer and undoubtedly amounted to sexual harassment of Miss X and the punishment imposed by the appellant, was, thus, commensurate with the gravity of his objectionable behaviour and did not warrant any interference by the High Court in exercise of its power of judicial review. At the conclusion of the hearing, learned counsel for the respondent submitted that the respondent was repentant of his actions and that he tenders an unqualified apology and that he was willing to also go and to apologize to Miss X. We are afraid, it is too late in the day to show any sympathy to the respondent in such a case. Any lenient action in such a case is bound to have demoralizing effect on working women. Sympathy in such cases is uncalled for and mercy is misplaced. Thus, for what we have said above the impugned order of the High Court is set aside and the punishment as imposed by the Disciplinary Authority and upheld by the Departmental Appellate Authority of removal of the respondent from service is upheld and restored. The, appeals, thus succeed and are allowed. We, however, make no order as to costs.





# GENDER SENSITIZATION





**In Re: Indian woman says gang-raped on orders of village court  
published in business and financial news**

**(2014) 4 SCC 786**

Suo Motu Writ Petition (Criminal) No. 24 of 2014

*Appellants: In Re: Indian Woman says gang-raped on orders of Village Court  
published in Business and Financial News*

Decided on: **March 23, 2014**

Bench : **Hon'ble Mr. Justice P. Sathasivam, C.J.I., Hon'ble Mr. Justice S.A. Bobde  
and Hon'ble Mr. Justice N.V. Ramana**

J U D G M E N T :

Judgment delivered by: **Hon'ble Mr. Justice P. Sathasivam, C.J.I.**

1. This Court, based on the news item published in the Business and Financial News dated 23.01.2014 relating to the gang-rape of a 20 year old woman of Subalpur Village, P.S. Labpur, District Birbhum, State of West Bengal on the intervening night of 20/21.01.2014 on the orders of community panchayat as punishment for having relationship with a man from a different community, by order dated 24.01.2014, took suo motu action and directed the District Judge, Birbhum District, West Bengal to inspect the place of occurrence and submit a report to this Court within a period of one week from that date.
2. Pursuant to the direction dated 24.01.2014, the District Judge, Birbhum District, West Bengal along with the Chief Judicial Magistrate inspected the place in question and submitted a Report to this Court. However, this Court, on 31.01.2014, after noticing that there was no information in the Report as to the steps taken by the police against the persons concerned, directed the Chief Secretary, West Bengal to submit a detailed report in this regard within a period of two weeks. On the same day, Mr. Sidharth Luthra, learned Additional Solicitor General was requested to assist the Court as amicus in the matter.
3. Pursuant to the aforesaid direction, the Chief Secretary submitted a detailed report dated 10.02.2014 and the copies of the same were provided to the parties. On 14.02.2014, this Court directed the State to place on record the First Information Report (FIR), Case Diaries, Result of the investigation/ Police Report under Section 173 of the Code of Criminal Procedure, 1973 (in short 'the Code'), statements recorded under Section 161 of the Code, Forensic Opinion, Report of vaginal swab/other medical tests etc., conducted on the victim on the next date of hearing.
4. After having gathered all the requisite material, on 13.03.2014, we heard learned amicus as well as Mr. Anip Sachthey, learned Counsel for the State of West Bengal extensively and reserved the matter.

**Discussion:**

5. Mr. Sidharth Luthra, learned amicus having perused and scrutinized all the materials on record in his submissions had highlighted three aspects viz. (i) issues concerning the investigation; (ii) prevention of recurring of such crimes; and (iii) Victim compensation; and invited this Court to consider the same. Issues concerning the investigation:
6. Certain relevant issues pertaining to investigation were raised by learned amicus. Primarily, Mr. Luthra stated that although the FIR has been scribed by one Anirban Mondal, a resident of Labpur, Birbhum District, West Bengal, there is no basis as to how Anirban Mondal came to the Police Station and there is also no justification for his presence there. Further, he stressed on the point that Section 154 of the Code requires such FIR to be recorded by a woman police officer or a woman officer and, in addition, as per the latest amendment dated 03.02.2013, a woman officer should record the statements under Section 161 of the Code. While highlighting the relevant provisions, he also submitted that there was no occasion for Deputy Superintendent of Police to re-record the statements on 26.01.2014, 27.01.2014 and 29.01.2014 and that too in gist which would lead to possible contradictions being derived during cross-examinations. He also drew our attention to the statement of the victim under Section 164 of the Code. He pointed out that mobile details have not been obtained. He also brought to our notice that if the Salishi (meeting) is relatable to a village, then the presence of persons of neighbouring villages i.e., Bikramur and Rajarampur is not explained. Moreover, he submitted that there is variance in the version of the FIR and the Report of the Judicial Officer as to the holding of the meeting (Salishi) on the point whether it was held in the night of 20.01.2014 as per the FIR or the next morning as per the Judicial Officer's report, which is one of the pertinent issues to be looked into. He also submitted that the offence of extortion under Section 385 of the Indian Penal Code, 1860 (in short 'the Indian Penal Code') and related offences have not been invoked. Similarly, offence of criminal intimidation under Section 506 Indian Penal Code and grievous hurt under Section 325 Indian Penal Code have not been invoked. Furthermore, Sections 354A and 354B ought to have been considered by the investigating agency. He further pointed out the discrepancy in the name of accused Ram Soren mentioned in the FIR and in the Report of the Judicial Officer which refers to Bhayek Soren which needs to be explained. He also submitted that the electronic documents (e-mail) need to be duly certified under Section 65A of the Indian Evidence Act, 1872. Finally, he pointed out that the aspect as to whether there was a larger conspiracy must also be seen.
7. Mr. Anip Sachthey, learned Counsel for the State assured this Court that the deficiency, if any, in the investigation, as suggested by learned amicus, would be looked into and rectified. The above statement is hereby recorded.

**Prevention of recurring of such crimes:**

8. Violence against women is a recurring crime across the globe and India is no exception in this regard. The case at hand is the epitome of aggression against a woman and it is shocking that even with rapid modernization such crime persists in our society. Keeping in view this dreadful increase in crime against women, the Code of Criminal Procedure has been specifically amended by recent amendment dated 03.02.2013 in order to advance the safeguards for women in such circumstances which are as under:

**154.** Information in cognizable cases.-

(1) xxx

*Provided that if the information is given by the woman against whom an offence under Section 326A, Section 326B, Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, or Section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer:*

*Provided further that:*

(a) *in the event that the person against whom an offence under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, or Section 509 of the Indian Penal Code is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;*

(2) xxx

(3) xxx

**161.** Examination of witnesses by police: (1) xxx

(2) xxx

(3) xxx

*Provided further that the statement of a woman against whom an offence under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, or Section 509 of the Indian Penal Code is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.*

**164.** Recording of confessions and statements.-

*5A In cases punishable under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Sub-section (1) or Sub-section (2) of Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, or Section 509 of the Indian Penal Code, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in Sub-section (5), as soon as the commission of the offence is brought to the notice of the police:*

**164 A.** *Medical examination of the victim of rape.- (1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.*

**(2)** *The registered medical practitioner, to whom such woman is sent shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:*

**(i)** *the name and address of the woman and of the person by whom she was brought;*

**(ii)** *the age of the woman;*

**(iii)** *the description of material taken from the person of the woman for DNA profiling;*

**(iv)** *marks of injury, if any, on the person of the woman;*

**(v)** *general mental condition of the woman; and (vi) other material particulars in reasonable detail.*

**(3)** *The report shall state precisely the reasons for each conclusion arrived at.*

**(4)** *The report shall specifically record that the consent of the woman or of the person competent, to give such consent on her behalf to such examination had been obtained.*

**(5)** *The exact time of commencement and completion of the examination shall also be noted in the report.*

**(6)** *The registered medical practitioner shall, without delay forward the report to the investigating officer who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in Clause (a) of Sub-section (5) of that section.*

**(7)** *Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.*

*Explanation--For the purposes of this section, "examination" and "registered medical practitioner" shall have the same meanings as in Section 53.*

9. The courts and the police officials are required to be vigilant in upholding these rights of the victims of crime as the effective implementation of these provisions lies in their hands. In fact, the recurrence of such crimes has been taken note of by this Court in few instances and seriously condemned in the ensuing manner.

10. In *Lata Singh v. State of U.P. and Ors.* (2006) 5 SCC 475, this Court, in paras 17 and 18, held as under:

17. *The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.*

18. *We sometimes hear of "honour" killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal-minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism.*

11. In *Arumugam Servai v. State of Tamilnadu* (2011) 6 SCC 405, this Court, in paras 12 and 13, observed as under:

12. *We have in recent years heard of "Khap Panchayats" (known as "Katta Panchayats" in Tamil Nadu) which often decree or encourage honour killings or other atrocities in an institutionalised way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people. We are of the opinion that this is wholly illegal and has to be ruthlessly stamped out. As already stated in *Lata Singh* case, there is nothing honourable in honour killing or other atrocities and, in fact,*

*it is nothing but barbaric and shameful murder. Other atrocities in respect of personal lives of people committed by brutal, feudal-minded persons deserve harsh punishment. Only in this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal.*

- 13.** Hence, we direct the administrative and police officials to take strong measures to prevent such atrocious acts. If any such incidents happen, apart from instituting criminal proceedings against those responsible for such atrocities, the State Government is directed to immediately suspend the District Magistrate/Collector and SSP/SPs of the district as well as other officials concerned and charge-sheet them and proceed against them departmentally if they do not (1) prevent the incident if it has not already occurred but they have knowledge of it in advance, or (2) if it has occurred, they do not promptly apprehend the culprits and Ors. involved and institute criminal proceedings against them, as in our opinion they will be deemed to be directly or indirectly accountable in this connection.
- 12.** Likewise, the Law Commission of India, in its 242nd Report on Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition) had suggested that:
- 11.1** In order to keep a check on the high-handed and unwarranted interference by the caste assemblies or panchayats with sagotra, inter-caste or inter-religious marriages, which are otherwise lawful, this legislation has been proposed so as to prevent the acts endangering the liberty of the couple married or intending to marry and their family members. It is considered necessary that there should be a threshold bar against the congregation or assembly for the purpose of disapproving such marriage/intended marriage and the conduct of the young couple. The members gathering for such purpose, i.e., for condemning the marriage with a view to take necessary consequential action, are to be treated as members of unlawful assembly for which a mandatory minimum punishment has been prescribed.
- 11.2** So also the acts of endangerment of liberty including social boycott, harassment, etc. of the couple or their family members are treated as offences punishable with mandatory minimum sentence. The acts of criminal intimidation by members of unlawful assembly or others acting at their instance or otherwise are also made punishable with mandatory minimum sentence.
- 11.3** A presumption that a person participating in an unlawful assembly shall be presumed to have also intended to commit or abet the commission of offences under the proposed Bill is provided for in Section 6.
- 11.4** Power to prohibit the unlawful assemblies and to take preventive measures are conferred on the Sub-Divisional/District Magistrate. Further, a SDM/DM is enjoined to receive a request or information from any person seeking protection from the assembly of persons or members of any family who are likely to or who have been objecting to the lawful marriage.
- 11.5** The provisions of this proposed Bill are without prejudice to the provisions of Indian Penal Code. Care has been taken, as far as possible, to see that there is no overlapping with the provisions of the general penal law. In other words, the criminal acts other than those specifically falling under the proposed Bill are punishable under the general penal law.

- 11.6 The offence will be tried by a Court of Session in the district and the offences are cognizable, non-bailable and non-compoundable.
- 11.7 Accordingly, the Prohibition of Interference with the Freedom of Matrimonial Alliances Bill 20 has been prepared in order to effectively check the existing social malady.
13. It is further pertinent to mention that the issue relating to the role of Khap Panchayats is pending before this Court in *Shakti Vahini v. Union of India and Ors.* in W.P. (C) No. 231 of 2010.
14. Ultimately, the question which ought to consider and assess by this Court is whether the State Police Machinery could have possibly prevented the said occurrence. The response is certainly a 'yes'. The State is duty bound to protect the Fundamental Rights of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage. Such offences are resultant of the States incapacity or inability to protect the Fundamental Rights of its citizens.
15. In a report by the Commission of Inquiry, headed by a former Judge of the Delhi High Court Justice Usha Mehra (Retd.), (at pg. 86), it was seen (although in the context of the NCR) that police officers seldom visit villages; it was suggested that a Police Officer must visit a village on every alternate days to "instill a sense of security and confidence amongst the citizens of the society and to check the depredations of criminal elements."
16. As a long-term measure to curb such crimes, a larger societal change is required via education and awareness. Government will have to formulate and implement policies in order to uplift the socio-economic condition of women, sensitization of the Police and other concerned parties towards the need for gender equality and it must be done with focus in areas where statistically there is higher percentage of crimes against women.

**Victim Compensation:**

17. No compensation can be adequate nor can it be of any respite for the victim but as the State has failed in protecting such serious violation of a victim's fundamental right, the State is duty bound to provide compensation, which may help in the victim's rehabilitation. The humiliation or the reputation that is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace.
18. In 2009, a new Section 357A was introduced in the Code which casts a responsibility on the State Governments to formulate Schemes for compensation to the victims of crime in coordination with the Central Government whereas, previously, Section 357 ruled the field which was not mandatory in nature and only the offender can be directed to pay compensation to the victim under this Section. Under the new Section 357A, the onus is put on the District Legal Service Authority or State Legal Service Authority to determine the quantum of compensation in each case. However, no rigid formula can be evolved as to have a uniform amount, it should vary in facts and circumstances of each case. In the case of *State of Rajasthan v. Sanyam, Lodha* (2011) 13 SCC 262, this Court held that the failure to grant uniform ex-gratia relief is not arbitrary or unconstitutional. It was held that the quantum may depend on facts of each case.

19. Learned amicus also advocated for awarding interim compensation to the victim by relying upon judicial precedents. The concept of the payment of interim compensation has been recognized by this Court in *Bodhisattwa Gautam v. Miss Subhra Chakraborty* (1996) 1 SCC 490. It referred to *Delhi Domestic Working Women's Forum v. Union of India and Ors.* to reiterate the centrality of compensation as a remedial measure in case of rape victims. It was observed as under:

*If the Court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the Court the right to award interim compensation which should also be provided in the Scheme.*

20. This Court, in *P. Rathinam v. State of Gujarat* (1994) SCC (CrI) 1163, which pertained to rape of a tribal woman in police custody awarded an interim compensation of Rs. 50,000/- to be paid by the State Government. Likewise, this Court, in *Railway Board v. Chandrima Das* (2000) 2 SCC 465, upheld the High Court's direction to pay Rs. 10 lacs as compensation to the victim, who was a Bangladeshi National. Further, this Court in SLP (CrI.) No. 5019/2012 titled as *Satya Pal Anand v. State of M.P.*, vide order dated 05.08.2013, enhanced the interim relief granted by the State Government from Rs. 2 lacs to 10 lacs each to two girl victims.
21. The Supreme Court of Bangladesh in *The State v. Md. Moinul Haque and Ors.* LEX/BDHC/0247/2001 : (2001) 21 BLD 465 has interestingly observed that "victims of rape should be compensated by giving them half of the property of the rapist(s) as compensation in order to rehabilitate them in the society." If not adopting this liberal reasoning, we should at least be in a position to provide substantial compensation to the victims.
22. Nevertheless, the obligation of the State does not extinguish on payment of compensation, rehabilitation of victim is also of paramount importance. The mental trauma that the victim suffers due to the commission of such heinous crime, rehabilitation becomes a must in each and every case. Mr. Anip Sachthey, learned Counsel for the State submitted a report by Mr. Sanjay Mitra, Chief Secretary, dated 11.03.2014 on the rehabilitation measures rendered to the victim. The report is as follows:

GOVERNMENT OF WEST BENGAL HOME DEPARTMENT  
*Report on the Rehabilitation Measures*

*Reference: Suo Motu Writ Petition No. 24 of 2014*

*Subject: PS Labpur, District Birbhum, West Bengal Case No. 14/2014 dated 22.01.2014 under Section 376D/341/506 Indian Penal Code.*

*In compliance with the order passed by the Hon'ble Supreme Court during the hearing of the aforesaid case on 4th March, 2014, the undersigned has reviewed the progress of rehabilitation measures taken by the State Government agencies. The progress in the matter is placed hereunder for kind perusal.*

*Crime Against Women*

1. *A Government Order has been issued sanctioning an amount of Rs. 50,000/- to the victim under the Victim Compensation Scheme of the State Government. It is assured that the amount will be drawn and disbursed to the victim within a week.*
2. *Adequate legal aid has been provided to the victim.*
3. *'Patta' in respect of allotment of a plot of land under 'Nijo Griha Nijo Bhumi Scheme' of the State Government has been issued in favour of the mother of the victim.*
4. *Construction of residential house out of the fund under the scheme 'Amar Thikana' in favour of the mother of victim has been completed.*
5. *Widow pension for the months of January, February and March, 2014 has been disbursed to the mother of the victim.*
6. *Installation of a tube well near the residential house of the mother of the victim has been completed.*
7. *Construction of sanitary latrine under TSC Fund has been completed.*
8. *The victim has been enrolled under the Social Security Scheme for Construction Worker.*
9. *Antyodaya Anna Yojna Card has been issued in favour of the victim and her mother.*
10. *Relief and Government relief articles have been provided to the victim and her family.*

*The State Government has taken all possible administrative action to provide necessary assistance to the victim which would help her in rehabilitation and reintegration.*

*(Sanjay Mitra)*  
*Chief Secretary*

23. The report of the Chief Secretary indicates the steps taken by the State Government including the compensation awarded. Nevertheless, considering the facts and circumstances of this case, we are of the view that the victim should be given a compensation of at least Rs. 5 lakhs for rehabilitation by the State. We, accordingly, direct the Respondent No. 1 (State of West Bengal through Chief Secretary) to make a payment of Rs. 5 lakhs, in addition to the already sanctioned amount of Rs. 50,000, within one month from today. Besides, we also have some reservation regarding the benefits being given in the name of mother of the victim, when the victim herself is a major (i.e. aged about 20 years). Thus, in our considered view, it would be appropriate and beneficial to the victim if the compensation and other benefits are directly given to her and accordingly we order so.

24. Further, we also wish to clarify that according to Section 357B, the compensation payable by the State Government under Section 357A shall be in addition to the payment of fine to the victim under Section 326A or Section 376D of the Indian Penal Code.
25. Also, no details have been given as to the measures taken for security and safety of the victim and her family. Merely providing interim measure for their stay may protect them for the time being but long term rehabilitation is needed as they are all material witnesses and likely to be socially ostracized. Consequently, we direct the Circle Officer of the area to inspect the victim's place on day-to-day basis.

**Conclusion:**

26. The crimes, as noted above, are not only in contravention of domestic laws, but are also a direct breach of the obligations under the International law. India has ratified various international conventions and treaties, which oblige the protection of women from any kind of discrimination. However, women of all classes are still suffering from discrimination even in this contemporary society. It will be wrong to blame only on the attitude of the people. Such crimes can certainly be prevented if the state police machinery work in a more organized and dedicated manner. Thus, we implore upon the State machinery to work in harmony with each other to safeguard the rights of women in our country. As per the law enunciated in *Lalita Kumari v. Govt. of U.P and Ors. 2013 (13) SCALE 559*, registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and the Police officers are duty bound to register the same.
27. Likewise, all hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, are statutorily obligated under Section 357C to provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under Sections 326A, 376, 376A, 376B, 376C, 376D or Section 376E of the Indian Penal Code.
28. We appreciate the able assistance rendered by Mr. Sidharth Luthra, learned ASG, who is appointed as amicus curiae to represent the cause of the victim in the present case.
29. With the above directions, we dispose of the suo motu petition.

□□□

## **Aparna Bhat v. State of Madhya Pradesh**

**AIR 2021 SC 1492**

Criminal Appeal No. 329 of 2021

[@ Special Leave Petition (Crl.) No. 2531 of 2021]  
(Arising out of S.L.P. (Crl.) Diary No. 20318 of 2020)

*Aparna Bhat ... Appellant(s)*

*versus*

*State of Madhya Pradesh ... Respondent(s)*

Decided on: **March 18, 2021**

Bench : **Hon'ble Mr. Justice A. M. Khanwilkar** and **Hon'ble Mr. Justice S. Ravindra Bhat**

### J U D G M E N T :

Judgment delivered by: **Hon'ble Mr. Justice S. Ravindra Bhat**

*A woman cannot be herself in the society of the present day, which is an exclusively masculine society, with laws framed by men and with a judicial system that judges feminine conduct from a masculine point of view." – Henrik Ibsen*

1. Leave granted. The appellants are public-spirited individuals, concerned about the adverse precedent set by the imposition of certain bail conditions in a case involving a sexual offence against a woman; they impugn a part of the judgment of the Madhya Pradesh High Court<sup>1</sup> that imposed these bail conditions. With the consent Signature of counsel for the parties, the appeal was heard finally. The appellants also filed an application<sup>2</sup>, seeking directions that all the High Courts and trial Courts be directed to refrain from making observations and imposing conditions in rape and sexual assault cases, at any stage of judicial proceedings, that trivialize the trauma undergone by survivors and adversely affect their dignity. Certain intervenors also preferred an application in support of the appeal, seeking clear directions to all Courts to refrain from imposing "*irrelevant, freaky or illegal bail conditions*".
2. Ibsen, the prescient nineteenth century author, made a powerful statement (quoted as the epigram at the beginning of this judgment); sadly, even today, in the twenty first century, after 70 years as a republic with the goal of equality for all, many courts seem to be oblivious of the problem. In a sense, this judgment is not as much about only the merits of the impugned conditions of the bail order, but is meant to address a wider canvas of (what appears to be) entrenched paternalistic and misogynistic attitudes that are regrettably reflected at times in judicial orders and judgments.

<sup>1</sup> In Vikram v. The State of Madhya Pradeshin MCRC 23350/ 2020, dated 30.7.2020

<sup>2</sup> Crl. M.P No. 102226/2020

3. The brief facts of the case are that on 20.04.2020 at about 2.30 a.m., the accused-applicant, a neighbour of the complainant, entered her house and caught hold of the complainant's hand, and allegedly attempted to harass her sexually. Accordingly, Crime No. 133/2020 was registered at Police Station, Bhatpachlana, District-Ujjain for the offences punishable under sections 452, 354A<sup>3</sup>, 323 and 506 of the Indian Penal Code (IPC). The case was investigated and a charge sheet was filed. The accused filed an application under Section 438 of Code of Criminal Procedure, 1973 (hereafter "CrPC") seeking pre-arrest bail. The High Court, by the impugned order, even while granting bail to the applicant imposed the following condition which is under challenge in this petition.

(i) *"The applicant along with his wife shall visit the house of the complainant with Rakhi thread/ band on 3rd August, 2020 at 11:00 a.m. with a box of sweets and request the complainant -Sarda Bai to tie the Rakhi band to him with the promise to protect her to the best of his ability for all times to come. He shall also tender Rs. 11,000/- to the complainant as a customary ritual usually offered by the brothers to sisters on such occasion and shall also seek her blessings. The applicant shall also tender Rs. 5,000/- to the son of the complainant – Vishal for purchase of clothes and sweets. The applicant shall obtain photographs and receipts of payment made to the complainant and her son, and the same shall be filed through the counsel for placing the same on record of this case before this Registry. The aforesaid deposit of amount shall not influence the pending trial, but is only for enlargement of the applicant on bail."*

4. The appellants submit that the expressions "in the interest of justice", "such other conditions court considers necessary" and "as it may think fit" as provided in the bare text of the Section 437(3)(c) as well as Section 438(2)(iv) of the CrPC, give discretion to the Courts to impose such other conditions as may be required in the facts of a particular case, but those conditions have to be in consonance with the other conditions in the provisions, the purpose of granting bail and no other consideration.

5. The appellants cite *Kunal Kumar Tiwari v. State of Bihar*<sup>4</sup> and *Sumit Mehta v. State (NCT of Delhi)*<sup>5</sup> and argue that this court's observations in those decisions must be followed by every court while considering and dealing with bail applications. They also rely on the observations made in para 18 of *State of M.P v. Madanlal*<sup>6</sup> and urge that in cases of sexual offences, the idea of compromise, especially in the form of marriage between the accused and the prosecutrix is abhorrent, and should not be considered a judicial remedy, as it would be antithetical to the woman's honour and dignity. Likewise,

3 "354A. Sexual harassment and punishment for sexual harassment.—

(1) A man committing any of the following acts—

(i) physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) a demand or request for sexual favours; or

(iii) showing pornography against the will of a woman; or

(iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

4 (2018) 16 SCC 74

5 (2013) 15 SCC 570

6 (2015) 7 SCC 681

reliance was placed on *Ramphal v. State of Haryana*<sup>7</sup>, where the court took note of the compromise between the survivor and accused, but found that such compromise is of no relevance when deciding on cases of rape and sexual assault.

6. The appellants brought to the notice of this Court, various decisions and orders where the observations made by the judges in offences against women including cases under the Protection of Children from Sexual Offences Act, 2012 (POCSO) were extraneous. The appellants submitted that the courts, in many cases, especially under the POCSO Act, granted bail on the plea that an agreement to marry had been reached between the accused and prosecutrix. Additionally, they also submitted that while adjudicating matters of sexual harassment and rape, judges have made shocking remarks on the character of the prosecutrix.
7. Reference is made to *Ravi Jatav v. State of M.P.*<sup>8</sup>, where the High Court of Madhya Pradesh, while granting bail (to an accused of committing offences under Sections 376-D, 366, 506, 34 IPC) imposed conditions that the accused “shall register himself as a Covid-19 Warrior” and was to be assigned work of Covid-19 disaster management at the discretion of the District Magistrate. In *Rakesh B. v. State of Karnataka*<sup>9</sup>, the Karnataka High Court granted bail to an accused alleged to have committed offences under Sections 376, 420, 506 IPC and Section 66-B of the Information Technology Act, 2000 (“IT Act”), and made remarks on the survivor’s conduct. The relevant extract is produced below:

“c) *nothing is mentioned by the complainant as to why she went to her office at night, that is, at 11 PM; she has also not objected to consuming drinks with the petitioner and allowing him to stay with her till morning; the explanation offered by the complainant that after the perpetration of the act she was tired and fell asleep, is unbecoming of an Indian woman; that is not the way our women react when they are ravished;*”
8. The appellants submit that no observation/condition should be made in any judgment, or orders which reflects bias of the judge or affects the dignity of a woman or affects the conduct of the trial in a fair and unbiased manner. They highlight that the impugned order, while granting bail, imposed a condition that the applicant shall visit the house of the complainant. The appellants submit that this is unacceptable and no observation/condition should be made which permits the accused to meet/have access to the survivor and her family members.
9. The appellants also cite *Mohan v. State*<sup>10</sup>, where the Madras High Court had referred the case of rape of a minor to mediation and observed that the case was fit for attempting a compromise between the parties. Likewise, *Samuvel v. Inspector of Police*<sup>11</sup> is cited, where the High Court of Madras referred to mediation, a case of rape where the prosecutrix was a minor and had become a mother of a child as a consequence of rape, because the accused agreed to marry her. It is urged that no observation/condition should be made which initiates or encourages compromise that disparages and downgrades an otherwise heinous crime thus indicating that such offences are remediable by way of a compromise/by marriage.

7 CrI. A. No. 438/2011 decided on 27.11.2019

8 MCRC No. 13734/2020 order dated 19.05.2020 passed by Madhya Pradesh High Court..

9 CrI. P. No. 2427/2020, order dated 22.06.2020 passed by High Court of Karnataka

10 M.P No. 2/2014 in CrI. A No. 402/2014 order dated 18.06.2015

11 CrI. O.P. No. 1881/2015.

10. *Sopikul Sk. @ Safikul Islam v. State*<sup>12</sup>, an order of the High Court of Calcutta in a POCSO case granting bail is cited; here, relief was given to the accused since the prosecutrix had attained majority and the accused intended to marry her. Further, in the case of *Gyanaranjan Behera v. State of Odisha*<sup>13</sup>, the Orissa High Court in a POCSO case granted interim bail to the accused for the purpose of marrying the prosecutrix. In *Suraj Kushwah v. State of M.P*<sup>14</sup>, the Madhya Pradesh High Court granted temporary bail to the accused for a crime under sections 376 (2)(n), 506 IPC read with Sections 3(1) (W-II), 3(2)(V), 3(2)(v-a) of the SC/ST (Prevention of Atrocities) Act, 1989 for the purpose of solemnizing marriage with the prosecutrix. The appellants submit that in POCSO and rape cases, no observation/condition should be made, which takes note of the fact that the survivor has attained majority and that the accused has offered to marry her.
11. *Vikas Garg v. State of Haryana*<sup>15</sup>, by the High Court of Punjab is cited, where the court granted bail to three persons accused of committing offences under Sections 376D, 376(2)(n), 376, 292, 120-B, 506 IPC and Section 67 of the IT Act, and made observations regarding the prosecutrix's "casual relationships", "promiscuous attitude", "voyeuristic mind", etc. The appellants submit that no observation/condition should be made which grants bail on the ground that the victim is of "loose character" or is "habituated to sexual intercourse."
12. Counsel for the Intervenors submitted that under sections 437(2) and 438, the power to impose conditions have been expressed in very wide terms by using the phrase "any condition." Recently, High Courts while granting bail under these sections have started imposing irrelevant conditions. The Intervenors have annexed around twenty-three orders in which such conditions for bail were imposed. They argue that the conditions that can be imposed under the law are clearly laid down by the Supreme Court in the case of *Munish Bhasin v. State*<sup>16</sup> and reiterated in *Parvez Noordin Lokhandwalla v. State of Maharashtra*.<sup>17</sup> Accordingly, it is clear that imposing conditions like rendering community service in COVID hospitals or in any other institution, plantation of trees, contributing to any particular charity relief fund, etc. is impermissible in law. The Intervenors further submit that the accused, during pendency of the trial are presumed innocent and their guilt is as yet to be adjudicated by the Court. Imposition of conditions like compulsive community service, etc. is violative of the right to equality and personal liberty, including procedure established by law in the Indian Constitution.
13. The Intervenors also submit that the Court while deciding a bail application, cannot assume the role of a social reformer or fund raiser for charities and impose conditions which have no nexus with the offense or relevance with the object of the bail provisions.
14. It was submitted that in IA No. 102226/2020, the appellants have brought to the notice of this Court, several other instances in which similar directions have been made by High Courts and Trial Courts across the country. Such wide prevalence necessitates the urgent intervention of this Court to *firstly*, declare that such remarks are unacceptable and have the potential to cause grave harm to the

12 CRM No. 2961/2020 Order dated 16.04.2020 of the Calcutta High Court

13 BLAPL No. 2596/2020 Order dated 02.06.2020, passed by Orissa High Court.

14 CRA No. 3353/2020 Order dated 02.09.2020 passed by the Madhya Pradesh High Court

15 Cr. M. No. 23962/2017, order dated 13.09.2017 passed by the Punjab and Haryana High Court

16 (2009) 4 SCC 45

17 (2020) 10 SCC 77

prosecutrix and the society at large, *secondly*, reiterate that judicial orders have to conform to certain judicial standards, and *thirdly*, take necessary steps to ensure that this does not happen in the future.

15. It was further submitted that this Court should intervene and issue directions or guidelines on bail and anticipatory bail to ensure that courts impose only those conditions as are permissible in law. Further, this Court was urged to issue directions on gender sensitization of the bar and the bench, particularly with regard to judicial empathy for the prosecutrix.
16. The learned Attorney General, who had been issued notice in this matter, made his submissions in support of the appeal; he also filed a detailed note suggesting the steps that should be taken to sensitize all stakeholders, especially courts, while dealing with offences against women. Highlighting the observations made in Kunal Kumar (*supra*), Sumit Mehta (*supra*), State of Punjab v. Gurmit Singh<sup>18</sup> and Sakshi v. State<sup>19</sup>, the learned Attorney General submitted that while relying upon the observations made in the above-mentioned cases, the court may highlight that in cases of crimes against women, the following additional considerations may be kept in mind:
- i. Bail conditions should not mandate or even permit contact between the accused and the victim.
  - ii. Bail conditions must seek to protect the complainant from any harassment by the accused.
  - iii. Where considered necessary, the complainant/prosecutrix may be heard on whether there is any peculiar circumstance which may require additional conditions for her protection.
  - iv. Wherever bail is granted, the complainant may immediately be informed that the accused has been granted bail.
  - v. Bail conditions must be free from stereotypical or patriarchal notions on women and their place in society, and must strictly be in accordance with the requirements of the CrPC.
  - vi. The Courts while adjudicating a case, should not suggest or entertain any notions (or encourage any step) towards compromises between the prosecutrix and the accused to get married, as it is beyond their powers and jurisdiction.
17. On gender equality and gender sensitization, the Attorney General argued that to achieve the goal of gender justice, it is imperative that judicial officers, judges, and members of the bar are made aware of gender prejudices that hinder justice. Accordingly, he submitted that the foremost aspect to facilitate a gender sensitive approach, is to train judges to exercise their discretion and avoid the use of gender-based stereotypes while deciding cases pertaining to sexual offences. Secondly, judges should have sensitivity to the concerns of the survivor of sexual offences.

18 (1996) 2 SCC 384

19 (2004) 5 SCC 518

18. Reliance was placed on the Bangkok General Guidance for Judges on Applying a Gender Perspective in South East Asia, by the International Commission of Jurists. It was pointed out that the following stereotypes are often encountered in the course of judicial decision-making and should be avoided: -
- i. Women are physically weak;
  - ii. Women cannot make decisions on their own;
  - iii. Men are the head of the household and must make all the decisions related to family;
  - iv. Women should be submissive and obedient;
  - v. Good women are sexually chaste;
  - vi. Every woman wants to be a mother;
  - vii. Women should be the ones in charge of their children;
  - viii. Being alone at night or wearing certain clothes make women responsible for being attacked;
  - ix. Women are emotional and often overreact or dramatize hence it is necessary to corroborate their testimony;
  - x. Testimonial evidence provided by women who are sexually active may be suspected when assessing “consent” in sexual offence cases; and xi. Lack of evidence of physical harm in sexual offence case means consent was given.
19. The Attorney General submitted that training for gender sensitization for judges at all levels of the judiciary should mandatorily be conducted at regular intervals by the National Judicial Academy and State Judicial Academies. He emphasized that any directions towards gender sensitization should include judges of all levels of the judiciary. Further, the counsel urged that courses on gender sensitization should be included in the curriculum of law schools, and the All-India Bar Exam should include questions on gender sensitization as well. In addition to this, he recommended that a detailed curriculum may be prepared with the help of subject matter experts by each High Court, to be a part of the syllabus for the Judicial Services Exams and training for inducted judges.

### **Nature of the beast<sup>20</sup>: the problem**

20. Women often experience obstacles in gaining access to mechanisms of redress, including legal aid, counselling services and shelters. They are re-victimized and exposed to further risk of violence through the denial of redress in the context of informal trials or negotiations between families and community leaders. The payment of financial compensation by the perpetrator or his family for acts of violence against women, in lieu of legal remedies, was a recurrent concern vis-à-vis the formal and informal justice systems. Violence against women in India is systematic and occurs in the public and private spheres. It is underpinned by the persistence of patriarchal social norms and inter- and intra-

<sup>20</sup> A phrase that means the traits inherent to a thing or situation, especially a negative or difficult one (See <https://idioms.thefreedictionary.com/the+nature+of+the+beast>)

gender hierarchies. Women are discriminated against and subordinated not only on the basis of sex, but on other grounds too, such as caste, class, ability, sexual orientation, tradition and other realities<sup>21</sup>.

21. Gender violence is most often unseen and is shrouded in a culture of silence. The causes and factors of violence against women include entrenched unequal power equations between men and women that foster violence and its acceptability, aggravated by cultural and social norms, economic dependence, poverty and alcohol consumption, etc. In India, the culprits are often known to the woman; the social and economic “costs” of reporting such crimes are high. General economic dependence on family and fear of social ostracization act as significant disincentives for women to report any kind of sexual violence, abuse or abhorrent behaviour. Therefore, the actual incidence of violence against women in India is probably much higher than the data suggests, and women may continue to face hostility and have to remain in environments where they are subject to violence. This silence needs to be broken. In doing so, men, perhaps more than women have a duty and role to play in averting and combating violence against women.
22. Unlike many other victims of interpersonal crimes such as theft, robbery or muggings, survivors of sexual assault are vulnerable to being blamed for their attack, and thus victim-blaming (overtly or in more subtle forms) in sexual assault cases has been the focus of several writings. Myths and stereotypes “underlie and fuel sexual violence against women and inform negative societal reactions”<sup>22</sup>. Joanne Conaghan points out pertinently that “removing the doctrinal debris of a legally instituted gendered hierarchical order does not necessarily get rid of deeply ingrained social and cultural attitudes which law has long endorsed and which continue to infuse the criminal justice process, albeit in more covert, less accessible forms.”<sup>23</sup>
23. Sexual violence is varied in degree. At the highest (or, rather most aggravated) level, is rape with or without attendant violence. However, there are a substantial number of incidents which fall within the rubric of sexual violence, that amount to offences under various penal enactments. These outlaw behaviours such as stalking, eve-teasing, shades of verbal and physical assault, and harassment. Social attitudes typically characterize this latter category of crimes as “minor” offences. Such “minor” crimes are, regrettably not only trivialised or normalized, rather they are even romanticized and therefore, invigorated in popular lore such as cinema. These attitudes – which indulgently view the crime through prisms such as “boys will be boys” and condone them, nevertheless have a lasting and pernicious effect on the survivors.
24. The United Nations Organisation has defined “violence against women” as “any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or

21 Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, on her Mission to India (22 April to 1 May, 2013) A/HRC/26/38/Add.1 (accessible at [www.ohchr.org](http://www.ohchr.org) > Documents > A-HRC-26-38-Add1\_en)

22 Shannon Sampert, “Let Me Tell You a Story: English-Canadian Newspapers and Sexual Assault Myths” (2010) 22:2 Canadian Journal of Women and the Law 301 at 304; also Janice Du Mont, and Deborah Parmis; “Judging Women: The Pernicious Effects of Rape Mythology” (1999) 19:1-2 Canadian Woman Studies 102 at 102

23 Joanne Conaghan, *Law and Gender* (Oxford: Oxford University Press, 2013) at 113

private life.”<sup>24</sup> The effect of offensive behaviour against women, which laws criminalize-physical, verbal, or other acts which threaten or give them acute discomfort, undermining their dignity, self-worth and respect, is to silence or subdue the survivor.

25. In *The Standard of Social Justice as a Research Process*<sup>25</sup> two scholars of psychology made a strong indictment of the (contextually, Canadian) criminal justice process:

*“The more general indictment of the current criminal justice process is that the law and legal doctrines concerning sexual assault have acted as the principle [sic] systemic mechanisms for invalidating the experiences of women and children. Given this state of affairs, the traditional view of the legal system as neutral, objective and gender-blind is not defensible. Since the system is ineffective in protecting the rights of women and children, it is necessary to re-examine the existing doctrines which reflect the cultural and social limitations that have preserved dominant male interests at the expense of women and children.”*

### Previous rulings

26. In *Kunal Kumar Tiwari v. State of Bihar* (supra), this court while dealing with Section 437(3)(c), Cr. PC (general conditions of bail) observed as follows:

“9. There is no dispute that Sub-clause (c) of Section 437(3) allows Courts to impose such conditions in the interest of justice. We are aware that palpably such wordings are capable of accepting broader meaning. But such conditions cannot be arbitrary, fanciful or extend beyond the ends of the provision. The phrase ‘interest of justice’ as used under the Sub-clause (c) of Section 437(3) means “good administration of justice” or “advancing the trial process” and inclusion of broader meaning should be shunned because of purposive interpretation.”

27. In *Sumit Mehta v. State (NCT of Delhi)* (supra) this court, with respect to the conditions that can be imposed validly under section 438(2) of the CrPC, observed that:

“11. While exercising power under Section 438 of the Code, the Court is duty bound to strike a balance between the individual’s right to personal freedom and the right of investigation of the police. For the same, while granting relief Under Section 438(1), appropriate conditions can be imposed Under Section 438(2) so as to ensure an uninterrupted investigation. The object of putting such conditions

24 The Declaration on the Elimination of Violence Against Women (also ‘DEVAW’). Articles 1 and 2 read as follows:

**“Article One:**

For the purposes of this Declaration, the term “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article Two:

Violence against women shall be understood to encompass, but not be limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”

25 (1997), 38 Can. Psychology 91, K. E. Renner, C. Alksnis and L. Park at p. 100

should be to avoid the possibility of the person hampering the investigation. Thus, any condition, which has no reference to the fairness or propriety of the investigation or trial, cannot be countenanced as permissible under the law. So, the discretion of the Court while imposing conditions must be exercised with utmost restraint.”

28. It was urged that the observations made in Kunal Kumar and Sumit Mehta ought to be followed while imposing bail conditions. The appellants relying upon the observations made in para 18 of State of M.P v. Madanlal<sup>26</sup>,<sup>26</sup> submit that in cases of sexual offences, the concept of compromise, especially in the form of marriage between the accused and the prosecutrix shall not be thought of, as any such attempt would be offensive to the woman’s dignity.

“18. ... We would like to clearly state that in a case of rape or attempt of rape, the conception of compromise under no circumstances can really be thought of. These are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasise, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the “purest treasure”, is lost. Dignity of a woman is a part of her non- perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error. Or to put it differently, it would be in the realm of a sanctuary of error.”

29. The decision in Ramphal v. State of Haryana<sup>27</sup> by order dated 27.11.2019, took note of the compromise between the survivor and accused persons but found that such compromise is of no relevance when deciding on rape and cases of sexual assault.

“It is brought to our notice that during the pendency of the appeals, both the appellants have paid Rs. 1.5 lakhs each in favor of the prosecutrix and she has accepted the same willingly for getting the matter compromised. However, it is imperative to emphasize that we do not accept such compromise in matters relating to the offence of rape and similar cases of sexual assault. Hence, the aforesaid compromise is of no relevance in deciding this matter. On merits, we do not find any ground to interfere in as much as the evidence of the prosecutrix is coupled with the medical evidence which clearly proves that the offence of rape has been committed. Therefore, the Trial Court and the High Court have rightly convicted the accused/appellants.”

30. Empirically, the statistics regarding certain kinds of crimes against women have not shown any significant decline. In states and union territories, 32033 rape cases (under Section 376 IPC) were registered in 2019; 4038 cases of attempt to rape were registered the same year (under Section 376 read with Section 511, IPC). As many as 88,387 cases under Section 354 IPC were registered the same year, whereas 6939 cases were registered under Section 509 (outraging the modesty of a woman) in

26 (2015) 7 SCC 681

27 CrI. A. No. 438/2011 28<https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf>

2019. In all, a total of 4,05,861 crimes against women were reported in 2019 (as against 359849 in 2017 and 378236 in 2018). The statistic for a relatively new species of offensive activities, cybercrimes that are women-centric, such as Transmitting of Sexually Explicit Material (Sec. 67A/67B, Information Technology Act), Blackmailing Defamation/Morphing/creating Fake Profile etc) registered in 2019, were 1645. POCSO offences, where girl children were victims, reported in 2019 were 46,005.<sup>28</sup>

**The role of the courts and law enforcement agencies as neutral authorities, under a duty to ensure fairness.**

31. The role of all courts is to make sure that the survivor can rely on their impartiality and neutrality, at every stage in a criminal proceeding, where she is the survivor and an aggrieved party. Even an indirect undermining of this responsibility cast upon the court, by permitting discursive formations on behalf of the accused, that seek to diminish his agency, or underplay his role as an active participant (or perpetrator) of the crime, could in many cases, shake the confidence of the rape survivor (or accuser of the crime) in the impartiality of the court. The current attitude regarding crimes against women typically is that “grave” offences like rape are not tolerable and offenders must be punished. This, however, only takes into consideration rape and other serious forms of gender-based physical violence. The challenges Indian women face are formidable: they include a misogynistic society with entrenched cultural values and beliefs, bias (often sub-conscious) about the stereotypical role of women, social and political structures that are heavily male-centric, most often legal enforcement structures that either cannot cope with, or are unwilling to take strict and timely measures. Therefore, reinforcement of this stereotype, in court utterances or orders, through considerations which are extraneous to the case, would impact fairness.
32. Academic writings highlight that a judgment at all levels has a number of distinct audiences, each of which engages with it in a different way. The parties to the case and their counsel will be interested in how the judge resolves their specific dispute - what the law gives to or requires of them. At the same time, in a legal system where judgments of courts set precedents, and in particular within a common law system, judgments have significance beyond their authoritative resolution of a specific dispute—particularly in the Supreme Court. Thus, the judge is not only communicating to the parties their rights and liabilities in the context of the specific dispute being litigated; the judge is also addressing the broader legal community— other lawyers, judges, legal academics, law students—and indeed the public at large.<sup>29</sup>
33. Using rakhi tying as a condition for bail, transforms a molester into a brother, by a judicial mandate. This is wholly unacceptable, and has the effect of diluting and eroding the offence of sexual harassment. The act perpetrated on the survivor constitutes an offence in law, and is not a minor transgression that can be remedied by way of an apology, rendering community service, tying a rakhi or presenting a gift to the survivor, or even promising to marry her, as the case may be. The law criminalizes outraging the modesty of a woman. Granting bail, subject to such conditions, renders the court susceptible to the charge of re-negotiating and mediating justice between confronting parties in a criminal offence and perpetuating gender stereotypes.

<sup>28</sup> <https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf>

<sup>29</sup> Erica Rackley, *The Art and Craft of Writing Judgements* in Hunter, Rosemary and McGlynn, Clare and Rackley, Erika, eds. *FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE*, Hart Publishing, Oxford. .

34. The Inter-American Commission on Human Rights has noted that judicial stereotyping “*is a common and pernicious barrier to justice, particularly for women victims and survivors of violence. Such stereotyping causes judges to reach a view about cases based on preconceived beliefs, rather than relevant facts and actual enquiry.*”<sup>30</sup> Furthering of rape myths and stereotypes by the judiciary, limits the emancipatory potential of the law.
35. ‘Judicial stereotyping’ refers to the practice of judges ascribing to an individual specific attributes, characteristics or roles by reason only of her or his membership in a particular social group (e.g. women). It is used, also, to refer to the practice of judges perpetuating harmful stereotypes through their failure to challenge them, for example by lower courts or parties to legal proceedings.<sup>31</sup> Stereotyping excludes any individualized consideration of, or investigation into, a person’s actual circumstances and their needs or abilities.<sup>32</sup>
36. There have been notable rulings by the CEDAW<sup>33</sup> Committee in this regard. In *V.K. v. Bulgaria*<sup>34</sup>, the Committee observed that:
- ‘stereotyping affects women’s right to a fair trial and that the judiciary must be careful not to create inflexible standards based on preconceived notions of what constitutes domestic or gender-based violence’.*
37. In *Karen Tayag Vertido v. The Philippines*<sup>35</sup>, the CEDAW Committee stressed that court should not create “inflexible standards” of what women should be or have done, when confronted with a situation of rape.
38. Judges can play a significant role in ridding the justice system of harmful stereotypes. They have an important responsibility to base their decisions on law and facts in evidence, and not engage in gender stereotyping. This requires judges to identify gender stereotyping, and identify how the application, enforcement or perpetuation of these stereotypes discriminates against women or denies them equal access to justice. Stereotyping might compromise the impartiality of a judge’s decision and affect his or her views about witness credibility or the culpability of the accused person.<sup>36</sup> As a judge of the Canadian Supreme Court remarked:

*“Myths and stereotypes are a form of bias because they impair the individual judge’s ability to assess the facts in a particular case in an open-minded fashion. In fact, judging based on myths and stereotypes is entirely incompatible with keeping an open mind, because myths*

30 Inter-American Commission on Human Rights, Access to Justice for Women Victims of Sexual Violence: Education and Health, OEA/Ser.L/V/II. Doc. 65 (2011) ; Simone Cusack, Eliminating Judicial Stereotyping, Paper submitted to the Office of the High Commissioner for Human Rights (2014).

31 Simone Cusack, Eliminating Judicial Stereotyping, Paper submitted to the Office of the High Commissioner for Human Rights (2014), p. 2

32 Supra, p. 17.

33 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), was adopted in 1979 by the UN General Assembly; it is sometimes described as an international bill of rights for women. The CEDAW Committee is set up under Article 17 of CEDAW.

34 *V.K. v. Bulgaria*, Communication No. 20/2008, UN Doc. CEDAW/C/49/D/20/2008 (2011) (CEDAW)

35 *Karen Tayag Vertido v. The Philippines*, Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (2010) (CEDAW), para. 8.4.

36 Simone Cusack, Eliminating Judicial Stereotyping, Paper submitted to the Office of the High Commissioner for Human Rights (2014), p. 22

*and stereotypes are based on irrational predisposition and generalization, rather than fact.*<sup>37</sup>

39. The stereotype of the ideal sexual assault victim disqualifies several accounts of lived experiences of sexual assault. Rape myths<sup>38</sup> undermine the credibility of those women who are seen to deviate too far from stereotyped notions of chastity, resistance to rape, having visible physical injuries, behaving a certain way, reporting the offence immediately, etc. In the words of the Supreme Court of Canada, in *R v. Seaboyer*<sup>39</sup>,

*“The woman who comes to the attention of the authorities has her victimization measured against the current rape mythologies, i.e., who she should be in order to be recognized as having been, in the eyes of the law, raped; who her attacker must be in order to be recognized, in the eyes of the law, as a potential rapist; and how injured she must be in order to be believed.”*

40. The Bangalore Principles of Judicial Conduct, 2002, were from a meeting of Chief Justices of Asian and African countries, and endorsed by the UN Commission on Human Rights, the ECOSOC and the Commission on Crime Prevention and Criminal Justice. The Bangalore Principles provide that:

**“2.4** *A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.*

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**5.1** *A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes (“irrelevant grounds”).*

**5.2** *A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.”*

41. This court held, in *State of Punjab v. Gurmit Singh & Ors.*<sup>40</sup> that:

*“The trial court not only erroneously disbelieved the prosecutrix, but quite uncharitably and unjustifiably even characterised her as a girl “of loose morals” or “such type of a girl”. ... We must express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a judge. ... The courts are expected to use self- restraint while recording such findings which have*

37 The Honourable Madame Justice Claire L'Heureux-Dubé, 'Beyond the Myths: Equality, Impartiality, and Justice' (2001) 10(1) Journal of Social Distress and the Homeless 87, 88. .

38 Explained in *R. v. Osolin*, [1993] 4 S.C.R. 595 (a Canadian case) as opinions improperly forming the background for considering evidentiary issues in sexual assault trials. These include the false concepts that: women cannot be raped against their will; only “bad girls” are raped; anyone not clearly of “good character” is more likely to have consented.

39 *R v. Seaboyer*, [1991] 2 S.C.R. 577, 650 (L'Heureux-Dubé & Gonthier JJ, dissenting in part) (Canada, Supreme Court)

40 *State of Punjab v. Gurmit Singh & Ors.*, 1996 SCC (2) 384.

*larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole – where the victim of crime is discouraged – the criminal encouraged and in turn crime gets rewarded!*

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*“Language is ‘a medium of social action’ not ‘merely a vehicle of communication’ and the written judicial opinion is the primary, if not the sole, medium in which judges within our judicial system execute language.”<sup>41</sup>*

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*... the text of judicial decisions and opinions constitutes the law by which our common law system abides and the basis on which judges, lawyers, and citizens make reasoned legal judgments about future action.”<sup>42</sup>*

42. This Court therefore holds that the use of reasoning/language which diminishes the offence and tends to trivialize the survivor, is especially to be avoided under all circumstances. Thus, the following conduct, actions or situations are hereby deemed irrelevant, e.g. - to say that the survivor had in the past consented to such or similar acts or that she behaved promiscuously, or by her acts or clothing, provoked the alleged action of the accused, that she behaved in a manner unbecoming of chaste or “Indian” women, or that she had called upon the situation by her behavior, etc. These instances are only illustrations of an attitude which should never enter judicial verdicts or orders or be considered relevant while making a judicial decision; they cannot be reasons for granting bail or other such relief. Similarly, imposing conditions that implicitly tend to condone or diminish the harm caused by the accused and have the effect of potentially exposing the survivor to secondary trauma, such as mandating mediation processes in non-compoundable offences, mandating as part of bail conditions, community service (in a manner of speaking with the so-called reformatory approach towards the perpetrator of sexual offence) or requiring tendering of apology once or repeatedly, or in any manner getting or being in touch with the survivor, is especially forbidden. The law does not permit or countenance such conduct, where the survivor can potentially be traumatized many times over or be led into some kind of non-voluntary acceptance, or be compelled by the circumstances to accept and condone behavior what is a serious offence.
43. The instances spelt out in the present judgment are only illustrations; the idea is that the greatest extent of sensitivity is to be displayed in the judicial approach, language and reasoning adopted by the judge. Even a solitary instance of such order or utterance in court, reflects adversely on the entire judicial system of the country, undermining the guarantee to fair justice to all, and especially to victims of sexual violence (of any kind from the most aggravated to the so-called minor offences).
44. Having regard to the foregoing discussion, it is hereby directed that henceforth:

41 Rachael K. Hinkle et al., A Positive Theory and Empirical Analysis of Strategic Word Choice in District Court Opinions, 4 J. OF LEGAL ANALYSIS 407, 408 (2012).

42 Ibid, at p. 409.

- (a) *Bail conditions should not mandate, require or permit contact between the accused and the victim. Such conditions should seek to protect the complainant from any further harassment by the accused;*
  - (b) *Where circumstances exist for the court to believe that there might be a potential threat of harassment of the victim, or upon apprehension expressed, after calling for reports from the police, the nature of protection shall be separately considered and appropriate order made, in addition to a direction to the accused not to make any contact with the victim;*
  - (c) *In all cases where bail is granted, the complainant should immediately be informed that the accused has been granted bail and copy of the bail order made over to him/her within two days;*
  - (d) *Bail conditions and orders should avoid reflecting stereotypical or patriarchal notions about women and their place in society, and must strictly be in accordance with the requirements of the Cr. PC. In other words, discussion about the dress, behavior, or past “conduct” or “morals” of the prosecutrix, should not enter the verdict granting bail;*
  - (e) *The courts while adjudicating cases involving gender related crimes, should not suggest or entertain any notions (or encourage any steps) towards compromises between the prosecutrix and the accused to get married, suggest or mandate mediation between the accused and the survivor, or any form of compromise as it is beyond their powers and jurisdiction;*
  - (f) *Sensitivity should be displayed at all times by judges, who should ensure that there is no traumatization of the prosecutrix, during the proceedings, or anything said during the arguments, and*
  - (g) *Judges especially should not use any words, spoken or written, that would undermine or shake the confidence of the survivor in the fairness or impartiality of the court.*
45. Further, courts should desist from expressing any stereotype opinion, in words spoken during proceedings, or in the course of a judicial order, to the effect that (i) women are physically weak and need protection; (ii) women are incapable of or cannot take decisions on their own; (iii) men are the “head” of the household and should take all the decisions relating to family; (iv) women should be submissive and obedient according to our culture; (v) “good” women are sexually chaste; (vi) motherhood is the duty and role of every woman, and assumptions to the effect that she wants to be a mother; (vii) women should be the ones in charge of their children, their upbringing and care; (viii) being alone at night or wearing certain clothes make women responsible for being attacked; (ix) a woman consuming alcohol, smoking, etc. may justify unwelcome advances by men or “has asked for it”; (x) women are emotional and often overreact or dramatize events, hence it is necessary to corroborate their testimony; (xi) testimonial evidence provided by women who are sexually active may be suspected when assessing “consent” in sexual offence cases; and (xii) lack of evidence of physical harm in sexual offence case leads to an inference of consent by the woman.
46. As far as the training and sensitization of judges and lawyers, including public prosecutors goes, this court hereby mandates that a module on gender sensitization be included, as part of the foundational

training of every judge. This module must aim at imparting techniques for judges to be more sensitive in hearing and deciding cases of sexual assault, and eliminating entrenched social bias, especially misogyny. The module should also emphasize the prominent role that judges are expected to play in society, as role models and thought leaders, in promoting equality and ensuring fairness, safety and security to all women who allege the perpetration of sexual offences against them. Equally, the use of language and appropriate words and phrases should be emphasized as part of this training.

47. The National Judicial Academy is hereby requested to devise, speedily, the necessary inputs which have to be made part of the training of young judges, as well as form part of judges' continuing education with respect to gender sensitization, with adequate awareness programs regarding stereotyping and unconscious biases that can creep into judicial reasoning. The syllabi and content of such courses shall be framed after necessary consultation with sociologists and teachers in psychology, gender studies or other relevant fields, preferably within three months. The course should emphasize upon the relevant factors to be considered, and importantly, what should be avoided during court hearings and never enter judicial reasoning. Public Prosecutors and Standing Counsel too should undergo mandatory training in this regard. The training program, its content and duration shall be developed by the National Judicial Academy, in consultation with State academies. The course should contain topics such as appropriate court-examination and conduct and what is to be avoided.
48. Likewise, the Bar Council of India (BCI) should also consult subject experts and circulate a paper for discussion with law faculties and colleges/universities in regard to courses that should be taught at the undergraduate level, in the LL.B program. The BCI shall also require topics on sexual offences and gender sensitization to be mandatorily included in the syllabus for the All India Bar Examination.
49. Before parting, this Court expresses its gratitude for the valuable suggestions and the assistance rendered by the learned Attorney General pursuant to the notice issued. We also appreciate the submissions made on behalf of the appellant(s) and the intervenor(s).
50. Each High Court should, with the help of relevant experts, formulate a module on judicial sensitivity to sexual offences, to be tested in the Judicial Services Examination.
51. In the light of the above, the bail conditions in the impugned judgment, extracted at para 3 above, are set aside, and expunged from the record.
52. Before concluding, it would be appropriate to quote certain excerpts from the Canadian Commentaries on Judicial Conduct:<sup>43</sup>

*"[T]he wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.*

*True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind."*

<sup>43</sup> Les Éditions Yvon Blais Inc, 1991, quoted by Rt. Hon'ble Beverley McLachlin, former Chief Justice of Canada, in her Speech Judging in a Democratic State <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2004-06-03-eng.aspx#fnb10>

53. Judges play – at all levels – a vital role as teachers and thought leaders. It is their role to be impartial in words and action, at all times. If they falter, especially in gender related crimes, they imperil fairness and inflict great cruelty in the casual blindness to the despair of the survivors.
54. The appeal is disposed of in the above terms; there shall be no order on costs.

