JUDICIAL ACADEMY JHARKHAND

SNIPPETS

OF

SUPREME COURT JUDGMENTS

(December 09-December 15, 2019)

Prepared by :-

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1. *Google India Private Limited v. Visakha Industries and Another, (2019 SCC OnLine SC 1587)*

Decided on: 10.12.2019

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2. Hon'ble Mr. Justice K. M. Joseph

(Section 79 of the Information Technology Act, prior to its substitution, did not protect an intermediary in regard to the offence under Section 499/500 of the IPC.)

Facts:

The appellant is the second accused in criminal complaint filed by the first respondent (hereinafter referred to as 'complainant', for short). The appellant filed a Petition under Section 482 The Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Cr.PC', for short), seeking to quash the order passed by the Magistrate summoning the appellant pursuant to the complaint which seeks to invoke Sections 120B, 500 and 501 read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC', for short).

The findings of the High Court were as follows:

Section 79 of The Information Technology Act, 2000 (hereinafter referred to as 'the Act', for short), was found to not exempt a network service provider from liability much less criminal liability for the offences under other laws or, more particularly, under the IPC. It was further found that the above provision exempted Network Service Provider from liability only on proving that the offence or contravention was committed without its knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention. Proof, in that regard, can be let in by leading evidence by the accused. This is a question of fact which the High Court may not go into in the petition under Section 482 of the Cr.PC.

Decision and Observations:

The Apex Court referred to *State of Haryana v. Bhajan Lal* [1]and discussed the contours of the jurisdiction of the High Court under section 482 of the Cr.P.C. Applying the principles

[1]1992 Supp (1) SCC 335
"102. 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 reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to 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.

enunciated in the case of ***Bhajan Lal***, the Apex Court was of the opinion that as far as offence of defamation is concerned, even though Section 500 is non cognizable, the same would not be covered by para 2 or para 4 as it is the case of a complaint and not of a police report. Also, it could not be stated that the proceeding was initiated maliciously to wreak vengeance. Then the Apex Court considered whether there is any express legal bar engrafted in any provisions of the Code or the Act governing the field to the institution and continuance of the proceedings which brought Section 79 of the Act in focus regarding which the Apex Court stated as follows:

> **60.** In our view, Section 79, before its substitution, exempted the Network Service Provider, which is defined as an intermediary, from liability under the Act, Rules or Regulations made thereunder in regard to any third-party information or data made available by him provided the Service Provider:
>
> 1. Proves that the offence or contravention was committed without his knowledge;
>
> 2. The Service Provider proves that he had exercised all due diligence to prevent the commissioning of such offences or contraventions.
>
> **61.** This provision may be contrasted with the later *avtar* of Section 79 of the Act consequent upon substitution with effect from 27.10.2009. Sub-Section (1) of Section 79, in unambiguous words, declares by way of a *non-obstante* clause that in spite of anything contained in any law which is in force, though subject to the provisions of sub-Sections (2) and (3), an intermediary would not be liable for any third-party information, data or communication link hosted by him. The conditions are set out in sub-Section (2).
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> **62.** As we have noticed, the scope of Section 79, before its substitution, was confined to confer immunity from liability in regard to an offence under the Act or the

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(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.

Rules or Regulations *qua* third-party action or data made available. In this regard, it must be noticed that Chapter XI of the Act deals with the offences. Sections 65 to 67B deals with various offences under the Act. This is besides Sections 71, 72A, 73 and 74 of the Act. Section 79 falls under Chapter XII. Therefore, the scheme of the Act would also indicate that Section 79, as it was prior to the substitution, was indeed confined to the liability of the Network Service Provider arising out of the provisions of the Act besides, no doubt, Rules and Regulations, and it was not, in short, a bar to the complaint under Section 500 of the IPC being launched or prosecuted.

63. The complaint relates, in short, to a period, much prior to the substitution of Section 79 of the Act, which ultimately took place only with effect from 27.10.2009. The court, in *Shreya Singhal* (supra), was not considering the provisions of Section 79 as it stood before the substitution on 27.10.2009 which is what the High Court has focussed on to find that it was not open to the appellant to seek shelter under Section 79. No doubt, there are certain observations which have been made by the High Court regarding notice to the petitioner, which we will dwell upon.

64. We may, in fact, notice another aspect of the matter. Even, proceeding on the basis that Section 79 should engage us any further, we cannot be oblivious to an integral feature of Section 79 prior to its substitution. As we have noted, the Law Giver has given protection from liability not unconditionally. It is for the Service Provider to prove that the offence or contravention was committed without his knowledge. He is also to prove that he has exercised all due diligence to prevent the commission of such offence or contravention. We will, for the purpose of argument, assume that the offence or contravention could relate to even Section 500 of the IPC. Even then, for the protection given by the provisions, as it stood at the time when the offence alleged against the appellant was allegedly committed by it, to apply, it would become incumbent upon the appellant to prove that the offence or the contravention was committed without its knowledge and that it had taken all due diligence to prevent the commission of such offence or contravention. It may be at once noticed that in reality the scope of Section 79 of the Act, prior to the substitution, was limited to granting exemption to the Network Service Provider from any liability under the Act, Rules or Regulations made thereunder, no doubt, in regard to third-party information or data available by him. The commission of an offence under Section 500 of the IPC, would not be a liability under the Act or a Rules, or Regulations made under the Act. However, it is undoubtedly true that the scope of the protection afforded to the intermediary stands remarkably expanded with the substituted provisions of Section 79 coming into force, no doubt, subject to the conditions attached thereunder and as explained by this Court in *Shreya Singhal* (supra).

Also, regarding the effect of the substitution of section 79 of the Act, the Apex Court was of the following opinion:

135. It is seen that the Magistrate has issued summons to the appellant vide Annexure P5 calling upon him to appear before the Court on 09.09.2009. If that be so, not only was the complaint filed at the time when Section 79, in its erstwhile *avtar*, was in force before the present provision was enforced, cognizance thereunder was also taken. If that be so, the question of exemption from liability may fall to be decided under Section 79 of the Act as it stood and not under the substituted provision.

The Appellant has contended after placing reliance on ***Sharat Babu Digumarti v. Government (NCT of Delhi),***[2] and ***Shreya Singhal v. Union of India*** that since no provisions of the Act are invoked, the Complaint is vitiated. While examining whether the decision in ***Sharat Babu Digumarti*** would come to the rescue of the appellant, the Apex Court stated:

> **93.** The premise of the judgment of this Court in *Sharat Babu* (supra) was that what was involved was an electronic record within the meaning of the Act. The appellant in the said case stood discharged under Section 67 of the Act. The reasoning, which has been upheld by the Court, was that the special provisions contained in the Act would override and cover a criminal act and he would get out of the net of the IPC which in the said case was Section 292. To repeat, the appellant stood discharged under Section 67 of the Act, and therefore, could not be prosecuted under Section 292 of the IPC.
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> *****
>
> **96.** At any rate, Section 66A has been declared unconstitutional by this Court. Apart from Section 66A, there is obviously no other provision in the Act which deals with defamation in the electronic form. In that way, the subject of defamation would be governed by Section 500 of the IPC. Therefore, the reliance placed on *Shreya Singhal* (supra) is without any basis.

The Apex Court concluded in the following words:

> **156.** The upshot of the above discussion is as follows:
>
> 1. We reject the contention of the appellant that the High Court should have acted on the Google LLC conditions and found that the appellant is not the intermediary. We hold that this is a matter for trial.
> 2. We hold that Section 79 of the Act, prior to its substitution, did not protect an intermediary in regard to the offence under Section 499/500 of the IPC.
> 3. We set aside the findings by the High Court regarding the alleged refusal of the appellant to respond to the notice to remove. We make it clear, however, that it is for the Court to decide the matter on the basis of the materials placed before it, and taking into consideration, the observations contained in this judgment.

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[2] (2017) 2 SCC 18
The relevant para 32 of the judgment in *Sharat Babu Digumarti* states:
"32. Section 81 of the IT Act also specifically provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. All provisions will have their play and significance, if the alleged offence pertains to offence of electronic record. It has to be borne in mind that IT Act is a special enactment. It has special provisions. Section 292 IPC makes offence sale of obscene books, etc. but once the offence has a nexus or connection with the electronic record the protection and effect of Section 79 cannot be ignored and negated. We are inclined to think so as it is a special provision for a specific purpose and the Act has to be given effect to so as to make the protection effective and true to the legislative intent. This is the mandate behind Section 81 of the IT Act. The additional protection granted by the IT Act would apply."

2. *Chanappa Nagappa Muchalagoda v. Divisional Manager, New India Insurance Company Limited, (2019 SCC OnLine SC 1590)*

Decided on: 10.12.2019

Bench: 1. Hon'ble Mr. Justice U. U. Lalit
2. Hon'ble Ms. Justice Indu Malhotra

(Functional disability assessed as 100% in a motor vehicle accident)

Facts

The Appellant - a driver of heavy vehicles, was employed by one Sekar Santharam. On 13.05.2006, while he was driving a truck loaded with sand from Islampura towards Ratnagiri, he lost control of the truck due to an axle cut, and dashed against a rock on the side of the road. The truck was insured with the Respondent - Insurance Company. The Appellant suffered from serious injuries in his right leg. Plastic surgery was performed on his right leg. This led to his right leg getting permanently injured, which resulted in complete disability to continue his vocation as a driver of a heavy motor vehicle.

The Appellant filed a Claim under the Workmen's Compensation Act, 1923 ("the Act") before the Labour Officer and Commissioner for Workmen's Compensation ("Commissioner") against the Truck Owner and the Insurance Company, praying that an amount of Rs. 5,00,000/- be awarded to him as compensation.

The Truck Owner filed his Written Statement, wherein he admitted the factum of the accident and the injuries suffered by the Appellant. He submitted that he was paying Rs. 4,000/- p.m. and Rs. 30 *batta* per day to the Appellant.

A Knee Specialist from Belagavi who had examined the Appellant, deposed that the Appellant can neither stand for a long period of time, nor can he fold his legs. He was required to use a walking stick, and could not lift heavy objects. The Doctor opined that the Appellant suffered 37% disability in his whole body, and could not perform the work of a truck driver any longer.

The Commissioner assessed the Appellant's income at Rs. 3,000/- p.m., and held that he had lost 50% of his earning capacity. Since the Appellant was 33 years old at the time of the accident, 201.66 was taken as the relevant factor as per Schedule IV to the Act. Accordingly, the compensation was computed at Rs. 1,81,494/-. The Respondent - Insurance Company was held liable to pay the amount awarded.

The Appellant filed MFA No. 1569/2008 before the Karnataka High Court (Dharwad Bench) for enhancement of the compensation awarded by the Commissioner.

The High Court accepted the income of the Appellant at Rs. 4,000/- p.m. as per the statement made by the employer. Insofar as the functional disability of the Appellant was concerned, the Court held the assessment by the Commissioner at 50% was on the lower side, and increased it to 60%, since the Appellant could no longer earn his livelihood as a driver, and

could not even stand for a long time.The compensation was accordingly enhanced to Rs. 2,90,390/- with Interest @12% p.a. payable from one month after the date of the accident.

Aggrieved, the Appellant filed the present Civil Appeal for enhancement of the compensation awarded by the High Court.

Decision and Observations

The Apex court referred to *Raj Kumar* v. *Ajay Kumar,*[3] *K. Janardhan* v. *United India Insurance Co. Ltd.,*[4] *S. Suresh* v. *Oriental Insurance Co. Ltd.*[5] on the point of functional disability and stated the following:

> **20.** The aforesaid judgments are instructive for assessing the compensation payable to the Appellant in the present case. As a consequence of the accident, the Appellant has been incapacitated for life, since he can walk only with the help of a walking stick. He has lost the ability to work as a driver, as he would be disqualified from even getting a driving license. The prospect of securing any other manual labour job is not possible, since he would require the assistance of a person to ensure his mobility and manage his discomfort. As a consequence, the functional disability suffered by the Appellant must be assessed as 100%.
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> **21.** We affirm the judgment of the High Court on assessing the income of the Appellant at Rs. 4,000/- p.m. as per the evidence of his employer. The "functional disability" of the Appellant is assessed as 100%, and the relevant factor would be 201.66 as per Schedule IV to the Act. Consequently, the compensation payable to the Appellant would work out to Rs. 4,83,984/- under Section 4 of the Act.

Also, the Apex court awarded a lump sum amount of Rs. 1,00,000 towards his medical expenses as he was hospitalized for 65 days.

[3] (2011) 1 SCC 343
[4] (2008) 8 SCC 518
[5] (2010) 13 SCC 777

3. *Rajendra Diwan v. Pradeep Kumar Ranibala and Another, (2019 SCC OnLine SC 1586)*

Decided on: 09.12.2019

Bench:- 1. Hon'ble Mr. Justice Arun Mishra
2. Hon'ble Ms. Justice Indira Banerjee
3. Hon'ble Mr. Justice Vineet Saran
4. Hon'ble Mr. Justice M. R. Shah
5. Hon'ble Mr. Justice S. Ravindra Bhat

(A State Act providing for direct appeal to the Supreme Court from an order of a Tribunal [Rent Control Tribunal in the present case], held unconstitutional on the ground of legislative competence)

Issue

Whether Section 13(2)[6] of the Chhattisgarh Rent Control Act, 2011 (hereinafter, referred as Rent Control Act) is *ultra vires* the Constitution of India, by reason of lack of legislative competence of the Chhattisgarh State legislature to enact the provision.

Decision and Observations

The Apex Court was of the opinion:

> **48.** When the question of vires of any enactment is considered, it is to be seen, whether looking at the legislation as a whole, it can be said to be a legislation, substantially with respect to any of the matters, with regard to which the Legislature is competent to legislate, under any specific Article of the Constitution, or any of the Entries in the relevant List in the Seventh Schedule thereto. Once it is held that it is so, the legislative power conferred by that Entry is to extend to all ancillary matters, which may fairly and reasonably be said to be comprehended in that arena, as held by the Federal Court in *United Provinces* v. *Atika Begum* reported in AIR 1941 FC 16 (25) and reiterated by this Court in numerous judgments.
>
> **49.** Section 13(2) of the Rent Control Act, providing for direct appeal to the Supreme Court from orders passed by the Rent Control Tribunal, is not ancillary or incidental to the power of the Chhattisgarh State Legislature to enact a Rent Control Act, which provides for appellate adjudication of appeals relating to tenancy and rent by a Tribunal. In enacting Section 13(2) of the Rent Control Act, the Chhattisgarh State Legislature has overtly transgressed the limits of its legislative power, as reiterated and discussed hereinafter.

[6] Section 13(2) of the Rent Control Act provides:—
(1) Notwithstanding anything to the contrary contained in this Act, a landlord and/or tenant aggrieved by any order of the Rent Controller shall have the right to appeal in the prescribed manner within the prescribed time to the Rent Control Tribunal.
(2) Appeal against an order of the Rent Control Tribunal shall lie with the Supreme Court.

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51. As observed above, both the Union legislature and the State Legislature derive their power to legislate from Article 245 of the Constitution of India. It is axiomatic that the legislature of a State may only make laws for the whole or any part of the State, while Parliament may make laws for the whole or any part of the territory of India. There is no provision in the Constitution which saves State laws with extra-territorial operation, similar to Article 245(2) which expressly saves Union laws with extra-territorial operation, enacted by Parliament. The Chhattisgarh State Legislature, thus, patently lacks competence to enact any law which affects the jurisdiction of the Supreme Court, outside the State of Chhattisgarh.

52. Entry 18 of the State List only enables the State Legislature to legislate with regard to landlord tenant relationship, collection of rents etc. This Entry does not enable the State Legislature to circumvent Entry 64 of the State List or Entry 46 of the Concurrent List which enable the State Legislature to enact laws with respect to the jurisdiction and powers of Courts, except the Supreme Court, or to render otiose, Entry 77 of the Union List, which expressly confers law making power in respect of the jurisdiction of the Supreme Court, exclusively to Parliament.

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55. Article 323B(3)(d) provides that a law made under Article 323B(1) may exclude the jurisdiction of all courts except the jurisdiction of the Supreme Court under Article 136, with respect to all or any of the matters falling within the jurisdiction of the said tribunals. Article 323B does not enable a State Legislature to expand the jurisdiction of the Supreme Court by enacting a provision for further statutory appeal to the Supreme Court from an order of an Appellate Tribunal.

It was contended by the appellant that Section 13(2) of the Rent Control Act does not confer on the Supreme Court, jurisdiction it did not already possess, but is only incidental to and/or extension of its power under Article 136. However, the same was not found sustainable in law as the Apex Court was of the following opinion:

58. Article 136 does not confer a right of appeal on any party, but confers a discretionary power on the Supreme Court to interfere in appropriate cases. This power can be exercised in spite of other provisions for appeal contained in the Constitution, or any other law, as held in *N. Natarajan* v. *B.K. Subba Rao* reported in (2003) 2 SCC 76.

59. Conclusiveness or finality given by a statute to decision of a Court or Tribunal, cannot deter the Supreme Court from exercising this jurisdiction under Article 136 of the Constitution as held by a Constitution Bench of this Court, inter alia, in *Dhakeshwari Cotton Mills Ltd.* v. *Commissioner of Income Tax, West Bengal* reported in AIR 1955 SC 65 and reiterated in numerous other decisions.

> appellate jurisdiction is not exercised when a statute gives finality to a decision of the Court or Tribunal.

The Apex court elaborated on the nature of power vested in Article 136 and distinguished it from an appeal. (Refer Para 60-62 of the judgment)

Further, the Counsel for the appellant was found right in arguing that ***L Chandra Kumar v. Union of India*** [7], pertains to the power of the High Court under Articles 226 and 227 of the Constitution of India. The State Legislature has the power to enact law which abridges the powers of the High Court, except those powers, which constitute an inviolable basic feature of the Constitution, such as the powers of the High Court under Articles 226 and 227. Regarding the second proviso to Article 200[8] of the Constitution, the same was found to be not attracted in this case as the Apex Court found it well settled that there is no inherent right of appeal. Right of appeal is conferred by Statute. A Statute is not invalid only because it has no provision of appeal to the High Court.

> **73.** Suffice it to note that in view of Entry 65 of the State List and Entry 46 of the Concurrent List, the State Legislature can enact law which affects the jurisdiction of all Courts, except the Supreme Court. In other words it can enact law which affects the jurisdiction of the High Court, except under Articles 226 and 227, but it cannot enact law which touches the jurisdiction of the Supreme Court. The Rent Control Tribunal having been established under Article 323B of the Constitution, as observed above, the diminution, if any, of the jurisdiction of the High Court, except under Article 226 and 227, would be saved by Article 323B(3)(d) of the Constitution, but not the provision for statutory appeal to the Supreme Court.

Also, the proposition urged by the appellant that when a State Law gets the assent of the President of India, that law prevails in the States, notwithstanding repugnancy with an earlier Union law, was found unexceptionable as the Apex Court stated:

> **76.** However, Presidential assent makes no difference in case of legislative incompetence. Presidential assent cannot and does not validate an enactment in excess of the legislative powers of the State Legislature, nor validate a statutory provision, which would render express provisions of the Constitution otiose. Presidential assent cures repugnancy with an earlier Central Statute, provided the State Legislature is otherwise competent to enact the Statute.

Further, the Apex Court was of the opinion:

> **79.** Section 13(2) of the Rent Control Act purports to confer a right of statutory Second Appeal to the Supreme Court. Even in case of concurrent findings of the Rent Controller and Rent Control Tribunal, where no serious question of law were involved, an appeal would have to be entertained and decided. Such a provision which mandates the Supreme Court to consider an appeal is clearly beyond the legislative competence

[7](1997) 3 SCC 261

[8] It prohibits the Governor from assenting to a Bill, which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court, as to endanger the position which the High Court is, by the Constitution of India, design to fill and the Governor is obliged to reserve such bill for the consideration of the President

of the State Legislature, as argued by the learned Attorney General. Article 200 as observed above does not and cannot validate an ultra vires enactment, which the concerned Legislature lacked competence to enact.

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89. For the reasons discussed above, we hold that the State Legislature lacked legislative competence to enact Section 13(2) of the Rent Control Act. We, therefore, declare Section 13(2) of the Rent Control Act *ultra vires* the Constitution of India, null and void and of no effect.

4. *Ram Murti Yadav v. State of Uttar Pradesh and Another, (2019 SCC OnLine SC 1589)*

Decided on : -10.12.2019

Bench :- 1. Hon'ble Mr. Justice Ashok Bhushan
2. Hon'ble Mr. Justice Navin Sinha

(Judicial Review of the order for compulsory retirement vis-à-vis Judicial Officers)

Facts

The appellant while posted as a Chief Judicial Magistrate granted acquittal to the accused on 17.09.2007 in Criminal Case No. 4670 of 2005 "*State v. Mohd. Ayub*" under Sections 467, 468, 471, 474, 420, 406 and 120B of the Indian Penal Code. A complaint was lodged against the appellant with regard to the acquittal. After calling for comments from the appellant, and perusing the judgment and the order of reversal in appeal, the Administrative Judge on 24.02.2009 recommended an enquiry. A vigilance enquiry, V.B. Enquiry No. 26/2009, was held by the OSD, Enquiry, High Court of Allahabad. The enquiry report dated 10.05.2012 was adverse to the appellant. His comments were called for on 28.06.2012. On 20.12.2012, the appellant was informed that on basis of the enquiry, a censure entry had been recorded in his character roll. The order of punishment was accepted by the appellant without any challenge. On 01.04.2016, a committee of three Hon'ble Judges constituted for screening of judicial officers for compulsorily retirement under the Rules recommended the compulsory retirement of the appellant which was endorsed by the Full Court on 14.04.2016 leading to the impugned order of compulsory retirement. The challenge laid out by the appellant to his order of retirement before the High Court was unsuccessful and thus the present appeal.

Observations and Decision

The Hon'ble Court discussing the role of subordinate judiciary and the duties and responsibilities of Judicial Officers observed as follows :-

> **14.** A person entering the judicial service no doubt has career aspirations including promotions. An order of compulsory retirement undoubtedly affects the career aspirations. Having said so, we must also sound a caution that judicial service is not like any other service. A person discharging judicial duties acts on behalf of the State in discharge of its sovereign functions. Dispensation of justice is not only an onerous duty but has been considered as akin to discharge of a pious duty, and therefore, is a very serious matter. The standards of probity, conduct, integrity that may be relevant for discharge of duties by a careerist in another job cannot be the same for a judicial officer. A judge holds the office of a public trust. Impeccable integrity, unimpeachable independence with moral values embodied to the core are absolute imperatives which brooks no compromise. A judge is the pillar of the entire justice system and the public has a right to demand virtually irreproachable conduct from anyone performing a judicial function. Judges must strive for the highest standards of integrity in both their professional and personal lives.

> **15.** It has to be kept in mind that a person seeking justice, has the first exposure to the justice delivery system at the level of subordinate judiciary, and thus a sense of injustice can have serious repercussions not only on that individual but can have its fall out in the society as well. It is therefore absolutely necessary that the ordinary litigant must have complete faith at this level and no impression can be afforded to be given to a litigant which may even create a perception to the contrary as the consequences can be very damaging. **The standard or yardstick for judging the conduct of the judicial officer therefore has necessarily to be strict. Having said so, we must also observe that it is not every inadvertent flaw or error that will make a judicial officer culpable. The State Judicial Academies undoubtedly has a stellar role to perform in this regard. A bona fide error may need correction and counselling. But a conduct which creates a perception beyond the ordinary cannot be countenanced. For a trained legal mind, a judicial order speaks for itself.**
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> (emphasis supplied)

With reference to the present system of ACRs for Judicial Officers, the Hon'ble Court, referring to the judgment of ***Registrar General, Patna High Court* v. *Pandey Gajendra Prasad*, (2012) 6 SCC 357**, accepted that "*the inadequacy of the present system of writing ACRs of judicial officers has deficiencies in several ways*". However, regarding the nature of compulsory retirement, its requirements and the judicial review thereof, the Hon'ble Court referred to the judgments of the Apex Court in ***Union of India v. K.K. Dhawan***, (1993) 2 SCC 56; ***Union of India* v. *Duli Chand***, (2006) 5 SCC 680, ***Syed T.A. Naqshbandi* v. *State of Jammu & Kashmir***, (2003) 9 SCC 592, ***Rajendra Singh Verma (D) thr. Lrs.* v. *Lt. Governor (NCT of Delhi)***, (2011) 10 SCC 1, ***High Court of Judicature at Bombay* v. *Shashikant S. Patil***, (2000) 1 SCC 416, ***P.C. Joshi* v. *State of U.P.***, (2001) 6 SCC 491, ***Ramesh Chander Singh* v. *High Court of Allahabad***, (2007) 4 SCC 247 and in ***Pyare Mohan Lal* v. *State of Jharkhand***, (2010) 10 SCC 693 and held as follows :-

> **9.** The submission of Shri Basant that compulsory retirement could not have been ordered for mere error of judgment in decision making merits no consideration in view of *K.K. Dhawan* (supra) and *Duli Chand* (supra). Likewise, what has been euphemistically described as "washed-off theory" by reason of any subsequent promotion after adverse entry being relevant for further promotion but not for compulsory retirement has to be rejected in view of *Pyare Mohan Lal* (supra). A single adverse entry could suffice for an order of compulsory retirement as held in *Pyare Mohan Lal* (supra) .....
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> *********
>
> **13.** *P.C. Joshi* (supra) was a case relating to an order of punishment in a departmental proceeding held to be vitiated for want of any legally acceptable or relevant evidence in support of the charges of misconduct. *Ramesh Chander Singh* (supra) related to an order of bail dealing with exercise of discretionary powers specially when a co-accused had been granted bail by the High Court. An order of compulsory retirement not been a punishment, much less stigmatic in the facts and circumstances of the present case. *Ram Ekbal Sharma* (supra) was dealing with the issue that the form of the order was not

conclusive and the veil could be lifted to determine if it was ordered as punishment more so in view of the stand taken in the counter affidavit with regard to grave financial irregularities, again has no relevance to the present controversy.

Applying the aforesaid principles to the present case, the Hon'ble Court dismissed the appeal and observed :-

6. The service records of the appellant have been examined by the Screening Committee, the Full Court as also by the Division Bench of the High Court. The scope for judicial review of an order of compulsory retirement based on the subjective satisfaction of the employer is extremely narrow and restricted. Only if it is found to be based on arbitrary or capricious grounds, vitiated by malafides, overlooks relevant materials, could there be limited scope for interference. The court, in judicial review, cannot sit in judgment over the same as an Appellate Authority. Principles of natural justice have no application in a case of compulsory retirement.

5. *Suraj Jagannath Jadhav v. State of Maharashtra, (2019 SCC OnLine SC 1608)*

Decided on: 13.12.2019

Bench:- 1. Hon'ble Mr. Justice Ashok Bhushan
2. Hon'ble Mr. Justice M. R. Shah

(Intoxication not a mitigating circumstance in absence of evidence led by the accused that he was in a highly inebriated condition and/or he was such a drunk that he lost all the senses.)

Facts

The facts of the case can be culled out from the submissions made by the Counsel on behalf of the State:

> It is submitted that, in the present case, as such, after abusing and assaulting the deceased, the accused poured kerosene on her person and set her ablaze. It is submitted that when the deceased was trying to run out of the house to save herself, at which time, the accused came from behind and threw match-stick on her person and set her ablaze. It is submitted that at the relevant time, the deceased was carrying pregnancy of 18 to 20 weeks. It is submitted that, as per the statement/dying declaration of the deceased, after the deceased came out of the room making noise, the accused poured the water on her. It is submitted that the act of pouring kerosene, though on spur of moment, was followed by lighting a match-stick and throwing it on the deceased and thereby setting her ablaze are intimately connected with each other and resulted in causing death of the deceased. It is submitted that the act of the accused falls under Section 300 fourthly and therefore the death of the deceased can be said to be culpable homicide amounting to murder. It is submitted that every person of average intelligence would have the knowledge that the pouring of kerosene and setting a person on fire is so imminently dangerous that in all probability such an act would cause injuries causing death. It is submitted therefore that Section 300 fourthly shall be attracted and not Exception 4 to Section 300 IPC as submitted on behalf of the accused.

Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court of Judicature at Bombay in Criminal Appeal No. 723 of 2013, by which the High Court has dismissed the said appeal preferred by the appellant herein-original accused and has confirmed the judgment and order of conviction passed by the learned Trial Court convicting the accused for the offence punishable under Section 302 of the IPC, the original accused has preferred the present appeal.

The only submission made by the counsel appearing on behalf of the appellant-original accused is that the death of the deceased can be said to be a culpable homicide not amounting to murder and the case would fall under Exception 4 to Section 300 IPC and therefore the case would be under Section 304 Part II IPC. The Counsel appearing on behalf

of the appellant-original accused has submitted that, as such, there was no intention on the part of the accused to kill his wife. It is submitted that at the time when the unfortunate incident had taken place, the accused was under the influence of liquor and therefore his condition was such that he could not understand what he was doing. It is further submitted by the learned counsel appearing on behalf of the appellant-original accused that even thereafter the appellant tried to save the deceased and poured water to save her and, while doing so, even the appellant-original accused also sustained the injuries. Therefore, relying upon the decision of the Court in the case of *Kalu Ram* v. *State of Rajasthan*,[9] (2000) 10 SCC 324, it was prayed to alter the conviction from Section 302 IPC to Section 304 Part II IPC.

Decision and Observations

The Apex Court was of the opinion that the case clearly fell under section 300 fourthly and not under exception 4 to section 300. The Apex Court stated:

> **8.** It is the case on behalf of the appellant-original accused that as at the time when the incident took place, the accused was drunk and under the influence of liquor and he had no intention to cause death of the deceased-wife and that even subsequently the accused tried to save the deceased and poured the water on her and therefore the case would fall under Exception 4 to Section 300 IPC and, therefore the conviction is to be altered from Section 302 of the IPC to Section 304 Part II IPC, having relied upon the decision of this Court in the case of *Kalu Ram* (supra). However, it is required to be noted that, in the present case, the appellant-accused poured the kerosene on the deceased when she was trying to run out of the house to save herself and was trying to open the latch of the door of the house, the accused threw the match-stick on her person and set her ablaze. Nothing is on record that the accused was in a highly inebriated stage. Even looking to the conversation which took place between the deceased and the accused, so stated in the dying declaration given by the deceased, it can safely be said that the accused was in very much conscious condition when the incident took place. He was very much in the senses and was conscious about what he was doing. Therefore, the accused was fully conscious of the fact that if kerosene is poured and match-stick is lit and put on the body, a person might die due to burns. Therefore, the case would fall under Section 300 fourthly and Exception 4 to Section 300 IPC shall not be applicable.

The Apex Court referred to ***Santosh* v. *State of Maharashtra***,[10] (2015) 7 SCC 641 wherein the issue was whether the act of pouring water would constitute a mitigating circumstance and

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[9] In *Kalu Ram case* [(2000) 10 SCC 324: 2000 SCC (Cri) 86], the accused was having two wives. The accused in a highly inebriated condition asked his wife to part with her ornaments so that he could purchase more liquor, which led to an altercation when the wife refused to do as demanded. Infuriated by the fact that his wife had failed to concede to his demands, the accused poured kerosene on her and gave her a matchbox to set herself on fire. On her failure to light the matchstick, the accused set her ablaze. But when he realised that the fire was flaring up, he threw water on her person in a desperate bid to save her. In such facts and circumstances, the Court held that the accused would not have intended to inflict the injuries which she sustained on account of the act of the accused and the conviction was altered from Section 302 IPC to Section 304 Part II IPC.

[10] "**13.** Even assuming that the accused had no intention to cause the death of the deceased, the act of the accused falls under clause Fourthly of Section 300 IPC that is the act of causing injury so imminently dangerous where it will in all probability cause death. Any person of average intelligence would have the knowledge that

Bhagwan Tukaram Dange **v.** *State of Maharasthra,*[11] (2014) 4 SCC 270 wherein the accused raised the defence that at the time of the pouring the kerosene and litting a match-stick, he was under the influence of liquor and intoxication and, therefore, the intoxication can be said to be a mitigating circumstance. The Apex Court then concluded:

> **11.** Therefore, the decision of this Court in the case of *Kalu Ram* (supra) upon which the reliance has been placed by the learned counsel appearing on behalf of the appellant-accused shall not be of any assistance to the accused, more particularly, in absence of any evidence led by the accused that he was in a highly inebriated condition and/or he was such a drunk that he lost all the senses.
>
> **12.** Applying the law laid down by this Court in the cases of *Bhagwan* (supra) and *Santosh* (supra) to the facts of the case on hand and the manner in which the accused poured the kerosene on the deceased and thereafter when she was trying to run away from the room to save her, the accused came from behind and threw a match-stick and set her ablaze, we are of the opinion that the death of the deceased was a culpable homicide amounting to murder and Section 300 fourthly shall be applicable and not Exception 4 to Section 300 IPC as submitted on behalf of the accused. We are in complete agreement with the view taken by the learned Trial Court as well as the High Court convicting the accused for the offence punishable under Section 302 of the IPC.

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pouring of kerosene and setting her on fire by throwing a lighted matchstick is so imminently dangerous that in all probability such an act would cause injuries causing death.

14. Insofar as the conduct of the accused in attempting to extinguish fire, placing reliance upon the judgment of this Court in *Kalu Ram case* [(2000) 10 SCC 324: 2000 SCC (Cri) 86], it was contended that such conduct of the accused would bring down the offence from murder to culpable homicide not amounting to murder……

15. The decision in *Kalu Ram case* [(2000) 10 SCC 324: 2000 SCC (Cri) 86] cannot be applied in the instant case. The element of inebriation ought to be taken into consideration as it considerably alters the power of thinking. In the instant case, the accused was in his complete senses, knowing fully well the consequences of his act. The subsequent act of pouring water by the accused on the deceased also appears to be an attempt to cloak his guilt since he did it only when the deceased screamed for help. Therefore, it cannot be considered as a mitigating factor. ***An act undertaken by a person in full awareness, knowing its consequences cannot be treated on a par with an act committed by a person in a highly inebriated condition where his faculty of reason becomes blurred.***"

[11] "**12.** Intoxication, as such, is not a defence to a criminal charge. At times, it can be considered to be a mitigating circumstance if the accused is not a habitual drinker, otherwise, it has to be considered as an aggravating circumstance. The question, as to whether the drunkenness is a defence while determining sentence, came up for consideration before this Court in *Bablu* v. *State of Rajasthan* [(2006) 13 SCC 116: (2007) 2 SCC (Cri) 590], wherein this Court held (SCC p. 129, para 12) that the ***defence of drunkenness can be availed of only when intoxication produces such a condition as the accused loses the requisite intention for the offence and onus of proof about reason of intoxication, due to which the accused had become incapable of having particular knowledge in forming the particular intention, is on the accused***. Examining Section 85 IPC, this Court held that the evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into account with the other facts proved in order to determine whether or not he had the intention. The Court held that merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts. This Court, in that case, rejected the plea of drunkenness after noticing that the crime committed was a brutal and diabolic act."

6. *Siraj Ahmad v. State of Uttar Pradesh and Another, (2019 SCC OnLine SC 1613)*

Decided on: 13.12.2019

Bench :- 1. Hon'ble Mr. Chief Justice S. A. Bobde
2. Hon'ble Mr. Justice B. R. Gavai
3. Hon'ble Mr. Justice Surya Kant

(Irregular and illegal appointment discussed)

Facts:

The appellant was appointed on ad-hoc basis on the post of Junior Engineer in the pay scale of Rs. 485-860/- by order dated 30.03.1987, issued by Respondent No. 1. The said Order was issued with prior approval of the Governor of Uttar Pradesh. The said appointment was made after the post was advertised and after the appellant underwent the selection process conducted by the State under the provisions of U.P. Development Authorities Centralized Services Rules, 1985 (hereinafter referred as "the said Rules"). Pursuant to the selection and appointment, the appellant joined with the Agra Development Authority on 08.04.1987. While in service the appellant obtained the degree in B.Sc.-Engineering from Aligarh Muslim University, Aligarh on 08.06.1987. The appellant thereafter through proper channel communicated the respondents the fact regarding obtaining of requisite qualification and being eligible for consideration for promotion, to the post of Assistant Engineer (Civil), in the Centralised Services under Sub Rule (3) of Rule 24 of the said Rules. It is the case of the appellant, that the State Government had sought information from all the Development Authorities vide communication dated 25.09.1987 with regard to the number of Junior Engineers possessing the degree of Bachelor of Engineering/A.M.I.E. In compliance to the said communication the Vice-Chairman of Agra Development Authority informed the State Government that in Agra Development Authority appellant was the only Junior Engineer, who was possessing the degree of Bachelor of Engineering.

Since the appellant was not promoted, he made various representations to the State seeking promotion. The appellant had claimed the promotion from 18.01.1995, i.e. the date on which the juniors to the appellant were promoted. The appellant's claim for promotion came to be rejected on 16.04.2015. Hence the appellant approached the division bench of the High Court by way of Writ Petition. The petition came to be rejected. Hence, the present appeal.

Decision and Observations

The Apex Court referred to *State of M.P. v. Lalit Kumar Verma*,[12] wherein the distinction between irregular appointment and illegal appointment was made clear.

[12] (2007) 1 SCC 575.
"**12.** The question which, thus, arises for consideration, would be: Is there any distinction between "irregular appointment" and "illegal appointment"? The distinction between the two terms is apparent. In the event the appointment is made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, which is "State" within the meaning of Article 12 of the Constitution of India, the recruitment would be an illegal one; whereas there may be cases where, although, substantial compliance with the constitutional

Also in ***State of Karnataka* v. *M.L. Kesari*** it was held, that where the appointment are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointment will be considered to be illegal. However, when the person employed possessed the prescribed qualifications and is working against the sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.

In the present case, the Apex Court noted that the appellant would be on a much better pedestal than the one in the case of ***M.L.Kesari***. The Appellant had applied in pursuance to the advertisement issued by State for the post in the Centralised Services under the provisions of the said rules. The appellant had participated in the selection process along with the other competitors. The appellant was possessing the requisite qualification and was selected after competing with others and was appointed against the sanctioned posts for a period of One year. The appellant thereafter has continuously rendered his services, till the date of regularisation of his services i.e. on 23.11.2002 and even thereafter till date. The only issue which is found against the appellant is that prior to appointment there was no concurrence of the U.P. Public Service Commission. Therefore, the Apex Court held that the appointment of the appellant at the most can be termed as irregular and not illegal.

In the case of ***Direct Recruit Class II Engineering Officers Association* v. *State of Maharashtra,***[13]the Constitution Bench in unequivocal terms held that, if the initial appointment is not made by following the procedure laid down by the rules, but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

Therefore, the Apex Court held that the appointment of the appellant at the most can be considered as irregular and not illegal. The Apex Court concluded:

> **28.** It could thus be seen that, in view of the office memorandum dated 11.03.1994, the appellant was entitled to be promoted immediately after the issuance of the said office memorandum as he possessed the requisite degree when the said office memorandum was issued. In any case the appellant is entitled to be promoted with effect from 18.01.1995 i.e. the date on which the juniors to him were promoted.
>
> **29.** As already discussed, the non-concurrence with the U.P. Public Service Commission, at the most would make the appointment of the appellant irregular and not illegal. We are therefore of the considered view that the High Court erred in dismissing the petition of the appellant. The appeal deserves to succeed on more than one ground.

scheme as also the rules have been made, the appointment may be irregular in the sense that some provisions of some rules might not have been strictly adhered to."

[13] (1990) 2 SCC 715

7. *Raja v. State by Inspector of Police, (2019 SCC OnLine SC 1591*

Decided on: 10.12.2019
Bench :- 1. Hon'ble Mr. Justice U.U. Lalit
2. Hon'ble Ms. Justice Indu Malhotra

(The weightage to the TIP and to the delay in conducting TIP depends on the facts and circumstances of the case. What is important is the identification in Court and if such identification is otherwise found by the Court to be truthful and reliable, such substantive evidence can be relied upon by the Court.)

Facts

Mr. Sengoda Goundar was the father of P.Ws. 1 and 3 and husband of P.W.2. P.W.4 is the wife of P.W.3 and the daughter-in-law of the deceased. P.W.5 is the grandson of the deceased and P.W.2. P.Ws. 3 and 4 had a child also and all of them were living together under one roof in Nallavumpatti village.

On 27.05.1999, P.Ws. 1 to 5, after having their dinner, had fallen asleep. The house of P.W.1 and others is facing towards west. P.W.1 was sleeping in the room situated on the northern portion of the house. P.Ws. 3 and 4 along with the child were sleeping in the room situated on the southern portion of the house. P.W.5 was sleeping on the pial situated on the veranda in front of the said house. Just opposite to the said house, on the western side, the tractor shed belonging to them is situated. The deceased Sengoda Goundar and his wife (P.W.2) were sleeping in the said tractor shed.

Around 09.30 p.m., they went to the respective place to sleep. When they were fast asleep, around 01.00 a.m. on 28.05.1999, these appellants (accused 1 to 6) came to the house of the deceased in order to commit dacoity. They first went into the tractor shed and started mounting attack with deadly weapons on the deceased. The deceased cried for help which awakened P.W.2. These accused indiscriminately attacked P.W.2 also. She raised alarm and cried for help. On hearing the cry of the deceased and P.W.2, P.W.1 who was sleeping in the room situated on the western portion of the house, opened the main door from inside and came out. On seeing him, some of the accused attacked him with deadly weapons like knife and wooden log. Since the attack was so violent, unable to bear the same and in order to avoid further blows being made, P.W.1 crying for help, tried to rush inside the house. By the time, on hearing the alarm raised, P.W.3 came out of the house. Some of the accused, attacked him with weapons. He sustained bleeding injuries. With a view to save himself from further attack, he rushed into the house and went into the room where his wife was sleeping. The assailants did not stop. They gave a chase, entered into the said room and indiscriminately attacked P.W.3 and his wife (P.W.4) with weapons. Both sustained a number of bleeding injuries. P.W.5 who was sleeping at the Pial, awakened by the cry, rushed out. He was also attacked. Raising alarm, he rushed towards the house of one Thaluka Goundar. These assailants, barged into the house, looted the properties. Number of

jewels worn by the witnesses were snatched away by the accused. They broke open the steel bureau in the house and committed theft of the jewels. All happened with a short time. Even before the villagers could gather at the place of occurrence, the accused fled away from the scene of occurrence with decamped valuable jewels and other articles. P.Ws. 1 to 5 and the deceased were struggling for life due to the bleeding injuries. The villagers immediately rushed all of them to the Government hospital at Uthangarai.

Investigation and Trial

The investigation was commenced by PW17-M. Chinnathambi, Deputy Superintendent of Police. Accused No. 1-Raja, Accused No. 2-Govindraj, Accused No. 3-Palani, Accused No. 4-Vandikaran @ Murugan, Accused No. 5-Elumalai and Accused No. 7- Arumugam were arrested on 21.06.1999 while Accused No. 6-Chinnapaiyan surrendered himself before the Magistrate on 22.06.1999, who remanded him to judicial custody on the same day. On 27.06.1999 requisition was made by the Investigating Officer for conducting Test Identification Parade (TIP for short) insofar as all the arrested accused were concerned. On 28.6.1999 an application was made by the Investigating Officer seeking permission to take Accused No. 6 - Chinnapaiyan in police custody. The permission was granted by the concerned Magistrate on 29.06.1999 to hold the TIP on 01.07.1999. The police custody of Accused No. 6 was also given for 3 days from 01.07.1999. Thereafter, the TIP was held on 01.07.1999, in which PWs 1 to 5 identified the concerned accused. The TIP was conducted in the presence and under the supervision of PW11-Boopalan, who was then working as Sub-Judge, Rani Pettai.

After completion of investigation, the aforementioned seven accused persons were charged of having committed various offences including those punishable under Sections 109, 120B, 394, 395, 396, 449 of the Indian Penal Code, 1860 ('IPC', for short). The prosecution, in support of its case, principally relied upon the testimonies of PWs 1 to 5 who identified Accused Nos. 1 to 6 to be the assailants. All the witnesses, however, stated that Accused No. 7 was not present as a member of the assembly. In their cross examination, it was suggested to all the witnesses that the accused were shown to the witnesses while they were in custody and that their photographs were also published in newspapers before the TIP was undertaken.

PW11-Boopalan, Sub-Judge in whose presence the TIP was conducted, stated that the Accused Nos. 1 to 6 were made to stand for identification along with 19 other inmates from the Central Prison who were used as dummies and that PWs.1 to 5 identified Accused Nos. 1 to 6. PW8-Thangaraj, Village Administrative Officer, in whose presence, the recoveries were said to have been effected, turned hostile. The prosecution did not examine the other Panch, Kasim. PW17, the Investigating Officer, in his cross examination by the Accused 1 to 5 and 7 stated :—

> "It is not correct to say that, the accused 1 to 5 and 7 were brought to Singarapettai Police station where they were shown to the witnesses and identified. I do not know if the photos of the accused 1 to 5 and 7 were already published in the newspaper before 21-06-1999."

The case of the prosecution was accepted by the Additional Sessions Judge, Krishnagiri, who by the judgment dated 24.07.2012 found Accused Nos. 1 to 6 guilty of the offences punishable under Sections 394, 396, 449 IPC. Accused Nos. 1 to 3 were also convicted under Section 395 read with Section 397 IPC while Accused Nos. 2, 4, 5 and 6 were convicted under Section 395 IPC and all were awarded the sentence of life imprisonment along with other sentences, including payment of fine and default sentences. Accused No. 7 was, however, acquitted of all the charges.

Thereafter, Criminal Appeal No. 604 of 2012 was preferred by Accused Nos. 1 to 5 while Criminal Appeal No. 92 of 2013 was preferred by Accused No. 6. By its common judgment and order dated 27.04.2016 the High Court affirmed the view taken by the Trial Court and dismissed both the appeals. Being aggrieved, Accused Nos. 1, 2, 3, 5 and 6 preferred the present Criminal Appeals.

Observations and Decision of the Hon'ble Supreme Court

The Appeals were *inter alia* primarily based on the ground that –

> (a) The initial reporting shows that the identity of the assailants was not known to any of the witnesses. The admissions given by PWs. 1, 2, 3 and 4 in their cross-examination show that the accused were shown to the witnesses in the Police Station. It is accepted that the photographs of the accused were published in local newspapers.

Regarding the time-period within which TIP must be held, the Hon'ble Court discussed the cases of ***Pramod Mandal v. State of Bihar***[14], ***Wakil Singh v. State of Bihar***[15], ***Subhash* v. *State of Uttar Pradesh***[16], ***Daya Singh v. State of Haryana***[17] and ***Soni* v. *State of Uttar Pradesh***[18] and observed as follows :-

> **14.** In the present case, the incident occurred after mid night. The prosecution witnesses 1 to 5 suffered injuries in the transaction but the initial reporting showed that the identity of the assailants was not known to the witnesses. It is true that no identification marks or attributes were stated but it was asserted that the assailants were in the age group of 20 to 25 and one of the assailants had worn a red colour shirt. Further, if the nature and number of injuries suffered by each of the witnesses are considered, the assailants must have been quite close to the witnesses to afford to the witnesses sufficient time and opportunity to observe their features.
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> **15.** It has been accepted by this Court that what is substantive piece of evidence of identification of an accused, is the evidence given during the trial. However, by the time the witnesses normally step into the box to depose, there would be substantial time gap

[14] (2004) 13 SCC 150.
[15] 1981 Supp SCC 28.
[16] (1987) 3 SCC 231.
[17] (2001) 3 SCC 468.
[18] (1982) 3 SCC 368.

between the date of the incident and the actual examination of the witnesses. If the accused or the suspects were known to the witnesses from before and their identity was never in doubt, the lapse of time may not qualitatively affect the evidence about identification of such accused, but the difficulty may arise if the accused were unknown. In such cases, the question may arise about the correctness of the identification by the witnesses. The lapse of time between the stage when the witnesses had seen the accused during occurrence and the actual examination of the witnesses may be such that the identification by the witnesses for the first time in the box may be difficult for the court to place complete reliance on. In order to lend assurance that the witnesses had, in fact, identified the accused or suspects at the first available opportunity, the TIP which is part of the investigation affords a platform to lend corroboration to the ultimate statements made by the witnesses before the Court. However, what weightage must be given to such TIP is a matter to be considered in the facts and circumstances of each case.

16. Again, there is no hard and fast rule about the period within which the TIP must be held from the arrest of the accused. In certain cases, this Court considered delay of 10 days to be fatal while in other cases even delay of 40 days or more was not considered to be fatal at all.....

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19. It is, thus, clear that if the material on record sufficiently indicates that reasons for "gaining an enduring impression of the identity on the mind and memory of the witnesses" are available on record, the matter stands in a completely different perspective. This Court also stated that in such cases even non-holding of identification parade would not be fatal to the case of the prosecution. Applying the tests so laid down to the present case, in view of the fact that each of the eyewitnesses had suffered number of injuries in the transaction, it can safely be inferred that every one of them had sufficient opportunity to observe the accused to have an enduring impression of the identity of the assailants. It is not as if the witnesses had seen the assailants, in a mob and from some distance. Going by the injuries, the contact with the accused must have been from a close distance.

Regarding the submission that the witnesses were able to identify the accused only because they had been shown to them when the accused persons were in custody, the Hon'ble Court relied on ***Manu Sharma* v. *State (NCT of Delhi)***[19] and held as follows :-

21. However, what is urged, is that at least three of the eyewitnesses had accepted that the accused were shown to them while the accused were in police custody. The responses of PWs 1, 2, and 3 as quoted hereinbefore do indicate that they had seen and identified the accused while they were in custody. The suggestion that the witness was able to identify the accused only because they were shown while the accused were in police custody or that their photographs had appeared in newspaper, was, however, denied by PW1. The response of PW4 was with regard to identification of gold chain of four sovereign and that is why the identification was in Morappur police station whereas from the responses of PWs 1, 2 and 3 it is clear that the accused were in Singarapettai police station. The

[19] (2010) 6 SCC 1.

response of PW4 does not indicate that the witness had seen the accused while they were in custody. PW5 completely denied the suggestion that he could identify only because the accused were shown while they were in custody and that because the photographs of the accused were shown to the witnesses. He also denied that newspaper "Dhina Thanthi", which apparently had published the photographs of the accused, was available in their village at that time. No defence evidence has been placed on record either to establish the date of publication of such photographs in any newspaper and whether the newspaper "Dhina Thanthi" was normally available in the concerned village.

22. Thus, out of five prosecution witnesses who were all injured in the transaction, the testimonies of at least two of them, namely, PWs 4 and 5 stand on a different footing. Even with respect to PWs 1, 2 and 3, though there is some room to say that the accused were shown to the witnesses while they were in custody, that part by itself may not be sufficient in the light of the discussion in *Manu Sharma v. State (NCT of Delhi)*.....

The Hon'ble Court, after applying the principles related to TIP, dismissed the appeals and held as follows :-

23. The facts on record thus indicate with clarity that:

(a) There was no delay in holding the test identification parade and the delay, if any, was attributable to the fact that one of the accused was in judicial custody whose presence had to be secured only after appropriate permissions from the court;

(b) It is not the case of the accused that Accused No. 6 was ever shown to any of the witnesses. The test identification parade of Accused No. 6 has no infirmity on any count and all the witnesses consistently identified said Accused No. 6;

(c) Out of five injured witnesses, two had completely denied that either the accused or their photographs were shown to the witnesses, while other three did accept the suggestion in that behalf; and

(d) All the witnesses were injured in the transaction with number of injuries. It can, therefore, safely be stated that every one of them had adequate and proper opportunity to observe the features of each of the accused.

24. As has been repeatedly laid down by this Court, what is important is the identification in Court and if such identification is otherwise found by the Court to be truthful and reliable, such substantive evidence can be relied upon by the Court. Considering the totality of circumstances on record, the presence and participation of the Accused Nos. 1 to 6, in our view, stood proved through the eyewitness account. We do not find any infirmity in the evidence of identification by PWs 1 to 5.