

CHHATTISGARH STATE JUDICIAL ACADEMY, BILASPUR
MEMO

No. 685/CSJA/Online Workshop/2022

Bilaspur, dated 01.09.2022

To,

The District & Sessions Judge,
Balod/Baloda-Bazar/Balrampur at Ramanujganj/Bilaspur/
Dantewada/Dhamtari/Durg/ Janjgir Champa/Jagdarpur/Jashpur/
Kanker/Kawardha/ Kondagaon/Korba/Korea at Baikunthpur /
Mahasamund/Mungeli/Raigarh/ Raipur/ Rajnandgaon/Surajpur/
Surguja at Ambikapur.

Sub.: Regarding **Online Workshop** of Judges of Higher Judicial Services and Lower Judicial Services on “**Victim Law and Gender Sensitization-Gender Barrier in Accessing Justice, Compensation Laws-Scope of Inquiry with Discussion on Recent Case Laws**” scheduled to be held on **17/09/2022 (Saturday)**.

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As per Academic Calendar for the year 2022-23, One day Workshop of Judges of Higher Judicial Services and Lower Judicial Services on “**Victim Law and Gender Sensitization-Gender Barrier in Accessing Justice, Compensation Laws-Scope of Inquiry with Discussion on Recent Case Laws**” is scheduled to be held on **17/09/2022 (Saturday)**.

CSJA is organizing Workshop of Judges of Higher Judicial Services and Lower Judicial Services on “**Victim Law and Gender Sensitization-Gender Barrier in Accessing Justice, Compensation Laws-Scope of Inquiry with Discussion on Recent Case Laws**” on **17/09/2022 (Saturday) at 11.00 a.m.** through **Online mode**.

It is further to inform you that Digital Platform/link to join the online workshop will be shared with all the participants by CSJA.

You are, therefore, requested to circulate it amongst all the concerned Judicial Officers posted in your District as per the table below with a request that they shall attend the **Online Workshop from the court premises on 17/09/2022 by 10.30 a.m. positively in the prescribed uniform**. They shall maintain social distancing in case more than one are attending the online workshop in a single room and follow the guidelines and norms issued by the Central Government and the State Government as well as advisories issued by the

Hon'ble High Court during the period Covid-19.

The table is as under:

District	H.J.S	L.J.S.
Balod	(i) Shri Mukesh Kumar Patre, Additional District & Sessions, FTSC (POCSO) Balod	1. Ku. Madhuri Markam, I Civil Judge Class-II 2. Shri Hemant Raj Dhurve, II Civil Judge Class-II
Balodabazar	(i) Smt. Kiran Tripathi, Additional District & Sessions Judge FTSC (POCSO), Balodabazar	1. Ku. Diksha Deshlahare, III Additional Judge to the Court of Civil Judge Class- II
Balrampur at Ramanujganj	(i) Shri Ashish Pathak Additional District & Sessions Judge, FTSC (POCSO), Ramanujganj	-----
Bastar at Jagdalpur	(i) Shri Jagmohan Sharkar Patel, Additional District & Sessions Judge FTSC (POCSO), Jagdalpur	1. Ku. Danteshwari Netam, III Civil Judge Class-II
Bemetara	-----	-----
Bilaspur	(i) Shri Vivek Kumar Tiwari (Jr.), I st Additional District & Sessions Judge, FTSC (POCSO), Bilaspur	1. Ku. Shoa Mansoor, II Additional Judge to the Court of I Civil Judge Class-II 2. Ku. Shweta Awasthi, III Additional Judge to the Court of I Civil Judge Class-II 3. Ku. Kanchi Agrawal, IV Additional Judge to the Court of I Civil Judge Class-II
Dantewada	Shri Shailesh Sharma, Additional District & Sessions Judge, FTC, Dantewada	-----
Dhamtari	(i) Smt. Sunita Toppo, Additional District & Sessions Judge, FTC, Dhamtari	1. Ku. Manisha Thakur, I Civil Judge Class-II, Dhamtari
Durg	(i) Smt. Sarita Das, Additional District & Sessions Judge, I st	2. Smt. Kewara Rajput, I Civil Judge Class-II, Durg

	FTSC (POCSO), Durg (ii) Smt. Sangeeta Navin Tiwari, Additional District & Sessions Judge IV th FTSC (POCSO), Durg	3. Ku. Surabhi Dhangad, I Additional Judge to the Court of I Civil Judge Class-II 4. Shri Nilesh Kumar Baghel, VII Civil Judge Class-II, Durg
Janjgir- Champa	(i) Shri Yashvant Kumar Sarthi, Additional District & Sessions Judge, FTSC(Rape & POCSO), Sakti	3. Shri Vikas Khandey, I Civil Judge Class-II 4. Shri Aman Tigga, II Civil Judge Class-II
Jashpur	(i) Shri Ajit Kumar Rajbhanu Ist Additional District & Sessions Judge, Kunkuri	-----
Kawardha	-----	3. Ku. Pooja Mandavi, Civil Judge Class-II 4. Shri Vinay Kumar Sahu, I Additional Judge to the Court of Civil Judge Class- II
Kondagaon	Shri Kamlesh Kumar Jurri, Additional District & Sessions Judge, FTC, Kondagaon	2. Ku. Yogita Kunwar, I Additional Judge to the Court of I Civil Judge Class-II
Korba	(i) Shri Vikram Pratap Chandra, Additional District & Sessions Judge, FTC, Korba	3. Shri Manjeet Jangde, Civil Judge Class-II 4. Smt. Richa Yadav, I Additional Judge to the Court of Civil Judge Class- II
Koriya	(i) Shri Anand Prakash Dixit, Additional District & Sessions Judge FTSC (Rape & PocsO), Manendragarh	-----
Mahasamund	(i) Smt. Yogita Vinay Wasnik FTC, Mahasamund (ii) Smt. Shobhna Koshta, Additional District & Sessions Judge, Saraipali	-----
Mungeli	(i) Shri Purushottam Singh Markam, Additional District & Sessions Judge, FTSC (POCSO), Mungeli	-----
Raigarh	(i) Smt. Pratibha Verma,	1. Ku. Shweta Thakur, IV

	<p>Additional District & Sessions Judge, FTC, Raigarh.</p> <p>(ii) Shri Achhe Lal Kachhi, Additional District & Sessions Judge, Gharghora</p>	<p>Additional Judge to the Court of I Civil Judge Class-II</p> <p>2. Shri Saurabh Bara, III Civil Judge Class-II</p>
Raipur	<p>(i) Smt. Shubhra Pachouri Additional District & Sessions Judge, 1st FTSC (POCSO) , Raipur</p> <p>(iii) Shri Rakesh Kumar Som, Additional District & Sessions Judge, IInd, FTSC(POCSO), Raipur</p>	<p>1. Ku. Ankita Yadu, I Addl. Judge to the Court of I Civil Judge Class-II, Raipur</p> <p>2. Smt. Neeharika Tiwari, VIII Additional Judge to the Court of I Civil Judge Class-II</p> <p>3. Shri Harshwardhan Jaiswal, IX Additional Judge to the Court of I Civil Judge Class-II</p> <p>4. Ku. Soumya Rai, X Additional Judge to the Court of I Civil Judge Class-II</p> <p>5. Ku. Akanksha Khalkho, XI Additional Judge to the Court of I Civil Judge Class-II</p> <p>6. Ku. Preeti Jha, XII Additional Judge to the Court of I Civil Judge Class-II</p>
Rajnandgaon	<p>(i) Shri Avinash Tiwari, Additional District & Sessions Judge FTSC (POCSO) , Rajandgaon</p>	<p>1. Shri Devendra Kumar Dixit, V Additional Judge to the Court of I Civil Judge Class-II</p> <p>2. Ku. Perna Verma, VI Additional Judge to the Court of I Civil Judge Class-II</p>
Surajpur	<p>(i) Ku. Ranju Rautrai, Additional District & Sessions Judge, FTSC (Rape & POCSO), Surajpur</p> <p>(ii) Shri Sanjay Agrawal, Additional District & Sessions Judge, Pratappur</p>	<p>1. Shri Vivek Kumar Tandon, II Civil Judge Class-II</p> <p>2. Ms. Savitri Raksel, II Additional Judge to the Court of I Civil Judge Class-II</p>
Surguja at Ambikapur	<p>(i) Smt. Pooja Jaiswal, Additional District & Sessions Judge, FTSC (POCSO) , Ambikapur</p>	<p>-----</p>

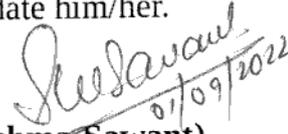
Uttar Bastar Kanker	-----	1. Shri Arindam Neral, I Additional Judge to the Court of Civil Judge Class- II
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For ready reference, copy of Reading Material is enclosed herewith.

All the participants nominated by the District & Sessions Judges shall prepare the paper on the subject and one of them will present in the Workshop.

A further request is made that in case of exigency any of the abovesaid Judicial Officers is not present in his/her headquarter or place of posting and is present in other district within the State, he/she shall attend the On-line Workshop from nearest Civil Court building where he/she is at present with an oral information to the concerned District & Sessions Judge. The said District & Sessions Judge is requested to accommodate him/her.

Encl: Copy of Reading Material.

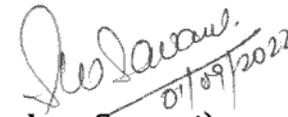

(Sushma Sawant)
Director

Endt.No.686/CSJA/Online Workshop/2022

Bilaspur, dated 01.09.2022

Copy to :

1. S.O. to Registrar General, High Court of C.G. Bilaspur for information.
2. CPC for directing the In-charge, NIC for uploading the memo on official website of CSJA.
3. All Judicial Officers of Higher Judicial Services and Lower Judicial Services as per the table above with a request that they shall attend the **Online Workshop from the court premises on 17/09/2022 (Saturday) by 10.30 a.m. positively in the prescribed uniform.** They shall maintain social distancing in case more than one are attending the Online workshop in a single room and follow the guidelines and norms issued by Central Government and State Government as well as advisories issued by Hon'ble High Court during the period Covid-19.


(Sushma Sawant)
Director

**Victim Law and Gender Sensitization- Gender
Barrier in Accessing Justice.**

**Compensation Law- Scope of Inquiry with discussion on
recent case laws**

S.No.	Particulars of the Case Law	Brief	Relevant Paragraphs	Page Number
01.	XYZ Vs. State of Chhattisgarh through the Secretary, Home department and Another 2020 SCC Online Chh 161, (2020) 214 AIC 355	Rape victim is entitled for compensation under S. 357A of CrPC r/w S. 33(8) of POCSO Act Guidelines on the Chhattisgarh Victim Compensation Scheme, 2011 enacted under Section 357A of the Code and the Schedule attached with the Scheme to award the compensation to the victim is explained	12,13,18, 21-24	
02.	Ankush Shivaji Gaikwad v. State of Maharashtra, (2013) 6 SCC 770,	Award to Compensation to the victim of crime or their dependants under sec 357 CrPC Mandatory Duty of Criminal Court to apply its mind in question of awarding Compensation in every case. Power is not ancillary to other sentence but in addition thereto. Use of word “May” in S.357 held does not mean that court need not consider applicability of S.357 in every Criminal case. Very object of S.357 would be defeated if courts choose to ignore s.357 and do not apply	28, 33-47, 49-55,61	

		<p>their mind to question of compensation</p> <p>The schemes specify maximum limit of compensation and subject to maximum limit, the discretion to decide the quantum has been left with the State/District Legal Authorities. It has been brought to our notice that even though almost a period of five years has expired since the enactment of Section 357-A, the award of compensation has not become a rule and interim compensation, which is very important, is not being granted by the courts. It has also been pointed out that the upper limit of compensation fixed by some of the States is arbitrarily low and is not in keeping with the object of the legislation.</p>		
03.	Suresh v. State of Haryana, (2015) 2 SCC 227	<p>Special Court upon receipt of information as to commission of any offence under the Act by registration of FIR shall on his own or on the application of the victim make enquiry as to the immediate needs of the child for relief or rehabilitation and upon giving an opportunity of hearing to the State and other affected parties including the victim pass appropriate order for interim compensation and/or rehabilitation of the child. In conclusion of proceeding,</p>	14-19	

		<p>The interim/final compensation shall be paid either from the Victim Compensation Fund or any other special scheme/fund established under section 357-A of the Code or any other law for the time being in force through the State Legal Services Authorities or the District Services Authority in whose hands the Fund is entrusted. If the Court declines to pass interim or final compensation in the instant case it shall record its reasons for not doing so. The interim compensation, so paid, shall be adjusted with final compensation, if any, awarded by the Special Court in conclusion of trial in terms of section 33 (8) of the Act.</p>		
04.	Nipun Saxena v. Union of India, (2019) 2 SCC 703	<p>No Person can print or publish in print, electronic, social media etc the name of the victim being identified and which should make her identity known to public at large.</p> <p>Disclosure of name of child to make the child a symbol of protest cannot normally be treated to be in the interest of the child.</p> <p>Disclosure of name and identity of victim applies even to dead victims</p>	9-12,34, 35	

05.	Hari Singh v. Sukhbir Singh, (1988) 4 SCC 551	<p>While the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation.</p> <p>Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 of the Code of Criminal Procedure would involve a certain enquiry albeit summary unless of course the facts as merging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family.</p>	10-16	
06.	Bijoy alias Guddu Das v. State of West Bengal, 2017 Cri LJ 3893	<p>directives are issued to the investigating agencies, prosecutors and the Special Courts so that the aforesaid provisions of law are followed in letter and spirit and fundamental right of dignity of a child victim and other basic human rights are preserved</p>	32-36, 40	

07.	Laxmi Vs Union of India and Others (2014) 4 SCC 427	<p>Guideline for Compensation to victim of Acid Attack uniform compensation of Rs. 3 Lakhs should be paid by State/UTs to victim of acid attack , Rs.1 Lakh should be paid immediately within 15 days, remaining Rs.2 Lakhs should be paid within 2 months as expeditiously as possible</p> <p>Authorities directed to give wide publicity to said directions.</p>	9-15	
08.	Aparna Bhat and Others Vs. State of Madhya Pradesh and Another 2021 SCC OnLine SC 230	<p>Certain Guideline were issued for granting the bail specially in case of crime against women.</p> <p>The National Judicial Academy is 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</p> <p>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.</p> <p>The foremost aspect to facilitate a gender sensitive approach, is to train judges to exercise their discretion and avoid the use of</p>	19-25, 38-52	

		gender based stereotypes while deciding cases pertaining to sexual offences. Secondly, Judges should have sensitivity to the concerns of the survivor of sexual offences.		
09.	Vishaka and Others Vs. State of Rajasthan & Others (1997) 6 SCC 241	<p>Rights of working women include right to work with dignity and right against sexual harassment in work place</p> <p>Each incident of sexual harassment of women at workplace result in violation of the fundamental right of “Gender Equality” and the Right to life and liberty. The meaning and content of the fundamental right guaranteed in the constitution of India of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse.</p> <p>Guideline for protection rights of the working women at their workplace issued.</p>	3,14,17	
10.	Bhawan Singh & Others Vs. State of Chhattisgarh CRA No.1607 of 2015 (DOJ 11.05.2022)	The Appellate Court while considering an application filed under Section 389 of Cr.P.C. for suspension of sentence and grant of bail is empowered to suspend the substantive jail sentence of a convicted person, for the reasons to be recorded in the order, pending final disposal of the criminal appeal filed by him, and	9, 10,11	

		if he is in confinement, he be released on bail or on his own bond (personal bond).		
11.	Balraj Vs. State of U.P (1994) 4 SCC 29	Power to award compensation not ancillary to other sentences but in addition thereto	11,12	
12.	Saheli, A women's Resources centre through Mrs. Nalini Bhanot & others Vs. Commissioner of Police Delhi Police Headquarter and others (1990) 1 SCC 422	State liable for tortious act committed by its agency. Child done to death on account of beating and assault by police acting in violation and excess of power vested in them, mother of the child entitled to exemplary compensation.	11,15	
13.	Bodhisattwa Gautam Vs. Subhra Chakarborty (MS), (1996) 1 SCC 490	Award of interim compensation during pendency of the proceeding under court has jurisdiction to award interim compensation to victim. Offence of rape is against the dignity of women violation of right to life which includes right to live with human dignity Offence of rape is crime against the entire society plight of rape victims in the present legal system despite making the rule of corroboration of prosecutrix not always necessary and introduction of sec 114A Evidence Act highlighted	8,9,10,18-20.,	
14.	Akash Chandrakar and Another Vs. State of Chhattisgarh Criminal Appeal No.101 of 2021 DOJ 19.02.2022	In an appeal filed by the accused convicted for offence under Section 6 read with Section 17 of the POCSO Act while hearing the application for suspension of	20-22	

		sentence and grant of bail under Section 389(1) of the CrPC, notice to the victim / complainant / her parents is necessary.		
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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.101 of 2021

Order reserved on:17/11/2021

Order delivered on: 19/01/2022

1. Akash Chandrakar, S/o Shri Ashok Chandrakar, aged about 23 years, R/o Village Bemcha, Police Station and District Mahasamund (CG)
2. Kumari @ Guddi Chandrakar, W/o Manglu, aged about 40 years, R/o Village Barbaspur, Police Station and District Mahasamund (CG)
---- Appellants

Versus

State of Chhattisgarh, Through Station House Officer, Police Station Mahasamund, District Mahasamund (CG)

---- Respondent

For Appellants: Mr. C.R. Sahu, Advocate.
For Respondent / State: -
Mr. Ravish Verma, Government Advocate.
Amicus Curiae: Mr. Ashish Surana, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal and
Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. Order

Sanjay K. Agrawal, J.

1. The short question that has cropped up for consideration would be, whether for considering an application for suspension of sentence and grant of bail under Section 389(1) of the CrPC, notice to the victim/complainant under the provisions of the Protection of Children from Sexual Offences Act, 2012 (for short, 'the POCSO Act') would be necessary as appellant NO.1 has been convicted for offence under Section 6 of the POCSO Act and appellant No.2 has been convicted for offence under Section 6 read with Section 17 of the POCSO Act in



addition to their conviction for offences under the provisions of the Indian Penal Code.

2. In this appeal preferred under Section 374(2) of the CrPC, application for suspension of their substantive jail sentence has also been preferred by the appellants/accused for suspension of their sentences for offences under the provisions of the IPC as well as under the provisions of the POCSO Act.
3. Mr. Ashish Surana, learned Amicus Curiae, would submit that by Amendment Act No.5 of 2009 and by virtue of the POCSO Rules, 2007, the right created in favour of the victim has to be given fullest effect to and interest of the victim/ informant/ complainant has to be protected post trial proceedings also and that would extend while hearing the application for suspension of sentence as ultimately by suspending the substantive jail sentence awarded, bail has to be granted which would be covered within the meaning of sub-rule (15) of Rule 4 of the POCSO Rules, 2020. He would further submit that in the matter of **Aparna Bhat and others v. State of Madhya Pradesh and another**¹ while setting aside the imposition of certain bail conditions in a case involving sexual offence against woman, the Supreme Court has held that in case bail is granted the complainant should immediately be informed that the accused has been granted bail and copy of the bail order be made over to him/her within two days, as such, notice of the application for suspension of sentence in any criminal appeal has to be served to the victim/complainant, so that he/she may have a say on the application for suspension of sentence, in which ultimately by suspending sentence the accused has to be

¹ 2021 SCC OnLine SC 230



enlarged on bail in pending criminal appeal, therefore, notice to the complainant/victim would be absolutely necessary before considering the application for suspension of sentence.

4. We have heard learned counsel appearing for the parties as well as the *amicus curiae* and given our thoughtful consideration and also went through the records with utmost circumspection.
5. As noticed above, the short question would be, whether notice to the victim/complainant of offence under the POCSO Act would be necessary while considering the application for suspension of sentence preferred under Section 389(1) of the CrPC in pending criminal appeal against conviction of the appellants / accused persons.

6. At this stage, it would be necessary to notice brief history relating to evolution of victim's right as the State has ultimate control over the investigation and conduct of criminal proceedings during trial. Earlier the right of victim was not recognized appropriately having no participation in adjudication process. The Supreme Court in the matter of **Rattan Singh v. State of Punjab**² pointed out the deficiency in the system wherein the right of victim has not been recognized at all. Thereafter the Law Commission of India in its 154th report in Chapter XV on Victimology made several recommendations on compensation to the victim and again the Committee on Reforms of Criminal Justice System was constituted by the Government of India and ultimately, the Malimath Committee report made several recommendations relating to participation of victim in trial, impleadment of victim in trial as party

² (1979) 4 SCC 719



and representation through Advocate and the report of the Law Commission and the recommendations of the Committee made thereon is one of the cause leading to passing of the Code of Criminal Procedure (Amendment) Act, 2008 which came into force w.e.f 31.12 2009.

7. In the unamended Code of Criminal Procedure, 1861, there was no right to appeal against the order of acquittal. The Code of Criminal Procedure, 1898 provided unconditional right to appeal against the order of acquittal enabling the State to direct the Public Prosecutor to present an appeal to the High Court from the order of acquittal passed by any Court. However, the Code of Criminal Procedure, 1973 inserted Section 378(3) requiring to seek leave for filing appeal against the order of acquittal and now unconditional right to appeal has been given to the victim by virtue of proviso to Section 372 of the CrPC.

8. The Code of Criminal Procedure was amended vide Code of Criminal Procedure (Amendment) Act No. 5 of 2009. The statement of objects and reasons of the Amendment Act reads as under:-

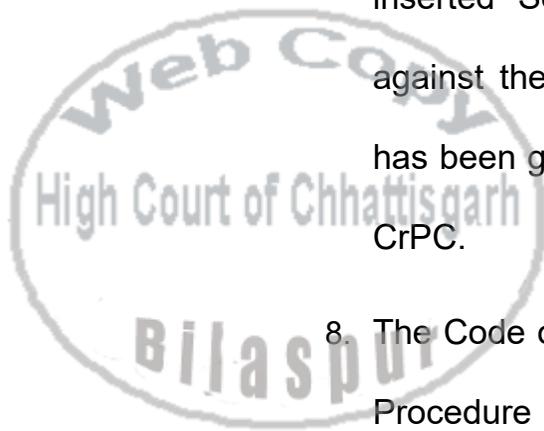
“Statement of Objects and Reasons.-

The need to amend the Code of Criminal Procedure, 1973.....

2.....At present, the victims are the worst sufferers in a crime and they don't have much role in the Court proceedings. They need to be given certain rights and compensation, so that there is no distortion of the criminal justice system.”

9. Section 2(wa) of the CrPC defines “victim” which states as under:-

“2.(wa) “victim” means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression “victim”





includes his or her guardian or legal heir;”.

Section 24(8) has also been inserted in the Code of Criminal Procedure by the Amendment Act No.5 of 2009. Proviso to sub-section (8) of Section 24 of the CrPC provides as under:-

“24(8) xxx xxx xxx

Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.”

10. As such, by virtue of proviso to Section 24(8) of the CrPC, the victim can seek permission of the Court to engage an Advocate of his/her choice to assist the prosecution. This provision has been inserted for protection of right of the victim in trial by making appropriate amendment in Section 24 of the CrPC and keeping in view that the victim is the worst sufferer of the crime and he/she would be involved in adjudication of criminal trial.

11. The Supreme Court in the matter of Sandeep Kumar Bafna v. State of Maharashtra³ has recognized the right of the complainant/informant in the following words:-

“32.....The complainant or informant or aggrieved party may, however, be heard at a crucial and critical juncture of the trial so that his interests in the prosecution are not prejudiced or jeopardised. It seems to us that constant or even frequent interference in the prosecution should not be encouraged as it will have a deleterious impact on its impartiality. If the Magistrate or Sessions Judge harbours the opinion that the prosecution is likely to fail, prudence would prompt that the complainant or informant or aggrieved party be given an informal hearing.”

12. Thus, in view of the aforesaid principle of law laid down by the Supreme Court in Sandeep Kumar Bafna (supra), if any adverse order in any criminal proceeding is going to be passed against the

³ (2015) 3 SCC (Cri.) 558

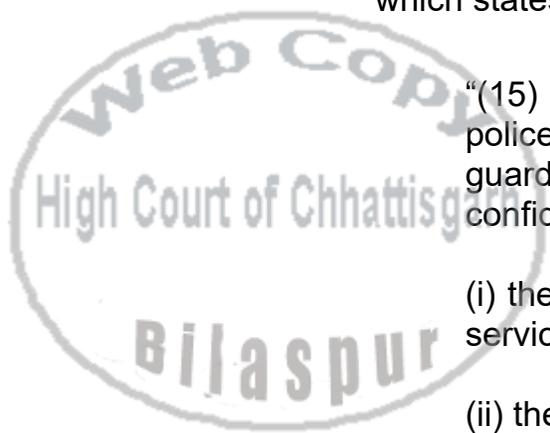


prosecution, it is in the interest of justice to hear the informant/complainant in assistance of the prosecution.

13. The question is requirement of notice to the victim/informant/complainant under the Act of 2012 which came into force w.e.f. 14.11.2012, The POCSO Act makes special provision for sexual crime against children and Sections 23, 24(5) and 33(7) of the POCSO Act 2012 ensure protection of the victim. The Central Government in exercise of the powers conferred by sub-section (1) read with clauses (a) to (d) of sub-section (2) of Section 45 of the POCSO Act has framed rules known as the Protection of Children from Sexual Offences Rules, 2020 of which sub-rule (15) of Rule 4 is pertinent which states as under:-

“(15) The information to be provided by the SJPU, local police, or support person, to the child and his parents or guardian or other person in whom the child has trust and confidence, includes but is not limited to the following:-

- (i) the availability of public and private emergency and crises services;
- (ii) the procedural steps involved in a criminal prosecution;
- (iii) the availability of victims' compensation benefits;
- (iv) the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation;
- (v) the arrest of a suspected offender;
- (vi) the filing of charges against a suspected offender;
- (vii) the schedule of court proceedings that the child is either required to attend or is entitled to attend;
- (viii) the bail, release or detention status of an offender or suspected offender;
- (ix) the rendering of a verdict after trial; and





(x) the sentence imposed on an offender.”

14. A careful perusal of the aforesaid rule would show that victim/child and his/her parents or guardian or other person in whom the child has trust and confidence, is entitled for the notice of the bail, release or detention status of an offender or suspected offender as a matter of right and that can be done only if the victim/child or his/her parents or guardian or other person in whom the child has trust and confidence, such an information has to be provided by Special Juvenile Police Unit / local police / support person. In the considered opinion of this Court, the object of the rule above-stated can be achieved competently by giving prior notice by the Court while hearing the application for suspension of sentence filed by the accused, who has been convicted for offence under the POCSO Act, to the child/victim/ child's parents/guardian/other person in whom the child has trust and confidence.

15. Section 39 of the POCSO Act provides guidelines for child to take assistance of experts, etc., which states as under:-

“39. Guidelines for child to take assistance of experts, etc.- Subject to such rules as may be made in this behalf, the State Government shall prepare guidelines for use of nongovernmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child.”

16. In exercise of the powers conferred under Section 39 of the POCSO Act, the Ministry of Women and Child Development, Government of India, has issued Model Guidelines of which Guideline 2.2 is relevant to the present context which is reproduced herein-below:-

“2.2. At trial

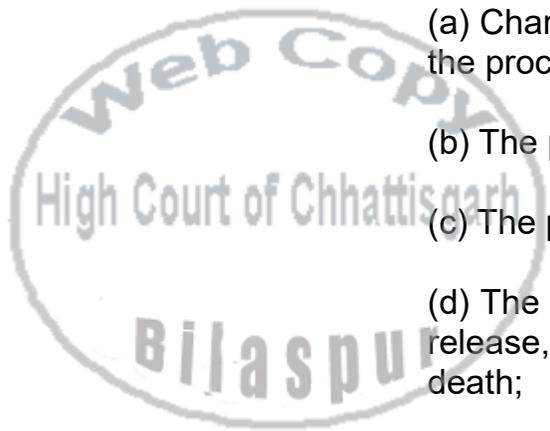


(i) **Children have the right to be heard in any judicial and administrative proceedings affecting them.** They must be given a reasonable opportunity to express their views all matters affecting him and these must be taken into account. He should also be allowed to provide initial and further information, views or evidence during the proceedings.

(ii) **Children have the right to information about the case in which they are involved,** including information on the progress and outcome of that case, unless the lawyer considers that it would be contrary to the welfare and best interests of the child. It would be best if the lawyer coordinates with other persons or agencies concerned with the child's welfare, such as the support person, so that this information is conveyed in the most effective manner. Victims should receive the most appropriate information on the proceedings from all their representatives, and the assistance of a support person appointed under Rule 4(7) most often constitutes the best practice in ensuring that full information is conveyed to the victim.

Such information would include:

- (a) Charges brought against the accused or, if none, the stay of the proceedings against him;
- (b) The progress and results of the investigation;
- (c) The progress of the case;
- (d) The status of the accused, including his/her bail, temporary release, parole or pardon, escape, absconding from justice or death;
- (e) The available evidence;
- (f) The child's role in the proceedings;
- (g) The child's right to express their views and concerns in relation to the proceedings;
- (h) The scheduling of the case;
- (i) All decisions, or, at least those decisions affecting their interests;
- (j) Their right to challenge or appeal decisions and the modalities of such appeal;
- (k) The status of convicted offenders and the enforcement of their sentence, including their possible release, transfer, escape or death."

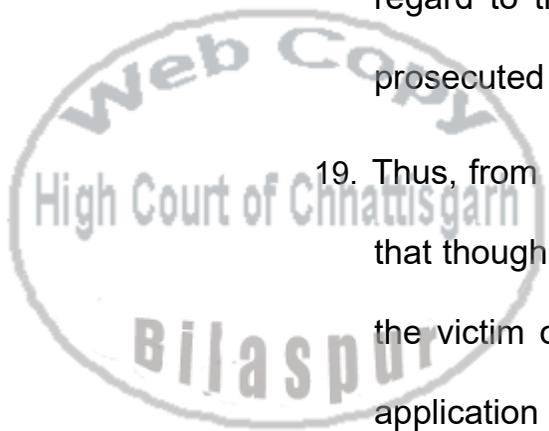




17. A careful perusal of the aforesaid guidelines would show that the victim has been held entitled to receive most appropriate information of the proceedings which would include the status of the accused including his/her bail, temporary release parole or pardon, escape, absconding from justice etc.. As such, the victim is entitled to have full information with regard to hearing an application for grant of bail filed by the accused and children have the right to be heard in any judicial and administrative proceedings affecting them.

18. The guidelines issued by the Ministry of Women and Child Development, Government of India under Section 39 of the POCSO Act clearly provide that the victim is entitled for full information with regard to the status of bail application of an accused who is being prosecuted on the report made on his/her behalf.

19. Thus, from the aforesaid discussion, we are of the considered opinion that though the POCSO Act does not provide for issuance of notice to the victim or his parents or guardian at the time of consideration of application for suspension of sentence of the accused/appellant who has preferred an appeal and who has been convicted for offence under the provisions of the POCSO Act, but by virtue of sub-rule (15) of Rule 4 of the Rules of 2020 and by virtue of the guidelines issued by the Central Government under Section 39 of the POCSO Act, issuance of prior notice to the victim/ complainant or his/her parents or guardian/informant would be absolutely necessary in the ends of justice before hearing the application for suspension of sentence preferred under Section 389(1) of the CrPC in pending criminal appeal by convicted person and if the sentence awarded to the accused is





suspended, he has to be released on bail on terms and conditions imposed by that Court, as such, for suspension of sentence and grant of bail under Section 389 of the CrPC proceeding, the victim/ complainant or his/her parents would be entitled for prior notice of hearing of that application.

20. The Supreme Court in Aparna Bhat (supra) while considering the untenable conditions imposed by the High Court while granting bail in the case involving sexual offence against woman has laid down the following parameters including that the fact of grant of bail should be informed to the complainant immediately and copy of the bail order made over to him/her within two days. Para 44 of the report states as under:-

“44. Having regard to the foregoing discussion, it is hereby directed that henceforth:

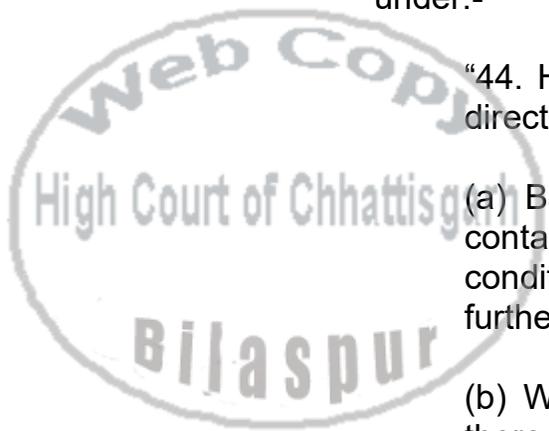
(a) Bail conditions should not mandate, require or permit contact between the accused and the victim. Such conditions should seek to protect the complainant from any further harassment by the accused;

(b) Where circumstances exit 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 order 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.”

21. The Calcutta High Court In the Matter of : Ganesh Das⁴ while considering the question where the victim is a necessary party to an appeal preferred under Section 374 of the CrPC from conviction, who has been convicted also under the provisions of the POCSO Act, has held that though the victim is not a necessary party to the Criminal Appeal from conviction for offences against woman or child, punishable under provisions of the IPC or POCSO Act, but if the appellate Court deems it necessary to provide further assistance to secure the interest of the victim and directed as under:-

“26. iii) The procedure to be adopted in all such appeals would be to deal with those appeals without insisting on the impleadment of the victim. In cases where, over and above the assistance of the Public Prosecutor representing the State, the appellate court deems it necessary to provide further assistance to secure the interest of the victim through legal aid, the HCLSC or the DLSA concerned may be required to provide assistance through an empanelled or other advocate as may be decided by the HCLSC or the DLSA concerned. However, even in such cases, it shall be insisted by the Court that the principles relating to protection of dignity and privacy and modality of ensuring those values, as delineated above, are scrupulously adhered to.”

22. Thus, from the aforesaid legal analysis and following the provisions contained in sub-rule (15) of Rule 4 of the Rules 2020 as well as the

4 2021 SCC OnLine Cal 1422



guidelines issued by the Central Government in exercise of the powers conferred under Section 39 of the POCSO Act and following the decision of the Supreme Court in Aparna Bhat (supra), we are of the considered opinion that notice either to the victim or one of his/her parents or guardian/informant or support person in whom the child has trust and confidence would be absolutely necessary in the ends of justice while hearing and considering the application for suspension of sentence in pending appeal preferred by the appellant/accused convicted under the offences against woman or child punishable under the provisions of the POCSO Act. However, in such cases, it shall be insisted by the Court that the principles relating to protection of dignity and privacy and modality of ensuring those values, as delineated by their Lordships of the Supreme Court in the matter of Nipun Saxena and another v. Union of India and others⁵, are scrupulously adhered to and followed religiously.

23. Accordingly, it is directed that notice of the application for suspension of sentence be also issued to the victim or one of his/her parents or guardian or informant and it should be served on the address provided by the State Counsel. To secure the interest of victim, legal assistance may be provided by DLSA or SALSA or High Court Legal Services Committee, as the case may be, through their empanelled Advocate etc..

24. The aforesaid question is answered accordingly. This court appreciates the valuable assistance rendered by Mr. Ashish Surana on short notice as *amicus*.

5 (2019) 2 SCC 703



25. List the matter on 4-3-2022 for hearing on the application for suspension of sentence and grant of bail and another IA.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Arvind Singh Chandel)
Judge

B/-





HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.101 of 2021

Akash Chandrakar and another

Versus

State of Chhattisgarh

Head Note

In an appeal filed by the accused convicted for offence under Section 6 read with Section 17 of the POCSO Act while hearing the application for suspension of sentence and grant of bail under Section 389(1) of the CrPC, notice to the victim / complainant / her parents is necessary.



BALRAJ v. STATE OF U.P.

29

a title and interest held by Kartar Lal, his vendor. The first respondent being successor-in-interest, becomes entitled to the enforcement of the contract of the half share by specific performance. The decree of the trial court is confirmed only to the extent of half share in the aforesaid property. The appeal is accordingly allowed and the decree of the High Court is set aside and that of the trial court is modified to the above extent. The parties are directed to bear their own costs throughout.

b

(1994) 4 Supreme Court Cases 29

(BEFORE K. JAYACHANDRA REDDY AND DR A.S. ANAND, JJ.)

BALRAJ .. Appellant;

Versus

c STATE OF U.P. .. Respondent.

Criminal Appeal No. 26 of 1994[†], decided on April 12, 1994

d **A. Penal Code, 1860 — S. 302 — Death sentence — When not justified — Mitigating factors — Murder of brother, his two children and their friend — Offence committed under the influence of extreme mental and emotional disturbance and reasonable apprehension that his brother and his brother's wife wanted to kill him — Innocents also killed but murders not cold-blooded — Absence of direct evidence connecting the accused with murder of his brother and his friend — Held, in circumstances, not safe to award death sentence — CrPC, 1973, S. 354(3) — Penology**

Held :

e It is true that the accused attacked the members of family of his brother but in awarding death sentence the court has to take into consideration the mental condition of the accused. The brother of the accused had been harassing the accused in respect of the opening of the shop and had been making undue demands and even raised a dispute regarding supply of electricity. The accused had an apprehension that his brother and wife wanted to do away with him so that he may not be an obstacle. This is one of the important circumstances which should be given weight in determination of sentence. On the facts and circumstances of this case it cannot be said that the accused would be a menace to the society if allowed to live. It is not a case where he committed these murders merely for personal gain but on the other hand committed the same under the influence of extreme mental and emotional disturbance and also having a reasonable apprehension that his life was in danger. No doubt, two innocent kids also received injuries in the occurrence but when once there is material to show that the accused acted in a highly disturbed mental condition, the murders cannot be said to be cold-blooded. The accused g seemed to have acted in a frenzied manner in such a disturbed mental condition. Further, there is no direct evidence connecting the accused with the murders of his brother and his friend. Under these circumstances it would not be safe to award death sentence and therefore, sentence of death reduced to imprisonment for life.

(Para 10)

Bachan Singh v. State of Punjab, (1980) 2 SCC 684; 1980 SCC (Cri) 580, followed

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† From the Judgment and Order dated 14-5-1993 of the Allahabad High Court in CrI. A. No. 64 of 1992

Asharfi Lal v. State of U.P., (1987) 3 SCC 224: 1987 SCC (Cri) 470, referred to

B. Criminal Procedure Code, 1973 — S. 357(3) — Compensation to victim — Power to award compensation not ancillary to other sentences but in addition thereto — Widow of deceased left without any support with a family to be maintained — Accused having property and also some means — Accused directed to pay Rs 10,000 by way of compensation to the widow of the deceased

Sarwan Singh v. State of Punjab, (1978) 4 SCC 111: 1978 SCC (Cri) 549: AIR 1978 SC 1525; *Hari Singh v. Sukhbir Singh*, (1988) 4 SCC 551: 1988 SCC (Cri) 984, relied on

S-M/13017/CR

Advocates who appeared in this case :

I.S. Goel, Advocate, for the Appellant;
Pramod Swarup and A.S. Pundir, for the Respondent.

The Judgment of the Court was delivered by

K. JAYACHANDRA REDDY, J.— Balraj, the sole appellant has been convicted under Section 302 IPC for the offence of committing the murders of four members of PW 2's family and also under Section 307 IPC for attempting to commit the murder of PW 2. In respect of murder charge he has been sentenced to death and for the offence punishable under Section 307 IPC he has been sentenced to undergo seven years' RI. The Division Bench of the High Court confirmed the convictions and the sentences awarded by the trial court.

2. The prosecution case is as follows: PW 2, Smt Laxmi Devi, is the wife of Tej Pal, one of the deceased persons in the case. The appellant Balraj is the younger brother of Tej Pal. Budh Jyoti, a boy aged about 13 months, Kumari Renu, aged about 4 years, Kumari Chandrawati, aged about 11 years and Kumari Deep Mala, aged about 8 years were the children of PW 2 and Tej Pal. One Bhante Baba was a person known to the family. According to the prosecution there were disputes between the deceased Tej Pal and the accused about the opening of a shop. Tej Pal was demanding an advance of Rs 7000 and even regarding the electricity a dispute arose. Balraj suspected that his younger brother Tej Pal and his wife PW 2 poisoned him and because of that he suffered vomiting of blood and he also suspected that these persons had decided to commit his murder. On the day of occurrence i.e. 13-2-1988 at about 7.30 p.m. the accused armed with a gandas came to the house of PW 2 saying that she wanted to kill him and therefore he will finish all of them that day. So saying he started assaulting Budh Jyoti, Renu and other children. He also assaulted PW 2, who became unconscious after receipt of the injuries. According to the prosecution, during the same occurrence the accused also assaulted Tej Pal and Bhante Baba. PW 7, the Inspector of Police, Sitarganj received a phone call that an injured man was lying near the Post Office, Sitarganj and another injured man was lying almost dead near a culvert of a canal but the informant did not disclose his name. PW 7 having made an entry in the diary visited the place in a jeep and he saw a group of people there. He found Tej Pal lying with injuries and near the culvert Bhante Baba lying with injuries. He also came to know that Bhante Baba was living in the house of Tej Pal. PW 7 immediately visited

the house of Tej Pal which was nearby and he found that the door was closed. He opened the door and went inside along with the witnesses and he

a found Kumari Deep Mala and Kumari Chandrawati lying unconscious with injuries. He also saw PW 2 and Budh Jyoti lying injured on the cot and Kumari Renu lying injured on another cot which was close by. PW 7 found that all of them were in a state of unconsciousness. All of them were removed to the hospital. After registration of the crime, coming to know that the accused Balraj was available at the residence of his relatives at

b Moradabad, he went there and arrested him and at the instance of the accused the gandasa was recovered. Meanwhile Tej Pal and Bhante Baba, Budh Jyoti and Renu died. PW 1 the Doctor, who conducted the post-mortem on the dead body of Tej Pal, found six incised injuries and opined that the death was due to these injuries. He also conducted post-mortem on the dead body of Renu and found some stitched wounds and found that the skull was

c fractured which resulted in death. He also conducted post-mortem on the dead body of Budh Jyoti. He found four stitched wounds on him and opined that the death was due to these injuries which could have been caused by a gandasa. On 16-2-1988, PW 6 conducted the post-mortem on the dead body of Bhante Baba who was aged about 60 years. He found some stitched wounds and incised wounds and he opined that the death occurred due to

d shock and haemorrhage due to ante-mortem injuries which could have been caused by a gandasa.

3. On 14-2-1988, PW 10, another Doctor examined PW 2 and found some stitched wounds and incised wounds and the Doctor opined that they could have been caused by a sharp-edged weapon. On the same day, PW 10 examined Kumari Chandrawati, PW 3 and he found four incised injuries on

e her which could have been caused by a gandasa. After completion of the investigation, the charge-sheet was laid. The prosecution examined as many as 19 witnesses. A number of them are doctors as stated above. PWs 2, 3 and 4 examined as eyewitnesses and PWs 5, 11, 14, 18 and 19 were examined who spoke about the motive and the disputes between the two brothers and they turned hostile. The others are all formal witnesses.

f 4. The accused pleaded not guilty and stated that he has been falsely implicated. Out of PWs 2, 3 and 4, PW 3 stated that she could not identify the assailant and she was also treated hostile. However, in the cross-examination by the prosecution, she stated that she and her mother and other sisters were assaulted by the assailant whom she did not identify. She has, however, stated that there was quarrel between her father and the accused.

g PW 4 was treated as a minor child and the trial court has not even obtained her signature under her statement. Therefore her evidence was not taken into account at all. Therefore the prosecution is left only with the evidence of PW 2 as an eyewitness. She has not stated as to who assaulted Tej Pal and Bhante Baba. She deposed that at about 7 or 7.30 p.m. the accused came with a gandasa and saying that they wanted to kill him and therefore he

h would finish them all, assaulted the children and also assaulted her (PW 2) and consequently she became unconscious. In the cross-examination she

denied the suggestion that some 10 to 12 assailants who could not be identified assaulted her. Both the courts have accepted her evidence.

5. Learned counsel for the appellant submitted that PW 2 has not come out with the whole truth particularly regarding the motive and that from her evidence it cannot conclusively be held that the appellant alone caused the injuries to Tej Pal and Bhante Baba near the Post Office or near the culvert and no other evidence is there to connect the appellant with those two murders.

6. Having perused the evidence of PW 2, which is also supported by the medical evidence, we are satisfied that there cannot be any dispute as to the time and place of occurrence in respect of attack on PW 2 and Budh Jyoti and Renu. No doubt there is no evidence to prove as to who assaulted Tej Pal and Bhante Baba but the inference is that they also must have received the injuries during the same transaction. The High Court, however, pointed out that there is no evidence to prove as to who assaulted Tej Pal and Bhante Baba but concluded that the accused assaulted Budh Jyoti, Renu and PW 2. Having perused the evidence of PW 2, we are satisfied that the accused was at least responsible for causing the deaths of Budh Jyoti and Renu and also for causing the injuries to PW 2. No doubt the occurrence has taken place at about 7.30 p.m. in the darkness but PW 2 says that there was electric light and even otherwise the accused was known to her well. Therefore there would not have been any difficulty for her to identify the accused.

7. In view of the fact that the accused has caused injuries even to minor children and that he wanted to attack all the members of the family, both the courts below held that the case of the accused comes under the category of rarest of rare cases where death sentence alone should be awarded.

8. In this context, the High Court relied on the judgment of this Court in *Asharfi Lal v. State of U.P.*¹ where the accused committed the murders because of greed and personal vengeance. This Court also noted that the murders were committed with extreme brutality. The High Court observed that since the accused did not even spare his dearest and nearest and since PW 2 is left without any helper or protector because of this occurrence, a serious view of the nature of occurrence has to be taken particularly from the point of view of law and order.

9. In *Bachan Singh v. State of Punjab*² this Court agreed that the following are undoubtedly the relevant circumstances which must be given weight in determination of the sentence namely: (SCC p. 750, para 206)

“(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

* * *

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.”

1 (1987) 3 SCC 224: 1987 SCC (Cri) 470

2 (1980) 2 SCC 684: 1980 SCC (Cri) 580

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10. It is true, as observed by the courts below, that the accused attacked the members of family of Tej Pal but in awarding death sentence, the court

a has to take into consideration the mental condition of the accused. From the findings of the courts below, it is clear that the accused was mentally disturbed and in fact he expressed before PW 2 that she wanted to kill him and therefore he would finish them. The records and the evidence of the Inspector as well as of PW 15, the Panch witness reveal that the accused stated that Tej Pal and PW 2 wanted to kill him and accordingly

b administered some poison which made him vomit the blood. From the beginning the case of the prosecution is that Tej Pal has been harassing the accused in respect of the opening of the shop and has been making undue demands and even raised a dispute regarding supply of electricity to the shop to be opened by Balraj which fell to his share. Actually the prosecution examined the close relations of the accused and the deceased namely PWs 5,

c 11, 14, 18 and 19 to prove the motive aspect namely that Tej Pal was harassing the accused who is no other than his own brother and has been demanding an amount of Rs 7000 in respect of permitting Balraj to open the shop and also raised a dispute regarding electricity. Coupled with this the accused was further mentally disturbed and had an apprehension that Tej Pal and PW 2 wanted to do away with him so that he may not be an obstacle.

d This is one of the important circumstances which should be given weight in determination of sentence. On the facts and circumstances of this case it cannot be said that the accused would be a menace to the society if allowed to live. It is not a case where he committed these murders merely for personal gain but on the other hand committed the same under the influence of extreme mental and emotional disturbance and also having a reasonable

e apprehension that his life was in danger. No doubt, two innocent kids also received injuries in the occurrence but when once there is material to show that the accused acted in a highly disturbed mental condition, the murders cannot be said to be cold-blooded. The accused seemed to have acted in a frenzied manner in such a mental disturbed condition. We cannot also overlook the fact that there is no direct evidence connecting the accused with

f the murders of Tej Pal and Bhante Baba and with regards the assault on PW 2 and children inside the house, there is only the solitary evidence of PW 2 and the other children PWs 3 and 4 who were examined as eyewitnesses did not support the evidence of PW 2.

11. Under these circumstances, we think it may not be safe to award death sentence. Learned counsel for the State, however, invited out attention

g that PW 2 is left without any support with a family to be maintained. Therefore it is a fit case where this Court should award compensation to her. We are also of the view that this is very much necessary. Section 357(3) CrPC provides for ordering of payment by way of compensation to the victim by the accused. It is an important provision and it must also be noted that power to award compensation is not ancillary to other sentences but it is

h in addition thereto. To the same effect are the decisions of this Court in

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*Sarwan Singh v. State of Punjab*³ and *Hari Singh v. Sukhbir Singh*⁴. In the instant case the records show that the appellant Balraj has property and also some means. a

12. For the reasons stated above, we confirm the conviction of the appellant under Section 302 IPC but reduce the sentence of death to imprisonment for life. We further direct that the appellant Balraj shall pay Rs 10,000 by way of compensation to PW 2 Smt Laxmi Devi and if the appellant fails to pay this amount within three months from today, the same may be collected as provided under Section 431 CrPC and be paid to PW 2. The conviction and sentence of seven years' RI under Section 307 IPC are, however, confirmed. The sentences shall run concurrently. The order of the High Court is modified to the extent indicated above and the appeal is partly allowed. b

(1994) 4 Supreme Court Cases 34 c

(BEFORE M.N. VENKATACHALIAH, C.J. AND S. MOHAN, J.)

MOHD. IQBAL KHANDAY .. Appellant;

Versus

ABDUL MAJID RATHER .. Respondent. d

Civil Appeal Nos. 2297-98 of 1994[†], decided on April 6, 1994

Contempt of Courts Act, 1971 — S. 2(b) — Interim order passed by High Court directing the appellant to grant ad hoc promotion to the respondent — Order found to be incapable of being implemented — Held, appellant could not ignore the order and should have taken prompt steps to invoke appellate procedures rather than pleaded difficulties in implementation when contempt proceedings were initiated — However, High Court not justified in declining to accept unconditional apology tendered by the appellant till implementation of said interim order — Inadvisable for court to insist compliance of an order impossible of compliance — Order of High Court directing the Additional Advocate-General not to appear for the appellant but to assist the court also not sustainable — Appellant directed to tender unconditional apology before the High Court — Service Law — Relief e

Held :

There has to be balance the dignity of the court in requiring obedience to its orders as against the performance of an act contrary to rules compelled by the court's direction. (Para 13)

The law of contempt is based on sound public policy by punishing any conduct which shakes the public confidence in the administration of justice. Right or wrong, the order has been passed. Normally speaking, it cannot be gainsaid that the order ought to have been obeyed but it appears that there are insuperable difficulties in implementing the order. (Paras 14 and 15) g

³ (1978) 4 SCC 111; 1978 SCC (Cr) 549; AIR 1978 SC 1525

⁴ (1988) 4 SCC 551; 1988 SCC (Cr) 984 h

[†] From the Judgment and Order dated 1-9-1993 of the Jammu and Kashmir High Court in Contempt No. 52 of 1993

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SUPREME COURT CASES

(1990) 1 SCC

(1990) 1 Supreme Court Cases 422

(BEFORE B.C. RAY AND S. RATNAVEL PANDIAN, JJ.)

SAHELI, A WOMEN'S RESOURCES CENTRE,

THROUGH Ms NALINI BHANOT AND OTHERS

.. Petitioners;

Versus

COMMISSIONER OF POLICE,

DELHI POLICE HEADQUARTERS AND OTHERS

.. Respondents.

Writ Petition (Criminal) Nos. 250-253 of 1988[†], decided on December 14, 1989

Tort Law — Compensation — State liable for tortious act committed by its agency — Child done to death on account of beating and assault by the police acting in violation and excess of power vested in them — Held, mother of the child entitled to exemplary compensation of Rs 75,000 from State for death of the child — Constitution of India, Articles 32, 21 and 300 — PIL

Held:

An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In case of assault, battery and false imprisonment the damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death. The State is responsible for the tortious acts of its employees. On a conspectus of various decisions of the Court, it is deemed just and proper to direct the State (Delhi Administration) to pay compensation to the mother of the deceased child a sum of Rs 75,000 within four weeks. The Delhi Administration may take appropriate steps for recovery of the amount paid as compensation or part thereof from the officers who will be found responsible, if they are so advised. (Paras 11 and 15)

Joginder Kaur v. Punjab State, 1969 ACJ 28; *State of Rajasthan v. Vidhyawati*, AIR 1962 SC 933; 1962 Supp 2 SCR 989; *Peoples' Union for Democratic Rights v. Police Commissioner, Delhi Police Headquarters*, (1989) 4 SCC 730, *relied on*

Writ petitions disposed of

R-M/9735/CR

Advocates who appeared in this case:

Gobind Mukhoty, Senior Advocate (S.K. Bhattacharya, Advocate, with him) for the Petitioners;

V.C. Mahajan, Senior Advocate (Ms A. Subhashini and R.B. Mishra, Advocates, with him) for the Respondents.

The Judgment of the Court was delivered by

RAY, J.—These writ petitions have been filed by the Women's and Civil Rights Organization known as SAHELI, a Women's Resources Centre on behalf of two women Maya Devi and Kamlesh Kumari who have been residing in one room tenement each on the ground floor of house No. 408/S/A L Gali No. 29, Anand Parbat and were severely beaten up by the alleged landlord in collusion with the SHO, Shri Lal Singh and the police of Anand Parbat Police Station. The facts of the case giving rise to these writ petitions are as follows:

† Under Article 32 of the Constitution of India

Kamlesh Kumari and her husband Inder Singh moved into the house No. 408/5/A L, Gali No. 29, Anand Parbat in 1974. They had three children, Saroj 13 years old girl, Naresh 9 years old boy (now deceased) and Suresh 7 years old boy. They were living in one room on the ground floor of the said house which is a double storey. The other lady, Maya Devi has also been living in another room of the said house on the ground floor with her husband and children. The husbands of both Kamlesh Kumari and Maya Devi are truck drivers and they often remain away from their home. There is a dispute over the ownership of the house. In or about 1984, the old landlord, one Tajinder Singh left the house and one Manohar Lal claims to be the new landlord. At present, one Puran Chand and his two sons Shambu Dayal and Prakash Chand claim to have bought the said property from Manohar Lal and they have been illegally evicting all the tenants from the said premises. In their attempt they succeeded in evicting all the tenants except the two tenants named Kamlesh Kumari and Maya Devi. It is because of these illegal threats of eviction, Kamlesh Kumari obtained an order of stay from the court against her forceful eviction and that said order is in force. Some time in October 1987 the so-called landlords cut off the water and electricity supply to Kamlesh Kumari's room and the same has not been restored till this day. On November 2, 1987 the then SHO of Anand Parbat Police Station, Lal Singh called for Kamlesh Kumari and told her to vacate the room. On November 4, 1987, the said SHO again called for Kamlesh Kumari and when she arrived at the police station she found that the so-called landlords were already present there. In the presence of Shambu Dayal and others, Lal Singh told Kamlesh Kumari to take some money and leave the room whereon Kamlesh Kumari said that she should be given some time especially because her children are studying in schools. On November 12, 1987, the said SHO once again called Kamlesh Kumari and this time he threatened to lock her up if she refused to vacate the room. On November 13, 1987, Kamlesh Kumari went to Tis Hazari Court to consult her lawyer. On coming back she found her children missing and Maya Devi was standing outside, all her belongings thrown out. Maya Devi told Kamlesh Kumari that the Sub-Inspector of Police K.L. Nanda of Anand Parbat Police Station had come and had taken away her children and had thrown away Maya Devi from her room. Kamlesh Kumari immediately went to the police station and met the SHO, Lal Singh and asked him about her children. The SHO said that her children had been kept locked up and she would not be allowed to see her children unless she vacated the room. Kamlesh Kumari then went to Tis Hazari Court to see her lawyer. The lawyer phoned the police control room and rushed back to Anand Parbat Police Station. With great difficulty the lawyer got the three children released from the police station.

2. On the same day, i.e. November 13, 1987, after Kamlesh Kumari and her children had just taken their dinner, Shambu Dayal trespassed

into her room and hit Kamlesh Kumari on the forehead with a brick. She rushed to the police station and reported the matter to the police. The police had her medically examined but refused to take any action against the assailants.

3. On November 14, 1987, Kamlesh Kumari was attacked by Shambu Dayal, his brother Prakash Chand accompanied by Lal Singh in civilian clothes and Sham Lal, Sub-Inspector in uniform accompanied by two others. They beat Kamlesh Kumari, tore her clothes and molested her. Her 9 year old son clung to his mother to protect her when Lal Singh took him away and forcibly threw him on the floor. Lal Singh also asked Shambu Dayal to beat Naresh. Kamlesh Kumari was dragged away to the police station and a criminal case was imposed upon her of trespass. She was sent to Tihar Jail and her lawyer got her released on November 16, 1987. Kamlesh Kumari on her release came back and found that her child, Naresh was in a very bad condition. The children took shelter at a neighbour's house and the neighbours had got local doctor to look after Naresh. On the advice of the doctors, Naresh was admitted to Ram Manohar Lohia Hospital on November 18, 1987. However, no medical legal case was registered. Kamlesh Kumari's lawyer tried to get a medical legal case registered. At last medical legal case was registered on November 23, 1987 by the ACP, Patel Nagar at 11.30 p.m. In the FIR No. 143/87 the said ACP had written that she had said that no policeman had beaten her son although she had specifically named Lal Singh and others. On November 26, 1987, Naresh died in hospital and an inquest was carried out. This news was published in the Hindi newspapers.

4. On December 10, 1987, SDM, Vipul Mittra called Kamlesh Kumari to his office stating that he was conducting an enquiry into the facts and circumstances leading to Naresh's death. On December 6, 1987, the Crime Branch filed its report in the court opposing bail for Shambu Dayal. In the said report, it has been stated that the details of the DD entries mentioned in the bail application itself show conspiracy or connivance of the local police with the accused. This report was annexed as annexure 'C' to these petitions. Kamlesh Kumari and her neighbours and lawyer on the day of Naresh's death sat on dharna outside the residence of the Lt. Governor and demanded a judicial enquiry be ordered into the death of the Kamlesh's son, Naresh. The report given by the fact-finding team of the Peoples' Union for Democratic Rights, into the death of Naresh was also published. The said report states that the representatives of the Peoples' Union for Democratic Rights met the SDM, Vipul Mittra who told them that he would intimate them his findings; but subsequently when they contacted him it was told that it was a sensitive report and it can be made public only by the Lt. Governor. As such the instant writ petitions were moved before this Court praying amongst others the issuance of a writ for directions directing the respondents to

pay Kamlesh Kumari exemplary damages for the death of her son, Naresh.

5. On June 13, 1988, this Court directed to implead the Medical Superintendent, Ram Manohar Lohia Hospital, New Delhi as respondent 4 and also directed the Medical Superintendent to keep the record relating to Naresh, son of Kamlesh Kumari in a sealed cover and deposit the same with the Registrar of this Court within two weeks from the date of the order. By order dated August 22, 1988 the respondents were given two weeks time to file counter-affidavit and one week's time thereafter was given to the petitioners to file rejoinder.

6. Kanwaljit Deol, Deputy Commissioner of Police, Headquarters (II), Delhi on behalf of Commissioner of Police affirmed an affidavit in counter wherein it has been stated that:

“On the basis of the aforesaid complaint ACP/Patel Nagar got registered case FIR No. 143 dated November 24, 1987 under Section 308/34 IPC, P.S. Anand Parbat, New Delhi and entrusted investigation to Inspector, Vigilance, Central District, who arrested accused Shambu Dayal, son of Puran Chand on November 24, 1987. On November 26, 1987 Naresh expired in Ram Manohar Lohia Hospital and post-mortem was got conducted. The autopsy doctor opined that injuries were ante-mortem caused by blunt force impact/possible injuries were not sufficient to cause death. Death was due to puenuonitis as diagnosed clinically. Offence was changed to Section 304/34 IPC.”

7. It has also been stated therein that Maya Devi residing in one room adjacent to room of Kamlesh Kumari for 6-7 months, the landlords did not issue any rent receipt. It was also stated that:

“.....On November 13, 1987 the landlord forcibly got vacated the room in possession of Maya Devi with the connivance of local police which is evident from the DD entry made by ASI, Kishan Lal who visited the spot on the information of quarrel between Maya Devi and landlords' men.”

It has further been stated that on November 14, 1987, Shambu Dayal got registered a false case under Section 448 IPC to get the above objective and the local police arrested Smt. Kamlesh Kumari the same day. She was not admitted to bail despite approach by her relatives. The SHO himself took part in the beatings and the minor child (Naresh) of Smt. Kamlesh was also not spared, and was thrown away while he clung to feet of his mother, while she was being beaten mercilessly. Naresh sustained severe injury in his left leg and could not be attended by the doctors in absence of his parents. On November 16, 1987 only Naresh was attended by his mother after release from jail and by then the child had suffered from old ailments. She took him to RML Hospital on the advice of the local doctors. The injuries inflicted to Naresh on November 14, 1987 caused fever and pneumonitis and finally resulted in his death. Later on

the nature of injury on left leg of the child was opined to be grievous one.

8. The relevant portion of the report dated December 5, 1987 submitted by Puran Singh, Inspector, Crime Branch, Delhi is quoted hereunder:

“So far it seems that there is a high level conspiracy in getting the rooms of tenants got vacated by the landlord if the accused is bailed out, it will be difficult to find out the truth. Smt. Shobha and the doctor are already under pressure. As the local police is involved in all this episode so bailing out the accused will definitely affect the fate of the case. The accused should not be bailed out as it is clear case u/s 302/120-B IPC. The details of DD entries mentioned in the bail application itself show the conspiracy or connivance of the local police with the accused. Therefore the bail is opposed strongly.”

9. The landlord, Shambu Dayal and Puran Prakash and Lal Singh, SHO and Shyam Lal, Sub-Inspector have been impleaded as respondents by order dated September 20, 1988 in these writ petitions. They also filed counter-affidavits.

10. It is now apparent from the report dated December 5, 1987 of the Inspector of the Crime Branch, Delhi as well as the counter-affidavit of the Deputy Commissioner of Police, Delhi on behalf of the Commissioner of Police, Delhi and also from the fact that the prosecution has been launched in connection with the death of Naresh, son of Kamlesh Kumari showing that Naresh was done to death on account of the beating and assault by the agency of the sovereign power acting in violation and excess of the power vested in such agency. The mother of the child, Kamlesh Kumari, in our considered opinion, is so entitled to get compensation for the death of her son from respondent 2, Delhi Administration.

11. An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In case of assault, battery and false imprisonment the damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death. As we have held hereinbefore that the son of Kamlesh Kumari aged 9 years died due to beating and assault by the SHO, Lal Singh and as such she is entitled to get the damages for the death of her son. It is well settled now that the State is responsible for the tortious acts of its employees. Respondent 2, Delhi Administration is liable for payment of compensation to Smt. Kamlesh Kumari for the death of her son due to beating by the SHO of Anand Parbat Police Station, Shri Lal Singh.

12. It is convenient to refer in this connection the decision in *Joginder Kaur v. Punjab State*¹ wherein it has been observed that:

1 1969 ACJ 28, 32 (P&H)

“In the matter of liability of the State for the torts committed by its employees, it is now the settled law that the State is liable for tortious acts committed by its employees in the course of their employment.”

13. In *State of Rajasthan v. Vidhyawati*² it has been held that: (SCR p. 1007)

“Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such as any other employer. The immunity of the Crown in the United Kingdom, was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the Common Law immunity never operated in India.”

14. In *Peoples' Union for Democratic Rights v. Police Commissioner, Delhi Police Headquarters*³ one of the labourers who was taken to the police station for doing some work and on demand for wages was severely beaten and ultimately succumbed to the injuries. It was held that the State was liable to pay compensation and accordingly directed that the family of the deceased labourer will be paid Rs 75,000 as compensation.

15. On a conspectus of these decisions we deem it just and proper to direct the Delhi Administration, respondent 2 to pay compensation to Kamlesh Kumari, mother of the deceased, Naresh a sum of Rs 75,000 within a period of four weeks from the date of this judgment. The Delhi Administration may take appropriate steps for recovery of the amount paid as compensation or part thereof from the officers who will be found responsible, if they are so advised. As the police officers are not parties before us, we state that any observation made by us in justification of this order shall not have any bearing in any proceedings specially criminal prosecution pending against the police officials in connection with the death of Naresh. The writ petitions are disposed of accordingly.

² 1962 Supp (2) SCR 989, 1007: AIR 1962 SC 933

³ (1989) 4 SCC 730

which has to follow from the rule which holds the field. In the present case, it being the Punjab Rules under which the allotment was made, we are not in a position to agree with Shri Bhandare, despite his forceful submission, that the appellants may not be asked to pay interest, despite there having been no offer of delivery of possession of fully developed plots. a

9. We, therefore, hold that the interest in the present and similar cases had become due from 17-10-1980. We understand from Shri Bhandare that most of the members of the appellant-Association had paid the instalments with interest as per the notice of Respondent 2. According to us, as interest became chargeable from 17-10-1980, it would be open to the members of the Association to claim refund if they had paid interest, as claimed in the notices issued by Respondent 2. b

10. We do not propose to leave the matter at this. The allotments having been made about two decades ago, there can be no justification in not fully developing the plots even by 1992. The statement in IA No. 2 of 1992 that the sector is “almost fully developed” and that “temporary disposal has been completed” do speak about lack of proper interest and attention on the part of the respondents. In this connection we would state that a statement had been made on behalf of the respondents before this Court on 14-1-1985 that possession of the developed plots would be given to the appellants within a period of six months, and so such a direction was given. Shri Bhandare states that direction is yet to be complied with in letter and spirit. It is this complaint which has given rise to Contempt Petition No. 22 of 1989. On the facts and circumstances of the case, we do not propose to pursue the contempt application and would direct the respondents once again to develop the sector fully, and not, “almost fully”. This would be done within a period of six months, failing which the respondents would not only be liable for contempt but the allottees would be exonerated from the liability to pay any interest whatsoever. c
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11. The appeal is disposed of accordingly, without any order as to costs.

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(1996) 1 Supreme Court Cases 490 f

(BEFORE KULDIP SINGH AND S. SAGHIR AHMAD, JJ.)

BODHISATTWA GAUTAM Petitioner;

Versus

SUBHRA CHAKRABORTY (Ms) Respondent. g

SLP (Crl.) No. 2675 of 1995[†], decided on December 15, 1995

A. Penal Code, 1860 — S. 376 — Compensation — Award of interim compensation during pendency of the proceedings under — Court has jurisdiction to award interim compensation to victim — Complaint under Ss. 312/420/493/496/498-A IPC filed by respondent-victim against appellant for h

[†] From the Judgment and Order dated 12-5-1995 of the Gauhati High Court in Crl R No 2(K) of 1995

a developing sexual relationship with her on false assurance of marriage and later secretly marrying her before God by putting vermilion on her forehead but after having impregnated her twice, compelling her to undergo abortion on both the occasions and ultimately deserting her — Appellant's petition under S. 482 CrPC for quashing the complaint dismissed by High Court — While dismissing the SLP preferred by appellant, held, Supreme Court has jurisdiction to pass order compelling the accused to pay maintenance to the victim during pendency of the criminal case — Accordingly, on being prima facie satisfied about the allegations, appellant's plea that his service having been terminated he may not be burdened with the liability to pay any maintenance, rejected and appellant b directed to pay Rs 1000 per month as interim compensation to respondent during pendency of the criminal case — Constitution of India, Arts. 136, 32, 226, 142 and 21

B. Constitution of India — Art. 21 — Right to life — Dignity of woman — Rape — Held, violative of right to life which includes right to live with human dignity — Penal Code, 1860, S. 376

c C. Penal Code, 1860 — S. 376 — Rape — It is a crime against the entire society — Plight of the rape victims in the present legal system despite making the rule of corroboration of prosecutrix not always necessary and introduction of S. 114-A in Evidence Act highlighted and reform suggested

d D. Constitution of India — Art. 32 — Jurisdiction — Private parties — Award of compensation against — Court can enforce Fundamental Rights even against private bodies or individuals and also award compensation for violation of Fundamental Rights — Court can exercise its jurisdiction suo motu or on the basis of PIL in absence of personal approach by the victim

e The respondent lodged a complaint against the appellant which was registered under Sections 312/420/493/496/498-A IPC. The complaint revealed that there was initially a period of romance between the parties during which the appellant used to visit the house of respondent and on one occasion he told her that he was in love with her and ultimately succeeded, on the basis of his assurances to marry her, in developing sexual relationship with her with the tragic result that the respondent became pregnant. While in that state, she persuaded the appellant to marry her, but he deferred the proposal on the plea that he had to take his parents' permission. He, however, agreed to marry her secretly. Consequently, the appellant took her before the God he worshipped and put vermilion on her forehead and accepted her as his lawful wife. In spite of the secret marriage, he, through his insistence, succeeded in motivating her for an abortion which took place in a clinic. The respondent became pregnant a second time and at the instance of the appellant she had to undergo abortion again in a nursing home where the appellant signed the consent paper by deliberately mentioning a false name. Ultimately the appellant deserted her. The appellant filed a petition under Section 482 CrPC for quashing the complaint which was dismissed by the High Court. The appellant thereupon approached the Supreme Court by way of SLP. The Supreme Court while dismissing the SLP further took suo motu notice of the facts of the case as narrated in the complaint and issued notice to the appellant as to why he should not be asked to pay reasonable maintenance per month to the respondent during pendency of the prosecution proceedings against him. The appellant put up appearance and filed an affidavit denying the allegations against him and stating that his service having since been terminated and he thus being unemployed no question of burdening him with the liability to pay maintenance could arise. In the circumstances question before the Court was whether h any further order could be passed compelling the appellant to pay maintenance to the

respondent during the pendency of the criminal case for which the show-cause notice had been issued to him? Disposing of the appeal of the accused

Held :

(1) When the court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the court the right to award interim compensation which should also be provided in the scheme for rape victims to be evolved by the Union of India pursuant to directions of the Supreme Court in *Delhi Domestic Working Women's Forum case*. On the basis of the principles set out in that decision the jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the courts trying the offences of rape which, is an offence against basic human rights as also the fundamental right of personal liberty and life. Besides, the Supreme Court has the inherent jurisdiction to pass any order it considers fit and proper in the interest of justice or to do complete justice between the parties. (Paras 18 and 19)

Delhi Domestic Working Women's Forum v. Union of India, (1995) 1 SCC 14 : 1995 SCC (Cri) 7, followed

On being prima facie satisfied about the allegations made in the complaint, the matter is disposed of by providing that the appellant shall pay to the respondent a sum of Rs 1000 every month as interim compensation during pendency of the criminal case against him. He shall also be liable to pay arrears of compensation at the same rate from the date on which the complaint was filed till the date of the present decision. However, whatever has been said in this judgment shall not, in any way, affect or prejudice the Magistrate from deciding the complaint on merits on the basis of the evidence as may be tendered before it and in accordance with law.

(Para 20)

(2) A woman, in our country, belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, under the Constitution, enjoy equal status. Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. They are mother, daughter, sister and wife and not playthings for centre spreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by Nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world. (Para 9)

Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will-power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the fundamental rights, namely, the Right to Life contained in Article 21. "Right to Life" does not merely mean animal existence but means something more, namely, the right to live with human dignity. Right to Life would, therefore, include all those aspects of life which go to make a life meaningful, complete and worth living.

(Paras 10 and 8)

Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608 . 1981 SCC (Cri) 212 : AIR 1981 SC 746; *State of Maharashtra v Chandrabhan Tale*,

a (1983) 3 SCC 387 . 1983 SCC (Cri) 667 : 1983 SCC (L&S) 391 : AIR 1983 SC 803, *Olga Tellis v Bombay Municipal Corpn* , (1985) 3 SCC 545 . AIR 1986 SC 180, *Delhi Transport Corpn v DTC Mazdoor Congress*, 1991 Supp (1) SCC 600 1991 SCC (L&S) 1213 AIR 1991 SC 101, *relied on*

b (3) In spite of the decision of the Supreme Court that (depending upon the circumstances of the case) corroboration of the prosecutrix was not necessary, the cases continued to end in acquittal on account of mishandling of the crime by the police and the invocation of the theory of 'consent' by the courts who tried the offence of rape To overcome this difficulty, the legislature introduced Section 114-A in the Evidence Act. The situation, however, has hardly improved. The fear has to be allayed from the minds of women so that if and when this crime is committed, the victim may promptly report the matter to the police and on a charge-sheet being submitted, the trial may proceed speedily without causing any embarrassment to the prosecutrix who may come in the witness-box without fear psychosis.

(Paras 15 and 16)

c Sir Matthew Hale: "*Historia Placitorum Coronae*" or, in other words, "*History of the Pleas of the Crown*", *referred to*

State of H P. v. Raghubir Singh, (1993) 2 SCC 622 . 1993 SCC (Cri) 674; *State of Karnataka v Mahabaleshwar Gourya Naik*, 1992 Supp (3) SCC 179 . 1993 SCC (Cri) 180 : AIR 1992 SC 2043, *relied on*

d (4) The Supreme Court, as the highest Court of the country, has a variety of jurisdiction. Under Article 32 of the Constitution, it has the jurisdiction to enforce the fundamental rights by issuing writs. Fundamental rights can be enforced even against private bodies and individuals. Even the right to approach the Supreme Court for the enforcement of the fundamental rights under Article 32 itself is a fundamental right. The jurisdiction enjoyed by the Supreme Court under Article 32 is very wide as the Supreme Court, while considering a petition for the enforcement of any of the fundamental rights, can declare an Act to be ultra vires or beyond the competence of the legislature and has also the power to award compensation for the violation of the fundamental rights For the exercise of this jurisdiction, it is not necessary that the person who is the victim of violation of his fundamental right should personally approach the court as the court can itself take cognizance of the matter and proceed suo motu or on a petition of any public-spirited individual. The Supreme Court through its various decisions, has already given new dimensions, meaning and purpose to many of the fundamental rights especially the Right to Freedom and Liberty and Right to Life. The Directive Principles of State Policy have also been raised by the Supreme Court from their static and unenforceable concept to a level as high as that of the fundamental rights.

(Paras 6 and 7)

Rudul Sah v State of Bihar, (1983) 4 SCC 141 . 1983 SCC (Cri) 798 AIR 1983 SC 1086; *Peoples' Union for Democratic Rights v. Police Commr, Delhi Police HQs* , (1989) 4 SCC 730 . 1990 SCC (Cri) 75, *relied on*

[Ed. : The present case came by way of an SLP under Article 136]

R-M/15490/CR

g Advocates who appeared in this case :
Avijit Bhattacharjee, Advocate, for the Petitioner.

Chronological list of cases cited

in para(s)

- h 1. (1995) 1 SCC 14 1995 SCC (Cri) 7, *Delhi Domestic Working Women's Forum v Union of India* 17
2. (1993) 2 SCC 622 : 1993 SCC (Cri) 674, *State of H P. v Raghubir Singh* 13
3. 1992 Supp (3) SCC 179 1993 SCC (Cri) 180 : AIR 1992 SC 2043, *State of Karnataka v. Mahabaleshwar Gourya Naik* 14

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4.	1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213 : AIR 1991 SC 101, <i>Delhi Transport Corpn. v. DTC Mazdoor Congress</i>	8
5.	(1989) 4 SCC 730 : 1990 SCC (Cri) 75, <i>Peoples' Union for Democratic Rights v Police Commr, Delhi Police HQs.</i>	6 a
6.	(1985) 3 SCC 545 . AIR 1986 SC 180, <i>Olga Tellis v. Bombay Municipal Corpn</i>	8
7.	(1983) 4 SCC 141 : 1983 SCC (Cri) 798 AIR 1983 SC 1086, <i>Rudul Sah v State of Bihar</i>	6
8.	(1983) 3 SCC 387 : 1983 SCC (Cri) 667 : 1983 SCC (L&S) 391 AIR 1983 SC 803, <i>State of Maharashtra v. Chandrabhan Tale</i>	8 b
9.	(1981) 1 SCC 608 1981 SCC (Cri) 212 AIR 1981 SC 746, <i>Francis Coralie Mullin v. Administrator, Union Territory of Delhu</i>	8

The Judgment of the Court was delivered by

S. SAGHIR AHMAD, J.— Subhra Chakraborty (alias Kalpana) who was a student of the Baptist College, Kohima where the opposite party, Shri Bodhisattwa Gautam was a lecturer, filed a complaint in the Court of the Judicial Magistrate, First Class, Kohima, Nagaland, alleging, inter alia, as under:

“3. That, the complainant begs to state that in April 1989 the accused person entered into Baptist College, Kohima as a Lecturer thereof and the complainant was a student of the said College at that relevant period.

4. That, the accused person was in said service in Kohima from April 1989 till he resigned the service on 27-1-1995 and was residing in a rented house in Kenezou Valley, Kohima owned by Dr Zakiebatsu Angam.

5. That, on 6-2-1995 the accused person left for Silchar and is presently residing in his uncle's (Shri Amiya Kanta Chakraborty) house in Premtala, Silchar-4, District Cachar, in the State of Assam and assumed his service as lecturer in Cachar College (Commerce Department) Silchar-4 (Assam).

6. That, on 10-6-1989 for the first time the accused visited the complainant's residence in Kohima and thereafter often he used to visit complainant's residence. As a teacher he was respected by the complainant as well as all the family members including her parents. In course of such visits once in the month of November 1989 the accused voluntarily told the complainant that he was already in her love. Thus there developed a love affair between them since 1989.

7. That, the complainant most humbly states further that with mala fide intention to practise deception on the complainant, the accused gave false assurance of marriage to the innocent complainant and thereby the accused dishonestly procured sexual intercourse with the complainant. The accused often used to induce the complainant to have biological contact with him, but whenever he was approached by the complainant to complete the marriage ceremony, the accused very tactfully used to defer the marriage, sometimes saying that he was waiting for his

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parents' formal consent and sometimes saying to cooperate with him till he got a government service.

a 8. That, in course of continuation of the affair between the complainant and the accused, the complainant got pregnant twice, once in the month of September 1993 and secondly in the month of April 1994 out of her cohabitation with the accused person.

b 9. That, the complainant being worried about her said pregnancy created pressure upon the accused to marry her immediately and to save her from being ruined, but the accused on the plea of his parents' permission went on deferring the marriage. As a result there was a quarrel between the complainant and the accused, whereafter the accused lastly opined for secret marriage to avoid social gathering as he was waiting for his parents' permission. The complainant being pregnant was placed in a very awkward position, as such, agreed to the said secret marriage. Accordingly the accused on 20-9-1993, married the complainant in front of the God he worships in his residence in Kenezou Valley, Kohima by putting vermilion (sindur) on the complainant's forehead and accepted the complainant as his lawful wife and thus the complainant was consorted and consoled. But the complainant faced further corporal punishment as the accused kept on insisting the complainant to refrain from giving birth to the baby and was pressurising her to undergo operation/abortion despite her refusal for the same. The accused with fraudulent intention to deceive the complainant proposed the said abortion on the plea that birth of the baby would be a barrier to convince his parents to accept the complainant as their daughter-in-law and such event would lead the complainant to a path of unhappiness. The complainant being an innocent lady failed to understand the accused's wicked and mischievous plan whereby the accused succeeded and dishonestly motivated the complainant for abortion and compelled the complainant to undergo operation in the Putonou Clinic, Kohima and abortion in October 1993.

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f 10. That, the said ceremony of putting sindur (vermilion) on the complainant's forehead by the accused in front of God made the complainant believe that she was lawfully married wife of the accused and with such belief she in good faith completely submitted herself to the accused as an ideal wife and never disbelieved the accused. The complainant even did not have any doubt as to why the accused insisted her to keep their marriage secret. The complainant was forced to undergo abortion even second time in the month of April 1994 in the CAREWELL NURSING HOME at Dimapur with the pretext that if the complainant gave birth to any child before the accused could convince his parents she would never be accepted by Bodhisattwa's parents and relatives. Further their marriage being a secret one, the developed stage of the complainant would hamper the dignity of her own parents and other paternal relations irreparably and thus taking the privilege of
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h complainant's innocence the accused has exploited the complainant in a

very pre-planned way. The accused is so wicked that he even furnished a false name in the said Nursing Home and signed the consent Register/Paper as BIKASH GAUTAM concealing his real name BODHISATTWA GAUTAM which fact was unknown to the innocent complainant until recently and came to know only in the second week of February 1995 when the complainant went to obtain a certified copy of the abortion consent paper of the accused. a

A copy of said consent paper signed by the accused is annexed hereto and marked as Annexure 1. b

11. That, believing herself to be the lawful wife of the accused, the complainant like a dumb person shouldered all those hardships since 1989. On hearing the message that the accused would go to Silchar, the complainant on 4-2-1995 went down to Dimapur and visited the accused to take the complainant permanently with the accused to Silchar as he was going to Silchar to join as a Lecturer in a government college named CACHAR COLLEGE which both of them actually waited for. But the wicked accused forgetting the consequences of all his fraudulent activities in total disregard of their marriage and their relationship refused to accept the complainant as his wife and abandoned the complainant asking her to forget all her dream. Be it further submitted that the accused's friends namely (1) Shri Subrata Datta, (2) Shri Ranadhir Deb, (3) Shri Prasanta Dey and (4) Shri Pradeep Paul of Dimapur tried a lot to convince the accused not to abandon the complainant in such a cruel manner, as he had already married the complainant and cohabited years together, but all efforts ended in futility as the accused in reply said that the putting of vermilion on complainant's forehead was a pretext of marriage to overcome the past situations and not at all a complete marriage and the accused repeatedly said that he had no option, but to abandon the complainant as his parents are not agreeable to accept the complainant as their daughter-in-law. c
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12. That, the accused not only induced the complainant and cohabited with her, giving her a false assurance of marriage but also fraudulently went through certain marriage ceremony with knowledge that it was not a valid marriage and thereby dishonestly made the complainant to believe that she was a lawfully married wife of the accused. The accused even committed the offence of miscarriage by compelling the complainant to undergo abortion twice against her free will. The way the accused exploited the complainant and abandoned her is nothing but an act of grave cruelty as the same has caused serious injury and danger to the complainant's health both mentally and physically. As such, the accused abovenamed has committed criminal offences punishable under Sections 312/420/493/496/498-A of Indian Penal Code." f
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2. This complaint was registered as Criminal Case No. 1 of 1995 under Sections 312/420/493/496/498-A, Indian Penal Code and Bodhisattwa h

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Gautam was summoned but he, in the meantime, filed a petition in the Gauhati High Court under Section 482 of the Code of Criminal Procedure for quashing of the complaint and the proceedings initiated on its basis, on the ground that the allegations, taken at their face value, do not make out any case against him. But the High Court by its judgment and order dated 12-5-1995, dismissed the petition compelling Bodhisattwa Gautam to approach this Court by way of special leave petition. Special Leave Petition (Criminal) No. 2675 of 1995 was filed and was dismissed by us by our order dated 20-10-1995, in which we stated as under:

“We see no ground to interfere with the impugned judgment of the High Court. We dismiss the special leave petition. Having done so, we further take suo motu notice to the facts of this case as narrated in the complaint which has been read before us. We issue notice to the petitioner as to why he should not be asked to pay reasonable maintenance per month to the respondent during the pendency of the prosecution proceedings against him. Mr A. Bhattacharjee accepts notice.

List it on 1-12-1995.

Petitioner in person be present in Court on the next date of hearing. Notice be also sent to the respondent along with the copy of this order.”

3. Pursuant to the above order, Shri Bodhisattwa Gautam put in an appearance and filed an affidavit in reply in which he denied the allegation made against him in the complaint and stated that the complaint was filed only to harass and humiliate him and, therefore, there was no occasion to direct him to pay any amount as maintenance to the respondent. He also indicated that although he had taken up service in another college, namely, Cachar College, his services had since been terminated. Para 4 of his affidavit in which these facts have been stated is reproduced below:

“4. That I say that I am not in any employment now and I am an unemployed person after my service as a Lecturer in Cachar College, Silchar, has been terminated with effect from 16-7-1995 by a resolution of the Governing Body of the said College passed in a meeting held on 14-9-1995. A true copy of the proceedings of the said meeting of the Governing Body of Cachar College, Silchar held on 14-9-1995 is annexed hereto as *Annexure A-1*.

The relevant Resolution 5(A) of the said meeting of the Governing Body reads as follows:

Resolution No. 5(A)

The Principal placed the leave petitions of Shri B. Gautam, Lecturer, Department of Commerce, adding that Shri Gautam resumed his duties in the College on the reopening day of the College after summer vacation, i.e., on 15-7-1995 and at first he sought leave for twenty-one days and for three years at a stretch.

The Principal also stated that Shri B. Gautam was appointed against a lien vacancy for one year vice Dr A. Mazumdar, the one-year lien having expired on 9-9-1995. a

The matter was thoroughly discussed and it was unanimously resolved that since Shri B. Gautam's term of appointment against lien vacancy had expired on 9-9-1995 and his service was not confirmed, (he did not complete even one full year's service), he cannot be granted three years' leave at a stretch as prayed for by him. b

Also resolved that as Shri B. Gautam has been absent from the College from 16-7-1995 and also the term of his appointment expired on 9-9-1995, Shri Gautam's service as lecturer in the Department of Commerce in Cachar College, Silchar be treated as having been terminated w.e.f. 16-7-1995. c

The Principal be requested to forward the above resolution to the DPI Assam, for his kind approval of the termination of the services of Shri B. Gautam w.e.f. 16-7-1995. c

This resolution along with other resolutions passed in the said meeting held on 14-9-1995 were placed before the meeting of the Governing Body held subsequently on 11-11-1995 for confirmation. A true copy of the notice of meeting to be held on 11-11-1995 containing the agenda of the meeting is annexed hereto as *Annexure A-2*. d

Now I have been reliably informed that in the meeting of the Governing Body on 11-11-1995, the aforesaid resolution terminating my service has been confirmed. I further state that I have not received any payment towards my salary since July 1995 and after the termination of my service with effect from 16-7-1995 no question of my receiving any salary arises. e

In the circumstances I respectfully submit that no question of burdening me with the liability of paying maintenance to the respondent can arise."

4. The facts set out in the complaint lodged against Bodhisattwa Gautam indicate that there was initially a period of romance during which Bodhisattwa Gautam used to visit the house of Subhra Chakraborty and on one occasion, he told her that he was in love with her and ultimately succeeded, on the basis of his assurances to marry her, in developing sexual relationship with her with the tragic result that Subhra Chakraborty became pregnant. While in that state, she persuaded Gautam to marry her, but he deferred the proposal on the plea that he had to take his parents' permission. He, however, agreed to marry her secretly. Consequently, on 20-9-1993, Bodhisattwa Gautam took her before the God he worshipped and put vermilion on her forehead and accepted her as his lawful wife. In spite of the secret marriage, he, through his insistence, succeeded in motivating her for an abortion which took place in a clinic at Kohima in October 1993. Subhra Chakraborty became pregnant second time and at the instance of f
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BODHISATTWA GAUTAM v SUBHRA CHAKRABORTY (*Saghir Ahmad, J.*) 499

Bodhisattwa Gautam she had to undergo abortion again in April 1994 in the Carewell Nursing Home at Dimapur where Gautam signed the consent paper and deliberately mentioned himself as Bikash Gautam.

a 5. The Gauhati High Court, as already pointed out above, refused to quash the proceedings in Criminal Case No. 1 of 1995 pending in the Court of the Judicial Magistrate, First Class, Kohima and this Court has upheld the judgment of the Gauhati High Court. The question is whether any further order can be passed in the case and Gautam can be compelled to pay maintenance to Subhra Chakraborty during the pendency of the Criminal Case for which show-cause notice has been issued to him?

b 6. This Court, as the highest Court of the country, has a variety of jurisdiction. Under Article 32 of the Constitution, it has the jurisdiction to enforce the Fundamental Rights guaranteed by the Constitution by issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. Fundamental Rights can be enforced even against private bodies and individuals. Even the right to approach the Supreme Court for the enforcement of the Fundamental Rights under Article 32 itself is a Fundamental Right. The jurisdiction enjoyed by this Court under Article 32 is very wide as this Court, while considering a petition for the enforcement of any of the Fundamental Rights guaranteed in Part III of the Constitution, can declare an Act to be ultra vires or beyond the competence of the legislature and has also the power to award compensation for the violation of the Fundamental Rights (See: *Rudul Sah v. State of Bihar*¹; *Peoples' Union for Democratic Rights v. Police Commr., Delhi Police HQs.*²)

c 7. For the exercise of this jurisdiction, it is not necessary that the person who is the victim of violation of his fundamental right should personally approach the court as the court can itself take cognizance of the matter and proceed suo motu or on a petition of any public-spirited individual. This Court through its various decisions, has already given new dimensions, meaning and purpose to many of the fundamental rights especially the Right to Freedom and Liberty and Right to Life. The Directive Principles of State Policy have also been raised by this Court from their static and unenforceable concept to a level as high as that of the fundamental rights.

d 8. This Court has, innumerable times, declared that "Right to Life" does not merely mean animal existence but means something more, namely, the right to live with human dignity. (See: *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*³; *State of Maharashtra v. Chandrabhan Tale*⁴; *Olga Tellis v. Bombay Municipal Corpn.*⁵ and *Delhi Transport Corpn. v. DTC Mazdoor Congress*⁶. Right to Life would,

1 (1983) 4 SCC 141 1983 SCC (Cri) 798 : AIR 1983 SC 1086

2 (1989) 4 SCC 730 · 1990 SCC (Cri) 75

3 (1981) 1 SCC 608 : 1981 SCC (Cri) 212 : AIR 1981 SC 746

4 (1983) 3 SCC 387 · 1983 SCC (Cri) 667 1983 SCC (L&S) 391 : AIR 1983 SC 803

5 (1985) 3 SCC 545 AIR 1986 SC 180

6 1991 Supp (1) SCC 600 · 1991 SCC (L&S) 1213 · AIR 1991 SC 101

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therefore, include all those aspects of life which go to make a life meaningful, complete and worth living.

9. Unfortunately, a woman, in our country, belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoy equal status. Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. They are mother, daughter, sister and wife and not playthings for centre spreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by Nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world.

10. Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will-power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects.

11. It is said that present-day laws relating to rape have their origin in 1736 in Britain, when Sir Matthew Hale in his *Historia Placitorum Coronae* or, in other words, "*History of the Pleas of the Crown*" presented common law rape doctrines which were immediately noticed to be hostile to the interests of women as one of the requirements was to inform the jury during trial that rape charges were easy to bring but difficult to defend. Consequently, in a tide of law reforms, this requirement was removed. The rule of corroboration which was much stricter in a trial for the offence of rape than for other offences was also largely removed from law.

12. In India also the rule of "Corroboration of the Prosecutrix" has undergone a change through statutory amendments as also through decisions of this Court.

13. In *State of H.P. v. Raghbir Singh*⁷, this Court observed as under: (SCC p. 626, para 5)

"There is no legal compulsion to look for corroboration of the evidence of the prosecutrix before recording an order of conviction.

7 (1993) 2 SCC 622 1993 SCC (Cri) 674

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a 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. In the present case the evidence of the prosecutrix is found to be reliable and trustworthy. No corroboration was required to be looked for, though enough was available on the record. The medical evidence provided sufficient corroboration.”

b **14.** In *State of Karnataka v. Mahabaleshwar Gourya Naik*⁸, the Court went to the extent of laying down that even if the victim of rape is not available to give evidence on account of her having committed suicide, the prosecution case cannot be thrown away overboard. In such a case, the non-availability of the victim will not be fatal and the court can record a conviction on the basis of the available evidence brought on record by the prosecution.

c **15.** In spite of the decision of this Court that (depending upon the circumstances of the case) corroboration of the prosecutrix was not necessary, the cases continued to end in acquittal on account of mishandling of the crime by the police and the invocation of the theory of ‘consent’ by the courts who tried the offence. To overcome this difficulty, the legislature intervened and introduced Section 114-A in the Evidence Act by Act No. 43 of 1983 reading as under:

d “114-A. *Presumption as to absence of consent in certain prosecutions for rape.*— In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.”

e **16.** This section enables a court to raise a presumption that the woman who was the victim of rape had not consented and that the offence was committed against her will. The situation, however, has hardly improved. Conviction rates for rape are still lower than any other major crime and the women continue to argue even today that in rape cases the victimised women, rather than the rapists, were put on trial. A large number of women still fail to report rapes to the police because they fear embarrassing and insensitive treatment by the doctors, the law enforcement personnel and/or the cross-examining defence attorneys. The fear has to be allayed from the minds of women so that if and when this crime is committed, the victim may promptly report the matter to the police and on a charge-sheet being submitted, the trial may proceed speedily without causing any embarrassment to the prosecutrix who may come in the witness-box without fear psychosis.

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17. We may, at this stage, refer to a decision of this Court in *Delhi Domestic Working Women's Forum v. Union of India*⁹, in which this Court observed as under: (SCC pp. 18-19, para 13)

"It is rather unfortunate that in recent times, there has been an increase in violence against women causing serious concern. Rape does indeed pose a series of problems for the criminal justice system. There are cries for harshest penalties, but often times such crimes eclipse the real plight of the victim. Rape is an experience which shakes the foundations of the lives of the victims. For many, its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour and values and generating endless fear. In addition to the trauma of the rape itself, victims have had to suffer further agony during legal proceedings."

This Court further observed as under: (SCC Headnote pp. 14 and 15)

"The defects in the present system are: Firstly, complaints are handled roughly and are not given such attention as is warranted. The victims, more often than not, are humiliated by the police. The victims have invariably found rape trials a traumatic experience. The experience of giving evidence in court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than the rape itself. Undoubtedly, the court proceedings added to and prolonged the psychological stress they had had to suffer as a result of the rape itself."

In this background, it is necessary to indicate the broad parameters in assisting the victims of rape.

(1) The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well-acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counselling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represent her till the end of the case.

(2) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

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a (3) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

(4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

b (5) The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained.

(6) In all rape trials anonymity of the victims must be maintained, as far as necessary.

c (7) It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatised to continue in employment.

d (8) Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape.

e In the present situation, the third respondent will have to evolve such scheme as to wipe out the tears of such unfortunate victims. Such a scheme shall be prepared within six months from the date of this judgment. Thereupon, the Union of India, will examine the same and shall take necessary steps for the implementation of the scheme at the earliest.”

f **18.** This decision recognises the right of the victim to compensation by providing that it shall be awarded by the court on conviction of the offender subject to the finalisation of the Scheme by the Central Government. 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. On the basis of principles set out in the aforesaid decision in *Delhi Domestic*
g *Working Women’s Forum*⁹, the jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the courts trying the offences of rape which, as pointed out above is an offence against basic human rights as also the Fundamental Right of Personal Liberty and Life.

h **19.** Apart from the above, this Court has the inherent jurisdiction to pass any order it considers fit and proper in the interest of justice or to do complete justice between the parties.

20. Having regard to the facts and circumstances of the present case in which there is a serious allegation that Bodhisattwa Gautam had married Subhra Chakraborty before the God he worshipped by putting vermilion on her forehead and accepting her as his wife and also having impregnated her twice, resulting in abortion on both the occasions, we, on being prima facie satisfied, dispose of this matter by providing that Bodhisattwa Gautam shall pay to Subhra Chakraborty a sum of Rs 1000 every month as interim compensation during the pendency of Criminal Case No. 1 of 1995 in the Court of the Judicial Magistrate, First Class, Kohima, Nagaland. He shall also be liable to pay arrears of compensation at the same rate from the date on which the complaint was filed till this date. We may further observe that whatever has been said in this judgment shall not, in any way, affect or prejudice the Magistrate from deciding the complaint on merits on the basis of the evidence as may be tendered before it and in accordance with law.

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(BEFORE K. RAMASWAMY AND B.L. HANSARIA, JJ.)

UNION OF INDIA AND ANOTHER . . . Appellants;

Versus

MURUGAN TALKIES . . . Respondent.

Civil Appeal No. 9407 of 1995[†], decided on December 12, 1995

Labour Law — Cine Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981 — Ss. 24 and 25 — Theatre owners/licensees challenging before the High Court the validity of Ss. 24 and 25 and the Notification No. 35016 dated 30-4-1986 issued by Government of India, Ministry of Labour and obtaining stay of operation of the notification — High Court upholding the impugned sections but granting relief to them to pay their share of contribution towards provident fund and to deduct the employees' contribution only w.e.f. the date of judgment — Propriety — Relief granted in respect of the employees' share of contribution upheld but the relief granted to the theatre owners and licensees, held, improper — Hence, such theatre owners/licensees directed to deposit their share of contribution towards provident fund from the date they had filed the writ petitions in the High Court — Employees' Provident Funds and Miscellaneous Provisions Act, 1952, Ss. 5(1) and 6 — Constitution of India, Art. 142 — Relief (Paras 4 and 5)

Distt. Exhibitors' Assn. v. Union of India, (1991) 3 SCC 119 . 1991 SCC (L&S) 822 . (1991) 17 ATC 272, *relied on*

Appeal partly allowed H-M/15549/CL

Advocates who appeared in this case :

T.C. Sharma and C.V.S. Rao, Advocates, for the Appellants;
K.M. Vijayan and K.V. Mohan, Advocates, for the Respondent.

[†] From the Judgment and Order dated 24-11-1994 of the Madras High Court in WP No 12533 of 1986

children as per the order dated 19-1-1993 and the learned 2nd Additional Sessions Judge also committed no error in dismissing the revision petition
 a filed by the respondent. The High Court, on the other hand, fell in complete error in holding that the right to claim maintenance of the children under Section 125 CrPC was taken away and superseded by Section 3(1)(b) of the 1986 Act and that maintenance was payable to the minor children of Muslim parents only for a period of two years from the date of the birth of the child concerned notwithstanding the provisions of Section 125 CrPC. The order of
 b the High Court cannot, therefore, be sustained. It is accordingly set aside. The order of the trial court and the revisional court is restored. This appeal succeeds and is allowed but without any orders as to cost.

13. The arrears of maintenance in respect of the children shall be paid by the respondent to the appellant-mother, who filed the petition on their behalf, within one year from the date of this order in four equal instalments, payable
 c quarterly. The first instalment shall be paid on or before 15-8-1997 and thereafter every three months. Any single default in the payment of the arrears will entitle the appellant to recover the entire balance amount at once with 12% interest through the trial court in the manner prescribed by the Code. The respondent shall continue to pay maintenance as directed by the
 d trial court, till the children attain majority or are able to maintain themselves and in the case of the daughters, till they get married.

(1997) 6 Supreme Court Cases 241

(BEFORE J.S. VERMA, C.J. AND SUJATA V. MANOHAR
 AND B.N. KIRPAL, JJ.)

e VISHAKA AND OTHERS .. Petitioners;
Versus
 STATE OF RAJASTHAN AND OTHERS .. Respondents.

f Writ Petitions (Crl.) Nos. 666-70 of 1992[†], decided on August 13, 1997
 A. Constitution of India — Arts. 14, 19 & 21 and 15(1), (3), 42, 51-A(a), (e) and 32 & 141 — Rights of working women against sexual harassment in workplaces — Held, they have rights to gender equality, to work with dignity and to a working environment safe and protected from sexual harassment or abuse — In absence of suitable legislation in this sphere, international
 g conventions and norms, so far as they are consistent with the constitutional spirit, can be relied on — Accordingly, guidelines and norms prescribed by the Supreme Court, with the assistance of Solicitor General appearing for Union of India and other counsel, for protection and enforcement of these rights of the women at their workplaces — These guidelines and norms must be strictly observed in all working places by treating them as law declared under Art. 141 — Beijing Statement of Principles of the Independence of the Judiciary in the
 h LAWASIA region (as accepted by the Chief Justices of Asia and the Pacific at

[†] Under Article 32 of the Constitution of India

Beijing in 1995), Art. 10 — Convention on the Elimination of All Forms of Discrimination against Women, Arts. 11 & 24 — CEDAW, Arts. 11, 22, 23, 24 — Protection of Human Rights Act, 1993 — Judicial activism — Legislation by judiciary a

B. Constitution of India — Art. 32 — PIL seeking gender justice for protection and enforcement of fundamental and human rights of working women — Writ of mandamus along with suitable directions can be issued by Supreme Court

C. Constitution of India — Arts. 32 and 73 & 50 — PIL — In enforcement of fundamental rights, guidelines and norms can be laid down by Supreme Court to fill up the vacuum in existing legislation — Power of Supreme Court under Art. 32 and executive power of the Union to protect and enforce the fundamental rights and meet the social evil threatening these rights — Analogy of Art. 73 — Judicial activism — Legislation by judiciary b

D. Constitution of India — Arts. 32 and 51(c), 51-A(e) & (f), 253 & Sch. VII List I Entry 14 — International conventions and norms, consistent with the spirit of the fundamental rights, can be read into those rights for interpreting them in the larger context to promote the objects of the Constitution — In the absence of domestic law on the particular aspect, these conventions and norms as ratified by India, can be relied on by the Supreme Court to formulate guidelines for enforcement of fundamental rights — International Law — International conventions and norms c

The present writ petition was filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21. It was brought as a class action by certain social activists and NGOs with the aim of assisting in finding suitable methods for realisation of the true concept of “gender equality”; and to prevent sexual harassment of working women in all workplaces through judicial process and to fill the vacuum in existing legislation. The immediate cause for the filing of the writ petition was an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. The notice of the petition was given to the State of Rajasthan and the Union of India. The Solicitor General who appeared for Union of India and other counsel who appeared before the Supreme Court rendered needed assistance to the Court to deal with the matter. Disposing of the writ petition d

Held :

Each incident of sexual harassment of woman at workplace results in violation of the fundamental rights of “Gender Equality” and the “Right to Life and Liberty”. It is a clear violation of the rights under Articles 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim’s fundamental right under Article 19(1)(g). The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. e

(Paras 3 and 14) g

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. 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 workplaces, 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 h

a implicit therein and for the formulation of guidelines to achieve this purpose. 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 the enabling power of 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.

(Paras 10, 7 and 14)

b *Minister for Immigration and Ethnic Affairs v. Teoh*, 128 Aus LR 353; *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746 : 1993 SCC (Cri) 527, *relied on*

c 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 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. By virtue of Article 73 the executive power of the Union is available till Parliament enacts legislation to expressly provide measures needed to curb the evil.

(Paras 3 and 7)

e Thus, the power of the Supreme 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 requirement as a logical concomitant of the constitutional scheme. The obligation of the Supreme Court under Article 32 for the enforcement of the 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 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.

(Paras 8 and 11)

g Some provisions in the “Convention on the Elimination of All Forms of Discrimination against Women” (Articles 11 and 24) as also the general recommendations of CEDAW in this context (Articles 11, 22, 23, 24), as ratified the Resolution on 25-6-1993 with some reservations which are not material in the present context, are of significance. At the Fourth World Conference on Women in Beijing, the Government of India has also made an 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. Therefore, reliance can be placed on the above for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in our Constitution.

(Paras 12 and 13)

In view of the above, and in 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 workplaces, guidelines and norms are hereby laid down for strict observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by the Supreme Court under Article 141 of the Constitution.

(Paras 16 and 18)

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 workplaces and that enactment of such legislation will take considerable time,

It is necessary and expedient for employers in workplaces 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 workplaces and other institutions:*

It shall be the duty of the employer or other responsible persons in workplaces 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 whereunder 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 workplace 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:

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(a) Express prohibition of sexual harassment as defined above at the workplace should be notified, published and circulated in appropriate ways.

a (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.

b (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 workplaces and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

c 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*.

d 5. *Disciplinary action:*

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

e 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.

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

g 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.

h

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. a

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 a suitable manner.

10. *Third-party harassment:*

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

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. c

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993. (Para 17)

These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. (Para 18)

R-M/18375/CR d

Advocates who appeared in this case :

F.S. Nariman, Senior Advocate (Ms Meenakshi Arora and Ms Niti Dixit, Advocates, with him) for the Petitioners;

T.R. Andhyarujina, Solicitor General (Mukul Mudgal, Ms Suvira Lal, C.V.S. Rao, K.S. Bhati and M.K. Singh, Advocates, with him) for the Respondents.

Chronological list of cases cited

on page(s)

1. (1993) 2 SCC 746 : 1993 SCC (Cri) 527, *Nilabati Behera v. State of Orissa* 251d-e e
2. 128 Aus LR 353, *Minister for Immigration and Ethnic Affairs v Teoh* 251d

The Judgment of the Court was delivered by

VERMA, C.J.— 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 against 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 workplaces through judicial process, to fill the vacuum in existing legislation. f

2. The immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. That incident is the subject-matter of a separate criminal action and no further mention of it, by us, is necessary. The incident reveals the hazards to which a g

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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.

3. Each such incident results in violation of the fundamental rights of “Gender Equality” and the “Right to Life and Liberty”. It is a clear violation of the rights under Articles 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim’s fundamental right under Article 19(1)(g) “to practise 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.

4. 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.

5. Apart from Article 32 of the Constitution of India, we may refer to some other provisions 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 grounds only of religion, race, caste, sex, place of birth or any of them.

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(1997) 6 SCC

(2) * * *

(3) Nothing in this article shall prevent the State from making any special provision for women and children.”

a

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 51-A:

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

b

(a) to abide by the Constitution and respect its ideals and institutions, ...;

(b)-(d) * * *

(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;”

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6. 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:

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Article 51:

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

(a)-(b) * * *

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

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* * *

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.”

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Seventh Schedule:

“List I — Union List

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

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7. 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 workplaces, 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

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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 the enabling power of 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 Parliament enacts legislation to expressly provide measures needed to curb the evil.

8. 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 requirement 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.

9. 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 workplaces to curb this social evil.

10. 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.

11. 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 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.” a

12. 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 a basis of equality of men and women, the same rights, in particular: b

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

* * *

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

* * *

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.” d

13. 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 workplace. e

23. Sexual harassment includes such unwelcome sexually determined behaviour as physical contacts and advances, 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. f g

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 workplace.”

The Government of India has ratified the above Resolution on 25-6-1993 with some reservations which are not material in the present context. At the h

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- Fourth World Conference on Women in Beijing, the Government of India has also made an 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.

- 14.** The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass 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 field 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 v. Teoh*¹ has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.

- 15.** In *Nilabati Behera v. State of Orissa*² 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.

- 16.** 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 workplaces, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces 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.

¹ 128 Aus LR 353
² (1993) 2 SCC 746 : 1993 SCC (Cri) 527

17. 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 workplaces and that enactment of such legislation will take considerable time,

It is necessary and expedient for employers in workplaces 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 workplaces and other institutions:*

It shall be the duty of the employer or other responsible persons in workplaces 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 whereunder 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 workplace 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 (a) Express prohibition of sexual harassment as defined above at the workplace 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.

b (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.

c (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 workplaces and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. *Criminal proceedings:*

d 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*.

e 5. *Disciplinary action:*

Where such conduct amounts to misconduct 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:*

f 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:*

g 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.

h The Complaints Committee should be headed by a woman and not less than half of its members should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such

Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the Government Department concerned of the complaints and action taken by them. a

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. b

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 a suitable manner. c

10. Third-party harassment:

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

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. e

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

18. Accordingly, we direct that the above guidelines and norms would be strictly observed in all workplaces 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. f

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2017 SCC OnLine Cal 417 : (2017) 2 KLJ (NOC) 1 : (2017) 2 Cal LJ 224 : 2017
Cri LJ 3893 : (2017) 2 E Cr N 298 : (2017) 2 RCR (Cri) 858

In the High Court of Calcutta
Criminal Appellate Jurisdiction
Appellate Side
(BEFORE JOYMALYA BAGCHI, J.)

Bijoy @ Guddu Das

v.

The State of West Bengal

C.R.A. 663 of 2016 and CRAN 4926 of 2016

Decided on March 2, 2017, [Heard on : 7.2.2017, 15.2.2017, 23.2.2017 &
2.3.2017]

For the Appellant : Mr. Asimes Goswami
Ms. Paulomi Banerjee Ms. Priyanka Dutta
For the State : Mr. Kishore Dutta, Advocate General
Mr. Saswata Gopal Mukherjee, P.P.
Mr. Ayan Bose Mr. Saryati Datta

The Judgment of the Court was delivered by

JOYMALYA BAGCHI, J.:— The appeal is directed against the judgment and order dated July 26, 2016 and July 27, 2016 passed by the Learned Additional District & Sessions Judge, 2nd Court, Krishanagar, Nadia in Sessions Trial No. II(XII) of 2015 corresponding to Sessions Case No. 04(09) of 2015 convicting the appellant for commission of offence punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012 and sentencing him to suffer rigorous imprisonment for 5 years and to pay a fine of Rs. 5,000/- in default to undergo further rigorous imprisonment for three months more has been assailed.

2. Prosecution case, as alleged, against the appellant is to the effect that on 07.09.2015 at about 6.30 P.M., the mother of the victim asked her to fetch water from the tube well of a nearby school. When she had gone to fetch water, the appellant caught the victim from the rear and dragged her behind the school building and touched her private parts. When the victim raised objection and started screaming, the appellant threatened her for dire consequences and fled away.

3. On the written complaint of the mother of the victim, Taherpur P.S. Case No. 159/15 dated 17.09.2015 under section 8 of the Protection of Children from Sexual Offences Act was registered for investigation. In conclusion of investigation charge-sheet was filed under the aforesaid provision of law. Charge was framed against the appellant and the same was read over and explained to him. He pleaded not guilty and claimed to be tried.

4. In the course of trial, the prosecution examined as many as 17 witnesses to prove its case. The defence of the appellant was one of innocence and false implication. In conclusion of trial, the trial Court convicted and sentenced the appellant, as aforesaid.

5. Ms. Banerjee, learned counsel for the appellant submits that prosecution case has not been proved beyond reasonable doubt. There is no explanation as to why the victim was sent to collect water from the tube well in a nearby school, although evidence has come on record that there is a tube well in their house. There is contradiction in the manner in which the victim was subjected to sexual assault. While

the victim and her parents deposed that the appellant touched her private parts, the medical officer, P.W.7 deposed that the victim stated that she was touched in the thigh and other witnesses deposed that the victim told them that the appellant had pulled her hand. Accordingly, she prayed for acquittal in the instant case.

6. On the other hand, Mr. Bose, learned counsel for the State, submits that the evidence on record is clear and consistent and established the ingredients of the alleged offence. Minor contradictions as to the part of the body of the victim which the appellant had touched would not erode the consistent evidence of the prosecution witnesses that the appellant took away the victim while she was collecting water from the tube well and touched her in an indecent manner. The evidence of the victim and her relations are corroborated by the independent witnesses including the doctor in that regard. Accordingly, he prayed for dismissal of the appeal.

7. P.W.1. is the victim in the instant case. She deposed that she is eleven years of age and is reading in Class VII. The incident took place on 17th September, 2015 at about 6.30/7 P.M. when she had gone to fetch water and the appellant asked her for water. After taking water, the appellant started tickling her legs and thereafter he pulled her frock. At that time her brother was also present. The appellant directed her brother to leave the place but her brother refused to do so. Then he gagged her mouth and took her behind the school and threatened her that she would be killed and thereafter touched her vagina over her undergarment. Thereafter he released her. She narrated the incident to her mother. Her mother lodged a written complaint at Taherpur P.S. She was medically treated and she was also stated the incident to the learned Magistrate.

8. In cross-examination, she stated that there was a tube well in her house. They took water from the said tube well. There is distance between the house of the appellant and her house is a 5 minute walk. Her father and that of the appellant are close friends. The good relationship turned bitter after the incident. Prior to the incident they were on visited terms. She denied that she was tutored by her parents.

9. P.W.2, is the mother of the victim. She deposed that the incident took place around 5/6 months ago at about 6/6.30 P.M. She heard the incident from her daughter. At the time her daughter and her son had gone to fetch water and were engaging in pouring water from the tap when the appellant wanted water from her daughter. When her daughter provided water, appellant drank the water and then started tickling her daughter's leg. Thereafter he put off her frock from the rear. At that time her son was present. He gagged her daughter's face and took her behind the school. When she tried to shout, appellant threatened her daughter that she would be killed and thereafter touched her vagina. She went to the police station and as per her dictation one Dilip Sarkar scribed the written complaint. She put her signature thereon (Ext.2).

10. P.W.3, the father of the victim corroborated the evidence of P.W. 1 and 2.

11. P.W. 4, is the brother of the victim. About four months ago the incident took place. At that time he and his elder sister had gone to fetch water from a tap situated near their school. The appellant wanted water from him and her sister provided him water. Then appellant asked him to leave the place and started tickling the leg of his sister. Thereafter his sister was taken behind the school and threatened not to shout. Then he went to call his mother and his sister was discharged from the clutches of the appellant. He identified the appellant.

12. In cross-examination, he told that the tap is situated in the school campus and near the tap the house of Pakhi is situated.

13. P.W.5, Monila Dey, is a neighbor of the victim. She deposed that about 8/9 months at about 5 P.M. the incident occurred under the neem tree situated in their village. There is a tube well near the neem tree. He saw the appellant was standing

near the tube well and heard from the victim that the appellant touched her body and had pulled her wearing apparel. He identified the appellant.

14. P.W.6, is the uncle of the victim. He heard the incident from P.W.1 and 4 and has corroborated their evidence.

15. P.W.7, Sudhir Ranjan Sarkar is the doctor. He examined the victim on 8.9.2015. The victim stated to him that she was taken near the school at 6.30 P.M. by the appellant and the appellant had kept his hand on her thigh. On examination, he found that hymen was intact. He proved the injury report (Ext.3).

16. P.W.8, Ashish Das, received written complaint from P.W.2 and drew up the formal FIR (Ext. 4) after making necessary endorsement there (Ext.2/1).

17. P.W.9, P.W.10, P.W.11, P.W.12 & P.W.13 are the people of the locality. They deposed that the appellant had taken the victim behind the school and touched her body.

18. P.W.14, Swadesh Garai, is the doctor who examined the appellant and found him potent for sexual intercourse. He proved his report (Ext.5).

19. P.W.15, Dilip Sarkar, is the scribe of the first information report. He proved the written complaint (Exht.2/2).

20. P.W.16, A.S.I. Lalita Sarka, recorded the statement of the victim.

21. P.W.17, Prabin Kumar Sarkar, is the investigating officer of the case. He prepared rough sketch may (Ext.6). He recorded the statement of all the witnesses and the statement under Section 161 Cr.P.C. Statement of the victim was recorded before the Magistrate under section 164 Cr.P.C. He arrested the appellant and obtained his potency report (Ext.7). He obtained original birth certificate of the victim and it handed over to P.W.2 on execution of zimmanama (Ext.8). On completion of investigation, he filed charge-sheet.

22. From the aforesaid evidence on record, it is clear that the victim had been accosted by the appellant when she had gone to the tube well to collect water. Tube well was situated near her school which is not far away from her residence. She was accompanied by P.W.4. It has been argued that no reason is forthcoming as to why the victim had gone to the tube well near her school to collect water when there is a tube well in her house.

23. Admittedly, there is a tube well near the school premise and the school premise which is situated at a short distance from the house of the victim and the appellant. The evidence of the victim, P.W.1, that she had gone to the tube well to collect water is not only corroborated by her family members but also by the independent witnesses namely P.Ws. 5 & 9 to 13 herein. In view of the consistent ocular version of the prosecution witnesses that the victim had gone to the nearby tube well to collect water, I am unable to accept the contention of the appellant that the prosecution case ought to be disbelieved merely because there is a tube well in the house of the victim. Hence, the aforesaid issue raised by the appellant to improbabilise the prosecution case appears to be untenable and accordingly fails.

24. An analysis of the evidence of the prosecution witnesses shows that the version of P.W.1 is corroborated not only by her family members namely P.W.2, 3, 4 and 5 but also by the independent witnesses that she had been accosted by the appellant when she had gone to the tube well to collect water and thereafter had been taken behind the school and was indecently touched by the appellant against her will. There is, however, some controversy as to whether the appellant had touched her vagina over her undergarment or any other part of her body.

25. I find that P.W.7, the doctor, deposed that P.W.1 and her mother (P.W.2) had reported that the appellant had touched her thigh. Other witnesses like P.W.5 and 9 to 13 claimed that the victim stated that the appellant had forcibly touched her body.

However, the consistent evidence of P.W.1 and her parents P.W. 2 and 3 is to the effect that the appellant had touched her vagina over her undergarments. It is possible that the victim and her parents out of shame and embarrassment had not indicated to the doctor or the neighbours that the victim was touched in her private parts. However, the consistent evidence of not only the victim and her relations but also of the independent witnesses is to the effect that the victim was accosted by the appellant and her body was touched in an indecent manner against her will. Section 7 of the POCSO Act defines sexual assault as follows:

"7. Sexual Assault.- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

26. The scope and ambit of the offence of sexual assault under the aforesaid provision does not only extend to touching of the vagina of the victim but also to the touching of any part of her body with a sexual intent.

27. Judging the prosecution case from this perspective, I am of the opinion any minor variation in the evidence of the witnesses as to which part of the anatomy of the victim was touched would not bring the act of the appellant which was prompted by lascivious instincts beyond the culpable bounds of the aforesaid penal provision. Nor would such variation improbabilise the very genesis of the prosecution case of physical touching of the victim by the appellant with sensual intent which is consistently supported by all the witnesses.

28. Hence, I am of the opinion that the aforesaid evidence on record clearly proves the ingredients of the alleged offence and the conviction of the appellant is accordingly upheld.

29. Coming to the issue of sentence, I find that the appellant aged about nineteen years and does not have any criminal antecedent.

30. In the aforesaid factual matrix, I modify the sentence imposed on the appellant and direct that the appellant shall suffer rigorous imprisonment for three years and shall pay a fine of Rs. 10,000/- in default shall suffer rigorous imprisonment for three months more.

31. Period of detention suffered by the appellant and during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon him in terms of 428 of the Code of Criminal Procedure.

32. I find that the trial Judge has not addressed himself to the issue of grant of compensation to the victim in the instant case. Grant of compensation to a victim in a prosecution under the POCSO Act is adumbrated in section 33(8) of the said Act read with Rule 7 of the Protection of Children from Sexual Offences Rules, 2012 (hereinafter referred to as 'the Rules'). Section 33(8) of the Act reads as follows:—

"Section 33(8).-- In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child."

33. Rule 7 of the Rules is as under:—

Rule 7. Compensation.-- (1) The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.

(2) The Special Court may, on its own or on an application filed by or on

behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

(3) Where the Special Court, under sub-section (8) of Section 33 of the Act read with sub-sections (2) and (3) of section 357A of the Code of Criminal Procedure, makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the following:—

- (i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;*
- (ii) the expenditure incurred or likely to be incurred on his medical treatment for physical and/or mental health;*
- (iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;*
- (iv) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;*
- (v) the relationship of the child to the offender, if any;*
- (vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;*
- (vii) whether the child became pregnant as a result of the offence;*
- (viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;*
- (ix) whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;*
- (x) any disability suffered by the child as a result of the offence;*
- (xi) financial condition of the child against whom the offence has been committed so as to determine his need for rehabilitation;*
- (xii) any other factor that the Special Court may consider to be relevant.*

(4) The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357A of the Code of Criminal Procedure or any other laws for the time being in force, or, where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

(6) Nothing in these rules shall prevent a child or his parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government."

34. Compensation envisaged under the aforesaid provision of law may be awarded by the Special Court at the interim stage also for immediate relief and rehabilitation of a child victim in light of the parameters laid down under Sub-Rule (3) of Rule 7 of the aforesaid Rules. Such compensation payable by the State is independent of the compensation which may be directed to be paid by the convict upon conviction in terms of Section 357(2) and (3) of the Code. The philosophy of awarding compensation by the State is in the nature of a reparation to the victim of crime on its

failure to discharge its sovereign duty to protect and preserve sanctity and safety of the individual from the ravages of such crime. I am informed that a Victim Compensation Fund has been notified by the State under Section 357A Cr.P.C., which, inter alia, prescribes the minimum amount of compensation that may be awarded for various offences/injuries in the following manner as set in the schedule of the notifications:—

Schedule

Sl. No.	Description of Injuries/Loss	Minimum Amount of Compensation
1.	Acid Attack	Rs. 3 lakhs
2.	Rape	Rs. 3 lakhs
3.	Physical abuse of minor	Rs. 2 lakhs
4.	Rehabilitation of victim of Human Trafficking or other offences like witch hunting etc.	Rs. 1 lakh
5.	Sexual assault (Excluding rape)	Rs. 50,000/-
6.	Death	Rs. 2 lakhs
7.	Permanent Disability (80% or more)	Rs. 2 lakhs
8.	Partial Disability (40% to 80%)	Rs. 1 lakh
9.	Burns affecting greater than 25% of the body (excluding Acid Attack cases)	Rs. 2 lakhs
10.	Loss of foetus	Rs. 50,000/-
11.	Loss of fertility	Rs. 1.5 lakhs

Note : If the victim is less than 14 years of age, the compensation shall be increased by 50% over the amount specified above.

35. The aforesaid scheme is, therefore, lays down the minimum limit for award of compensation in cases of offences relating to rape, sexual assault (excluding rape), physical abuse of minor etc. It also provides for a hike of 50% of the amount of compensation if the victim is below 14 years of age. Although offences under POCSO are not specifically mentioned in the Schedule, the cognate nature of offences of penetrative sexual assault or aggravated penetrative sexual assault punishable under Sections 4 & 6 of POCSO when compared with rape and that of sexual assault with sections 6 & 8 of POCSO, prompts me to hold that the duty of the State to award compensation to victims under the aforesaid Fund would extend to such offences also. The Special Court, therefore, while dealing with such offences may make orders of interim or final compensation to victim from the Fund made available by the State. It is further clarified that a conjoint reading of the Section 33(8) of the Act along with Rule 7 of the Rules made it amply clear that the power of the Special Court to award interim/final compensation is not restricted to the terms of the Victim Compensation Fund promulgated by the State but empowers the Court to award such reasonable and just amount as may be determined by it in the facts of the case in the light of the parameters laid down in Rule 7(3) of the aforesaid Rules to provide succour to a child victim. Upon orders being passed by the Special Court relating to such compensation the State Government shall pay the compensation so ordered by the Special Court within 30 days of the receipt of the order by itself or through the State Legal Services

Authority or the District Legal Services Authority in whose hands the Victim Compensation Fund may be entrusted. It is also made clear that it shall be open to the Special Court in appropriate cases to grant compensation over and above the limit proposed under the scheme inasmuch as the scheme merely lays down the minimum limits of such compensation and does not provide for an upper limit which is left open to the judicial discretion of the Court to be determined in the light of the parameters laid down in Rule 7(3) of the aforesaid Rules.

36. In view of the aforesaid discussion and in the factual backdrop of the case particularly the nature and extent of injury and trauma caused to the victim by the sexual assault perpetrated upon her and her age, that is, 11 years, I award compensation to the tune of Rs. 75,000/- to the victim which shall be payable by the State through the State Legal Services Authority to the parents of the victim, that is, P.W.2 and 3, for the mental and physical trauma suffered by her due to the crime committed on her within one month from date.

37. I also notice with utmost displeasure that the identity of the victim has been disclosed in the judgment delivered by the trial Judge. The scheme of the Act, inter alia, lays down adequate safeguards to ensure that the identity of a victim is not disclosed during investigation or trial. The privacy of child victim has been sought to be protected in the course of investigation and trial of cases under the various provisions of the Act. Section 23 of the Act lays down an embargo on any report or comment made or photograph published in any media disclosing the identity of the child including his/her name, address, photograph, family details, school, neighbourhood or any other particulars in relation thereto. Contravention of the said provision is made punishable under subsection (4) thereof. Section 24(5) of the Act, inter alia, provides that police officer shall ensure that the identity of the victim shall be protected from public media. Section 33(7) enjoins the Special Court to ensure that the identity of the child is not disclosed at any time during the course of investigation or trial unless for reasons recorded in writing the Court permits such disclosure in the interest of the child. For the purpose of the said section, identity of the child is defined to include "the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed." Section 36 of the said Act permits the child to give evidence in such manner that he or she is not exposed to the accused at the time of recording evidence and permits such child to record statement through video conferencing or by utilizing single visibility mirror or curtain to achieve such purpose. Section 37 of the Act mandates that trial in cases under the Act shall be held in camera in the presence of the parents of the child or any other person in whom the child has trust or confidence. Evidence of the child may also be recorded by way of commission under section 284 of the Code of Criminal Procedure, if necessary. The aforesaid provisions, therefore, make it clear that the functionaries under the Act, namely, the investigating agency, the prosecutors and the court must take appropriate measures to ensure that the identity of the child is not disclosed to his/her prejudice in the course of investigation and trial. Trial of a case concludes by delivery of judgment, hence, disclosure of identity of child in the judgment delivered by the Special Court would amount to breach of the aforesaid statutory mandate. It is apposite to note that while dealing with similar provisions in the Code, namely, section 327(2) & (3) of the Code read with section 228A of the Penal Code, 1860, the Apex Court in the cases of *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 and *Dinesh @ Buddha v. State of Rajasthan*, (2006) 3 SCC 771, declared that the name of the victim in rape cases should not be indicated by the trial Court or the superior Courts. In *Sakshi v. Union of India*, (2004) 5 SCC 518, safeguards were laid down with regard to trial in cases of child sexual abuse and the privacy safeguards were ever extended to cases under section 354 and 377 I.P.C. In *Sakshi* (supra) the Court laid down the following safeguards in child sex abuse cases:—

“(1) The provisions of sub-section (2) of Section 327 CrPC shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC.

(2) In holding trial of child sex abuse or rape:

(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.”

38. The judicial dicta in the aforesaid reports appear to have received statutory recognition in the present legislation under the aforesaid provisions of the said Act.

39. The aforesaid legislative mandate as interpreted by judicial pronouncements create a humanizing impact on the adversarial trial processes in child sex abuse cases and make it imperative that the privacy and other basic human rights of the child victim are scrupulously protected so as to achieve the goal of access to justice to the most vulnerable section of society, namely, children subjected to sexual abuse, in the truest sense.

40. The following directives are issued to the investigating agencies, prosecutors and the Special Courts so that the aforesaid provisions of law are followed in letter and spirit and fundamental right of dignity of a child victim and other basic human rights are preserved:—

1. Police Officer or the Special Juvenile Police Unit receiving complaint as to commission or likelihood of commission of offence under the Act shall forthwith register the same in terms of Section 19 of the Act and furnish a copy free of cost to the child and/or his/her parents and inform the child or his/her parents or any person in whom the child has trust and confidence of his/her right to legal aid and representation and if the child is unable to arrange for his/her legal representation, refer the child to the District Legal Services Authority for necessary legal aid/representation under section 40 of the Act. Failure to register First Information Report in respect of offences punishable under sections 4, 6, 7, 10 & 12 of POCSO shall attract penal liability under section 166-B of the Penal Code, 1860 as the aforesaid offences are cognate and/or *pari materia* to the Penal Code offences referred to in the said penal provision.
2. The Police Officer on registration of FIR shall promptly forward the child for immediate emergency medical aid, whenever necessary, and/or for medical examination under section 27 of the Act and ensure recording of the victim's statement before Magistrate under Section 25 of the Act. In the event, the Police Officer or the Special Juvenile Police Unit is of the opinion that the child falls within the definition of “child in need care and protection” as defined under Section 2(d) of the Juvenile Justice (Care and Protection of Children) Act, 2000, the said Police Officer or the Special Juvenile Police Unit shall forthwith forward the child to the jurisdictional Child Welfare Committee for providing care, protection, treatment and rehabilitation of the child in accordance with law.
3. Whenever a registration of FIR is reported to the Special Court, the Special Court shall make due enquiries from the investigating agency as to compliance of the aforesaid requirements of law as stated in (1) and (2) above and pass necessary orders to ensure compliance thereof in accordance with law, if necessary.

4. Officer-in-Charge of the police station and the investigating officer in the case including the Special Juvenile Police Unit shall ensure that the identity of the victim is not disclosed in the course of investigation, particularly at the time of recording statement of the victim under section 24 of the Act (which as far as practicable may be done at the residence or a place of choice of the victim or that of his/her parents/custodian, as the case may be), his/her examination before Magistrate under section 25 of the Act, forwarding of the child for emergency medical aid under section 19(5) and/or medical examination under section 27 of the Act.
5. The investigating agency shall not disclose the identity of the victim in any media and shall ensure that such identity is not disclosed in any manner whatsoever except the express permission of the Special Court in the interest of justice. Any person including a police officer committing breach of the aforesaid requirement of law shall be prosecuted in terms of section 23(4) of the said Act.
6. Trial of the case shall be held in camera in terms of section 37 of the Act and evidence of the victim shall be promptly recorded without unnecessary delay and following the procedure of screening the victim from the accused person as provided in section 36 of the Act. The evidence of the victim shall be recorded by the Court in a child friendly atmosphere in the presence of the parents, guardian or any other person in whom the child has trust and confidence by giving frequent breaks and the Special Court shall not permit any repetitive, aggressive or harassing questioning of the child particularly as to his/her character assassination which may impair the dignity of the child during such examination. In appropriate cases, the Special Court may call upon the defence to submit its questions relating to the incident during cross-examination in writing to the Court and the latter shall put such questions to the victim in a language which is comprehensible to the victim and in a decent and non-offensive manner.
7. In the event, the victim is abroad or is staying at a far off place or due to supervening circumstances is unable to physically attend the Court to record evidence, resort shall be taken for recording his/her evidence by way of video conference.
8. The identity of the victim particularly his/her name, parentage, address or any other particulars that may reveal such identity shall not be disclosed in the judgment delivered by the Special Court unless such disclosure of identity is in the interest of the child.
9. The Special Court upon receipt of information as to commission of any offence under the Act by registration of FIR shall on his own or on the application of the victim make enquiry as to the immediate needs of the child for relief or rehabilitation and upon giving an opportunity of hearing to the State and other affected parties including the victim pass appropriate order for interim compensation and/or rehabilitation of the child. In conclusion of proceeding, whether the accused is convicted or not, or in cases where the accused has not been traced or had absconded, the Special Court being satisfied that the victim had suffered loss or injury due to commission of the offence shall award just and reasonable compensation in favour of the victim. The quantum of the compensation shall be fixed taking into consideration the loss and injury suffered by the victim and other related factors as laid down in Rule 7(3) of the Protection of Children from Sexual Offences Rules, 2012 and shall not be restricted to the minimum amounts prescribed in the Victim Compensation Fund. The interim/final compensation shall be paid either from the Victim Compensation Fund or any other special scheme/fund established under section 357A of the Code or any other law for the time being in force through the State Legal

Services Authorities on the District Services Authority in whose hands the Fund is entrusted. If the Court declines to pass interim or final compensation in the instant case it shall record its reasons for not doing so. The interim compensation, so paid, shall be adjusted with final compensation, if any, awarded by the Special Court in conclusion of trial in terms of section 33(8) of the Act.

10. The Special Court shall ensure that the trial in cases under POCSO is not unduly protracted and shall take all measures to conclude the trial as expeditiously as possible preferably within a year from taking cognizance of the offence without granting unreasonable adjournment to the parties in terms of section 35(2) of the Act.

41. Concerned Legal Services Authority shall ensure that the interim/final compensations are paid to the victim from the Victim Compensation Fund or any other scheme/fund established under section 357A Cr.P.C. or the State government, as the case may be.

42. Registrar General is directed to circulate a copy of the judgment to all Special Courts in the State of West Bengal for necessary implementation of aforesaid directions.

43. Secretary, State Legal Services Authority shall send copies of this judgment to the State Commission for Protection of Child Rights (SCPCR) and all the District Legal Services Authorities for implementation of the aforesaid directions and/or ensuring public awareness amongst the victims for effective access to justice under the Act and the Rules framed thereunder.

44. Department is directed to send a copy of the judgment to Director General of Police, West Bengal, for circulation to all the police stations, Special Juvenile Police Units and other investigating agencies for due implementation of the aforesaid directions.

45. Copy of the judgment along with LCR be sent down to the trial court at once for necessary awareness and sensitization of the sentence in accordance with law.

46. The appeal is accordingly disposed of and the application being CRAN 4926 of 2016 is dismissed as infructuous.

47. Certified copy of this order, if applied for, be given to the parties on priority basis upon compliance of all formalities.

hence there is no need or justification for this Court to interfere with the order of the High Court. We are unable to countenance this argument because the High Court has failed to apply the correct principles of law while exercising its revisional powers.

12. In the light of our conclusions, the appeal succeeds and is accordingly allowed. The order of the High Court in civil revision as well as the order of eviction passed by the Rent Controller and the Appellate Authority are set aside and the respondent's petition for eviction will stand dismissed. There will, however, be no order as to costs.

(1988) 4 Supreme Court Cases 551

(BEFORE G. L. OZA AND K. JAGANNATHA SHETTY, JJ.)

HARI SINGH .. Appellant ;

Versus

SUKHBIR SINGH AND OTHERS .. Respondents.

Criminal Appeals Nos. 74 and 75 of 1986†,
decided on August 25, 1988

Penal Code, 1860 — Section 307 — “Intention or knowledge” sufficient to constitute murder an essential precondition under — That can be ascertained from facts and circumstances — That accused party carrying sharp-edged weapons (ballam) but using only blunt side of it even after suffering injuries by sharp-edged weapons wielded by the opposite party is a very significant circumstance showing absence of ‘intention or knowledge’ and suddenness of the incident — Accused therefore entitled to acquittal under Section 307

Held :

Under Section 307 IPC what the court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of “attempt to murder”. Under Section 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the

†From the Judgment and Order dated November 13, 1984 of the Punjab and Haryana High Court in Criminal Appeal No. 128-SB of 1984

intention. In this case, two parties in the course of a fight inflicted on each other injuries both serious and minor. The accused, though armed with ballam, never used the sharp edge of it. They used only the blunt side of it despite their being attacked by the other side. They suffered injuries but they were not provoked or tempted to use the cutting edge of the weapon. It is very very significant showing that they had no intention to commit murder. They had no motive either. The fight might have been a sudden flare up. Where the fight is accidental owing to a sudden quarrel, the conviction under Section 307 is generally not called for. There is, therefore, no reason to disturb the acquittal of the accused under Section 307 in this case. (Para 7)

Criminal Procedure Code, 1973 — Section 360 — Order under, for release of first offenders — Accused, having no intention to commit murder, acquitted from charge under Section 307/149 IPC — But while maintaining conviction under Sections 325/149, 323/149 and 148 IPC, accused released by High Court's order under Section 360 having regard to the facts that the occurrence was the outcome of a sudden flare up and there was no previous history of enmity between the parties — Held on facts, High Court's order under Section 360 justified

Held :

Many offenders are not dangerous criminals but are weak characters or who have surrendered to temptation or provocation. In placing such type of offenders on probation, the court encourages their own sense of responsibility for their future and protects them from the stigma and possible contamination of prison. In this case, there being no previous history of enmity between the parties, the occurrence having taken place as a result of a sudden flare up and the accused having no intention to commit murder, the extension of benefit of the beneficial legislation applicable to first offenders cannot be said to be inappropriate. (Para 8)

Criminal Procedure Code, 1973 — Section 357(3) — Award of compensation to victims under — Object — Order under, is not ancillary but in addition to other sentences — Liberal exercise of power by courts under, recommended — In appropriate cases order for compensation instead of deterrent sentence of imprisonment would be more justifiable

Held :

The power of courts to award compensation to victims under Section 357, while passing judgment of conviction, is not ancillary to other sentences but is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes, a step forward in our criminal justice system. Therefore, all courts are recommended to exercise this power liberally so as to meet the ends of justice in a better way. Any such measure which would give the victim succour is far better than a sentence by deterrence. (Paras 10 and 12)

Criminal Procedure Code, 1973 — Section 357(3) — Award of compensation to victims under, should be reasonable — Reasonableness of the compensation would depend upon facts and circumstances — Where injury inflicted by accused on head of the victim resulting in permanent impairment of his speech and accused able and willing to bear financial burden, High Court's order to each accused to pay Rs 2500 to the victim, being insufficient, altered and instead accused persons directed to pay Rs 50,000 to the victim

Held :

The order under Section 357 for payment by way of compensation must be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by instalments, may also be given. The court may enforce the order by imposing sentence in default. (Para 11)

In this case the victim's power of speech has been permanently impaired. The lifelong disability of the victim ought not to be bypassed by the court. He must be made to feel that the court and accused have taken care of him. The compensation of Rs 2500 payable by each accused to the victim awarded by the High Court was inadequate, having regard to the nature of injury suffered by the victim. The accused persons have means and ability and are also not unwilling to bear the additional financial burden. With due regard to all the facts and circumstances of the case, award of Rs 50,000 as compensation payable by the accused persons to the victim would meet the ends of justice. (Paras 12, 14 and 15)

Appeals disposed of

R-M/8944/CR

Advocates who appeared in this case :

- R. L. Kohli, Senior Advocate (R. C. Kohli and D. D. Sharma, Advocates, with him), for the Appellant in Cri. A. No. 74 of 1984 ;
- D. S. Tewatia, Senior Advocate (Mahabir Singh, Advocate, with him), for the Appellant in Cri. A. No. 75 of 1984 ;
- U. R. Lalit, Senior Advocate (R. S. Yadav and H. M. Singh, Advocates, with him), for the Respondents.

The Judgment of the Court was delivered by

JAGANNATHA SHETTY, J.—These two appeals, by special leave, are directed against a judgment of the High Court of Punjab and Haryana in Criminal Appeal No. 128-SP of 1984. The common respondents in the appeals were prosecuted for various offences in the court of Additional Sessions Judge, Faridkot. By judgment dated February 28, 1984 learned Judge convicted and sentenced the accused

as follows :

Keeping in view the circumstances of the case and the part played by each of them I, hereby sentence Sukhbir, Sukhpal and Surat Singh accused to undergo RI for four years under Section 307/149 IPC. Each of Om Pal, Dhan Pal, Mannu and Siri Chand are ordered to undergo RI for three years under Section 307/149 IPC.

Each of the seven accused are further ordered to undergo RI for one year under Section 148 IPC, two years RI under Section 325/149 IPC and one year RI under Section 323/149 IPC.

Keeping in view the circumstances of the case, all the sentences shall run concurrently.

2. The accused appealed to the High Court challenging the conviction and sentence. The High Court by the judgment under appeal acquitted Sukhpal Singh and Surat Singh of all charges by giving them the benefit of doubt. The other accused who are respondents herein are also acquitted of the offence under Section 307/149 and Section 148 IPC. Their conviction and sentence under Sections 325/149, 232/149 and Section 148 IPC are however, maintained. They are released on probation of good conduct. Each one of them, is ordered to pay compensation of Rs 2500 to Joginder who was seriously injured in the incident. In default to pay the compensation they are directed to serve their sentence. The operative portion of the judgment runs like this :

There is no previous history of enmity between the parties. The occurrence is the outcome of a sudden flare up. I think, these five appellants namely Sukhbir Singh, Dhan Pal, Mannu, Siri Chand and Om Pal are entitled to benefit under Section 360 CrPC. Consequently, I suspend their sentence under Sections 325/149, 323/149 and Section 148 IPC and order that the appellants namely Sukhbir Singh, Dhan Pal, Mannu, Siri Chand and Om Pal be released on probation on their entering into bonds of Rs 3000 each with one surety in the like amount for a period of one year, to the satisfaction of the trial court, undertaking to appear in the court to receive the sentence during the said period whenever called upon to do so and in the meantime to keep peace and be of good behaviour. However, each one of the appellants would pay Rs 2500 as compensation payable to Joginder injured. Compensation if not paid within two months, the appellants namely Sukhbir Singh, Dhan Pal, Mannu, Siri Chand and Om Pal would be called upon to serve their sentence. But for this modification, appeal fails and is hereby dismissed.

In view of Section 12 of the Probation of Offenders Act, no disqualification would attach to the appellants due to this conviction.

Sd/- K. P. S. Sandhu
Judge

dated November 13, 1984

3. In these appeals, there is no serious dispute with regard to acquittal of Sukhpal Singh and Surat Singh. The prosecution case that they were armed with barchha has not been proved. There was no incised injury on the victim or any of the prosecution witnesses. Their participation in the commission of crime therefore appears to be doubtful. The High Court was justified in acquitting them.

4. Counsel for the appellants are, however, very critical of the order of High Court with regard to the remaining accused. It is urged that the High Court was too much charitable to them. The intention of accused was obviously to commit murder of Joginder. Their acquittal under Section 307 IPC is characterised as perverse. At any rate, it is said that they ought not to have been put on probation. It is an abuse of the process of the court. They should have been properly sentenced to terms of imprisonment and fine. It is also urged that Joginder has sustained permanent disability due to head injury and no amount of compensation would be adequate for him except severe punishment to the accused as a general deterrence. Counsel for the accused on the other hand, seeks to support the order of the High Court in every respect.

5. In the light of the submissions, three questions arise for consideration (i) whether the respondents are not guilty of the offence under Section 307/149 IPC ; (ii) whether the High Court was justified in extending the benefit of Section 360 CrPC and releasing the accused on probation of good conduct ; and (iii) whether the compensation awarded to Joginder could be legally sustained, and if so, what should be the proper compensation ?

6. For a proper consideration of these questions, we may summarise briefly the factual background : The rival parties in this case are collaterals. On September 28, 1982 at about 8/9 a.m. they had an altercation near the tubewell belonging to Hari Kishan. Joginder is the son of Hari Kishan. Virender another injured in this case is nephew of Hari Kishan. Hari Kishan was sitting near his tubewell. Virender and Joginder were sowing berseem crop. The accused came from the side of the tubewell. They were armed with ballams and bangas. One of them raised a lalkara at which the accused attacked Virender and Joginder. In the brawl that followed some of the accused were also injured. The injured were removed to Civil Hospital, Ballabgarh. The Medical Officer there referred them to Safdarjung

Hospital, New Delhi. Finally, they landed themselves at the AIIMS New Delhi. They were examined by the doctors. Virender was found to have two injuries caused by blunt weapons. Joginder was found to have head injury. Amongst the accused Siri Chand, Dhan Pal, Om Pal and Sukhbir Singh were injured. They were medically examined in AIIMS or Safdarjung Hospital, New Delhi. Siri Chand had four injuries including a fracture caused by blunt weapon. That has been proved by Dr Rita Sood (DW 1). Dhan Pal and Om Pal each had four injuries but simple. They were also caused by blunt weapons. Dr V. K. Dhingra (DW 2) has spoken to that. Sukhbir Singh had one incised wound on his person. Dr Anurag Saxena (DW 3) has testified to it.

7. On the first question as to acquittal of the accused under Section 307/149 IPC, some significant aspects may be borne in mind. Under Section 307 IPC what the court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of "attempt to murder". Under Section 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention. In this case, two parties in the course of a fight inflicted on each other injuries both serious and minor. The accused though armed with ballam never used the sharp edge of it. They used only the blunt side of it despite they being attacked by the other side. They suffered injuries but were not provoked or tempted to use the cutting edge of the weapon. It is very very significant. It seems to us that they had no intention to commit murder. They had no motive either. The fight as the High Court has observed, might have been a sudden flare up. Where the fight is accidental owing to a sudden quarrel, the conviction under Section 307 is generally not called for. We, therefore, see no reason to disturb the acquittal of accused under Section 307 IPC.

8. The question next to be considered is whether the accused are entitled to the benefit of probation of good conduct? We gave our anxious consideration to the contentions urged by counsel. We are of opinion that the High Court has not committed any error in this regard also. Many offenders are not dangerous criminals but are weak characters or who have surrendered to temptation or provocation. In placing such type of offenders, on probation, the court encourages

their own sense of responsibility for their future and protects them from the stigma and possible contamination of prison. In this case, the High Court has observed that there was no previous history of enmity between the parties and the occurrence was an outcome of a sudden flare up. These are not shown to be incorrect. We have already said that the accused had no intention to commit murder of any person. Therefore, the extension of benefit of the beneficial legislation applicable to first offenders cannot be said to be inappropriate

9. This takes us to the third question which we have formulated earlier in this judgment. The High Court has directed each of the respondents to pay Rs 2500 as compensation to Joginder. The High Court has not referred to any provision of law in support of the order of compensation. But that can be traced to Section 357 CrPC. Section 357, leaving aside the unnecessary, provides :

357. *Order to pay compensation.*—(1) When a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

- (a) in defraying the expenses properly incurred in the prosecution ;
- (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court, recoverable by such person in a civil court ;

* * *

(3) When a court imposes a sentence, of which fine does not form a part, the court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an appellate court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this section.

10. Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. In this case, we are not concerned with sub-

section (1). We are concerned only with sub-section (3). It is an important provision but courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way.

11. The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by instalments, may also be given. The court may enforce the order by imposing sentence in default.

12. Joginder in this case is an unfortunate victim. His power of speech has been permanently impaired. Doctor has certified that he is unable to speak and that is why he has not stepped into the witness box for the prosecution. The lifelong disability of the victim ought not to be bypassed by the court. He must be made to feel that the court and accused have taken care of him. Any such measure which would give him succour is far better than a sentence by deterrence.

13. The compensation awarded by the High Court, in our opinion, appears to be inadequate having regard to the nature of injury suffered by Joginder. We have ascertained the means of accused and their ability to pay further sum to the victim. We are told that they are not unwilling to bear the additional burden. Mr Lalit learned counsel said that his clients are willing to pay any amount determined by this Court. It is indeed a good gesture on the part of counsel and his clients.

14. With due regard to all the facts and circumstances of the case, we consider that Rs 50,000 compensation to Joginder would

meet the ends of justice. We direct the respondents to pay the balance within two months in equal proportions.

15. The order of the High Court is modified only to the extent of compensation as indicated above and in all other respects it is kept undisturbed. The appeals are accordingly disposed of.

(1988) 4 Supreme Court Cases 559

(BEFORE L. M. SHARMA AND N. D. OJHA, JJ.)

YOGENDRA MURARI . . . Petitioner ;

Versus

STATE OF U. P. AND OTHERS . . . Respondents.

Writ Petition (Criminal) No. 259 of 1988†,
decided on August 8, 1988

Preventive Detention — Detention order — Delay in passing — Not invariably fatal to the detention — Depends upon facts and circumstances of each case — But delay in compliance with Article 22(5) fatal — Constitution of India, Article 22(5) — National Security Act, 1980, Section 3

Held :

It is not right to assume that an order of detention has to be mechanically struck down if passed after some delay. It is necessary to consider the circumstances in each individual case to find out whether the delay has been satisfactorily explained or not. In the present case the ground which led the District Magistrate to pass the detention order became available in July and the order was passed only in December. The petitioner was in custody and there could not be any apprehension of his indulging in illegal activities requiring his detention until the grant of bail by the criminal court became imminent. Besides, inquiry was also proceeding. This aspect has been explained in the detention order itself as also by the District Magistrate in his affidavit and it is clear that there has been no undue delay on his part in taking action. Besides, the distinction between such delay and the delay in complying with the procedural safeguards of Article 22(5) is also relevant here especially because of the background of the petitioner's antecedents taken into account by the detaining authority showing his propensity for acts which were likely to disturb public order. (Para 6)

K. Aruna Kumari v. Government of A.P., (1988) 1 SCC 296 : 1988 SCC (Cri) 116 and Rajendrakumar Natvarlal Shah v. State of Gujarat, (1988) 3 SCC 153 : 1988 SCC (Cri) 575, relied on

Preventive Detention — Grounds of detention — Three incidents mentioned in the grounds — First and third incidents relating to public

†Under Article 32 of the Constitution of India

(2019) 2 Supreme Court Cases 703

(BEFORE MADAN B. LOKUR AND DEEPAK GUPTA, JJ.)

a NIPUN SAXENA AND ANOTHER .. Petitioners;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petitions (C) No. 565 of 2012[†] with Nos. 568 of 2012, 22,
148 of 2013, Writ Petition (Crl.) No. 1 of 2013 and SLP (Crl.) No.

b ... Crl. MP No. 16041 of 2014[†], decided on December 11, 2018

A. Penal Code, 1860 — Ss. 228-A, 376, 376-A, 376-AB, 376-B, 376-C,
376-D, 376-DA, 376-DB and 376-E — Victims of sexual offences as specified
in S. 228-A(1) IPC — Disclosure of name and identity of — Prohibition
as to, under S. 228-A — Object, applicability and scope of — Considering
the exceptions to the said prohibition, held, S. 228-A prohibits not only the
c publication of the name of the victim but also the disclosure of any other
matter which may make known the identity of the victim

— Hence, 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 fact which
can lead to the victim being identified and which should make her identity
known to the public at large — Object behind such legislation is to protect the
d aforesaid victims from any hostile discrimination or harassment in future —
Words and Phrases — “Identity of any person” — Crimes Against Women and
Children — Disclosure of names of victims (Paras 9 to 12 and 50.1)

State of Punjab v. Gurmit Singh, (1996) 2 SCC 384 : 1996 SCC (Cri) 316; *Bhupinder Sharma*
v. State of H.P., (2003) 8 SCC 551 : 2004 SCC (Cri) 31, *relied on*

Aju Varghese v. State of Kerala, 2018 SCC OnLine Ker 5397, *referred to*

e B. Protection of Children from Sexual Offences Act, 2012 — Ss. 33(7),
37 and 24(5) — Minor/Child victims of sexual offences under POCSO Act —
Disclosure of identity of — Can only be permitted by Special Court, if such
disclosure is in the interest of the child — “Interest of the child” — What is

— Disclosure of name of child to make the child a symbol of protest cannot
normally be treated to be in the interest of the child — Further held, it is neither
f feasible nor would it be advisable to clearly lay down what is the meaning of
the phrase “interest of the child” — Each case in this regard would be decided
by Special Court on its own facts — Penal Code, 1860 — S. 228-A — Words
and Phrases — “Interest of the child” — Juvenile Justice (Care and Protection
of Children) Act, 2015, S. 74 (Paras 34, 35 and 50.8)

Bijoy v. State of W.B., 2017 SCC OnLine Cal 417 : 2017 Cri LJ 3893, *approved*

g *Subash Chandra Rai v. State of Sikkim*, 2018 SCC OnLine Sikk 29 : 2018 Cri LJ 3146, *referred to*

C. Protection of Children from Sexual Offences Act, 2012 — Ss. 33(7),
24(5) and 37 — Child victims of sexual offences — Disclosure of name and
identity of — Bar as to, under POCSO Act — Applicability of — Held, applies
even to dead victims — Penal Code, 1860 — S. 228-A — Constitution of India
— Art. 21 — Dignity and Privacy of the dead (Para 40)

h

[†] Under Article 32 of the Constitution of India

D. Criminal Procedure Code, 1973 — Ss. 154, 156 to 162, 164-A, 168, 172 and 173 — FIR and consequent police investigation — Sexual offences against women and children — Protection of identity of victims of — Prohibition as to disclosure of identity of such victims under S. 228-A IPC and POCSO Act, 2012 — Invocation — Exception to police officials — Disclosure of name of victim in FIR and during investigation — Duty and caution required on the part of police officials in respect of

— Held, though the name of victim will have to be disclosed in FIR, the copy of FIR relating to offences under Ss. 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB or 376-E IPC and offences under POCSO Act must not be put in the public domain — However, the Sessions Judge/Magistrate/Special Court concerned can for reasons to be recorded in writing and keeping in view the interest of victim permit the copy of FIR to be given to certain person(s) — Police officers investigating such cases should as far as possible use a pseudonym to describe the victim unless it is absolutely necessary to write down her identity — Even in matters where the identity of victim is required to be disclosed, like (i) when samples are taken from her body, (ii) when medical examination is conducted, (iii) when DNA profiling is done, (iv) when date of birth of victim has to be established by getting records from school, etc., the police officers should move with circumspection and disclose as little of the identity of the victim as possible but enough to link the victim with the information sought — Authorities to which the name of victim is disclosed by investigating agency or court are also duty-bound to keep the name and identity of victim a secret and not disclose it in any manner except in their report which should only be sent in a sealed cover — Police to ensure that all correspondences or memos exchanged or issued wherein the name of victim is disclosed, are kept in a sealed cover and are not disclosed to public at large including media and persons seeking information under RTI Act — Thus, police should keep all documents in which the name of victim is disclosed, as far as possible, in a sealed cover and replace these documents by identical documents in which the name of victim is removed in all records which may be scrutinised in the public domain — This sealed cover can be filed in court along with report under S. 173 CrPC — Penal Code, 1860, Ss. 228-A(1) and (2)(a) and Ss. 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB or 376-E — Protection of Children from Sexual Offences Act, 2012, Ss. 19, 24(5) and 33(7) (Paras 13, 50.5 and 50.6)

E. Protection of Children from Sexual Offences Act, 2012 — S. 23 — Restrictions on media, and duty and caution required on its part, while reporting sexual offences committed against children — Considering relevant provisions of POCSO Act and intention of legislature to protect the privacy and reputation of a child victim, held, media cannot disclose any material/information which may lead to disclosure of identity of a child victim — Any violation in this regard will amount to an offence under S. 23(4) of POCSO Act

— Distinguishing the case where a child victim belongs to a small village from the one where such victim belongs to a large city, held, in the former case, even the disclosure of name of village of victim may contravene the provisions of S. 23(2) of POCSO Act — Thus held, a duty has been cast upon

a media to ensure that it does nothing and gives no information which could directly or indirectly lead to disclosure of identity of child victim — Reportage of such cases should be done sensitively keeping in mind the best interest of the victims — Media should not sensationalise such matters — It should refrain from talking to victim because every time the victim repeats the tale of misery, the victim again undergoes the trauma which he/she has gone through — Press and Media Laws — Press/Media reporting/publication — Sexual crimes against women and children — Constitution of India, Arts. 19(1)(a) and (2) (Paras 37 to 39)

b **F. Penal Code, 1860 — S. 228-A(2)(c) — Minor victim of any sexual offence which is specified in S. 228-A(1) IPC — Disclosure of identity of, by, or with the authorisation in writing of, the next of kin of the victim, as provided under S. 228-A(2)(c) IPC — Invocation of provision as to, after enactment of POCSO Act, 2012 — Held, because of enactment of POCSO Act, 2012 which deals specifically with minors, S. 228-A(2)(c) IPC no longer applies to a case where the victim is a minor**

c — In fact, the words “or minor” occurring in S. 228-A(2)(c) should for all intents and purposes be deemed to be deleted therefrom — Interpretation of Statutes — Subsidiary Rules — Generalia specialibus non derogant — Protection of Children from Sexual Offences Act, 2012 (Para 15)

d **G. Penal Code, 1860 — Ss. 228-A(1) and (2)(c) — Victims of sexual offences as specified in S. 228-A(1) IPC — Disclosure of identity of any such victim who is dead or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim, as provided under S. 228-A(2)(c) IPC — Prerequisite as to — Prohibition under proviso to S. 228-A(2)(c) that no authorisation as to disclosure of identity must be given by the next of kin of the victim to anybody other than the Chairman or the Secretary of any recognised welfare institution or organisation — Applicability of, in a situation where till date neither the Central Government nor any State Government has recognised any such welfare institution or organisation to whom the next of kin should give the said authorisation — Absence of any rules, procedures or guidelines with regard to identification and functioning of such organisations/institutions — Effect — Issuance of necessary directions by Supreme Court exercising power under Art. 142 of the Constitution**

e — Held, in cases where victim of sexual offence specified in S. 228-A IPC is dead or of unsound mind, the name of the victim or her identity should not be disclosed even under the authorisation of the next of kin, unless circumstances justifying the disclosure of her identity exist, which must be decided by the competent authority — That competent authority presently stated to be Sessions Judge — Until Government acts under S. 228-A(2)(c) and lays down a criteria as per directions of Supreme Court herein for identifying the aforesaid welfare institutions or organisations, an application by the next of kin to authorise disclosure of identity of a dead victim or of a victim of unsound mind under S. 228-A(2)(c) IPC should be made only to Sessions Judge concerned — Constitution of India, Art. 142 (Paras 16 to 18, 20, 21, 50.2 and 50.7)

H. Penal Code, 1860 — S. 228-A — Victims of sexual offences as specified therein — Filing of appeal by, on acquittal of accused — Disclosure of name of such victim in memo of appeal — Held, is not necessary — Victim can file appeal with permission of court under a pseudonymous name or coded identity — Procedure to be followed and duty of court in such a case — Laid down — Criminal Procedure Code, 1973, S. 372

Held :

Section 228-A IPC imposes a clear-cut bar on the name or identity of the victim being disclosed. Therefore, where the accused is acquitted and the victim of the offence wants to file an appeal under Section 372 CrPC, she is not bound to disclose her name in the memo of appeal. Such a victim can move an application to the Court praying that she may be permitted to file a petition under a pseudonymous name e.g. 'X' or 'Y' or any other such coded identity that she may choose. However, she may not be permitted to give some other name which may indirectly harm another person. There may be certain documents in which her name will have to be disclosed e.g. the power of attorney and affidavit(s) which may have to be filed as per the Rules of the Court. The Court should normally allow such applicant to file the petition/appeal in a pseudonymous name. The victim can file such an appeal by showing her name as 'X' or 'Y' along with an application for non-disclosure of the name of the victim. In a sealed envelope to be filed with the appeal she can enclose the document(s), in which she can reveal her identity as required by the Rules of the appellate court. The Court can verify the details but in the material which is placed in the public domain the name of the victim shall not be disclosed. The application moved by the victim should be heard by the court in chamber and the name should not be reflected even in the cause list till such matter is decided. Any document disclosing the name and identity of the victim should not be in the public domain. (Paras 28 and 50.4)

I. Penal Code, 1860 — S. 228-A(3) — Proceedings before a court with respect to sexual offences specified in S. 228-A IPC — Held, are in-camera proceedings — Restrictions with respect to printing or publication or reporting by press of any matter as to the said proceedings

— Held, the printing or publication of any matter in relation to the said proceedings is an offence unless such publication is made with previous permission of the court concerned — During these proceedings, nobody must be present in court except the presiding officer, the court staff, the accused, his counsel, the public prosecutor, the victim, if she wants to be there, or the witnesses — However, the bounden duty of all the said persons is to ensure that what happens in court is not disclosed outside — As regards the reporting of such cases by press, though the press can report about the fixing of the case before the court, the purpose of its listing and examination of the witnesses, but it cannot report what transpired inside the court or what was the evidence or the statement of victim or witnesses — Criminal Procedure Code, 1973 — Ss. 327(2) and (3) — Constitution of India — Arts. 19(1)(a) and (2) — Press and Media Laws — Press/Media reporting/publication — Sexual crimes against women and children (Paras 22 and 23)

Nivedita Jha v. State of Bihar, 2018 SCC OnLine SC 1616, *cited*

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- J. Penal Code, 1860 — S. 228-A(2)(b) — Adult victim of any sexual offence which is specified in S. 228-A(1) IPC — Disclosure of identity of, in terms of S. 228-A(2)(b) IPC — Prerequisites as to**
- a — Held, such a victim can obviously authorise any person in writing to disclose her name — But, this has to be a voluntary and conscious act of the victim (Para 14)
- K. Evidence Act, 1872 — Ss. 137 and 138 — Cross-examination of victims of rape — Manner in which to be conducted — Duty of Presiding Judge — Cross-examination in such cases should be done with a certain level of decency and respect to women at large**
- b — Presiding Judge should prevent the defence from asking defamatory and unnecessary questions about victim's morals and character — Constitution of India — Art. 21 — Penal Code, 1860 — Ss. 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB and 376-E — Criminal Law — Crimes Against Women and Children — Rape (Para 5)
- c **L. Protection of Children from Sexual Offences Act, 2012 — S. 1, Preamble and Statement of Objects and Reasons — Nature of POCSO Act — Held, is gender neutral and applies to all children** (Para 30)
- M. Constitution of India — Art. 21 — Dignity, Right to — Even dead persons have their own dignity — Hence, they cannot be denied dignity only because they are dead** (Para 40)
- d **N. Penal Code, 1860 — S. 228-A(2)(c) — Words “next of kin” as occurring therein — Meaning of — Plea that the said words will have to be given the same definition as is contemplated under the Succession Act, 1925 — Not gone into — “Next friend” of victim when may move application**
- e — Held, in certain cases, the interest of the next of kin may not be the same as the interest of the victim — In such circumstances, the applicant as to disclosure of identity of victim may not be the next of kin, but the “next friend” of victim, who may be entitled to move such an application — Issue as to who is the “next friend” will have to be decided by court or competent authority in each case — Words and Phrases — “Next of kin”, “next friend” (Para 19)
- f **O. Protection of Children from Sexual Offences Act, 2012 — S. 1, Preamble and Statement of Objects and Reasons — Child victims of sexual offences — Protection of fundamental and other basic human rights of, by complying with provisions of law in letter and spirit — Directions issued by Calcutta High Court in *Bijoy*, 2017 SCC OnLine Cal 417 with regard to — Approved and annexed to present judgment (set out in para 53 herein) — Chairpersons and Members of Juvenile Justice Committee of all High Courts in the country — Directed to go through said judgment of Calcutta High Court and issue similar directions keeping in view the particular needs of each High Court/State** (Paras 45 and 53)
- Bijoy v. State of W.B.*, 2017 SCC OnLine Cal 417 : 2017 Cri LJ 3893, approved
- g **P. Penal Code, 1860 — S. 228-A — Victims of sexual offences as specified in S. 228-A(1) IPC — Disclosure of identity of — Prohibition as to, under S. 228-A — Applicability — Initiation of campaign to protect rights of such victims and mobilise public opinion — Held, can be done even without disclosing the identity of such victims** (Para 17)
- h

Q. Protection of Children from Sexual Offences Act, 2012 — Ss. 33(4), 36 and 37 — Trial of sexual offences committed against children — Need to establish child-friendly courts — Emphasised — Such courts can also be used for trial of cases of rape against women (Paras 46 to 49) a

R. Criminal Procedure Code, 1973 — S. 154 — FIR — Crimes against women and children — Establishment of “One-Stop Centres”, which can be used as a central police station where all crimes against women and children in a town/city are registered — Direction issued for, to be implemented in one year — Requirement of well trained staff sensitive to needs of victims (including counsellors and psychiatrists) and various facilities (pertaining to medical, videoconferencing for recording statement of victims under S. 164 CrPC, courtroom, etc.) to be available at such One-Stop Centres — Location of such Centres i.e. not to be within the court complex but near it — Penal Code, 1860 — Ss. 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB and 376-E — Protection of Children from Sexual Offences Act, 2012, S. 19 (Paras 49, 50.9 and 51) b

S. Words and Phrases — “Media” — Reference to “media” in present judgment — Includes all types of media including press, electronic and social media, etc. (Para 3) c

W-D/61469/CR

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NIPUN SAXENA v. UNION OF INDIA (*Deepak Gupta, J.*) 709

Mehlwal, Raju Sonkar, Chirag M. Shroff, V.G. Pragasam, Prabu Ramasubramanian, S. Manuraj, Ms Aditi Gupta, Satya Mitra, T.N. Rama Roy, Hitesh Kr. Sharma and T. Veera Reddy, Advocates] for the appearing parties;

a Nipun Saxena, Petitioner-in-Person.

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2. 2018 SCC OnLine SC 1616, <i>Nivedita Jha v. State of Bihar</i>	715d
3. 2018 SCC OnLine Sikk 29 : 2018 Cri LJ 3146, <i>Subash Chandra Rai v. State of Sikkim</i>	722b
4. 2017 SCC OnLine Cal 417 : 2017 Cri LJ 3893, <i>Bijoy v. State of W.B.</i>	722d, 722d-e, 724f-g
5. (2003) 8 SCC 551 : 2004 SCC (Cri) 31, <i>Bhupinder Sharma v. State of H.P.</i>	717a
6. (1996) 2 SCC 384 : 1996 SCC (Cri) 316, <i>State of Punjab v. Gurmit Singh</i>	710a, 715e, 716d-e

The Judgment of the Court was delivered by

c **DEEPAK GUPTA, J.**— How and in what manner the identity of adult victims of rape and children who are victims of sexual abuse should be protected so that they are not subjected to unnecessary ridicule, social ostracisation and harassment, is one of the issues which arises in these cases.

d 2. We are dividing this judgment into two parts. The first part deals with the victims of the offence of rape under the Penal Code, 1860 (for short “IPC”) and the second part deals with victims who are subjected to offences under the Protection of Children from Sexual Offences Act, 2012 (for short “POCSO”).

3. In this judgment any reference to “media” will include all types of media including press, electronic and social media etc.

PART I

e 4. Unfortunately, in our society, the victim of a sexual offence, especially a victim of rape, is treated worse than the perpetrator of the crime. The victim is innocent. She has been subjected to forcible sexual abuse. However, for no fault of the victim, society instead of empathising with the victim, starts treating her as an “untouchable”. A victim of rape is treated like a “pariah” and ostracised from society. Many times, even her family refuses to accept her back into their fold. The harsh reality is that many times cases of rape do not even get reported

f because of the false notions of so-called “honour” which the family of the victim wants to uphold. The matter does not end here. Even after a case is lodged and FIR recorded, the police, more often than not, question the victim like an accused. If the victim is a young girl who has been dating and going around with a boy, she is asked in intimidating terms as to why she was dating a boy. The victim’s first brush with justice is an unpleasant one where she is made to feel that she is at fault; she is the cause of the crime.

g 5. If the victim is strong enough to deal with the recriminations and insinuations made against her by the police, she normally does not find much succour even in court. In court the victim is subjected to a harsh cross-examination wherein a lot of questions are raised about the victim’s morals and character. The Presiding Judges sometimes sit like mute spectators and normally do not prevent the defence from asking such defamatory and unnecessary questions. We want to make it clear that we do not, in any manner,

h want to curtail the right of the defence to cross-examine the prosecutrix, but the

same should be done with a certain level of decency and respect to women at large. Over a period of time, lot of effort has been made to sensitise the courts, but experience has shown that despite the earliest admonitions, the first as far back as in 1996¹, the courts even today reveal the identity of the victim. a

6. Section 228-A was introduced in IPC vide Amendment Act 43 of 1983 with effect from 25-12-1983 and reads as follows:

“228-A. 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 376-A, Section 376-AB, Section 376-B, Section 376-C, Section 376-D, Section 376-DA, Section 376-DB or Section 376-E 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. b

(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— c

(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 d

(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. e

(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. f

*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.”

7. We may also refer to Section 327 of the Code of Criminal Procedure, 1973 (for short “CrPC”) which provides that courts should be open and normally public should have access to the courts. Sub-section (2) of Section 327 was inserted by the same Amendment Act 43 of 1983. Section 327, as amended, reads as follows: g

“327. Court to be open.—(1) The place in which any criminal court is held for the purpose of inquiring into or trying any offence shall be deemed to h

1 *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 : 1996 SCC (Cri) 316

be an open court, to which the public generally may have access, so far as the same can conveniently contain them:

a Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

b (2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-AB, Section 376-B, Section 376-C, Section 376-D, Section 376-DA, Section 376-DB or Section 376-E of the Penal Code (45 of 1860) shall be conducted *in camera*

Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court:

c Provided further that *in camera* trial shall be conducted as far as practicable by a woman Judge or Magistrate.

(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court:

d Provided that the ban on printing or publication of trial proceedings in relation to an offence of rape may be lifted, subject to maintaining confidentiality of name and address of the parties.” (emphasis supplied)

8. Vide the Amendment Act of 1983 cases of rape, gang rape, etc. were excluded from the category of cases to be tried in open court. Later other similar offences were included vide Amendment Act of 2013.

e **9.** Sub-section (1) of Section 228-A, provides that any person who makes known the name and identity of a person who is an alleged victim of an offence falling under Sections 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB or 376-E commits a criminal offence and shall be punishable for a term which may extend to two years.

f **10.** What is however, permitted under sub-section (2) of Section 228-A IPC is making known the identity of the victim by printing or publication under certain circumstances described therein. Any person, who publishes any matter in relation to the proceedings before a court with respect to such an offence, without the permission of the court, commits an offence. The Explanation however provides that printing or publication of the judgment of the High Courts or the Supreme Court will not amount to any offence within the meaning of IPC.

g **11.** Neither IPC nor CrPC define the phrase “identity of any person”. Section 228-A IPC clearly prohibits the printing or publishing “the name or any matter which may make known the identity of the person”. It is obvious that not only the publication of the name of the victim is prohibited but also the disclosure of any other matter which may make known the identity of such victim. We are clearly of the view that the phrase “matter which may make known the identity of the person” does not solely mean that only the name of

the victim should not be disclosed but it also means that the identity of the victim should not be discernible from any matter published in the media. The intention of the law-makers was that the victim of such offences should not be identifiable so that they do not face any hostile discrimination or harassment in the future. a

12. A victim of rape will face hostile discrimination and social ostracisation 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. Our criminal jurisprudence does not provide for an adequate witness protection programme and, therefore, the need is much greater to protect the victim and hide her identity. In this regard, we may make reference to some ways and means where the identity is disclosed without naming the victim. In one case, which made the headlines recently, though the name of the victim was not given, it was stated that she had topped the State Board Examination and the name of the State was given. It would not require rocket science to find out and establish her identity. In another instance, footage is shown on the electronic media where the face of the victim is blurred but the faces of her relatives, her neighbours, the name of the village, etc. is clearly visible. This also amounts to disclosing the identity of the victim. We, therefore, hold that no person can print or publish the name of the victim or disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large. b
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13. Sub-section (2) of Section 228-A IPC makes an exception for police officials who may have to record the true identity of the victim in the police station or in the investigation file. We are not oblivious to the fact that in the first information report (for short “FIR”) the name of the victim will have to be disclosed. However, this should not be made public and especially not to the media. We are of the opinion that the police officers investigating such cases and offences should also as far as possible either use a pseudonym to describe the victim unless it is absolutely necessary to write down her identity. We make it clear that the copy of an FIR relating to the offence of rape against a women or offences against children falling within the purview of POCSO shall not be put in the public domain to prevent the name and identity of the victim from being disclosed. The Sessions Judge/Magistrate/Special Court can for reasons to be recorded in writing and keeping in view the interest of the victim permit the copy of the FIR to be given to some person(s). Some examples of matters where her identity will have to be disclosed are when samples are taken from her body, when medical examination is conducted, when DNA profiling is done, when the date of birth of the victim has to be established by getting records from school, etc. However, in these cases also the police officers should move with circumspection and disclose as little of the identity of the victim as possible but enough to link the victim with the information sought. We make it clear that the authorities to which the name is disclosed when such samples are sent, 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. There can be no hard-and-fast rule in e
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a this behalf but the police should definitely ensure that the correspondence or memos exchanged or issued wherein the name of the victim is disclosed are kept in a sealed cover and are not disclosed to the public at large. They should not be disclosed to the media and they shall also not be furnished to any person under the Right to Information Act, 2015. We direct that the police officials should keep all the documents in which the name of the victim is disclosed 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 by a large number of people. The sealed cover can be filed in the court along with the report filed under Section 173 CrPC.

b **14.** As far as clause (b) of sub-section (2) of Section 228-A IPC is concerned, if an adult victim has no objection to her name being published or identity being disclosed, she can obviously authorise any person in writing to disclose her name. This has to be a voluntary and conscious act of the victim.
c There are some victims who are strong enough and willing to face society even after their names are disclosed. Some of them, in fact, help other victims of rape and they become a source of inspiration to other rape victims. Nobody can have any objection to the victim disclosing her name as long as the victim is a major.

d **15.** Coming to clause (c) of sub-section (2) of Section 228-A IPC, we are of the opinion that where the victim is a minor, Section 228-A will no longer apply because of the enactment of POCSO which deals specifically with minors. In fact, the words “or minor” should for all intents and purposes be deemed to be deleted from clause (c) of sub-section (2) of Section 228-A IPC.

e **16.** The vexatious issue which troubles us is with regard to the next of kin of the victim giving an authority to the Chairman or the Secretary of recognised welfare institutions or organisations to declare the name. As per the materials placed before us till date neither the Central Government nor any State Government has recognised any such social welfare institutions or organisations to whom the next of kin should give the authorisation.

f **17.** Before dealing with this technical aspect as to whom the authorisation is to be given, we feel that a word of caution is needed with regard to the right of the next of kin of the victim. A person of unsound mind is as much a citizen of the country as a sane person. A person of unsound mind who is also subjected to such a heinous sexual offence suffers a trauma which is unimaginable. The issue for consideration is — in what circumstances the next of kin should be permitted to authorise the naming and identification of the victim? It was urged before us that in certain matters the name of the victim should be permitted to be disclosed or published because the name and face of the victim can then become a rallying point to prevent other such sexual offences. The victim becomes a symbol of protest or is treated as an iconic figure. We are not at all impressed with this argument. Should the person who is dead or who is of unsound mind be permitted to become a symbol if such person herself might not want to be a rallying point? We are also of the considered view that it is not at all necessary to disclose the identity of the victim to arouse public opinion and sentiment.
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h This is a serious issue dealing with victims of heinous sexual offences and needs

to be dealt with sensitivity. Furthermore, all of us are fully aware that without disclosing her true identity “Nirbhaya” became the most effective symbol of protest the country has ever known. If a campaign has to be started to protect the rights of the victim and mobilise public opinion it can be done so without disclosing her identity.

18. We may also add that in this modern age where we have dealt with cases where daughters have been raped by their fathers, where victims of rape especially minor victims are very often subjected to this heinous crime either by family members or friends of the family, it is not unimaginable that the so-called next of kin may for extraneous reasons including taking money from a media house or a publishing firm which wants to publish a book, disclose the name of the victim. We do not, in any manner, want to comment upon the role of the parents but we cannot permit even one case of this type and in the larger interest we feel that, as a matter of course, the name of the victim or her identity should not be disclosed even under the authorisation of the next of kin, without permission of the competent authority.

19. It has been urged on behalf of the Union of India that the words “next of kin” will have to be given the same definition as is contemplated under the Succession Act, 1925. We do not want to enter into this dispute. As pointed by us, in certain cases, the interest of the next of kin may not be the same as the interest of the victim. In such circumstances, the applicant may not be the next of kin, but the “next friend” of the child, who may be entitled to move such an application. It will be for the court or the competent authority to decide who is the “next friend”.

20. As pointed out above, neither the Central Government nor any State Government has recognised any such welfare institution or organisation. No guidelines have been laid down in IPC as to what will be the nature of such organisation and what will be the qualifications of the persons who are made the Chairman or Secretary of such organisation. These matters cannot be left indeterminate.

21. There may be cases where the identity of the victim, if not her name, may have to be disclosed. There may be cases where a dead body of a victim is found. It is established that the victim was subjected to rape. It may not be possible to identify the victim. Then, obviously her photograph will have to be published in the media. Even here, we would direct that while this may be done, the fact that such victim has been subjected to a sexual offence need not be disclosed. There may be other situations where the next of kin may be justified in disclosing the identity of the victim. If any such need should arise, then we direct that an application to authorise disclosure of identity should be made only to the Sessions Judge/Magistrate concerned and the said Sessions Judge/Magistrate shall decide the application on the basis of the law laid down by us. We are exercising power under Article 142 of the Constitution in this regard because the Government has not identified any social or welfare institution/organisation and the law as laid down cannot be administered. We direct that if

a the Government wants to actually act under Section 228-A(2)(c) IPC, it must before identifying such social welfare institution or organisation clearly lay down some rules or clear-cut criteria in this regard. What should be the nature of the organisation? How should the application be made? In what manner that application should be dealt with? A clear-cut procedure must be laid down. Till that is done, our directions shall prevail.

b **22.** As far as sub-section (3) of Section 228-A IPC is concerned, we would like to make it clear that IPC clearly lays down that nobody can print or publish any matter in relation to any proceedings falling within the purview of Section 228-A and in terms of Section 327(2) CrPC. These are in-camera proceedings and nobody except the presiding officer, the court staff, the accused, his counsel, the public prosecutor, the victim, if at all she wants to be present or the witness shall be there. It is the bounden duty of all of them to ensure that what happens in court is not disclosed outside. This is not to say that c there can be no reporting of such cases. The press can report that the case was fixed before court and some witnesses were examined. It can report for what purpose the case was listed but it cannot report what transpired inside the court or what was the statement of the victim or the witnesses. The evidence cannot be disclosed. We are not elaborating and dealing with the issue of publication in press in greater detail since this issue is engaging our attention in *Nivedita d Jha case*² but it is clear that nobody can be permitted to violate Section 327(3) CrPC, the language of which is very clear and unambiguous.

23. Sub-section (3) of Section 228-A IPC makes printing or publication of any matter in relation to such proceedings before a court an offence unless its publication is made with the previous permission of such court.

e **24.** This Court, more than two decades back in *Gurmit Singh case*¹ raised a note of caution. It found that sexual crimes against women were rising. This Court held that victims of sexual abuse or assault were treated without any sensitivity during the course of investigation and trial. The Court further held that trial of rape cases in camera should be the rule and open trial an exception. Though the Court did not refer to Section 228-A IPC, the following f observations are pertinent: (SCC pp. 403-04, paras 21-22)

g “21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women’s rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim’s privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The

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² *Nivedita Jha v. State of Bihar*, 2018 SCC OnLine SC 1616

¹ *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 : 1996 SCC (Cri) 316

courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. ...

22. There has been lately, lot of criticism of the treatment of the victims of sexual assault in the court during their cross-examination. The provisions of the Evidence Act regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as “discrepancies and contradictions” in her evidence.”

25. Dealing with Section 327 CrPC in *Gurmit Singh case*¹ this Court held as follows: (SCC pp. 404-05, para 24)

“24. ... It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an *open court*, under the gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood. ... The courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible throughout. In the present case, the trial court has repeatedly used the name of the victim in its order under appeal, when it could have just referred to her as the prosecutrix. We need say no more on this aspect and hope that the trial courts would take recourse to the provisions of Sections 327(2) and (3) CrPC liberally. Trial of rape cases *in camera* should be the rule and an *open trial* in such cases an exception.” (emphasis in original)

¹ *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 : 1996 SCC (Cri) 316

26. *Bhupinder Sharma v. State of H.P.*³ is one of first cases where specific reference was made to Section 228-A IPC. This Court held as follows: (SCC p. 554, para 2)

a “2. We do not propose to mention the name of the victim. Section 228-A of the Penal Code, 1860 (in short “IPC”) makes disclosure of the identity of victims of certain offences punishable. Printing or publishing the name or any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or
b 376-D is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or publication of judgment by the High Court or the Supreme Court. But keeping in view the social object of preventing social victimisation or ostracism of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of a High Court or a lower court, the name of the
c victim should not be indicated. We have chosen to describe her as “victim” in the judgment.”

This Court held that the bar imposed under Section 228-A IPC did not in term apply to the printing or publication of judgments of the High Courts and the Supreme Court because of the Explanation to Section 228-A. However, keeping
d in view the social object of preventing the victims or ostracising of victims, it would be appropriate that in judgments of all the courts i.e. trial courts, High Courts and the Supreme Court the name of the victim should not be indicated. This has been repeated in a large number of cases and we need not refer to all.

27. The Kerala High Court in *Aju Varghese v. State of Kerala*⁴ held as follows: (SCC OnLine Ker para 8)

e “8. The statutory provision as explained by the Supreme Court clearly shows that the provision was specifically intended to ensure that the victim is not exposed to further agony by the consequent social victimization or ostracism pursuant to disclosure of her identity. It is clear that, it is intended to protect her from psychological and sociological torture or mental agony, that may follow the unfortunate incident of sexual violence. Society has
f a duty to support the victims of sexual violence and to ensure that they come back to normalcy and start leading a normal life. Victims of such violence are not denuded of their fundamental right to privacy and are liable to be insulated against unnecessary public comments. Definitely, it serves an avowed social purpose and has an element of public interest involved in it. Section is so clear, unambiguous and the consequence of breach of it
g is inescapable and the question whether the disclosure was intended, bona fide or without knowledge of law has no relevance. Hence, the provision of Section 228-A IPC prohibiting the disclosure of the name by an accused is absolute and cannot be diluted.”

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3 (2003) 8 SCC 551 : 2004 SCC (Cri) 31
4 2018 SCC OnLine Ker 5397

28. Before parting with this aspect, we would like to deal with a situation not envisaged by the law-makers. As we have held above, Section 228-A IPC imposes a clear-cut bar on the name or identity of the victim being disclosed. What happens if the accused is acquitted and the victim of the offence wants to file an appeal under Section 372 CrPC? Is she bound to disclose her name in the memo of appeal? We are clearly of the view that such a victim can move an application to the court praying that she may be permitted to file a petition under a pseudonymous name e.g. 'X' or 'Y' or any other such coded identity that she may choose. However, she may not be permitted to give some other name which may indirectly harm another person. There may be certain documents in which her name will have to be disclosed e.g. the power of attorney and affidavit(s) which may have to be filed as per the Rules of the Court. The Court should normally allow such applicant to file the petition/appeal in a pseudonymous name. Where a victim files an appeal we direct that such victim can file such an appeal by showing her name as 'X' or 'Y' along with an application for non-disclosure of the name of the victim. In a sealed envelope to be filed with the appeal she can enclose the document(s), in which she can reveal her identity as required by the Rules of the appellate court. The Court can verify the details but in the material which is placed in the public domain the name of the victim shall not be disclosed. Such an application should be heard by the Court in chambers and the name should not be reflected even in the cause list till such matter is decided. Any documents disclosing the name and identity of the victim should not be in the public domain.

PART II

29. In this part of the judgment we shall deal with the issues which relate to non-disclosure of the name and identity of a victim falling within the purview of POCSO. At the outset, we may note that the reasons which we have given in Part I of the judgment dealing with the adult victims, apply with even greater force to minor victims.

30. A minor who is subjected to sexual abuse needs to be protected even more than a major victim because a major victim being an adult may still be able to withstand the social ostracisation and mental harassment meted out by society, but a minor victim will find it difficult to do so. Most crimes against minor victims are not even reported as very often, the perpetrator of the crime is a member of the family of the victim or a close friend. Efforts are made to hush up the crime. It is now recognised that a child needs extra protection. India is a signatory to the United Nations Convention on the Rights of Child, 1989 and Parliament thought it fit to enact POCSO in the year 2012, which specifically deals with sexual offences against all children. The Act is gender neutral and whatever we say in this part will apply to all children.

31. Chapter VI of POCSO deals with procedure relating to recording the statement of a child. Section 24 deals with the statement recorded by the police. For our purpose sub-section (5) of Section 24 is relevant which reads as follows:

“24. Recording of statement of a child.—(1)-(4) * * *

a (5) The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.”

b **32.** Section 25 of POCSO states that statements of the child recorded under Section 164 CrPC which permits an advocate to be present will not be applicable in the case of children. Trials under POCSO are conducted by the Special Court which is expected to be child-friendly and specifically provides that the Special Court shall not permit aggressive questioning or character assassination of the child.

33. Sub-section (7) of Section 33 which is relevant reads as follows:

“33. Procedure and powers of Special Court.—(1)-(6) * * *

c (7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

d *Explanation.—*For the purposes of this sub-section, the identity of the child shall include the identity of the child’s family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.”

e **34.** Section 37 provides that all trials under POCSO are to be conducted in camera unless otherwise specifically decided for reasons to be recorded by the Special Court. A bare reading of Section 24(5) and Section 33(7) makes it amply clear that the name and identity of the child is not to be disclosed at any time during the course of investigation or trial and the identity of the child is protected from the public or media. Furthermore, Section 37 provides that the trial is to be conducted in camera which means that the media cannot be present. The entire purpose of POCSO is to ensure that the identity of the child is not disclosed unless the Special Court for reasons to be recorded in writing permits such disclosure. This disclosure can only be made if it is in the interest of the child and not otherwise. One such case where disclosure of the identity of the child may be necessary can be where a child is found who has been subjected to a sexual offence and the identity of the child cannot be established even by the investigating team. In such a case, the investigating officer or the Special Court may allow the photograph of the child to be published to establish the identity. It is absolutely clear that the disclosure of the identity can be permitted by the Special Court only when the same is in the interest of the child and in no other circumstances. We are of the view that the disclosure of the name of the child to make the child a symbol of protest cannot normally be treated to be in the interest of the child.

g **35.** It is contended by the learned Amicus Curiae that interest of the child has not been defined. We are of the view that it is neither feasible nor would it be advisable to clearly lay down what is the meaning of the phrase “interest of the child”. We have, however, given some examples hereinabove and we do not

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want to tie down the hands of the Special Court, which may have to deal with such cases. Each case will have to be dealt within its own factual scenario.

36. Section 23 of POCSO contains provisions which relate to procedure for media. It reads as follows: a

“23. Procedure for media.—(1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy. b

(2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child:

Provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the interest of the child. c

(3) The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee.

(4) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both.” d

37. Sub-section (1) of Section 23 prohibits any person from filing any report or making any comments on any child in any form, be it written, photographic or graphic without first having complete and authentic information. No person or media can make any comments which may have the effect of lowering the reputation of the child or infringing upon the privacy of the child. Sub-section (2) of Section 23 clearly lays down that no report in any media shall disclose identity of a child including name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to the disclosure of the identity of the child. This clearly shows that the intention of the legislature was that the identity of the child should not be disclosed directly or indirectly. The phrase “any other particulars” will have to be given the widest amplitude and cannot be read only ejusdem generis. The intention of the legislature is that the privacy and reputation of the child is not harmed. Therefore, any information which may lead to the disclosure of the identity of the child cannot be revealed by the media. The media has to be not only circumspect but a duty has been cast upon the media to ensure that it does nothing and gives no information which could directly or indirectly lead to the identity of the child being disclosed. e
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38. No doubt, it is the duty of the media to report every crime which is committed. The media can do this without disclosing the name and identity of the victim in case of rape and sexual offences against children. The media not only has the right but an obligation to report all such cases. However, media should be cautious not to sensationalise the same. The media should refrain from talking to the victim because every time the victim repeats the tale of misery, the victim again undergoes the trauma which he/she has gone through. h

a Reportage of such cases should be done sensitively keeping the best interest of the victims, both adult and children, in mind. Sensationalising such cases may garner television rating points (TRPs) but does no credit to the credibility of the media.

b **39.** Where a child belongs to a small village, even the disclosure of the name of the village may contravene the provisions of Section 23(2), POCSO because it will just require a person to go to the village and find out who the child is. In larger cities and metropolis like Delhi the disclosure of the name of the city by itself may not lead to the disclosure of the identity of the child but any further details with regard to the colony and the area in which the child is living or the school in which the child is studying are enough (even though the house number may not be given) to easily discover the identity of the child. In our considered view, the media is not only bound not to disclose the identity of the child but by law is mandated not to disclose any material which can lead to the disclosure of the identity of the child. Any violation of this will be an offence under Section 23(4).

c **40.** The learned Amicus Curiae urged that child for purposes of publication should only mean a living child. Her contention appears to be that when the child is dead then the name and identity of child can be disclosed. Her submission is based on the assumption that if the name and identity of the child is disclosed, public sentiment can be generated and a movement can be started to get justice for the child. According to her, it is difficult to garner such support if the name of the deceased child victim is not disclosed. We are not at all in agreement with this submission. The same reasoning which we have given above for victims will apply to dead victims also. In the case of dead victims, we have to deal with another factor. We have to deal with the important issue that even the dead have their own dignity. They cannot be denied dignity only because they are dead.

d **41.** Though in this case we are dealing with cases of victims but we may make reference to Section 74 of the Juvenile Justice (Care and Protection of Children) Act, 2015, which reads as follows:

e **“74. Prohibition on disclosure of identity of children.**—(1) No report in any newspaper, magazine, news-sheet or audio-visual media or other forms of communication regarding any inquiry or investigation or judicial procedure, shall disclose the name, address or school or any other particular, which may lead to the identification of a child in conflict with law or a child in need of care and protection or a child victim or witness of a crime, involved in such matter, under any other law for the time being in force, nor shall the picture of any such child be published:

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g Provided that for reasons to be recorded in writing, the Board or Committee, as the case may be, holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the best interest of the child.

h (2) The Police shall not disclose any record of the child for the purpose of character certificate or otherwise in cases where the case has been closed or disposed of.

(3) Any person contravening the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to six months or fine which may extend to two lakh rupees or both.”

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42. The name, address, school or other particulars which may lead to the identification of the child in conflict with law cannot be disclosed in the media. No picture of such child can be published. A child who is not in conflict with law but is a victim of an offence especially a sexual offence needs this protection even more.

43. The Sikkim High Court in *Subash Chandra Rai v. State of Sikkim*⁵ dealing with this issue held as follows: (SCC OnLine Sikk para 34)

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“34. The mandate of the provision requires no further clarification. Suffice it to say that neither for a child in conflict with law, or a child in need of care and protection, or a child victim, or witness of a crime involved in matter, the name, address, school or other particulars which could lead to the child being tracked, found and identified shall be disclosed, unless for the reasons given in the proviso extracted hereinbefore. The Police and Media as well as the Judiciary are required to be equally sensitive in such matters and to ensure that the mandate of law is complied with to the letter.”

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44. In *Bijoy v. State of W.B.*⁶, the Calcutta High Court has given a detailed judgment setting out the reasons while dealing with the provisions of POCSO and held that neither during investigation nor during trial the name of the victim should be disclosed.

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45. The Calcutta High Court in *Bijoy case*⁶ has also given other directions to ensure that the provisions of the law are followed in letter and spirit, and the fundamental rights of a child victim and other basic human rights are protected. We are in agreement with all these directions. Though some of the issues dealt with in these directions do not strictly arise in this case, keeping in view the fact that we are dealing with the rights of children, we are annexing the directions issued by the Calcutta High Court as Annexure 1 to this judgment. We request all the Chairpersons and Members of all the Juvenile Justice Committee of all the High Courts in the country to go through the judgment of the Calcutta High Court and the directions issued therein and they may issue similar directions, keeping in view the particular needs of each High Court/State.

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46. Before parting we would like to emphasise the need to have child-friendly courts. POCSO mandates setting up of child-friendly courts. Though some progress has been made in this regard, a lot still requires to be done.

47. Any litigant who enters the court feels intimidated by the atmosphere of the court. Children and women, especially those who have been subjected to sexual assault are virtually overwhelmed by the atmosphere in the courts. They are scared. They are so nervous that they, sometimes, are not even able to describe the nature of the crime accurately. When they are cross-examined in

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5 2018 SCC OnLine Sikk 29 : 2018 Cri LJ 3146

6 2017 SCC OnLine Cal 417 : 2017 Cri LJ 3893

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a a hostile and intimidatory manner then the nervousness increases and the truth does not come out.

- a **48.** It is, therefore, imperative that we should have courts which are child-friendly. Section 33(4) POCSO enjoins on the Special Court to ensure that there is child-friendly atmosphere in court. Section 36 lays down that the child should not see the accused at the time of testifying. This is to ensure that the child does not get scared on seeing the alleged perpetrator of the crime. As noted above, trials are to be conducted in camera. Therefore, there is a need to have courts
b which are specially designed to be child-friendly and meet the needs of child victims and the law.

- 49.** These courts need not only be used for trying cases under POCSO but can also be used as trial courts for trying cases of rape against women. In fact, it would be in the interest of children and women, and in the interest of justice if One-Stop Centres are also set up in all the districts of the country as early as
c possible. These One-Stop Centres can be used as a central police station where all crimes against women and children in the town/city are registered. They should have well-trained staff who are sensitive to the needs of children and women who have undergone sexual abuse. This staff should be given adequate training to ensure that they talk to the victims in a compassionate and sensitive manner. Counsellors and psychiatrists should also be available on call at these
d Centres so that if necessary the victims are counselled and in some cases it would be appropriate if the counsellors question the victims in a manner in which they have been trained to handle the victims of such offences. These One-Stop Centres should also have adequate medical facilities to provide immediate medical aid to the victims and the medical examination of the victims can be conducted at the Centre itself. These One-Stop Centres should also have
e video conferencing facility available where the statement of the victims to be mandatorily recorded under Section 164 CrPC can be recorded using video conferencing facilities and the victims need not be produced in the Court of the Magistrate. There should be courtroom(s) in these One-Stop Centres which can be used for trial of such cases. As far as possible these Centres should not be situated within the court complex but should be situated near the court complex
f so that the lawyers are also not inconvenienced. Resultantly, the victims of such offences will never have to go to a court complex which would result in a victim-friendly trial. One such Centre which has already been set up is “BHAROSA” in Hyderabad. This can be used as a model for other One-Stop Centres in the country.

- 50.** In view of the aforesaid discussion, we issue the following directions:
g **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.

- 50.2.** In cases where the victim is dead or of unsound mind the name of the
h victim or her identity should not be disclosed even under the authorisation of the next of 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.

50.3. FIRs relating to offences under Sections 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB or 376-E IPC and the offences under POCSO shall not be put in the public domain. a

50.4. 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.

50.5. 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. b

50.6. 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. c

50.7. 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 228-A(2)(c) IPC should be made only to the Sessions Judge concerned until the Government acts under Section 228-A(1)(c) and lays down criteria as per our directions for identifying such social welfare institutions or organisations. d

50.8. 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.

50.9. All the States/Union Territories are requested to set up at least one “One-Stop Centre” in every district within one year from today. e

51. A copy of this judgment be sent to the Registrars 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.

52. In view of the above, we dispose of these petitions as far as issues dealt with hereinabove are concerned. f

53. ANNEXURE — 1

(Directions issued by the Calcutta High Court in
*Bijoy v. State of W.B.*⁶, SCC OnLine Cal para 40)

“1. Police Officer or the Special Juvenile Police Unit receiving complaint as to commission or likelihood of commission of offence under the Act shall forthwith register the same in terms of Section 19 of the Act and furnish a copy free of cost to the child and/or his/her parents and inform the child or his/her parents or any person in whom the child has trust and confidence of his/her right to legal aid and representation and if the child is unable to arrange for his/her legal representation, refer the child to g
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a the District Legal Services Authority for necessary legal aid/representation under Section 40 of the Act. Failure to register first information report in respect of offences punishable under Sections 4, 6, 7, 10 and 12 of POCSO shall attract penal liability under Section 166-B of the Penal Code as the aforesaid offences are cognate and/or *pari materia* to the Penal Code offences referred to in the said penal provision.

b 2. The police officer on registration of FIR shall promptly forward the child for immediate emergency medical aid, whenever necessary, and/or for medical examination under Section 27 of the Act and ensure recording of the victim's statement before the Magistrate under Section 25 of the Act. In the event, the police officer or the Special Juvenile Police Unit is of the opinion that the child falls within the definition of "child in need of (sic) care and protection" as defined under Section 2(d) of the Juvenile Justice (Care and Protection of Children) Act, 2000, [as suitably modified by the Juvenile Justice (Care and Protection of Children) Act, 2015 (sic)] the said police officer or the Special Juvenile Police Unit shall forthwith forward the child to the jurisdictional Child Welfare Committee for providing care, protection, treatment and rehabilitation of the child in accordance with law.

c 3. Whenever a registration of FIR is reported to the Special Court, the Special Court shall make due enquiries from the investigating agency as to compliance of the aforesaid requirements of law as stated in Directions 1 and 2, above and pass necessary orders to ensure compliance thereof in accordance with law, if necessary.

d 4. Officer in charge of the police station and the investigating officer in the case including the Special Juvenile Police Unit shall ensure that the identity of the victim is not disclosed in the course of investigation, particularly at the time of recording statement of the victim under Section 24 of the Act (which as far as practicable may be done at the residence or a place of choice of the victim or that of his/her parents/custodian, as the case may be), his/her examination before the Magistrate under Section 25 of the Act, forwarding of the child for emergency medical aid under Section 19(5) and/or medical examination under Section 27 of the Act.

e 5. The investigating agency shall not disclose the identity of the victim in any media and shall ensure that such identity is not disclosed in any manner whatsoever except the express permission of the Special Court in the interest of justice. Any person including a police officer committing breach of the aforesaid requirement of law shall be prosecuted in terms of Section 23(4) of the said Act.

f 6. Trial of the case shall be held in camera in terms of Section 37 of the Act and evidence of the victim shall be promptly recorded without unnecessary delay and following the procedure of screening the victim from the accused person as provided in Section 36 of the Act. The evidence of the victim shall be recorded by the Court in a child-friendly atmosphere in the presence of the parents, guardian or any other person in whom the child has trust and confidence by giving frequent breaks and the Special

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Court shall not permit any repetitive, aggressive or harassing questioning of the child particularly as to his/her character assassination which may impair the dignity of the child during such examination. In appropriate cases, the Special Court may call upon the defence to submit its questions relating to the incident during cross-examination in writing to the court and the latter shall put such questions to the victim in a language which is comprehensible to the victim and in a decent and non-offensive manner.

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7. In the event, the victim is abroad or is staying at a far off place or due to supervening circumstances is unable to physically attend the court to record evidence, resort shall be taken for recording his/her evidence by way of video conference.

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8. The identity of the victim particularly his/her name, parentage, address or any other particulars that may reveal such identity shall not be disclosed in the judgment delivered by the Special Court unless such disclosure of identity is in the interest of the child.

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9. The Special Court upon receipt of information as to commission of any offence under the Act by registration of FIR shall on his own or on the application of the victim make enquiry as to the immediate needs of the child for relief or rehabilitation and upon giving an opportunity of hearing to the State and other affected parties including the victim pass appropriate order for interim compensation and/or rehabilitation of the child. In conclusion of proceeding, whether the accused is convicted or not, or in cases where the accused has not been traced or had absconded, the Special Court being satisfied that the victim had suffered loss or injury due to commission of the offence shall award just and reasonable compensation in favour of the victim. The quantum of the compensation shall be fixed taking into consideration the loss and injury suffered by the victim and other related factors as laid down in Rule 7(3) of the Protection of Children from Sexual Offences Rules, 2012 and shall not be restricted to the minimum amounts prescribed in the Victim Compensation Fund. The interim/final compensation shall be paid either from the Victim Compensation Fund or any other special scheme/fund established under Section 357-A of the Code of Criminal Procedure, 1973 (sic) or any other law for the time being in force through the State Legal Services Authorities or the District Services Authority in whose hands the Fund is entrusted. If the Court declines to pass interim or final compensation in the instant case it shall record its reasons for not doing so. The interim compensation, so paid, shall be adjusted with final compensation, if any, awarded by the Special Court in conclusion of trial in terms of Section 33(8) of the Act.

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10. The Special Court shall ensure that the trial in cases under POCSO is not unduly protracted and shall take all measures to conclude the trial as expeditiously as possible preferably within a year from taking cognizance of the offence without granting unreasonable adjournment to the parties in terms of Section 35(2) of the Act.”

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ORDER

a **1.** Leave granted. Pursuant to the order dated 11-4-2005¹, the learned Additional Solicitor General appearing for the appellants submits that the Railways have some reservation about the matter being referred to an independent arbitrator in view of the arbitration clause; and, further because this may become a precedent. We make it clear that our opinion as expressed in the order dated 11-4-2005¹ to refer the matter for adjudication by an independent arbitrator, preferably a retired Judge, was formed on the peculiar facts and circumstances of these cases and, therefore, cannot be a precedent to be followed in other cases.

b **2.** We direct that the disputes between the parties arising for decision in these matters be referred for adjudication by an Arbitral Tribunal consisting solely of Mr Justice K. Venkataswami, a former Judge of this Court. The learned arbitrator would appoint his reasonable fee and expenses. The parties would be at liberty to seek interim relief from the sole arbitrator.

c **3.** The impugned judgments² of the High Court are set aside. The appeals stand disposed of in the abovesaid terms.

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(2014) 4 Supreme Court Cases 427

(BEFORE R.M. LODHA AND F.M. IBRAHIM KALIFULLA, JJ.)

LAXMI .. Petitioner;

Versus

e UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition (Crl.) No. 129 of 2006, decided on July 18, 2013

f **A. Constitution of India — Arts. 21, 14, 15 and 32 — Acid attack — Preventive measures and relief to victims of acid attack — Some States already having made rules under S. 2, Poisons Act, 1919 to regulate retail sale of acids — For other States and Union Territories (UTs) draft Model Rules titled “Poisons Possession and Sale Rules, 2013” already having been framed but pending enactment — Directions issued pending enactment of Rules — Poisons Act, 1919 — Ss. 2 and 8 — Rule-making power of State**

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1 *Union of India v. Concrete Products & Construction Co.*, SLPs (C) Nos. 18244-45 of 2004, order dated 11-4-2005 (SC), wherein it was directed:

“The learned Senior Counsel for the respondents suggests that without going into the merits of the controversy raised, the respondents are agreeable to the entire controversy being referred for adjudication by an arbitrator who may be a retired Judge of the High Court. Let the learned Additional Solicitor General appearing for the petitioners have instructions. List on 2-5-2005.”

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2 *Union of India v. Concrete Products and Construction Co.*, Writ Appeal No. 2822 of 2001, decided on 30-4-2004 (Mad)

Governments, under Ss. 2 and 8 for regulating retail sale of acids — Rules to regulate and prevent acid attacks (Paras 7 to 11 and 15)

B. Criminal Procedure Code, 1973 — S. 357-A — Compensation to victims of acid attack — Quantum and manner of disbursement — Held, a uniform compensation of Rs 3 lakhs should be paid by all States/UTs to victims of acid attack — Rs 1 lakh should be paid immediately within 15 days — Remaining Rs 2 lakhs should be paid within 2 months as expeditiously as possible — Authorities directed to give wide publicity to said directions — Constitution of India — Arts. 21 and 32 — Acid attack (Paras 12 to 15)

Laxmi v. Union of India, (2014) 4 SCC 431, Footnote 1; *Laxmi v. Union of India*, (2014) 4 SCC 431, Footnote 2; *Laxmi v. Union of India*, (2014) 4 SCC 431, referred to

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| 2. (2014) 4 SCC 431, <i>Laxmi v. Union of India</i> | 428f-g |
| 3. (2014) 4 SCC 431, Footnote 2, <i>Laxmi v. Union of India</i> | 428f-g |

ORDER

1. On 6-2-2013, a direction was given to the Home Secretary, Ministry of Home Affairs associating the Secretary, Ministry of Chemical and Fertilisers to convene a meeting of the Chief Secretaries/Secretaries concerned of the State Governments and the Administrators of the Union Territories, inter alia, to discuss the following aspects:

1.1. Enactment of appropriate provision for effective regulation of sale of acid in the States/Union Territories.

1.2. Measures for the proper treatment, aftercare and rehabilitation of the victims of acid attack and needs of acid attack victims.

1.3. Compensation payable to acid attack victims by the State/or creation of some separate fund for payment of compensation to the acid attack victims.

2. Following the order of 6-2-2013, three subsequent orders on 16-4-2013¹, 9-7-2013² and 16-7-2013³ were passed by this Court.

3. Various State Governments/Union Territories have filed their affidavits. The Union of India filed its last affidavit on 17-7-2013. Along with that affidavit, draft Model Rules entitled “the Poisons Possession and Sale Rules, 2013” (for short “the Model Rules”) have been placed on record.

¹ *Laxmi v. Union of India*, (2014) 4 SCC 431, Footnote 1

² *Laxmi v. Union of India*, (2014) 4 SCC 431, Footnote 2

³ *Laxmi v. Union of India*, (2014) 4 SCC 431

4. Mr Mohan Parasaran, learned Solicitor General states that the Central Government will circulate the Model Rules to regulate sale of acid and other corrosive substances framed under the Poisons Act, 1919 to all the State Governments and Union Territories within a week from today. He also states that the Model Rules will include, inter alia, the form of acids (liquids or crystalline and its concentration) that can be stored and sold, issue of licences, procurement by individuals, educational and research institutions, hospitals, industries, government departments and departments of public sector undertakings. We accept the statement made by the learned Solicitor General as noted above.

5. Insofar as the States and Union Territories are concerned, we are informed that the States of Maharashtra, Karnataka, Kerala, Haryana, Punjab, Madhya Pradesh, Sikkim and Arunachal Pradesh have framed rules to regulate sale of acid and other corrosive substances. As regards the State of Meghalaya, we find from the available record that draft Rules have been prepared, a copy of which has been made available to the Court.

6. The learned counsel for the State of Tamil Nadu has stated before us that within two months from today, appropriate rules to regularise sale of acid and other corrosive substances shall be framed.

7. In our opinion, all the States and Union Territories which have not yet framed rules will do well to make rules to regulate sale of acid and other corrosive substances in line with the Model Rules framed by the Central Government. The States, which have framed rules but these rules are not as stringent as the Model Rules framed by the Central Government will make necessary amendments in their rules to bring them in line with the Model Rules. The Chief Secretaries of the respective States and the Administrators of the Union Territories shall ensure compliance with the above expeditiously and in no case later than three months from the receipt of the draft Model Rules from the Central Government.

8. The Centre and States/Union Territories shall work towards making the offences under the Poisons Act, 1919 cognizable and non-bailable.

9. 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 States concerned/Administrators of the Union Territories shall ensure the compliance with the following directions with immediate effect:

9.1. 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.

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9.2. 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; a

(b) specifies the reason/purpose for procuring acid.

9.3. All stocks of acid must be declared by the seller with the Sub-Divisional Magistrate (SDM) concerned within 15 days.

9.4. No acid shall be sold to any person who is below 18 years of age.

9.5. In case of undeclared stock of acid, it will be open to the SDM concerned to confiscate the stock and suitably impose a fine on such seller up to Rs 50,000. b

9.6. The SDM concerned may impose fine up to Rs 50,000 on any person who commits breach of any of the above directions.

10. 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: c

10.1. A register of usage of acid shall be maintained and the same shall be filed with the SDM concerned.

10.2. A person shall be made accountable for possession and safe keeping of acid in their premises. d

10.3. 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.

11. The SDM concerned shall be vested with the responsibility of taking appropriate action for the breach/default/violation of the above directions. e

12. Section 357-A came to be 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 dependants who have suffered loss or injury as a result of the crime and who require rehabilitation. f

13. We are informed that pursuant to this provision, 17 States and 7 Union Territories have prepared "Victim Compensation Scheme" (for short "the 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, the 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 g
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aftercare and rehabilitation cost. The suggestion of the learned Solicitor General is very fair.

- a* **14.** We, accordingly, direct that the acid attack victims shall be paid compensation of at least Rs 3 lakhs by the State Government/Union Territory concerned as the aftercare 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 Rs 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 with the above direction.

- c* **15.** The Chief Secretaries of the States and the Administrators of the Union Territories shall take necessary steps in getting this order translated into vernacular and publicise the same appropriately for the information of public at large. List the matter on 3-12-2013.

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(2014) 4 Supreme Court Cases 431

(Record of Proceedings)

(BEFORE R.M. LODHA AND S.J. MUKHOPADHAYA, JJ.)

LAXMI Petitioner;

Versus

e UNION OF INDIA AND OTHERS Respondents.

Writ Petition (Cri.) No. 129 of 2006, decided on July 16, 2013

Constitution of India — Arts. 21, 14, 15 and 32 — Acid attack — Preventive measures and relief to victims of acid attack — Directions issued — Poisons, Insecticides and Pesticides — Poisons Act, 1919, Ss. 2 and 8 (Paras 3 to 7)

f *Laxmi v. Union of India*, WP (Cri) No. 129 of 2006, order dated 16-4-2013 (SC); *Laxmi v. Union of India*, WP (Cri) No. 129 of 2006, order dated 9-7-2013 (SC), referred to

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Chronological list of cases cited ***on page(s)***

- g* 1. WP (Cri) No. 129 of 2006, order dated 9-7-2013 (SC), *Laxmi v. Union of India* 432a, 433d
2. WP (Cri) No. 129 of 2006, order dated 16-4-2013 (SC), *Laxmi v. Union of India* 432a, 433a

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(2015) 2 Supreme Court Cases 227

(BEFORE V. GOPALA GOWDA AND ADARSH KUMAR GOEL, JJ.)

a SURESH AND ANOTHER .. Appellants;

Versus

STATE OF HARYANA .. Respondent.

Criminal Appeal No. 420 of 2012[†], decided on November 28, 2014

b **A. Criminal Procedure Code, 1973 — Ss. 357-A and 357 — Victims of crime — Compensation, interim compensation and rehabilitation — Object and purpose of S. 357-A — Effectuation of S. 357-A — Duty of court to ascertain financial need of victim arising out of the crime *immediately* and to direct grant of interim compensation, on its own motion, irrespective of application of victim — Factors to be considered therefor — Need for States to provide adequate funds under S. 357-A CrPC compensation scheme — Directions issued**

— Object of S. 357-A CrPC is to pay compensation to victims where compensation paid under S. 357 CrPC is not adequate or where the case ended in acquittal or discharge and where the victim is required to be rehabilitated

d — Constitution of India — Art. 21 — Human and Civil Rights — UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 — Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure, 1985 — European Forum for Victims' Services Statement of Victims' Rights in the Process of Criminal Justice, 1996 — European Union Framework Decision on the Standing of Victims in Criminal Proceedings — Victimology

e **B. Criminal Procedure Code, 1973 — Ss. 357-A and 357 — Victims of crime — Compensation, interim compensation and rehabilitation — Adequacy of upper limit of compensation fixed by States — Necessary directions issued**

f — Judicial notice taken of fact: (a) that 25 out of 29 States have notified victim compensation schemes, (b) that although five years had expired since enactment of S. 357-A CrPC, the award of compensation has not become a rule, (c) that interim compensation is not being awarded by courts, and (d) that upper limit of compensation fixed by some States is arbitrarily low and is not in keeping with the object of legislation — Thus, directed that pending consideration of upward revision of compensation scales, scale notified by the State of Kerala in its scheme, unless the scale awarded by any other State or Union Territory is higher, to be adopted in all States — States of Andhra Pradesh, Madhya Pradesh, Meghalaya and Telangana directed to notify their schemes within one month from the receipt of a copy of this order — Lastly,

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h [†] From the Judgment and Order dated 17-9-2009 of the High Court of Punjab and Haryana at Chandigarh in CrI. A. No. 182-DB of 2004

directed that copy of this judgment be forwarded to National Judicial Academy so that all judicial officers in the country can be imparted requisite training to make Ss. 357-A and 357 CrPC operative and meaningful — a
Victimology

C. Criminal Procedure Code, 1973 — Ss. 357-A and 357 — Interim compensation to family of murdered victims — Payment of — Liability of State therefor — Interim compensation of Rs 10 lakhs directed to be paid to family of victims — Haryana Legal Services Authority directed to pay said amount within one month of receipt of copy of present judgment — State of Haryana directed to make available said sum, if not already available with Haryana Legal Services Authority within one month of receipt of copy of said judgment — And thereafter within one month Haryana Legal Services Authority would disburse the compensation b

Held :

Section 357-A has been incorporated in CrPC vide Act 5 of 2009 and the amendment duly came into force in view of the Notification dated 31-12-2009. The object and purpose of Section 357-A CrPC is to enable the court to direct the State to pay compensation to the victim where the compensation under Section 357 CrPC is not adequate or where the case ended in acquittal or discharge and the victim is required to be rehabilitated. The provision was incorporated on the recommendation of the 154th Report of the Law Commission. It recognises compensation as one of the methods of protection of victims. (Para 13) c

Ankush Shivaji Gaikwad v. State of Maharashtra, (2013) 6 SCC 770 : (2014) 1 SCC (Cri) 285; *Gang-Rape Ordered by Village Kangaroo Court in W.B. In re*, (2014) 4 SCC 786 : (2014) 2 SCC (Cri) 437; *Mohd. Haroon v. Union of India*, (2014) 5 SCC 252 : (2014) 2 SCC (Cri) 510; *Laxmi v. Union of India*, (2014) 4 SCC 427 : (2014) 4 SCC (Cri) 802, *relied on*

Abdul Rashid v. State of Odisha, 2013 SCC OnLine Ori 493 : ILR (2014) 1 Cut 202, *approved* e

Kewal Pati v. State of U.P., (1995) 3 SCC 600 : 1995 SCC (Cri) 556; *Supreme Court Legal Aid Committee v. State of Bihar*, (1991) 3 SCC 482 : 1991 SCC (Cri) 639; *Railway Board v. Chandrima Das*, (2000) 2 SCC 465; *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746 : 1993 SCC (Cri) 527; *Khatri (1) v. State of Bihar*, (1981) 1 SCC 623 : 1981 SCC (Cri) 225; *Union Carbide Corpn. v. Union of India*, (1989) 1 SCC 674 : 1989 SCC (Cri) 243; *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 SCC 14 : 1995 SCC (Cri) 7; *State of Gujarat v. High Court of Gujarat*, (1998) 7 SCC 392 : 1998 SCC (Cri) 1640; *Rohtash v. State of Haryana*, Criminal Appeal No. 250 of 1999, decided on 1-4-2008 (P&H); *Hari Singh v. Sukhbir Singh*, (1988) 4 SCC 551 : 1988 SCC (Cri) 984; *State of Assam, In re*, PIL No. 26 of 2013, decided on 24-4-2013 (Gau); *Savitri v. Govind Singh Rawat*, (1985) 4 SCC 337 : 1985 SCC (Cri) 556; *Shail Kumari Devi v. Krishan Bhagwan Pathak*, (2008) 9 SCC 632 : (2008) 3 SCC (Cri) 839, *cited* f

154th and 152nd Reports of the Law Commission; "Victim Restitution in Criminal Law Process: A Procedural Analysis", Harvard Law Review (1984); *Oxford Handbook of Criminology* (1994 Edn., pp. 1237-38); Recommendations of the Malimath Committee, 2003; *Handbook on Justice for Victims*; "Sentencing Restorative Justice: Compensation for Victims of Crime and Victim Empowerment" "Issue Paper 7" (1997) by South African Law Commission; *Earl Jowitt's Dictionary of English Law*, 1959 Edn., p. 1797, *referred to* g

25 out of 29 State Governments have notified victim compensation schemes. The schemes specify maximum limit of compensation and subject to maximum h

a limit, the discretion to decide the quantum has been left with the State/District Legal Authorities. It has been brought to notice of the Supreme Court that even though almost a period of five years has expired since the enactment of Section 357-A CrPC, the award of compensation has not become a rule and interim compensation, which is very important, is not being granted by the courts. It has also been pointed out that the upper limit of compensation fixed by some of the States is arbitrarily low and is not in keeping with the object of the legislation. (Para 15)

b It is the duty of the courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the court ought to direct grant of interim compensation, subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, c irrespective of the application by the victim. At the stage of final hearing it is obligatory on the part of the court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the d facts and circumstances of an individual case. (Para 16)

e There is need to consider upward revision in the scale for compensation and pending such consideration to adopt the scale notified by the State of Kerala in its scheme, unless the scale awarded by any other State or Union Territory is higher. The States of Andhra Pradesh, Madhya Pradesh, Meghalaya and Telangana are directed to notify their schemes within one month from the receipt of a copy of this order. It is directed that a copy of this judgment be forwarded to National Judicial Academy so that all judicial officers in the country can be imparted requisite training to make Sections 357-A and 357 CrPC operative and meaningful. (Paras 17 and 18)

f In the present case, the impugned judgment shows that the de facto complainant, PW 2 Raman Anand, filed Criminal Revision No. 1477 of 2004 for compensation to the family members of the deceased D and his son A. The same has been dismissed by the High Court without any reason. In fact even without such petition, the High Court ought to have awarded compensation. There is no reason as to why the victim's family should not be awarded compensation under Section 357-A CrPC by the State. Thus, the State of Haryana is liable to pay compensation to the family of the deceased. The g interim compensation payable for the two deaths is determined to be rupees ten lakhs, without prejudice to any other rights or remedies of the victim's family in any other proceedings. (Paras 19 and 20)

Raman Anand v. Ashok Kumar, Criminal Revision No. 1477 of 2004, order dated 2-9-2004 (P&H), *disapproved*

Suresh v. State of Haryana, Criminal Appeal No. 420 of 2012, order dated 17-9-2014 (SC), h *referred to*

D. Penal Code, 1860 — S. 302 r/w Ss. 34, 364-A, 201 and 120-B — Kidnapping and murder for ransom — Conviction based on circumstantial evidence by courts below, affirmed

— After receiving information about kidnapping (though delayed by about one week), police (in plain clothes) keeping an eye on suspected public telephone booths from where ransom calls were being made, overhearing accused talking about ransom relating to kidnapping of *D* and his son *A* and therefore, nabbing accused kidnappers (appellants) — All accused disclosing murder of kidnapped persons — Recovery of dead bodies and personal belongings of *D* and *A* was made based on disclosure made by accused kidnappers — Post-mortem report indicating that death of *D* was due to cutting of throat by sharp weapon and death of *A* was due to stab injuries in chest and abdomen and head injuries caused by blunt force impact — During negotiations for ransom with family and friends of *D*, voice of accused had been recorded — But accused refused to give their voice sample — Concurrent conviction and life sentence, affirmed — Failing to explain how accused knew place from where dead bodies were recovered or giving false explanation regarding same, held, is an additional circumstance against them and therefore, S. 106, Evidence Act is clearly attracted in present case — Evidence Act, 1872 — Ss. 106, 114 III. (g) and 27 — Applicability

Held :

Apart from the remaining evidence, this is a case where Section 106 of the Evidence Act is clearly attracted which requires the accused to explain the facts in their exclusive knowledge. No doubt, the burden of proof is on the prosecution and Section 106 is not meant to relieve it of that duty but the said provision is attracted when it is impossible or it is proportionately difficult for the prosecution to establish facts which are strictly within the knowledge of the accused. Recovery of dead bodies from covered gutters and personal belongings of the deceased from other places disclosed by the accused stood fully established. It casts a duty on the accused as to how they alone had the information leading to recoveries which was admissible under Section 27 of the Evidence Act. Failure of the accused to give an explanation or giving of false explanation is an additional circumstance against the accused. (Para 9)

State of Rajasthan v. Jaggu Ram, (2008) 12 SCC 51 : (2009) 1 SCC (Cri) 317, *relied on*

Thus, there is no ground to interfere with the conviction and sentence of the appellants. The appellants are on bail. They may be taken into custody for undergoing the remaining sentence. (Paras 5 to 10)

SS-D/54197/CR

Advocates who appeared in this case :

R.S. Suri, Senior Advocate (Ms Shabana, Ms Shama Praveen and Harinder Mohan Singh, Advocates) for the Appellants;
Roopansh Purohit, Dr Monika Gusain and Ramesh Shokeen, Advocates, for the Respondent.

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The Judgment of the Court was delivered by

g ADARSH KUMAR GOEL, J.— This appeal has been preferred against the conviction and sentence of the appellants under Section 302 read with Sections 34, 364-A, 201 and 120-B of the Penal Code, 1860.

h 2. The case of the prosecution is that on 18-12-2000, the deceased Devender Chopra and his son, deceased Abhishek Chopra had left their factory for their house in DLF, Gurgaon but did not reach their house. At about 9.41 p.m., PW 12 Pooja Chopra, daughter of Devender Chopra gave a call to her father to find out as to why he was late. She learnt that her father

and brother had been kidnapped and ransom of rupees fifty lakhs was demanded for their release. She contacted her father's business partner informing him that Devender Chopra and Abhishek Chopra were kidnapped and the kidnappers had demanded a ransom amount of rupees fifty lakhs on telephone. The kidnappers also talked to the wife of the deceased Devender Chopra at 11 p.m. demanding ransom money. Raman Anand also talked to Devender Chopra. There were frequent calls from the kidnappers from the morning of 19-12-2000 which were recorded on audio cassettes, Exts. P-1 to P-9. Since the family could not fulfil the demand and offer to pay rupees ten lakhs was not accepted by the kidnappers but negotiations continued. The police was not informed on account of the fear that the victims may be killed as was threatened.

3. When the kidnappers did not release Devender Chopra and Abhishek Chopra, and finding no way out, the matter was reported to the police on 24-12-2000 at 5 a.m. The statement of PW 2, Raman Anand Ext. PC was recorded by Inspector Randhir Singh (PW 17) who deputed police officials at nearby STD booths. PW 14, SI Rajender Singh found the accused at STD booth at Jawala Petrol Pump on Jaipur Highway at 8.15 a.m. He overheard accused Manmohan telling accused Suresh that ransom demand be not reduced below rupees twenty-five lakhs. He was in plain clothes and gave signal to PW 17 and the accused were apprehended. A slip Ext. P-35 carrying residential phone number of Devender Chopra was recovered from Manmohan. Ashok, the accused made disclosure statement, Ext. PS that Devender Chopra and Abhishek Chopra had been killed and their bodies thrown in gutters in Sectors 39 and 46. Mobile of Devender Chopra was kept concealed in the house of the accused. Accused Manmohan made similar disclosure statement, Ext. PT and that he had kept concealed the car of the deceased in his house at Palwal and a knife in his rented house at Sohna. Accused Suresh made similar disclosure statement, Ext. PJ and that he had concealed mobile of the deceased at the shop of his brother at Sohna. Accused Mahesh made similar disclosure statement, Ext. PV and that suitcase of the deceased was concealed in his old house. Accordingly, recoveries were effected. The post-mortem of dead bodies was conducted and other steps for investigation were completed.

4. After investigation, the accused were sent up for trial. The prosecution examined Dr B.K. Rajora (PW 1), complainant Raman Anand (PW 2), Mrs Vivek Bharti, Additional Chief Judicial Magistrate, Bhiwani (PW 3), Head Constable Naresh Kumar (PW 6), Sub-Inspector Balwan Singh (PW 7), Mahabir Singh (PW 8), Assistant Sub-Inspector Budh Ram (PW 9), Surender Singh Rahman (PW 10), Head Constable Mohan Lal (PW 11), Pooja Chopra (PW 12), Sub-Inspector Sanjeev Kumar (PW 13), Sub-Inspector Rajender Singh (PW 14), Brij Bhushan Mehta (PW 15), Sub-Inspector Shakuntla (PW 16) and Inspector Randhir Singh (PW 17) and produced documents and material exhibits. The accused denied the prosecution allegations.

5. After considering the evidence on record the trial court convicted and sentenced the appellants for kidnapping and murder and concealing evidence in conspiracy and by common intention. All the accused stand sentenced to undergo imprisonment for life and other lesser sentences which have been affirmed by the High Court.

6. We have heard the learned counsel for the parties.

7. The learned counsel for the appellants submitted that there was no legal evidence to sustain the conviction and that the evidence of disclosure statements and recoveries was not reliable.

8. The learned counsel for the State opposed the above statement and pointed out that the dead bodies were recovered at the instance of the appellants, apart from the recovery of car and personal belongings of the deceased. SI Rajender Singh (PW 14) and Inspector Randhir Singh (PW 17) had overheard the conversation of the accused making demand of ransom on telephone at the STD booth. The accused refused to give their voice sample as recorded in the order dated 1-1-2001 passed by the Additional Chief Judicial Magistrate, Gurgaon on application (Ext. PF). Pooja Chopra (PW 12) deposed that the deceased Devender Chopra had a talk with her mother on 18-12-2000 that the deceased had been kidnapped for ransom which was followed up by further conversation with the kidnappers. Raman Anand (PW 2) also had talks with the kidnappers from the mobile phone of his friend Neeraj. According to the post-mortem reports, the death of Devender Chopra was on account of strangulation and cutting of throat by sharp weapon. Death of Abhishek Chopra was on account of stab injuries in chest and abdomen and the head injury caused by blunt force impact.

9. Apart from the above, this is a case where Section 106 of the Evidence Act is clearly attracted which requires the accused to explain the facts in their exclusive knowledge. No doubt, the burden of proof is on the prosecution and Section 106 is not meant to relieve it of that duty but the said provision is attracted when it is impossible or it is proportionately difficult for the prosecution to establish facts which are strictly within the knowledge of the accused. Recovery of dead bodies from covered gutters and personal belongings of the deceased from other places disclosed by the accused stood fully established. It casts a duty on the accused as to how they alone had the information leading to recoveries which was admissible under Section 27 of the Evidence Act. Failure of the accused to give an explanation or giving of false explanation is an additional circumstance against the accused as held in number of judgments, including *State of Rajasthan v. Jaggu Ram*¹.

10. In view of the above, we do not find any ground to interfere with the conviction and sentence of the appellants. The appellants are on bail. They may be taken into custody for undergoing the remaining sentence.

11. We had asked the learned counsel for the parties to make their submissions as to applicability of Section 357-A of the Code of Criminal Procedure providing for compensation by the State to the victims of the

crime and also requested² Shri L. Nageswara Rao, Additional Solicitor General of India to assist the Court on this aspect.

12. Accordingly, Shri Rao has made his submissions and also furnished a written note of his submissions mentioning the legislative history and purpose of the said provision and the guidelines for determining the quantum of compensation and the power of the Court to grant the interim compensation. We place on record our appreciation for the valuable contribution of Shri Rao. a

13. It would now be appropriate to deal with the issue. The provision has been incorporated in CrPC vide Act 5 of 2009 and the amendment duly came into force in view of the Notification dated 31-12-2009. The object and purpose of the provision is to enable the Court to direct the State to pay compensation to the victim where the compensation under Section 357 was not adequate or where the case ended in acquittal or discharge and the victim was required to be rehabilitated. The provision was incorporated on the recommendation of 154th Report of the Law Commission. It recognises compensation as one of the methods of protection of victims. The provision has received the attention of this Court in several decisions including *Ankush Shivaji Gaikwad v. State of Maharashtra*³, *Gang-Rape Ordered by Village Kangaroo Court in W.B., In re*⁴, *Mohd. Haroon v. Union of India*⁵ and *Laxmi v. Union of India*⁶. b

14. In *Abdul Rashid v. State of Odisha*⁷, to which one of us (Goel, J.) was party, it was observed: (SCC OnLine Ori paras 6-10) c

“6. Question for consideration is whether the responsibility of the State ends merely by registering a case, conducting investigation and initiating prosecution and whether apart from taking these steps, the State has further responsibility to the victim. Further question is whether the Court has legal duty to award compensation irrespective of conviction or acquittal. When the State fails to identify the accused or fails to collect and present acceptable evidence to punish the guilty, the duty to give compensation remains. Victim of a crime or his kith and kin have legitimate expectation that the State will punish the guilty and d

2 *Suresh v. State of Haryana*, Criminal Appeal No. 420 of 2012, order dated 17-9-2014 (SC), wherein it was directed: e

“Heard further submissions of Mr R.S. Suri, learned Senior Counsel appearing on behalf of the appellants and Mr Roopansh Purohit, learned Additional Advocate General, appearing on behalf of the respondent State of Haryana. The learned counsel are requested to make submissions regarding Section 357-A of the Code of Criminal Procedure. Mr L. Nageswara Rao, learned Additional Solicitor General of India is also requested to assist this Court on this aspect. List this matter as part-heard on 24-9-2014 for further hearing.” f

3 (2013) 6 SCC 770 : (2014) 1 SCC (Cri) 285

4 (2014) 4 SCC 786 : (2014) 2 SCC (Cri) 437

5 (2014) 5 SCC 252 : (2014) 2 SCC (Cri) 510 g

6 (2014) 4 SCC 427 : (2014) 4 SCC (Cri) 802

7 2013 SCC OnLine Ori 493 : ILR (2014) 1 Cut 202 h

a compensate the victim. There are systemic or other failures responsible for crime remaining unpunished which need to be addressed by improvement in quality and integrity of those who deal with investigation and prosecution, apart from improvement of infrastructure but punishment of guilty is not the only step in providing justice to the victim. Victim expects a mechanism for rehabilitative measures, including monetary compensation. Such compensation has been directed to be paid in public law remedy with reference to Article 21. In numerous cases, to do justice to the victims, the Hon'ble Supreme Court has directed payment of monetary compensation as well as rehabilitative settlement where State or other authorities failed to protect the life and liberty of victims. For example, *Kewal Pati v. State of U.P.*⁸ (death of prisoner by co-prisoner), *Supreme Court Legal Aid Committee v. State of Bihar*⁹ (failure to provide timely medical aid by jail authorities, *Railway Board v. Chandrima Das*¹⁰ (rape of Bangladeshi national by Railway staff), *Nilabati Behera v. State of Orissa*¹¹ (custodial death), *Khatri (I) v. State of Bihar*¹² (prisoners' blinding by jail staff), *Union Carbide Corpn. v. Union of India*¹³ (gas leak victims).

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f 7. Expanding scope of Article 21 is not limited to providing compensation when the State or its functionaries are guilty of an act of commission but also to rehabilitate the victim or his family where crime is committed by an individual without any role of the State or its functionary. Apart from the concept of compensating the victim by way of public law remedy in writ jurisdiction, need was felt for incorporation of a specific provision for compensation by courts irrespective of the result of criminal prosecution. Accordingly, Section 357-A has been introduced in the CrPC and a Scheme has been framed by the State of Odisha called 'The Odisha Victim Compensation Scheme, 2012'. Compensation under the said section is payable to victim of a crime in all cases irrespective of conviction or acquittal. The amount of compensation may be worked out at an appropriate forum in accordance with the said Scheme, but pending such steps being taken, interim compensation ought to be given at the earliest in any proceedings.

g 8. In *Ankush Shivaji Gaikwad v. State of Maharashtra*³, the matter was reviewed by the Hon'ble Supreme Court with reference to development in law and it was observed: (SCC pp. 785-91 & 797, paras 33-48 & 66-67)

g '33. The long line of judicial pronouncements of this Court recognised in no uncertain terms a paradigm shift in the approach

8 (1995) 3 SCC 600 : 1995 SCC (Cri) 556

9 (1991) 3 SCC 482 : 1991 SCC (Cri) 639

10 (2000) 2 SCC 465

11 (1993) 2 SCC 746 : 1993 SCC (Cri) 527

h 12 (1981) 1 SCC 623 : 1981 SCC (Cri) 225

13 (1989) 1 SCC 674 : 1989 SCC (Cri) 243

3 (2013) 6 SCC 770 : (2014) 1 SCC (Cri) 285

towards victims of crimes who were held entitled to reparation, restitution or compensation for loss or injury suffered by them. This shift from retribution to restitution began in the mid-1960s and gained momentum in the decades that followed. Interestingly the clock appears to have come full circle by the lawmakers and courts going back in a great measure to what was in ancient times common place. Harvard Law Review (1984) in an article on “Victim Restitution in Criminal Law Process: A Procedural Analysis” sums up the historical perspective of the concept of restitution in the following words:

“Far from being a novel approach to sentencing, restitution has been employed as a punitive sanction throughout history. In ancient societies, before the conceptual separation of civil and criminal law, it was standard practice to require an offender to reimburse the victim or his family for any loss caused by the offense. The primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. It was a means by which the offender could buy back the peace he had broken. As the State gradually established a monopoly over the institution of punishment, and a division between civil and criminal law emerged, the victim’s right to compensation was incorporated into civil law.”

34. With modern concepts creating a distinction between civil and criminal law in which civil law provides for remedies to award compensation for private wrongs and the criminal law takes care of punishing the wrongdoer, the legal position that emerged till recent times was that criminal law need not concern itself with compensation to the victims since compensation was a civil remedy that fell within the domain of the civil courts. This conventional position has in recent times undergone a notable sea change, as societies world over have increasingly felt that victims of the crimes were being neglected by the legislatures and the courts alike. Legislations have, therefore, been introduced in many countries including Canada, Australia, England, New Zealand, Northern Ireland and in certain States in the USA providing for restitution/ reparation by the courts administering criminal justice.

35. England was perhaps the first to adopt a separate statutory scheme for victim compensation by the State under the Criminal Injuries Compensation Scheme, 1964. Under the Criminal Justice Act, 1972 the idea of payment of compensation by the offender was introduced. The following extract from *Oxford Handbook of Criminology* (1994 Edn., pp. 1237-38), which has been quoted with

approval in *Delhi Domestic Working Women's Forum v. Union of India*¹⁴ is apposite: (SCC pp. 20-21, para 16)

a "16. ... 'Compensation payable by the offender was introduced in the Criminal Justice Act, 1972 which gave the courts powers to make an ancillary order for compensation in addition to the main penalty in cases where 'injury, loss, or damage' had resulted. The Criminal Justice Act, 1982 made it possible for the first time to make a compensation order as the sole penalty. It also required that in cases where fines and compensation orders were given together, the payment of compensation should take priority over the fine. *These developments signified a major shift in penological thinking, reflecting the growing importance attached to restitution and reparation over the more narrowly retributive aims of conventional punishment. The Criminal Justice Act, 1982 furthered this shift. It required courts to consider the making of a compensation order in every case of death, injury, loss or damage and, where such an order was not given, imposed a duty on the court to give reasons for not doing so. It also extended the range of injuries eligible for compensation. These new requirements mean that if the court fails to make a compensation order it must furnish reasons. Where reasons are given, the victim may apply for these to be subject to judicial review....*

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The 1991 Criminal Justice Act contains a number of provisions which directly or indirectly encourage an even greater role for compensation.' " (emphasis supplied)

e 36. In the United States of America, the Victim and Witness Protection Act, 1982 authorises a federal court to award restitution by means of monetary compensation as a part of a convict's sentence. Section 3553(a)(7) of Title 18 of the Act requires courts to consider in every case "the need to provide restitution to any victims of the offense". Though it is not mandatory for the court to award restitution in every case, the Act demands that the Court provide its reasons for denying the same. Section 3553(c) of Title 18 of the Act states as follows:

f

"If the court does not order restitution or orders only partial restitution, *the court shall include in the statement the reason thereof.*"

g 37. In order to be better equipped to decide the quantum of money to be paid in a restitution order, the United States federal law requires that details such as the financial history of the offender, the monetary loss caused to the victim by the offence, etc. be obtained during a presentence investigation, which is carried out over a period of 5 weeks after an offender is convicted.

h

38. Domestic/Municipal legislation apart even the UN General Assembly recognised the right of victims of crimes to receive compensation by passing a resolution titled “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985”. The Resolution contained the following provisions on restitution and compensation:

“RESTITUTION

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimisation, the provision of services and the restoration of rights.

9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimising act or omission occurred is no longer in existence, the State or Government successor-in-title should provide restitution to the victims.

COMPENSATION

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a) victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimisation.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the

State of which the victim is a national is not in a position to compensate the victim for the harm.”

a 39. The UN General Assembly passed a resolution titled “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005” which deals with the rights of victims of international crimes and human rights violations. These principles (while in their draft form) were quoted with approval by this Court in *State of Gujarat v. High Court of Gujarat*¹⁵ in the following words: (SCC pp. 432-33, para 94)

b “94. In recent years the right to reparation for victims of violation of human rights is gaining ground. The United Nations Commission of Human Rights has circulated draft Basic Principles and Guidelines on the Right to Reparation for Victims of Violation of Human Rights. (*See annexure.*)”

c 40. Amongst others the following provisions on restitution and compensation have been made:

d “12. Restitution shall be provided to re-establish the situation that existed prior to the violations of human rights or international humanitarian law. Restitution requires inter alia, restoration of liberty, family life citizenship, return to one’s place of residence, and restoration of employment or property.

e 13. Compensation shall be provided for any economically assessable damage resulting from violations of human rights or international humanitarian law, such as:

- (a) Physical or mental harm, including pain, suffering and emotional distress;
(b) Lost opportunities including education;
(c) Material damages and loss of earnings, including loss of earning potential;
f (d) Harm to reputation or dignity;
(e) Costs required for legal or expert assistance, medicines and medical services.”

g 41. Back home the Code of Criminal Procedure of 1898 contained a provision for restitution in the form of Section 545, which stated in sub-clause (1)(b) that the Court may direct

“payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the court, recoverable by such person in a civil court”.

h 42. The Law Commission of India in its 41st Report submitted in 1969 discussed Section 545 of the Code of Criminal Procedure of 1898 extensively and stated as follows:

“46.12. Section 545.—Under clause (b) of sub-section (1) of Section 545, the court may direct

‘in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the court, recoverable by such person in a civil court’.

The significance of the requirement that compensation should be recoverable in a civil court is that the act which constitutes the offence in question should also be a tort. The word ‘substantial’ appears to have been used to exclude cases where only nominal damages would be recoverable. *We think it is hardly necessary to emphasise this aspect, since in any event it is purely within the discretion of the criminal courts to order or not to order payment of compensation, and in practice, they are not particularly liberal in utilising this provision. We propose to omit the word ‘substantial’ from the clause.*”

43. On the basis of the recommendations made by the Law Commission in the above report, the Government of India introduced the Code of Criminal Procedure Bill, 1970, which aimed at revising Section 545 and introducing it in the form of Section 357 as it reads today. The Statement of Objects and Reasons underlying the Bill was as follows:

“Clause 365 (now Section 357) which corresponds to Section 545 makes provision for payment of compensation to victims of crimes. At present such compensation can be ordered only when the court imposes a fine; the amount is limited to the amount of fine. Under the new provision, compensation can be awarded irrespective of whether the offence is punishable with fine and fine is actually imposed, but such compensation can be ordered only if the accused is convicted. The compensation should be payable for any loss or injury whether physical or pecuniary and *the court shall have due regard to the nature of injury, the manner of inflicting the same, the capacity of the accused to pay and other relevant factors.*”

44. As regards the need for courts to obtain comprehensive details regarding the background of the offender for the purpose of sentencing, the Law Commission in its 48th Report on “Some Questions Under the Code of Criminal Procedure Bill, 1970” submitted in 1972 discussed the matter in some detail, stating as follows:

“45. *Sentencing.*—It is now being increasingly recognised that a rational and consistent sentencing policy requires the removal of several deficiencies in the present system. *One such deficiency is a lack of comprehensive information as to the characteristics and background of the offender.*

The aims of sentencing—themselves obscure—become all the more so in the absence of comprehensive information on which the correctional process is to operate. The public as well as the courts themselves are in the dark about judicial approach in this regard.

a We are of the view that the taking of evidence as to the circumstances relevant to sentencing should be encouraged, and both the prosecution and the accused should be allowed to cooperate in the process.” (emphasis supplied)

b 45. The Criminal Procedure Code of 1973 which incorporated the changes proposed in the said Bill of 1970 states in its Statement of Objects and Reasons that Section 357 was “intended to provide relief to the poorer sections of the community” and that the amended CrPC empowered the Court to order payment of compensation by the accused to the victims of crimes “to a larger extent” than was previously permissible under the Code. The changes brought about by the introduction of Section 357 were as follows:

(i) The word “substantial” was excluded.
c (ii) A new sub-section (3) was added which provides for payment of compensation even in cases where the fine does not form part of the sentence imposed.

(iii) Sub-section (4) was introduced which states that an order awarding compensation may be made by an appellate court or by the High Court or Court of Session when exercising its powers of revision.

d 46. The amendments to the Code of Criminal Procedure brought about in 2008 focused heavily on the rights of victims in a criminal trial, particularly in trials relating to sexual offences. Though the 2008 amendments left Section 357 unchanged, they introduced Section 357-A under which the Court is empowered to direct the State to pay compensation to the victim in such cases where

e *“the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated”.*

f Under this provision, even if the accused is not tried but the victim needs to be rehabilitated, the victim may request the State or District Legal Services Authority to award him/her compensation. This provision was introduced due to the recommendations made by the Law Commission of India in its 152nd and 154th Reports in 1994 and 1996 respectively.

g 47. The 154th Law Commission Report on the Code of Criminal Procedure devoted an entire chapter to “Victimology” in which the growing emphasis on victim’s rights in criminal trials was discussed extensively as under:

h “1. Increasingly the attention of criminologists, penologists and reformers of criminal justice system has been directed to victimology, control of victimisation and protection of victims of crimes. Crimes often entail substantive harm to people and not merely symbolic harm to the social order. Consequently, the needs and rights of victims of crime should receive priority

attention in the total response to crime. One recognised method of protection of victims is compensation to victims of crime. The needs of victims and their family are extensive and varied.

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9.1. The principles of victimology has foundations in Indian constitutional jurisprudence. The provision on fundamental rights (Part III) and directive principles of State policy (Part IV) form the bulwark for a new social order in which social and economic justice would blossom in the national life of the country (Article 38). Article 41 mandates, inter alia, that the State shall make effective provisions for 'securing the right to public assistance in cases of disablement and in other cases of undeserved want'. So also Article 51-A makes it a fundamental duty of every Indian citizen, inter alia 'to have compassion for living creatures' and to 'develop humanism'. If emphatically interpreted and imaginatively expanded these provisions can form the constitutional underpinnings for victimology.

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9.2. However, in India the criminal law provides compensation to the victims and their dependants, only in a limited manner. Section 357 of the Code of Criminal Procedure incorporates this concept to an extent and empowers the criminal courts to grant compensation to the victims.

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11. In India the principles of compensation to crime victims need to be reviewed and expanded to cover all cases. The compensation should not be limited only to fines, penalties and forfeitures realised. The State should accept the principle of providing assistance to victims out of its own funds...."

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48. The question then is whether the plenitude of the power vested in the courts under Sections 357 and 357-A, notwithstanding, the courts can simply ignore the provisions or neglect the exercise of a power that is primarily meant to be exercised for the benefit of the victims of crimes that are so often committed though less frequently punished by the courts. In other words, whether courts have a duty to advert to the question of awarding compensation to the victim and record reasons while granting or refusing relief to them?

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66. To sum up: while the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would

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a evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 of the Code of Criminal Procedure would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so.

b Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family.

c 67. Coming then to the case at hand, we regret to say that the trial court and the High Court appear to have remained oblivious to the provisions of Section 357 CrPC. The judgments under appeal betray ignorance of the courts below about the statutory provisions and the duty cast upon the courts. Remand at this distant point of time does not appear to be a good option either. This may not be a happy situation but having regard to the facts and the circumstances of the case and the time lag since the offence was committed, we

d conclude this chapter in the hope that the courts remain careful in future.’

9. In *Rohtash v. State of Haryana*¹⁶, a Division Bench of the Punjab & Haryana High Court observed:

e ‘18. May be, in spite of best efforts, the State fails in apprehending and punishing the guilty but that does not prevent the State from taking such steps as may reassure and protect the victims of crime. Should justice to the victims depend only on the punishment of the guilty? Should the victims have to wait to get justice till such time that the handicaps in the system which result in large scale acquittals of guilty, are removed? It can be a long and

f seemingly endless wait. The need to address cry of victims of crime, for whom the Constitution in its Preamble holds out a guarantee for “justice” is paramount. How can the tears of the victim be wiped off when the system itself is helpless to punish the guilty for want of collection of evidence or for want of creating an environment in which witnesses can fearlessly present the truth before the Court?

g Justice to the victim has to be ensured irrespective of whether or not the criminal is punished.

h 19. The victims have right to get justice, to remedy the harm suffered as a result of crime. This right is different from and independent of the right to retribution, responsibility of which has been assumed by the State in a society governed by the rule of law.

16 Criminal Appeal No. 250 of 1999, decided on 1-4-2008 (P&H)

But if the State fails in discharging this responsibility, the State must still provide a mechanism to ensure that the victim's right to be compensated for his injury is not ignored or defeated. a

20. Right of access to justice under Article 39-A and principle of fair trial mandate right to legal aid to the victim of the crime. It also mandates protection to witnesses, counselling and medical aid to the victims of the bereaved family and in appropriate cases, rehabilitation measures including monetary compensation. It is a paradox that victim of a road accident gets compensation under no fault theory, but the victim of crime does not get any compensation, except in some cases where the accused is held guilty, which does not happen in a large percentage of cases. b

21. Though a provision has been made for compensation to victims under Section 357 CrPC, there are several inherent limitations. The said provision can be invoked only upon conviction, that too at the discretion of the Judge and subject to financial capacity to pay by the accused. The long time taken in disposal of the criminal case is another handicap for bringing justice to the victims who need immediate relief, and cannot wait for conviction, which could take decades. The grant of compensation under the said provision depends upon financial capacity of the accused to compensate, for which, the evidence is rarely collected. Further, victims are often unable to make a representation before the court for want of legal aid or otherwise. This is perhaps why even on conviction this provision is rarely pressed into service by the courts. Rate of conviction being quite low, inter alia, for competence of investigation, apathy of witnesses or strict standard of proof required to ensure that innocent is not punished, the said provision is hardly adequate to address to the need of victims. c
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In *Hari Singh v. Sukhbir Singh*¹⁷, referring to provisions for compensation, the Hon'ble Supreme Court observed: (SCC p. 558, para 10) f

“10. ... This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way.” g

22. It is imperative to educate the investigating agency as well as the trial Judges about the need to provide access to justice to victims h

a of crime, to collect evidence about financial status of the accused. It is also imperative to create mechanisms for rehabilitation measures by way of medical and financial aid to the victims. The remedy in civil law of torts against the injury caused by the accused is grossly inadequate and illusory.

b 23. This unsatisfactory situation is in contrast to global developments and suggestions of Indian experts as well. Some of the significant developments in this regard may be noticed as under—

b (1) UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, highlighting the following areas—

- c* (i) Access to justice and fair treatment;
(ii) Restitution;
(iii) Compensation;
(iv) Assistance.

d (2) Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure, 1985.

d (3) Statement of the Victims' Rights in the Process of Criminal Justice, issued by the European Forum for Victims' Services in 1996.

e (4) European Union Framework Decision on the Standing of Victims in Criminal Proceedings.

e (5) Council of Europe Recommendations on Assistance to Crime Victims adopted on 14-6-2006.

f (6) 152nd and 154th Reports of the Law Commission of India, 1994 and 1996 respectively, recommending introduction of Section 357-A in the Criminal Procedure Code, prescribing, inter alia, compensation to the victims of crime.

f (7) Recommendations of the Malimath Committee, 2003.

g 24. The subject-matter has been dealt with by experts from over 40 countries in series of meetings and a document has been developed in cooperation with United Nations Office at Vienna, Centre for International Crime Prevention and the compilation under the heading "Handbook on Justice for Victims" which deals with various aspects of impact of victimisation, victims assistance programmes and role and responsibility of frontline professionals and others to victims. The South African Law Commission, in its "Issue Paper 7" (1997) under the heading "Sentencing Restorative Justice: Compensation for Victims of Crime and Victim Empowerment" has deliberated on various relevant aspects of this issue.

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27. In *Malimath Committee Report* (March 2003), it was observed:

“6.7.1. Historically speaking, Criminal Justice System seems to exist to protect the power, the privilege and the values of the elite sections in society. The way crimes are defined and the system is administered demonstrate that there is an element of truth in the above perception even in modern times. However, over the years the dominant function of criminal justice is projected to be protecting all citizens from harm to either their person or property, the assumption being that it is the primary duty of a State under rule of law. The State does this by depriving individuals of the power to take law into their own hands and using its power to satisfy the sense of revenge through appropriate sanctions. The State (and society), it was argued, is itself the victim when a citizen commits a crime and thereby questions its norms and authority. In the process of this transformation of torts to crimes, the focus of attention of the system shifted from the real victim who suffered the injury (as a result of the failure of the State) to the offender and how he is dealt with by the State. Criminal Justice came to comprehend all about crime, the criminal, the way he is dealt with, the process of proving his guilt and the ultimate punishment given to him. The civil law was supposed to take care of the monetary and other losses suffered by the victim. Victims were marginalised and the State stood forth as the victim to prosecute and punish the accused.

6.7.2. What happens to the right of victim to get justice to the harm suffered? Well, he can be satisfied if the State successfully gets the criminal punished to death, a prison sentence or fine. How does he get justice if the State does not succeed in so doing? Can he ask the State to compensate him for the injury? In principle, that should be the logical consequence in such a situation; but the State which makes the law absolves itself.

* * *

6.8.1. The principle of compensating victims of crime has for long been recognised by the law though it is recognised more as a token relief rather than part of a punishment or substantial remedy. When the sentence of fine is imposed as the sole punishment or an additional punishment, the whole or part of it may be directed to be paid to the person having suffered loss or injury as per the discretion of the Court (Section 357 CrPC). Compensation can be awarded only if the offender has been convicted of the offence with which he is charged.

* * *

a 6.8.7. Sympathising with the plight of victims under criminal justice administration and taking advantage of the obligation to do complete justice under the Indian Constitution in defence of human rights, the Supreme Court and High Courts in India have of late evolved the practice of awarding compensatory remedies not only in terms of money but also in terms of other appropriate reliefs and remedies. Medical justice for the Bhagalpur blinded victims, rehabilitative justice to the communal violence victims and compensatory justice to the Union Carbide victims are examples of this liberal package of reliefs and remedies forged by the Apex Court. The recent decisions in *Nilabati Behera v. State of Orissa*¹¹ and in *Railway Board v. Chandrima Das*¹⁰ are illustrative of this new trend of using constitutional jurisdiction to do justice to victims of crime. Substantial monetary compensations have been awarded against the instrumentalities of the State for failure to protect the rights of the victim.

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d 6.8.8. These decisions have clearly acknowledged the need for compensating victims of violent crimes irrespective of the fact whether offenders are apprehended or punished. The principle invoked is the obligation of the State to protect basic rights and to deliver justice to victims of crimes fairly and quickly. It is time that the Criminal Justice System takes note of these principles of Indian Constitution and legislate on the subject suitably.” ’

e 10. *State of Assam, In re*¹⁸ vide judgment dated 24-4-2013, a Division Bench of the Gauhati High Court observed:

‘We have heard the learned counsel for the parties on the issue whether in absence of any prohibition under the scheme, interim compensation ought to be paid at the earliest to the victim irrespective of stage of enquiry or trial, either on application of the victim or suo motu by the Court.

f In *Savitri v. Govind Singh Rawat*¹⁹ question of interim maintenance under Section 125 CrPC was considered and it was observed: (SCC pp. 339-42, paras 3 & 6)

g “3. It is true that there is no express provision in the Code which authorises a Magistrate to make an interim order directing payment of maintenance pending disposal of an application for maintenance. The Code does not also expressly prohibit the making of such an order. The question is whether such a power can be implied to be vested in a Magistrate having regard to the nature of the proceedings under Section 125 and other cognate

11 (1993) 2 SCC 746 : 1993 SCC (Cri) 527

10 (2000) 2 SCC 465

18 PIL No. 26 of 2013, decided on 24-4-2013 (Gau)

19 (1985) 4 SCC 337 : 1985 SCC (Cri) 556

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provisions found in Chapter IX of the Code which is entitled 'Order for Maintenance of Wives, Children and Parents'. Section 125 of the Code confers power on a Magistrate of the First Class to direct a person having sufficient means but who neglects or refuses to maintain (i) his wife, unable to maintain herself, or (ii) his legitimate or illegitimate minor child, whether married or not, unable to maintain himself, or (iii) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain himself, or (iv) his father or mother, unable to maintain himself or herself, upon proof of such neglect or refusal, to pay a monthly allowance for the maintenance of his wife or such child, father or mother, as the case may be, at such monthly rate not exceeding five hundred rupees in the whole as such Magistrate thinks fit. Such allowance shall be payable from the date of the order, or, if so ordered from the date of the application for maintenance. Section 126 of the Code prescribes the procedure for the disposal of an application made under Section 125. Section 127 of the Code provides for alteration of the rate of maintenance in the light of the changed circumstances or an order or decree of a competent civil court. Section 128 of the Code deals with the enforcement of the order of maintenance. It is not necessary to refer to the other details contained in the abovesaid provisions.

* * *

6. In view of the foregoing it is the duty of the court to interpret the provisions in Chapter IX of the Code in such a way that the construction placed on them would not defeat the very object of the legislation. In the absence of any express prohibition, it is appropriate to construe the provisions in Chapter IX as conferring an implied power on the Magistrate to direct the person against whom an application is made under Section 125 of the Code to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application. It is quite common that applications made under Section 125 of the Code also take several months for being disposed of finally. In order to enjoy the fruits of the proceedings under Section 125, the applicant should be alive till the date of the final order and that the applicant can do in a large number of cases only if an order for payment of interim maintenance is passed by the court. Every court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim '*ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non*

potest’ (where anything is conceded, there is conceded also anything without which the thing itself cannot exist). (Vide *Earl Jowitt’s Dictionary of English Law*, 1959 Edn., p. 1797.)

a Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may not always be admissible in the present case however would

b advance the object of the legislation under consideration. A contrary view is likely to result in grave hardship to the applicant, who may have no means to subsist until the final order is passed. There is no room for the apprehension that the recognition of such implied power would lead to the passing of

c interim orders in a large number of cases where the liability to pay maintenance may not exist. It is quite possible that such contingency may arise in a few cases but the prejudice caused thereby to the person against whom it is made is minimal as it can be set right quickly after hearing both the parties. The Magistrate may, however, insist upon an affidavit being filed by

d or on behalf of the applicant concerned stating the grounds in support of the claim for interim maintenance to satisfy himself that there is a prima facie case for making such an order. Such an order may also be made in an appropriate case ex parte pending service of notice of the application subject to any modification or even an order of cancellation that may be passed after the

e respondent is heard. If a civil court can pass such interim orders on affidavits, there is no reason why a Magistrate should not rely on them for the purpose of issuing directions regarding payment of interim maintenance. The affidavit may be treated as supplying prima facie proof of the case of the applicant. If the

f allegations in the application or the affidavit are not true, it is always open to the person against whom such an order is made to show that the order is unsustainable. Having regard to the nature of the jurisdiction exercised by a Magistrate under Section 125 of the Code, we feel that the said provision should be interpreted as conferring power by necessary implication on the Magistrate to pass an order directing a person against whom an application

g is made under it to pay a reasonable sum by way of interim maintenance subject to the other conditions referred to therein pending final disposal of the application. In taking this view we have also taken note of the provisions of Section 7(2)(a) of the Family Courts Act, 1984 (Act 66 of 1984) passed recently by Parliament proposing to transfer the jurisdiction exercisable by

h Magistrates under Section 125 of the Code to the Family Courts constituted under the said Act.”

Above view has been reiterated, inter alia, in *Shail Kumari Devi v. Krishan Bhagwan Pathak*²⁰.

We are of the view that above observations support the submission that interim compensation ought to be paid at the earliest so that immediate need of victim can be met. For determining the amount of interim compensation, the Court may have regard to the facts and circumstances of individual cases including the nature of offence, loss suffered and the requirement of the victim. On an interim order being passed by the Court, the funds available with the District/State Legal Services Authorities may be disbursed to the victims in the manner directed by the Court, to be adjusted later in appropriate proceedings. If the funds already allotted get exhausted, the State may place further funds at the disposal of the Legal Services Authorities.’ ”

(emphasis in original)

15. We are informed that 25 out of 29 State Governments have notified victim compensation schemes. The schemes specify maximum limit of compensation and subject to maximum limit, the discretion to decide the quantum has been left with the State/District Legal Authorities. It has been brought to our notice that even though almost a period of five years has expired since the enactment of Section 357-A CrPC, the award of compensation has not become a rule and interim compensation, which is very important, is not being granted by the courts. It has also been pointed out that the upper limit of compensation fixed by some of the States is arbitrarily low and is not in keeping with the object of the legislation.

16. We are of the view that it is the duty of the courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the court ought to direct grant of interim compensation, subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim. At the stage of final hearing it is obligatory on the part of the court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case.

17. We are also of the view that there is need to consider upward revision in the scale for compensation and pending such consideration to adopt the scale notified by the State of Kerala in its scheme, unless the scale awarded

by any other State or Union Territory is higher. The States of Andhra Pradesh, Madhya Pradesh, Meghalaya and Telangana are directed to notify
a their schemes within one month from the receipt of a copy of this order.

18. We also direct that a copy of this judgment be forwarded to National Judicial Academy so that all judicial officers in the country can be imparted requisite training to make the provision operative and meaningful.

19. In the present case, the impugned judgment shows that the de facto complainant, PW 2 Raman Anand, filed Criminal Revision No. 1477 of 2004
b for compensation to the family members of the deceased Devender Chopra and his son Abhishek Chopra. The same has been dismissed²¹ by the High Court without any reason. In fact even without such petition, the High Court ought to have awarded compensation. There is no reason as to why the victim's family should not be awarded compensation under Section 357-A
c CrPC by the State. Thus, we are of the view that the State of Haryana is liable to pay compensation to the family of the deceased. We determine the interim compensation payable for the two deaths to be rupees ten lakhs, without prejudice to any other rights or remedies of the victim's family in any other proceedings.

20. Accordingly, while dismissing the appeal, we direct that the widow of
d Devender Chopra, who is the mother of the deceased Abhishek Chopra representing the family of the victim be paid interim compensation of rupees ten lakhs. It will be payable by the Haryana State Legal Services Authority within one month from the receipt of a copy of this order. If the funds are not available for the purpose with the said Authority, the State of Haryana will make such funds available within one month from the date of the receipt of a
e copy of this judgment and the Legal Services Authority will disburse the compensation within one month thereafter. The appeal stands disposed of accordingly.

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²¹ *Raman Anand v. Ashok Kumar*, Criminal Revision No. 1477 of 2004, order dated 2-9-2004 (P&H)

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SUPREME COURT CASES

(2013) 6 SCC

(2013) 6 Supreme Court Cases 770

(BEFORE T.S. THAKUR AND GYAN SUDHA MISRA, JJ.)

ANKUSH SHIVAJI GAIKWAD

.. Appellant;

Versus

STATE OF MAHARASHTRA

.. Respondent.

Criminal Appeal No. 689 of 2013[†], decided on May 3, 2013

A. Victimology — Award of compensation to victim(s) of crime or their dependants under S. 357 CrPC — Mandatory duty of criminal court to apply its mind to question of awarding compensation in every case — Power is not ancillary to other sentences but in addition thereto — Use of word “may” in S. 357, held, does not mean that court need not consider applicability of S. 357 in every criminal case — S. 357 CrPC confers power coupled with duty on court to mandatorily apply its mind to question of awarding compensation in every criminal case — Court must also disclose that it has applied its mind to such question by recording reasons for awarding/refusing grant of compensation — Power given to courts under S. 357 is intended to reassure victim that he/she is not forgotten in criminal justice system — Very object of S. 357 would be defeated if courts choose to ignore S. 357 and do not apply their mind to question of compensation — Hence, S. 357 is to be read as imposing a mandatory duty on court to apply its mind to question of awarding compensation in every case — Courts directed to remain careful in future as to their mandatory duty under S. 357 CrPC — Copy of order directed to be forwarded to Registrars General of all High Courts for its circulation amongst Judges handling criminal trials and hearing criminal appeals — Criminal Procedure Code, 1973 — S. 357 — Interpretation of Statutes — Basic Rules — Mischief rule/Heydon’s rule — Applied — Criminal Trial — Sentence — Compensation to victim

B. Victimology — Award of compensation to victim(s) of crime or their dependants under S. 357 CrPC — Factors to be considered — Capacity of accused to pay — Enquiry in respect of — When warranted — Held, enquiry albeit summary in nature needs to be conducted to determine paying capacity of offender unless facts as emerging in course of trial are so clear that court considers it unnecessary to do so — Enquiry can precede an order on sentence to enable court to take a view, both on question of sentence and compensation payable to victim or his/her family — Criminal Procedure Code, 1973, S. 357

Held :

The language of Section 357 CrPC at a glance may not suggest that any obligation is cast upon a court to apply its mind to the question of compensation in every case. Section 357(1) states that the Court “may” order for the whole or any part of a fine recovered to be applied towards compensation. Section 357(3)

[†] Arising out of SLP (Crl.) No. 6287 of 2011. From the Judgment and Order dated 24-8-2010 of the High Court of Judicature of Bombay, Bench at Aurangabad in Crl. A. No. 359 of 2008

- CrPC further empowers the court by stating that it “may” award compensation even in such cases where the sentence imposed does not include a fine. The legal position is however well established that cases may arise where a provision is mandatory despite the use of language that makes it discretionary. Section 357 CrPC confers a power coupled with a mandatory duty on the court to apply its mind to the question of awarding compensation in every criminal case. It is said so because in the background and context in which Section 357 CrPC was introduced, the power to award compensation was intended to reassure the victim that he or she is not forgotten in the criminal justice system. The victim would remain forgotten if despite the legislature having gone so far as to enact specific provisions relating to victim compensation, courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation. If application of mind to the question of compensation in every case is not considered mandatory, Section 357 CrPC would be rendered a dead letter. Further, the court must disclose that it has applied its mind to this question in every criminal case. The disclosure of application of mind is best demonstrated by recording reasons in support of the order or conclusion.

(Paras 49 to 55 and 61)

- Julius v. Lord Bishop of Oxford*, (1880) 5 AC 214 : (1874-80) All ER Rep 43 (HL); *Bachahan Devi v. Nagar Nigam, Gorakhpur*, (2008) 12 SCC 372; *Dhampur Sugar Mills Ltd. v. State of U.P.*, (2007) 8 SCC 338, *followed*
- NEPC Micon Ltd. v. Magma Leasing Ltd.*, (1999) 4 SCC 253 : 1999 SCC (Cri) 524; *Swantraj v. State of Maharashtra*, (1975) 3 SCC 322 : 1974 SCC (Cri) 930; *Maya Devi v. Raj Kumari Batra*, (2010) 9 SCC 486 : (2010) 3 SCC (Civ) 842; *State of Rajasthan v. Sohan Lal*, (2004) 5 SCC 573 : (2008) 2 SCC (Cri) 53; *Hindustan Times Ltd. v. Union of India*, (1998) 2 SCC 242 : 1998 SCC (L&S) 481; *Director, Horticulture, Punjab v. Jagjivan Parshad*, (2008) 5 SCC 539 : (2008) 2 SCC (L&S) 121; *United Commercial Bank v. P.C. Kakkar*, (2003) 4 SCC 364, *relied on*
- State of A.P. v. Polamala Raju*, (2000) 7 SCC 75 : 2000 SCC (Cri) 1284; *State of Punjab v. Prem Sagar*, (2008) 7 SCC 550 : (2008) 3 SCC (Cri) 183; *Sangeet v. State of Haryana*, (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611, *considered*
- Heydon case*, (1584) 3 Co Rep 7a : 76 ER 637; *Arun v. Inspector General of Police*, (1986) 3 SCC 696 : 1986 SCC (L&S) 707 : (1986) 1 ATC 330; *Union of India v. Jai Prakash Singh*, (2007) 10 SCC 712; *Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity*, (2010) 3 SCC 732; *Ram Phal v. State of Haryana*, (2009) 3 SCC 258 : (2009) 2 SCC (Cri) 72 : (2009) 1 SCC (L&S) 645, *cited*
- Maxwell; *Interpretation of Statute*, *referred to*

The Supreme Court has through a line of cases held that the power of courts to award compensation to victims under Section 357 CrPC is not ancillary to other sentences but in addition thereto. It would necessarily follow that the court has a duty to apply its mind to the question of awarding compensation under Section 357 too.

- Hari Singh v. Sukhbir Singh*, (1988) 4 SCC 551 : 1998 SCC (Cri) 984; *Sarwan Singh v. State of Punjab*, (1978) 4 SCC 111 : 1978 SCC (Cri) 549; *Balraj v. State of U.P.*, (1994) 4 SCC 29 : 1994 SCC (Cri) 823; *Baldev Singh v. State of Punjab*, (1995) 6 SCC 593 : 1995 SCC (Cri) 1132; *Dilip S. Dahamkar v. Kotak Mahindra Co. Ltd.*, (2007) 6 SCC 528 : (2007) 3 SCC (Cri) 209, *relied on*

- Thus, while the award or refusal of compensation in a particular case may be within the court’s discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the

question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. The amount of compensation is to be determined by the courts depending upon the facts and circumstances of each case, the nature of the crime, the justness of the claim and the capacity of the accused to pay. This capacity of the accused to pay which constitutes an important aspect of any order under Section 357 CrPC would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family. (Paras 31 and 66)

Hari Singh v. Sukhbir Singh, (1988) 4 SCC 551 : 1998 SCC (Cri) 984; *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd.*, (2007) 6 SCC 528 : (2007) 3 SCC (Cri) 209, *relied on*

A copy of this order be forwarded to the Registrars General of the High Courts in the country for circulation among the Judges handling criminal trials and hearing appeals. (Paras 67 and 68)

C. Victimology — Compensation to victims of crime — Approach — Shift from retribution to restitution of victims — Historical perspective of concept of restitution, traced — Development of law in many countries across the world providing for restitution of victims by criminal courts that was earlier in domain of civil courts — Recognition of rights of victims by UN General Assembly — Introduction of S. 357 in CrPC, 1973 for payment of compensation to victims of crime — Introduction of S. 357-A vide Act 5 of 2009 to further strengthen victim's rehabilitation — Failure of Indian courts in recognising such rights and giving effect to the provisions of S. 357, deprecated — Scope of court's power and duty under S. 357, explained — Held, it is a mandatory duty of criminal court to apply its mind to the question of awarding compensation in every criminal case — Criminal Procedure Code, 1973 — S. 357 and S. 357-A (as *ins.* by Act 5 of 2009) — Criminal Procedure Code, 1898 — S. 545(1)(b) — Criminal Injuries Compensation Scheme, 1964 (UK) — Criminal Justice Act, 1972 (UK) — Victim and Witness Protection Act, 1982 (US) — Title 18, Ss. 3553(a)(7) and (c) — Human and Civil Rights — United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 — Arts. 8 to 13 — United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005, Arts. 19 and 20 (Paras 28 and 33 to 47)

Maru Ram v. Union of India, (1981) 1 SCC 107 : 1981 SCC (Cri) 112; *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 SCC 14 : 1995 SCC (Cri) 7; *State of Gujarat v. High Court of Gujarat*, (1998) 7 SCC 392 : 1998 SCC (Cri) 1640, *considered*

“Victim Restitution in Criminal Law Process: A Procedural Analysis”, Harvard Law Review (1984); *Oxford Handbook of Criminology*, 1994 Edn., pp.1237-38; *Law*

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Commission of India, 41st Report (1969), Para 46.12; *Law Commission of India*, 152nd Report (1994); *Law Commission of India*, 154th Report (1996), Ch. XV, Paras 1, 9.1, 9.2 and 11, referred to

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D. Penal Code, 1860 — S. 302 or S. 304 Pt. II [S. 300 Exception 4] — Murder or culpable homicide not amounting to murder — Determination of — Nature of injury, weapon used, and part of body on which injury inflicted — Inference from — Applicability of S. 300 Exception 4 — Sudden quarrel ensuing over barking of dog — Appellant angered by barking of dog at him started beating the dog with iron rod that he was carrying — Deceased, owner of dog objected to the beating and the same led to scuffle between parties — Appellant hit the deceased with iron rod on head which caused injuries which proved to be fatal four days later — No premeditation — No prior enmity or motive to commit the offence — No lethal weapon used — No second blow/injury given once deceased collapsed to the ground — No act committed in unusual or cruel manner — Further, use of words by appellant that if deceased did not keep quiet he too would be beaten like a dog indicated that intention was only to beat up deceased and not to kill him — Benefit of Exception 4 to S. 300, held, available to appellant — Conviction by lower courts under S. 302 and sentence of RI for life altered to one under S. 304 Pt. II and sentence of 5 yrs' RI (Paras 11, 27 and 68)

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Surinder Kumar v. UT, Chandigarh, (1989) 2 SCC 217 : 1989 SCC (Cri) 348; *Ghapoo Yadav v. State of M.P.*, (2003) 3 SCC 528 : 2003 SCC (Cri) 765; *Sukhbir Singh v. State of Haryana*, (2002) 3 SCC 327 : 2002 SCC (Cri) 616; *Mahesh v. State of M.P.*, (1996) 10 SCC 668 : 1997 SCC (Cri) 181; *Vadla Chandraiah v. State of A.P.*, (2006) 13 SCC 587 : (2007) 3 SCC (Cri) 709; *Shankar Diwal Wadu v. State of Maharashtra*, (2007) 12 SCC 518 : (2008) 3 SCC (Cri) 285; *Camilo Vaz v. State of Goa*, (2000) 9 SCC 1 : 2000 SCC (Cri) 1128; *Jagrup Singh v. State of Haryana*, (1981) 3 SCC 616 : 1981 SCC (Cri) 768; *Chamru Budhwa v. State of M.P.*, AIR 1954 SC 652 : 1954 Cri LJ 1676; *Sarabjeet Singh v. State of U.P.*, (1984) 1 SCC 673 : 1984 SCC (Cri) 151; *Mer Dhana Sida v. State of Gujarat*, (1985) 1 SCC 200 : 1985 SCC (Cri) 54; *Sukhmandar Singh v. State of Punjab*, 1998 SCC (Cri) 701, followed

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Alister Anthony Pereira v. State of Maharashtra, (2012) 2 SCC 648 : (2012) 1 SCC (Civ) 848 : (2012) 1 SCC (Cri) 953; *Singapagu Anjaiah v. State of A.P.*, (2010) 9 SCC 799 : (2010) 3 SCC (Cri) 1498; *Basdev v. State of Pepsu*, AIR 1956 SC 488 : 1956 Cri LJ 919 (2); *R. v. Monkhouse*, (1849) 4 Cox CC 55; *Pulicherla Nagaraju v. State of A.P.*, (2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500, relied on

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Ankush Shivaji Gaikwad v. State of Maharashtra, SLP (Cri) No. 6287 of 2011, order dated 2-9-2011 (SC), referred to

Appeal partly allowed

O-D/51807/CR

Advocates who appeared in this case :

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Shankar Chillarge and Ms Asha Gopalan Nair, Advocates, for the Respondent.

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2.	(2012) 2 SCC 648 : (2012) 1 SCC (Civ) 848 : (2012) 1 SCC (Cri) 953, <i>Alister Anthony Pereira v. State of Maharashtra</i>	780f-g a
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6.	(2010) 3 SCC 732, <i>Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity</i>	796f-g
7.	Criminal Appeal No. 359 of 2008, decided on 24-8-2010 (Bom), <i>Ankush v. State of Maharashtra</i>	775d, 776h, 777a
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9.	(2008) 12 SCC 372, <i>Bachahan Devi v. Nagar Nigam, Gorakhpur</i>	792e
10.	(2008) 7 SCC 550 : (2008) 3 SCC (Cri) 183, <i>State of Punjab v. Prem Sagar</i>	794d-e
11.	(2008) 5 SCC 539 : (2008) 2 SCC (L&S) 121, <i>Director, Horticulture, Punjab v. Jagjivan Parshad</i>	796a-b, 797a-b
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17.	(2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500, <i>Pulicherla Nagaraju v. State of A.P.</i>	782g e
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20.	(2003) 3 SCC 528 : 2003 SCC (Cri) 765, <i>Ghapoo Yadav v. State of M.P.</i>	778g-h
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29.	(1996) 10 SCC 668 : 1997 SCC (Cri) 181, <i>Mahesh v. State of M.P.</i>	780b-c
30.	(1995) 6 SCC 593 : 1995 SCC (Cri) 1132, <i>Baldev Singh v. State of Punjab</i>	784g
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	40. (1978) 4 SCC 111 : 1978 SCC (Cri) 549, <i>Sarwan Singh v. State of Punjab</i>	784g
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	42. AIR 1956 SC 488 : 1956 Cri LJ 919 (2), <i>Basdev v. State of Pepsu</i>	781b-c, 781e
	43. AIR 1954 SC 652 : 1954 Cri LJ 1676, <i>Chamru Budhwa v. State of M.P.</i>	782b-c
c	44. (1880) 5 AC 214 : (1874-80) All ER Rep 43 (HL), <i>Julius v. Lord Bishop of Oxford</i>	792a
	45. (1849) 4 Cox CC 55, <i>R. v. Monkhouse</i>	781d-e
	46. (1584) 3 Co Rep 7a : 76 ER 637, <i>Heydon case</i>	793f

The Judgment of the Court was delivered by

d **T.S. THAKUR, J.**— Leave granted. This appeal arises out of a judgment and order dated 24-8-2010¹ passed by the High Court of Judicature of Bombay, Aurangabad Bench, whereby Criminal Appeal No. 359 of 2008 filed by the appellant and two others has been dismissed insofar as the appellant is concerned and allowed qua the remaining two, thereby upholding the appellant's conviction for the offence of murder punishable under Section 302 IPC and the sentence of imprisonment for life with a fine of Rs 2000 awarded to him. In default of payment of fine the appellant has been sentenced to undergo a further imprisonment for a period of three months.

e **2.** The factual matrix in which the appellant came to be prosecuted and convicted has been set out in detail by the trial court as also the High Court in the orders passed by them. We need not, therefore, recapitulate the same all over again except to the extent it is necessary to do so for the disposal of this appeal. Briefly stated, the incident that culminated in the death of deceased Nilkanth Pawar and the consequent prosecution of the appellant and two others occurred at about 10.00 p.m. on 3-2-2006 while the deceased and his wife PW 1, Mangalbai were guarding their jaggery crop growing in their field.

f **3.** The prosecution story is that the appellant, Ankush Shivaji Gaikwad accompanied by Madhav Shivaji Gaikwad (Accused 2) and Shivaji Bhivaji Gaikwad (Accused 3) were walking past the field of the deceased when a dog owned by the deceased started barking at them. Angered by the barking of the animal, the appellant is alleged to have hit the dog with the iron pipe that he was carrying in his hand. The deceased objected to the appellant beating the dog, whereupon the appellant started abusing the former and told him to

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¹ *Ankush v. State of Maharashtra*, Criminal Appeal No. 359 of 2008, decided on 24-8-2010 (Bom)

keep quiet or else he too would be beaten like a dog. The exchange of hot words, it appears, led to a scuffle between the deceased and the accused persons in the course whereof, while Accused 2 and 3 beat the deceased with fist and kicks, the appellant hit the deceased with the iron pipe on the head. a

4. On account of the injury inflicted upon him, the deceased fell to the ground whereupon all the three accused persons ran away from the spot. The incident was witnessed by the wife of the deceased, PW 1 Mangalbai and by PW 5, Ramesh Ganpati Pawar who was also present in the field nearby at the time of the occurrence. The deceased was carried on a motorcycle to the hospital of one Dr Chinchole at Omerga from where he was shifted to Solapur for further treatment. b

5. Two days after the occurrence when the condition of the deceased became precarious, PW 1 Mangalbai filed a complaint at the Police Station, Omerga on 5-2-2006 on the basis whereby Crime No. 25 of 2006 under Sections 326, 504 and 323 read with Section 34 IPC was registered by the police. Investigation of the case was taken up by PW 6, Police Sub-Inspector Parihar who recorded the panchnama of the scene of the crime and arrested the accused persons. The deceased eventually succumbed to his injuries on 7-2-2006 whereupon Section 302 read with Section 34 IPC was added to the case. c

6. The post-mortem examination of the deceased revealed a contusion behind his right ear, a contusion on the right arm and an abrasion on the right ankle joint. Internal examination, however, showed that the deceased had sustained an internal injury to the temporal and occipital region under the scalp and a fracture on the base of the skull. Blood clots were noted in the brain tissues and the base of the skull, besides internal bleeding. According to the doctor, the death was caused by the injury to the head. After completion of the investigation that included seizure of the alleged weapon used by the appellant, the police filed a charge-sheet before the Judicial Magistrate, who committed the appellant and co-accused to face trial for the offence of murder punishable under Section 302 read with Section 34 IPC before the Sessions Court. Before the Sessions Court the appellant and his co-accused pleaded not guilty and claimed a trial. d
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7. The prosecution examined as many as six witnesses including PW 1 Mangalbai, the widow of the deceased and PW 5 Ramesh, both of whom were presented as eyewitnesses to the occurrence. The remaining witnesses included PW 3, Dr Kamble and PW 6 Police Sub-Inspector Parihar. Appraisal of the evidence adduced by the prosecution led the trial court to hold the appellant and his co-accused guilty for the offence of murder and sentenced them to imprisonment for life besides a fine of Rs 2000 each and a default sentence of three months' rigorous imprisonment. g

8. The appellant and his co-accused preferred Criminal Appeal No. 359 of 2008 before the High Court of Judicature of Bombay, Bench at Aurangabad. The High Court has by the judgment impugned¹ in this appeal h

¹ *Ankush v. State of Maharashtra*, Criminal Appeal No. 359 of 2008, decided on 24-8-2010 (Bom)

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a dismissed the appeal of the appellant before us but allowed the same insofar as the co-accused are concerned. The correctness of the said judgment and order¹ is under challenge before us.

b **9.** When the matter initially came up before us for hearing on 2-9-2011 we issued² notice to the respondent State confined to the question of the nature of offence only. We have accordingly heard the learned counsel for the parties on the said question. The trial court as also the High Court have, as noticed earlier, found the appellant guilty of murder. The question, however, is whether in the facts and circumstances of the case the appellant has been rightly convicted for the capital offence and if not whether the act attributed to him would constitute a lesser offence like culpable homicide not amounting to murder punishable under Section 304 Part I or II IPC.

c **10.** On behalf of the appellant it was contended that the appellant's case fell within Exception 4 to Section 300 IPC which reads as under:

“**Exception 4.**—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.”

d **11.** It was argued that the incident in question took place on a sudden fight without any premeditation and the act of the appellant hitting the deceased was committed in the heat of passion upon a sudden quarrel without the appellant having taken undue advantage or acting in a cruel or unusual manner. There is, in our opinion, considerable merit in that contention. We say so for three distinct reasons:

e **11.1.** Firstly, because even according to the prosecution version, there was no premeditation in the commission of the crime. There is not even a suggestion that the appellant had any enmity or motive to commit any offence against the deceased, leave alone a serious offence like murder. The prosecution case, as seen earlier, is that the deceased and his wife were guarding their jaggery crop in their field at around 10 p.m. when their dog started barking at the appellant and his two companions who were walking along a mud path by the side of the field nearby. It was the barking of the dog that provoked the appellant to beat the dog with the rod that he was carrying apparently to protect himself against being harmed by any stray dog or animal. The deceased took objection to the beating of the dog without in the least anticipating that the same would escalate into a serious incident in the heat of the moment. The exchange of hot words in the quarrel over the barking of the dog led to a sudden fight which in turn culminated in the deceased being hit with the rod unfortunately on a vital part like the head.

g **11.2.** Secondly, because the weapon used was not lethal nor was the deceased given a second blow once he had collapsed to the ground. The

h ¹ *Ankush v. State of Maharashtra*, Criminal Appeal No. 359 of 2008, decided on 24-8-2010 (Bom)
² *Ankush Shivaji Gaikwad v. State of Maharashtra*, SLP (Cri) No. 6287 of 2011, order dated 2-9-2011 (SC), wherein it was directed:

“Issue notice to the respondent confined to the question of nature of offence.”

prosecution case is that no sooner the deceased fell to the ground on account of the blow on the head, the appellant and his companions took to their heels—a circumstance that shows that the appellant had not acted in an unusual or cruel manner in the prevailing situation so as to deprive him of the benefit of Exception 4. a

11.3. Thirdly, because during the exchange of hot words between the deceased and the appellant all that was said by the appellant was that if the deceased did not keep quiet even he would be beaten like a dog. The use of these words also clearly shows that the intention of the appellant and his companions was at best to belabour him and not to kill him as such. The cumulative effect of all these circumstances, in our opinion, should entitle the appellant to the benefit of Exception 4 to Section 300 IPC. b

12. Time now to refer to a few decisions of this Court where in similar circumstances this Court has held Exception 4 to Section 300 IPC to be applicable and converted the offence against the appellant in those cases from murder to culpable homicide not amounting to murder. c

13. In *Surinder Kumar v. UT, Chandigarh*³ this Court held that if on a sudden quarrel a person in the heat of the moment picks up a weapon which is handy and causes injuries out of which only one proves fatal, he would be entitled to the benefit of the Exception provided he has not acted cruelly. This Court held that the number of wounds caused during the occurrence in such a situation was not the decisive factor. What was important was that the occurrence had taken place on account of a sudden and unpremeditated fight and the offender must have acted in a fit of anger. Dealing with the provision of Exception 4 to Section 300 this Court observed: (SCC p. 220, para 7) d

“7. ... To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. *Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this Exception provided he has not acted cruelly.*” e

(emphasis supplied) g

14. We may also refer to the decision of this Court in *Ghapoo Yadav v. State of M.P.*⁴ wherein this Court held that in a heat of passion there must be no time for the passions to cool down and that the parties had in that case before the Court worked themselves into a fury on account of the verbal h

³ (1989) 2 SCC 217 : 1989 SCC (Cri) 348

⁴ (2003) 3 SCC 528 : 2003 SCC (Cri) 765

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a altercation in the beginning. Apart from the incident being the result of a sudden quarrel without premeditation, the law requires that the offender should not have taken undue advantage or acted in a cruel or unusual manner to be able to claim the benefit of Exception 4 to Section 300 IPC. Whether or not the fight was sudden, was declared by the Court to be decided in the facts and circumstances of each case. The following passage from the decision is apposite: (SCC p. 532, paras 10-11)

b “10. ... The help of Exception 4 can be invoked if death is caused: (a) without premeditation; (b) in a sudden fight; (c) without the offender’s having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the ‘fight’ occurring in Exception 4 to Section 300 IPC is not defined in the Penal Code. It takes two to make a fight. c Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a d quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, *it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner.* The expression ‘undue advantage’ as used in the provision means ‘unfair advantage’.

e “11. ... *After the injuries were inflicted the injured has fallen down, but there is no material to show that thereafter any injury was inflicted when he was in a helpless condition. The assaults were made at random. Even the previous altercations were verbal and not physical. It is not the case of the prosecution that the accused-appellants had come prepared and armed for attacking the deceased.* ... This goes to show that in the heat of passion upon a sudden quarrel followed by a fight the accused f persons had caused injuries on the deceased, but had not acted in a cruel or unusual manner. That being so, Exception 4 to Section 300 IPC is clearly applicable.” (emphasis supplied)

g “15. In *Sukhbir Singh v. State of Haryana*⁵ the appellant caused two bhala-blows on the vital part of the body of the deceased that was sufficient in the ordinary course of nature to cause death. The High Court held that the appellant had acted in a cruel and unusual manner. Reversing the view taken by the High Court this Court held that all fatal injuries resulting in death cannot be termed as cruel or unusual for the purposes of Exception 4 of Section 300 IPC. In cases where after the injured had fallen down, the h appellant did not inflict any further injury when he was in a helpless position,

it may indicate that he had not acted in a cruel or unusual manner. The Court observed: (SCC p. 340, para 19)

“19. ... All fatal injuries resulting in death cannot be termed as cruel or unusual for the purposes of not availing the benefit of Exception 4 to Section 300 IPC. *After the injuries were inflicted and the injured had fallen down, the appellant is not shown to have inflicted any other injury upon his person when he was in a helpless position.* It is proved that in the heat of passion upon a sudden quarrel followed by a fight, the accused who was armed with bhala caused injuries at random and thus did not act in a cruel or unusual manner.” (emphasis supplied) a
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16. Reference may also be made to the decision in *Mahesh v. State of M.P.*⁶, wherein the appellant had assaulted the deceased in a sudden fight and after giving him one blow he had not caused any further injury to the deceased which fact situation was held by this Court to be sufficient to bring the case under Exception 4 to Section 300 IPC. This Court held: (SCC p. 670, para 4) c

“4. ... Thus, placed as the appellant and the deceased were at the time of the occurrence, it appears to us that the appellant assaulted the deceased in that sudden fight and after giving him one blow took to his heels. He did not cause any other injury to the deceased and therefore it cannot be said that he acted in any cruel or unusual manner. Admittedly, he did not assault PW 2 or PW 6 who were also present along with the deceased and who had also requested the appellant not to allow his cattle to graze in the field of PW 1. This fortifies our belief that the assault on the deceased was made during a sudden quarrel without any premeditation. In this fact situation, we are of the opinion that Exception 4 to Section 300 IPC is clearly attracted to the case of the appellant and the offence of which the appellant can be said to be guilty would squarely fall under Section 304 (Part I) IPC.” (emphasis supplied) d
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17. To the same effect are the decisions of this Court in *Vadla Chandraiah v. State of A.P.*⁷ and *Shankar Diwal Wadu v. State of Maharashtra*⁸. f

18. The next question then is whether the case falls under Section 304 Part I or Part II IPC? The distinction between the two parts of that provision was drawn by this Court in *Alister Anthony Pereira v. State of Maharashtra*⁹ in the following words: (SCC p. 661, para 28)

“28. ... For punishment under Section 304 Part I, the prosecution must prove the death of the person in question; that such death was caused by the act of the accused and that the accused intended by such act to cause death or cause such bodily injury as was likely to cause death. As regards punishment for Section 304 Part II, the prosecution has g

6 (1996) 10 SCC 668 : 1997 SCC (Cri) 181

7 (2006) 13 SCC 587 : (2007) 3 SCC (Cri) 709 : (2006) 14 Scale 108

8 (2007) 12 SCC 518 : (2008) 3 SCC (Cri) 285

9 (2012) 2 SCC 648 : (2012) 1 SCC (Civ) 848 : (2012) 1 SCC (Cri) 953 h

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a to prove the death of the person in question; that such death was caused by the act of the accused and that he knew that such act of his was likely to cause death.”

19. Reference may also be made to the decision of this Court in *Singapagu Anjaiah v. State of A.P.*¹⁰ wherein this Court observed: (SCC p. 803, para 16)

b “16. In our opinion, as nobody can enter into the mind of the accused, his intention has to be gathered from the *weapon used, the part of the body chosen for the assault and the nature of the injuries caused.*”
(emphasis supplied)

20. The decision of this Court in *Basdev v. State of Pepsu*¹¹, drew a distinction between motive, intention and knowledge in the following words: (AIR p. 490, para 6)

c “6. Of course, we have to distinguish between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things.”

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21. This Court in the above decisions quoted the following passage from *R. v. Monkhouse*¹² where Coleridge, J. speaking for the Court observed: (*Basdev case*¹¹, AIR p. 490, para 9)

e “9. ... ‘The inquiry as to intent is far less simple than that as to whether an act has been committed, because you cannot look into a man’s mind to see what was passing there at any given time. *What he intends can only be judged of by what he does or says, and if he says nothing, then his act alone must guide you to your decision.* It is a general rule in criminal law, and one founded on common sense, that juries are to presume a man to do what is the natural consequence of his act. The consequence is sometimes so apparent as to leave no doubt of the intention. A man could not put a pistol which he knew to be loaded to another’s head, and fire it off, without intending to kill him; but even there the state of mind of the party is most material to be considered.’”
(emphasis supplied)

g 22. In *Camilo Vaz v. State of Goa*¹³ the accused had hit the deceased with a danda during a premeditated gang-fight, resulting in the death of the victim. Both the trial court and the Bombay High Court convicted the appellant

h 10 (2010) 9 SCC 799 : (2010) 3 SCC (Cri) 1498
11 AIR 1956 SC 488 : 1956 Cri LJ 919 (2)
12 (1849) 4 Cox CC 55
13 (2000) 9 SCC 1 : 2000 SCC (Cri) 1128

under Section 302 IPC. This Court, however, converted the conviction to one under Section 304 Part II IPC and observed: (SCC p. 9, para 14)

“14. ... When a person hits another with a danda on a vital part of the body with such a force that the person hit meets his death, knowledge has to be imputed to the accused. *In that situation case will fall in Part II of Section 304 IPC as in the present case.*” (emphasis supplied) a

23. In *Jagrup Singh v. State of Haryana*¹⁴ the accused had given a blow on the head of the deceased with the blunt side of a gandhala during a sudden fight causing a fracture to the skull and consequent death. This Court altered the conviction from Section 302 to Section 304 Part II IPC placing reliance upon the decision in *Chamru Budhwa v. State of M.P.*¹⁵ in which case also the exchange of abuses had led both the parties to use lathis in a fight that ensued in which the deceased was hit on the head by one of the lathi-blows causing a fracture of the skull and his ultimate death. The accused was convicted for the offence of culpable homicide not amounting to murder under Section 304 Part II IPC. b
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24. Reference may also be made to the decisions of this Court in *Sarabjeet Singh v. State of U.P.*¹⁶, *Mer Dhana Sida v. State of Gujarat*¹⁷ and *Sukhmandar Singh v. State of Punjab*¹⁸ in which cases also the cause of death was a fracture to the skull in a sudden fight without premeditation. The Court altered the conviction from Section 302 IPC to Section 304 Part II IPC. d

25. Though the accused had inflicted only one injury upon the deceased, the fact that he had attempted to stab him a second time was taken as an indication of the accused having any intention to kill for the purpose of Section 304 Part I IPC in *Kasam Abdulla Hafiz v. State of Maharashtra*¹⁹, wherein this Court observed: (SCC p. 537, para 12) e

“12. ... Looking at the nature of injuries sustained by the deceased and the circumstances as enumerated above the conclusion is irresistible that the death was caused by the acts of the accused done with the intention of causing such bodily injury as is likely to cause death and therefore the offence would squarely come within the first part of Section 304 IPC. *The guilty intention of the accused to cause such bodily injury as is likely to cause death is apparent from the fact that he did attempt a second blow though did not succeed in the same and it somehow missed.*” (emphasis supplied) f

26. We may lastly refer to the decision of this Court in *Pulicherla Nagaraju v. State of A.P.*²⁰ wherein this Court enumerated some of the g

14 (1981) 3 SCC 616 : 1981 SCC (Cri) 768

15 AIR 1954 SC 652 : 1954 Cri LJ 1676

16 (1984) 1 SCC 673 : 1984 SCC (Cri) 151

17 (1985) 1 SCC 200 : 1985 SCC (Cri) 54

18 1998 SCC (Cri) 701 : AIR 1995 SC 583

19 (1998) 1 SCC 526 : 1998 SCC (Cri) 427

20 (2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500 h

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circumstances relevant to finding out whether there was any intention to cause death on the part of the accused. This Court observed: (SCC pp. 457-

a 58, para 29)

“29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters — plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. *The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows.* The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.” (emphasis supplied)

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27. Coming back to the case at hand, we are of the opinion that the nature of the simple injury inflicted by the accused, the part of the body on which it was inflicted, the weapon used to inflict the same and the circumstances in which the injury was inflicted do not suggest that the appellant had the intention to kill the deceased. All that can be said is that the appellant had the knowledge that the injury inflicted by him was likely to cause the death of the deceased. The case would, therefore, more appropriately fall under Section 304 Part II IPC.

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28. The only other aspect that needs to be examined is whether any compensation be awarded against the appellant and in favour of the bereaved family under Section 357 of the Code of Criminal Procedure, 1973. This aspect arises very often and has been a subject-matter of several

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pronouncements of this Court. The same may require some elaboration to place in bold relief certain aspects that need to be addressed by the courts but have despite the decisions of this Court remained obscure and neglected by the courts at different levels in this country. a

29. More than four decades back Krishna Iyer, J. speaking for the Court in *Maru Ram v. Union of India*²¹, in his inimitable style said that while social responsibility of the criminal to restore the loss or heal the injury is a part of the punitive exercise, the length of the prison term is no reparation to the crippled or bereaved but is futility compounded with cruelty. Victimology must find fulfilment said the Court, not through barbarity but by compulsory recoupment by the wrongdoer of the damage inflicted not by giving more pain to the offender but by lessening the loss of the forlorn. b

30. In *Hari Singh v. Sukhbir Singh*²² this Court lamented the failure of the courts in awarding compensation to the victims in terms of Section 357(1) CrPC. The Court recommended to all courts to exercise the power available under Section 357 CrPC liberally so as to meet the ends of justice. The Court said: (SCC pp. 557-58, para 10) c

“10. ... Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. ... *It is an important provision but courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction.* In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. *It may be noted that this power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way.* (emphasis supplied) d
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31. The amount of compensation, observed this Court, was to be determined by the courts depending upon the facts and circumstances of each case, the nature of the crime, the justness of the claim and the capacity of the accused to pay.

32. In *Sarwan Singh v. State of Punjab*²³, *Balraj v. State of U.P.*²⁴, *Baldev Singh v. State of Punjab*²⁵, *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd.*²⁶ g

21 (1981) 1 SCC 107 : 1981 SCC (Cri) 112

22 (1988) 4 SCC 551 : 1998 SCC (Cri) 984

23 (1978) 4 SCC 111 : 1978 SCC (Cri) 549

24 (1994) 4 SCC 29 : 1994 SCC (Cri) 823

25 (1995) 6 SCC 593 : 1995 SCC (Cri) 1132

26 (2007) 6 SCC 528 : (2007) 3 SCC (Cri) 209 h

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a this Court held that the power of the courts to award compensation to victims under Section 357 is not ancillary to other sentences but in addition thereto and that imposition of fine and/or grant of compensation to a great extent must depend upon the relevant factors apart from such fine or compensation being just and reasonable. In *Dilip S. Dahanukar case*²⁶ this Court even favoured an inquiry albeit summary in nature to determine the paying capacity of the offender. The Court said: (SCC p. 545, para 38)

b “38. The purpose of imposition of fine and/or grant of compensation to a great extent must be considered having the relevant factors therefor in mind. It may be compensating the person in one way or the other. The amount of compensation sought to be imposed, thus, must be reasonable and not arbitrary. Before issuing a direction to pay compensation, the capacity of the accused to pay the same must be judged. A fortiori, an enquiry in this behalf even in a summary way, may be necessary. Some reasons, which may not be very elaborate, may also have to be assigned; the purpose being that whereas the power to impose fine is limited and direction to pay compensation can be made for one or the other factors enumerated out of the same; but sub-section (3) of Section 357 does not impose any such limitation and thus, power thereunder should be exercised only in appropriate cases. Such a jurisdiction cannot be exercised at the whims and caprice of a Judge.”

c 33. The long line of judicial pronouncements of this Court recognised in no uncertain terms a paradigm shift in the approach towards victims of crimes who were held entitled to reparation, restitution or compensation for loss or injury suffered by them. This shift from retribution to restitution began in the mid-1960s and gained momentum in the decades that followed. Interestingly the clock appears to have come full circle by the lawmakers and courts going back in a great measure to what was in ancient times common place. Harvard Law Review (1984) in an article on *Victim Restitution in Criminal Law Process: A Procedural Analysis* sums up the historical perspective of the concept of restitution in the following words:

f “Far from being a novel approach to sentencing, restitution has been employed as a punitive sanction throughout history. In ancient societies, before the conceptual separation of civil and criminal law, it was standard practice to require an offender to reimburse the victim or his family for any loss caused by the offense. The primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. It was a means by which the offender could buy back the peace he had broken. As the State gradually established a monopoly over the institution of punishment, and a division between civil and criminal law emerged, the victim’s right to compensation was incorporated into civil law.”

g 34. With modern concepts creating a distinction between civil and criminal law in which civil law provides for remedies to award compensation

26 *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd.*, (2007) 6 SCC 528 : (2007) 3 SCC (Cri) 209

for private wrongs and the criminal law takes care of punishing the wrongdoer, the legal position that emerged till recent times was that criminal law need not concern itself with compensation to the victims since compensation was a civil remedy that fell within the domain of the civil courts. This conventional position has in recent times undergone a notable sea change, as societies world over have increasingly felt that victims of the crimes were being neglected by the legislatures and the courts alike. Legislations have, therefore, been introduced in many countries including Canada, Australia, England, New Zealand, Northern Ireland and in certain States in the USA providing for restitution/reparation by the courts administering criminal justice.

35. England was perhaps the first to adopt a separate statutory scheme for victim compensation by the State under the Criminal Injuries Compensation Scheme, 1964. Under the Criminal Justice Act, 1972 the idea of payment of compensation by the offender was introduced. The following extract from the *Oxford Handbook of Criminology* (1994 Edn., pp. 1237-38), which has been quoted with approval in *Delhi Domestic Working Women's Forum v. Union of India*²⁷ is apposite: (SCC pp. 20-21, para 16)

“16. ... ‘Compensation payable by the offender was introduced in the Criminal Justice Act, 1972 which gave the courts powers to make an ancillary order for compensation in addition to the main penalty in cases where ‘injury, loss, or damage’ had resulted. The Criminal Justice Act, 1982 made it possible for the first time to make a compensation order as the sole penalty. It also required that in cases where fines and compensation orders were given together, the payment of compensation should take priority over the fine. *These developments signified a major shift in penological thinking, reflecting the growing importance attached to restitution and reparation over the more narrowly retributive aims of conventional punishment. The Criminal Justice Act, 1988 furthered this shift. It required courts to consider the making of a compensation order in every case of death, injury, loss or damage and, where such an order was not given, imposed a duty on the court to give reasons for not doing so.* It also extended the range of injuries eligible for compensation. *These new requirements mean that if the court fails to make a compensation order it must furnish reasons.* Where reasons are given, the victim may apply for these to be subject to judicial review....”

The 1991 Criminal Justice Act contains a number of provisions which directly or indirectly encourage an even greater role for compensation.’” (emphasis supplied)

36. In the United States of America, the Victim and Witness Protection Act, 1982 authorises a federal court to award restitution by means of monetary compensation as a part of a convict’s sentence. Section 3553(a)(7) of Title 18 of the Act requires courts to consider in every case “the need to provide restitution to any victims of the offense”. Though it is not mandatory

27 (1995) 1 SCC 14 : 1995 SCC (Cri) 7

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for the court to award restitution in every case, the Act demands that the Court provide its reasons for denying the same. Section 3553(c) of Title 18 of the Act states as follows:

a “If the court does not order restitution or orders only partial restitution, the court shall include in the statement the reason thereof.”

(emphasis supplied)

b 37. In order to be better equipped to decide the quantum of money to be paid in a restitution order, the United States federal law requires that details such as the financial history of the offender, the monetary loss caused to the victim by the offence, etc. be obtained during a presentence investigation, which is carried out over a period of 5 weeks after an offender is convicted.

c 38. Domestic/Municipal legislation apart even the UN General Assembly recognised the right of victims of crimes to receive compensation by passing a resolution titled “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985”. The Resolution contained the following provisions on restitution and compensation:

“Restitution

d 8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimisation, the provision of services and the restoration of rights.

9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

e 10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

f 11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimising act or omission occurred is no longer in existence, the State or Government successor-in-title should provide restitution to the victims.

Compensation

g 12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a) victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

h (b) the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimisation.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.” a

39. The UN General Assembly passed a resolution titled “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005” which deals with the rights of victims of international crimes and human rights violations. These principles (while in their draft form) were quoted with approval by this Court in *State of Gujarat v. High Court of Gujarat*²⁸ in the following words: (SCC pp. 432-33, para 94) b

“94. In recent years, the right to reparation for victims of violation of human rights is gaining ground. The United Nations Commission of Human Rights has circulated draft Basic Principles and Guidelines on the Right to Reparation for Victims of Violation of Human Rights. (*see annexure.*)” c

40. Amongst others the following provisions on restitution and compensation have been made: d

“**12.** Restitution shall be provided to re-establish the situation that existed prior to the violations of human rights or international humanitarian law. Restitution requires, inter alia, restoration of liberty, family life, citizenship, return to one’s place of residence, and restoration of employment or property.”

13. Compensation shall be provided for any economically assessable damage resulting from violations of human rights or international humanitarian law, such as: e

- (a) Physical or mental harm, including pain, suffering and emotional distress;
- (b) Lost opportunities including education;
- (c) Material damages and loss of earnings, including loss of earning potential; f
- (d) Harm to reputation or dignity;
- (e) Costs required for legal or expert assistance, medicines and medical services.”

41. Back home the Criminal Procedure Code of 1898 contained a provision for restitution in the form of Section 545, which stated in sub-clause (1)(b) that the Court may direct g

“payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the court, recoverable by such person in a civil court”.

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42. The Law Commission of India in its 41st Report submitted in 1969 discussed Section 545 CrPC of 1898 extensively and stated as follows:

a “46.12. **Section 545.**—Under clause (b) of sub-section (1) of Section 545, the court may direct

‘in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the court, recoverable by such person in a civil court’.

b The significance of the requirement that compensation should be recoverable in a civil court is that the act which constitutes the offence in question should also be a tort. The word ‘substantial’ appears to have been used to exclude cases where only nominal damages would be recoverable. *We think it is hardly necessary to emphasise this aspect, since in any event it is purely within the discretion of the criminal courts to order or not to order payment of compensation, and in practice, they are not particularly liberal in utilising this provision. We propose to omit the word ‘substantial’ from the clause.*” (emphasis supplied)

c 43. On the basis of the recommendations made by the Law Commission in the above report, the Government of India introduced the Criminal Procedure Code Bill, 1970, which aimed at revising Section 545 and introducing it in the form of Section 357 as it reads today. The Statement of Objects and Reasons underlying the Bill was as follows:

d “Clause 365 (now Section 357) which corresponds to Section 545 makes provision for payment of compensation to victims of crimes. At present such compensation can be ordered only when the court imposes a fine the amount is limited to the amount of fine. Under the new provision, compensation can be awarded irrespective of whether the offence is punishable with fine and fine is actually imposed, but such compensation can be ordered only if the accused is convicted. The compensation should be payable for any loss or injury whether physical or pecuniary and *the court shall have due regard to the nature of injury, the manner of inflicting the same, the capacity of the accused to pay and other relevant factors.*”

(emphasis supplied)

f 44. As regards the need for courts to obtain comprehensive details regarding the background of the offender for the purpose of sentencing, the Law Commission in its 48th Report on “Some Questions Under the Code of Criminal Procedure Bill, 1970” submitted in 1972 discussed the matter in some detail, stating as follows:

g “45. **Sentencing.**—It is now being increasingly recognised that a rational and consistent sentencing policy requires the removal of several deficiencies in the present system. *One such deficiency is a lack of comprehensive information as to the characteristics and background of the offender.*

The aims of sentencing—themselves obscure—become all the more so in the absence of comprehensive information on which the correctional process is to operate. The public as well as the courts themselves are in the dark about judicial approach in this regard.

h We are of the view that the taking of evidence as to the circumstances relevant to sentencing should be encouraged, and both the prosecution and the accused should be allowed to cooperate in the process.” (emphasis supplied)

45. The Criminal Procedure Code of 1973 which incorporated the changes proposed in the said Bill of 1970 states in its Statement of Objects and Reasons that Section 357 was “*intended to provide relief to the poorer sections of the community*” and that the amended CrPC empowered the Court to order payment of compensation by the accused to the victims of crimes “to a larger extent” than was previously permissible under the Code. The changes brought about by the introduction of Section 357 were as follows:

(i) The word “substantial” was excluded.

(ii) A new sub-section (3) was added which provides for payment of compensation even in cases where the fine does not form part of the sentence imposed.

(iii) Sub-section (4) was introduced which states that an order awarding compensation may be made by an appellate court or by the High Court or Court of Session when exercising its powers of revision.

46. The amendments to CrPC brought about in 2008 focused heavily on the rights of victims in a criminal trial, particularly in trials relating to sexual offences. Though the 2008 amendments left Section 357 unchanged, they introduced Section 357-A under which the Court is empowered to direct the State to pay compensation to the victim in such cases where

“the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated”.

Under this provision, even if the accused is not tried but the victim needs to be rehabilitated, the victim may request the State or District Legal Services Authority to award him/her compensation. This provision was introduced due to the recommendations made by the Law Commission of India in its 152nd and 154th Reports in 1994 and 1996 respectively.

47. The 154th Law Commission Report on CrPC devoted an entire chapter to “Victimology” in which the growing emphasis on victims’ rights in criminal trials was discussed extensively as under:

1. Increasingly the attention of criminologists, penologists and reformers of criminal justice system has been directed to victimology, control of victimisation and protection of victims of crimes. Crimes often entail substantive harm to people and not merely symbolic harm to the social order. Consequently, the needs and rights of victims of crime should receive priority attention in the total response to crime. One recognised method of protection of victims is compensation to victims of crime. The needs of victims and their family are extensive and varied.

* * *

9.1. The principles of victimology has foundations in Indian constitutional jurisprudence. The provision on Fundamental Rights (Part III) and Directive Principles of State Policy (Part IV) form the bulwark for a new social order in which social and economic justice would blossom in the national life of the country (Article 38). Article 41 mandates, inter alia, that the State shall make effective provisions for ‘securing the right to public

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a assistance in cases of disablement and in other cases of undeserved want'. So also Article 51-A makes it a fundamental duty of every Indian citizen, inter alia, 'to have compassion for living creatures' and 'to develop humanism'. If emphatically interpreted and imaginatively expanded these provisions can form the constitutional underpinnings for victimology.

b **9.2.** However, in India, the criminal law provides compensation to the victims and their dependants, only in a limited manner. Section 357 of the Code of Criminal Procedure incorporates this concept to an extent and empowers the criminal courts to grant compensation to the victims.

* * *

c **11.** In India the principles of compensation to crime victims need to be reviewed and expanded to cover all cases. The compensation should not be limited only to fines, penalties and forfeitures realised. The State should accept the principle of providing assistance to victims out of its own funds...."

d **48.** The question then is whether the plenitude of the power vested in the courts under Sections 357 and 357-A, notwithstanding, the courts can simply ignore the provisions or neglect the exercise of a power that is primarily meant to be exercised for the benefit of the victims of crimes that are so often committed though less frequently punished by the courts. In other words, whether courts have a duty to advert to the question of awarding compensation to the victim and record reasons while granting or refusing relief to them?

e **49.** The language of Section 357 CrPC at a glance may not suggest that any obligation is cast upon a court to apply its mind to the question of compensation. Sub-section (1) of Section 357 states that the Court "may" order for the whole or any part of a fine recovered to be applied towards compensation in the following cases:

f (i) To any person who has suffered loss or injury by the offence, when in the opinion of the court, such compensation would be recoverable by such person in a civil court.

(ii) To a person who is entitled to recover damages under the Fatal Accidents Act, when there is a conviction for causing death or abetment thereof.

g (iii) To a bona fide purchaser of property, which has become the subject of theft, criminal misappropriation, criminal breach of trust, cheating, or receiving or retaining or disposing of stolen property, and which is ordered to be restored to its rightful owner.

h **50.** Sub-section (3) of Section 357 further empowers the court by stating that it "may" award compensation even in such cases where the sentence imposed does not include a fine. The legal position is, however, well established that cases may arise where a provision is mandatory despite the use of language that makes it discretionary. We may at the outset, refer to the

oft-quoted passage from *Julius v. Lord Bishop of Oxford*²⁹ wherein the Court summed up the legal position thus: (AC pp. 222-23)

“... The words ‘it shall be lawful’ are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.”

51. There is no gainsaying that Section 357 confers a power on the Court insofar as it makes it “*legal and possible which there would otherwise be no right or authority to do*” viz. to award compensation to victims in criminal cases. The question is whether despite the use of discretionary language such as the word “*may*”, there is “*something*” in the nature of the power to award compensation in criminal cases, in the object for which the power is conferred or in the title of the persons for whose benefit it is to be exercised which, coupled with the power conferred under the provision, casts a duty on the court to apply its mind to the question of exercise of this power in every criminal case.

52. In *Bachahan Devi v. Nagar Nigam, Gorakhpur*³⁰, this Court while dealing with the use of the word “*may*” summed up the legal position thus: (SCC p. 383, para 18)

“18. It is well settled that the use of word ‘*may*’ in a statutory provision would not by itself show that the provision is directory in nature. In some cases, the legislature may use the word ‘*may*’ as a matter of pure conventional courtesy and yet intend a mandatory force. In order, therefore, to interpret the legal import of the word ‘*may*’, the court has to consider various factors, namely, the *object and the scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word, and the like. It is equally well settled that where the word ‘may’ involves a discretion coupled with an obligation or where it confers a positive benefit to a general class of subjects in a utility Act, or where the court advances a remedy and suppresses the mischief, or where giving the words directory significance would defeat the very object of the Act, the word ‘may’ should be interpreted to convey a mandatory force.*”

(emphasis supplied)

²⁹ (1880) 5 AC 214 : (1874-80) All ER Rep 43 (HL)

³⁰ (2008) 12 SCC 372 : AIR 2008 SC 1282

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53. Similarly in *Dhampur Sugar Mills Ltd. v. State of U.P.*³¹ this Court held that the mere use of word “may” or “shall” was not conclusive. The question whether a particular provision of a statute is directory or mandatory, held the Court, can be resolved by ascertaining the intention of the legislature and not by looking at the language in which the provision is clothed. And for finding out the legislative intent, the Court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to ensue or inconvenience likely to result if the provision is read one way or the other and many more considerations relevant thereto.

54. Applying the tests which emerge from the above cases to Section 357, it appears to us that the provision confers a power coupled with a duty on the courts to apply its mind to the question of awarding compensation in every criminal case. We say so because in the background and context in which it was introduced, the power to award compensation was intended to reassure the victim that he or she is not forgotten in the criminal justice system. The victim would remain forgotten in the criminal justice system if despite the legislature having gone so far as to enact specific provisions relating to victim compensation, courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation. It follows that unless Section 357 is read to confer an obligation on the courts to apply their mind to the question of compensation, it would defeat the very object behind the introduction of the provision.

55. If application of mind is not considered mandatory, the entire provision would be rendered a dead letter. It was held in *NEPC Micon Ltd. v. Magma Leasing Ltd.*³² albeit in the context of Section 138 of the Negotiable Instruments Act that even in regard to a penal provision, any interpretation, which withdraws the life and blood of the provision and makes it ineffective and a dead letter should be avoided.

56. Similarly in *Swantraj v. State of Maharashtra*³³ this Court speaking through Krishna Iyer, J. held: (SCC p. 323, para 1)

“1. Every legislation is a social document and judicial construction seeks to decipher the statutory mission, language permitting, taking the one from the rule in *Heydon case*³⁴ of suppressing the evil and advancing the remedy.”

57. The Court in *Swantraj case*³³ extracted with approval the following passage from *Maxwell on Interpretation of Statutes*:

“There is no doubt that ‘the office of the Judge is, to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief’. To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that

³¹ (2007) 8 SCC 338

³² (1999) 4 SCC 253 : 1999 SCC (Cri) 524

³³ (1975) 3 SCC 322 : 1974 SCC (Cri) 930

³⁴ (1584) 3 Co Rep 7a : 76 ER 637

which it has prohibited or enjoined: *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.*"

58. This Court has through a line of cases beginning with *Hari Singh case*²² held that the power to award compensation under Section 357 is not ancillary to other sentences but in addition thereto. It would necessarily follow that the court has a duty to apply its mind to the question of awarding compensation under Section 357 too. Reference may also be made to the decision of this Court in *State of A.P. v. Polamala Raju*³⁵ wherein a three-Judge Bench of this Court set aside a judgment of the High Court for non-application of mind to the question of sentencing. In that case, this Court reprimanded the High Court for having reduced the sentence of the accused convicted under Section 376 IPC from 10 years' imprisonment to 5 years without recording any reasons for the same. This Court said: (SCC pp. 78-79, paras 9 & 11)

"9. We are of the considered opinion that it is an obligation of the sentencing court to consider all relevant facts and circumstances bearing on the question of sentence and impose a sentence commensurate with the gravity of the offence. ...

* * *

11. To say the least, the order contains no reasons, much less 'special or adequate reasons'. The sentence has been reduced in a rather mechanical manner without proper application of mind."

59. In *State of Punjab v. Prem Sagar*³⁶ this Court stressed the need for greater application of mind of the courts in the field of sentencing. Setting aside the order granting probation by the High Court, the Court stated as follows: (SCC p. 560, paras 30-31)

"30. The High Court does not rest its decision on any legal principle. No sufficient or cogent reason has been arrived.

31. We have noticed the development of law in this behalf in other countries only to emphasise that the courts while imposing sentence must take into consideration the principles applicable thereto. It requires application of mind. The purpose of imposition of sentence must also be kept in mind."

60. Although speaking in the context of capital punishment, the following observation of this Court in *Sangeet v. State of Haryana*³⁷ could be said to apply to other sentences as well, particularly the award of compensation to the victim: (SCC p. 478, para 77)

"77.3. In the sentencing process, both the crime and the criminal are equally important. We have unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital

22 *Hari Singh v. Sukhbir Singh*, (1988) 4 SCC 551 : 1998 SCC (Cri) 984

35 (2000) 7 SCC 75 : 2000 SCC (Cri) 1284

36 (2008) 7 SCC 550 : (2008) 3 SCC (Cri) 183

37 (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611

offences, it has become Judge-centric sentencing rather than principled sentencing.”

- a **61.** Section 357 CrPC confers a duty on the court to apply its mind to the question of compensation in every criminal case. It necessarily follows that the court must disclose that it has applied its mind to this question in every criminal case. In *Maya Devi v. Raj Kumari Batra*³⁸ this Court held that the disclosure of application of mind is best demonstrated by recording reasons in support of the order or conclusion. The Court observed: (SCC p. 495, paras 28-30)

b “28. ... There is nothing like a power without any limits or constraints. That is so even when a court or other authority may be vested with wide discretionary power, for even discretion has to be exercised only along well recognised and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity.

- c 29. What then are the safeguards against an arbitrary exercise of power? The first and the most effective check against any such exercise is the well-recognised legal principle that orders can be made only after due and proper application of mind. Application of mind brings reasonableness not only to the exercise of power but to the ultimate conclusion also. *Application of mind in turn is best demonstrated by disclosure of the mind. And disclosure is best demonstrated by recording reasons in support of the order or conclusion.*

- d 30. *Recording of reasons in cases where the order is subject to further appeal is very important from yet another angle. An appellate court or the authority ought to have the advantage of examining the reasons that prevailed with the court or the authority making the order. Conversely, absence of reasons in an appealable order deprives the appellate court or the authority of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own.*
- e (emphasis supplied)

62. Similarly, in *State of Rajasthan v. Sohan Lal*³⁹ this Court emphasised the need for reasons thus: (SCC p. 576, para 3)

- f “3. ... The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the court concerned had really applied its mind.”

- g **63.** In *Hindustan Times Ltd. v. Union of India*⁴⁰ this Court stated that the absence of reasons in an order would burden the appellate court with the responsibility of going through the evidence or law for the first time. The Court observed: (SCC p. 248, para 8)

“8. ... In our view, the satisfaction which a reasoned judgment gives to the losing party or his lawyer is the test of a good judgment. Disposal

h 38 (2010) 9 SCC 486 : (2010) 3 SCC (Civ) 842
39 (2004) 5 SCC 573 : (2008) 2 SCC (Cri) 53
40 (1998) 2 SCC 242 : 1998 SCC (L&S) 481

of cases is no doubt important but quality of the judgment is equally, if not more, important. There is no point in shifting the burden to the higher court either to support the judgment by reasons or to consider the evidence or law for the first time to see if the judgment needs a reversal.” a

64. In *Director, Horticulture, Punjab v. Jagjivan Parshad*⁴¹ this Court stated that the spelling out of reasons in an order is a requirement of natural justice: (SCC p. 541, para 9)

“9. ‘15. ... Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the ‘inscrutable face of the sphinx’, it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking-out. The ‘inscrutable face of the sphinx’ is ordinarily incongruous with a judicial or quasi-judicial performance.’*” b

65. In *Maya Devi case*³⁸ this Court summarised the existing case law on the need for reasoned orders as follows: (SCC pp. 494-95, paras 22-27) c

“22. The juristic basis underlying the requirement that courts and indeed all such authorities, as exercise the power to determine the rights and obligations of individuals must give reasons in support of their orders has been examined in a long line of decisions rendered by this Court. In *Hindustan Times Ltd. v. Union of India*⁴⁰ the need to give reasons has been held to arise out of the need to minimise chances of arbitrariness and induce clarity. d

23. In *Arun v. Inspector General of Police*⁴² the recording of reasons in support of the order passed by the High Court has been held to inspire public confidence in administration of justice, and help the Apex Court to dispose of appeals filed against such orders. e

24. In *Union of India v. Jai Prakash Singh*⁴³, reasons were held to be live links between the mind of the decision-maker and the controversy in question as also the decision or conclusion arrived at. f

25. In *Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity*⁴⁴, reasons were held to be the heartbeat of every conclusion, apart from being an essential feature of the principles of natural justice, that ensure transparency and fairness, in the decision-making process. g

41 (2008) 5 SCC 539 : (2008) 2 SCC (L&S) 121

* Ed.: As observed in *United Commercial Bank v. P.C. Kakkar*, (2003) 4 SCC 364, p. 377, para 15.

38 *Maya Devi v. Raj Kumari Batra*, (2010) 9 SCC 486 : (2010) 3 SCC (Civ) 842

40 (1998) 2 SCC 242 : 1998 SCC (L&S) 481

42 (1986) 3 SCC 696 : 1986 SCC (L&S) 707 : (1986) 1 ATC 330

43 (2007) 10 SCC 712

44 (2010) 3 SCC 732 h

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a 26. In *Ram Phal v. State of Haryana*⁴⁵, giving of satisfactory reasons was held to be a requirement arising out of an ordinary man's sense of justice and a healthy discipline for all those who exercise power over others.

27. In *Director, Horticulture, Punjab v. Jagjivan Parshad*⁴¹, the recording of reasons was held to be indicative of application of mind specially when the order is amenable to further avenues of challenge."

b 66. To sum up: while the award or refusal of compensation in a particular case may be within the court's discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond
c dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 CrPC would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can
d precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family.

e 67. Coming then to the case at hand, we regret to say that the trial court and the High Court appear to have remained oblivious to the provisions of Section 357 CrPC. The judgments under appeal betray ignorance of the courts below about the statutory provisions and the duty cast upon the courts. Remand at this distant point of time does not appear to be a good option either. This may not be a happy situation but having regard to the facts and the circumstances of the case and the time lag since the offence was committed, we conclude this chapter in the hope that the courts remain
f careful in future.

g 68. In the result, we allow this appeal but only to the extent that instead of Section 302 IPC the appellant shall stand convicted for the offence of culpable homicide not amounting to murder punishable under Section 304 Part II IPC and sentenced to undergo rigorous imprisonment for a period of five years. The fine imposed upon the appellant and the default sentence awarded to him shall remain unaltered. The appeal is disposed of in the above terms in modification of the order passed by the courts below. A copy of this order be forwarded to the Registrars General of the High Courts in the country for circulation among the Judges handling criminal trials and hearing appeals.

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45 (2009) 3 SCC 258 : (2009) 2 SCC (Cri) 72 : (2009) 1 SCC (L&S) 645
41 (2008) 5 SCC 539 : (2008) 2 SCC (L&S) 121

2021 SCC OnLine SC 230

In the Supreme Court of India
(BEFORE A.M. KHANWILKAR AND S. RAVINDRA BHAT, JJ.)

Aparna Bhat and Others ... Appellant(s);
Versus

State of Madhya Pradesh and Another ... Respondent(s).

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)

Decided on March 18, 2021

The Judgment of the Court was delivered by

S. RAVINDRA BHAT, J.:—

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 Court¹ that imposed these bail conditions. With the consent of counsel for the parties, the appeal was heard finally. The appellants also filed an application², 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.

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, 354A³, 323 and 506 of the Penal Code, 1860 (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*⁴ and *Sumit Mehta v. State (NCT of Delhi)*⁵ 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*,⁶ 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, reliance was placed on *Ramphal v. State of Haryana*⁷, 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.*⁸, 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*⁹, 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*¹⁰, 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, *Samuel v. Inspector of Police*¹¹ 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.

10. *Sopikul Sk. @ Safikul Islam v. State*,¹² 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*,¹³ 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.*,¹⁴ 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*¹⁵, 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 Intervenor 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 Intervenor has 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*¹⁶ and reiterated in *Parvez Noordin Lokhandwalla v. State of Maharashtra*.¹⁷ 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 Intervenor 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 Intervenor 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 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*¹⁸ and *Sakshi v. State*¹⁹, 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. 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 offense 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 beast²⁰ : 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-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.²¹

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*".²² 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."²³

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 private life.*"²⁴ 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*²⁵ 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 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*,²⁶ 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 nonperishable 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*²⁷ 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 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 46,005.²⁸

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.*²⁹

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.

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.”*³⁰ 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.³¹ Stereotyping excludes any individualized consideration of, or investigation into, a person’s actual circumstances and their needs or abilities.³²

36. There have been notable rulings by the CEDAW³³ Committee in this regard. In *V.K. v. Bulgaria*³⁴, 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*³⁵, 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.³⁶ 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 and stereotypes are based on irrational predisposition and generalization, rather than fact."*³⁷

39. The stereotype of the ideal sexual assault victim disqualifies several accounts of lived experiences of sexual assault. Rape myths³⁸ 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*,³⁹

"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.

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*⁴⁰ 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 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!

*"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."*⁴¹

*...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."*⁴²

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:

- (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* : ⁴³

"[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."

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.

¹ In *Vikram v. The State of Madhya Pradesh* in MCRC 23350/2020, dated 30.7.2020

² CrI. M.P No. 102226/2020

³ Section 354A reads as follows:

"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

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.

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

¹⁸ (1996) 2 SCC 384

¹⁹ (2004) 5 SCC 518

²⁰ 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>)

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 > 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

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

²⁶ (2015) 7 SCC 681

²⁷ CrI. A. No. 438/2011

²⁸ <https://ncrb.gov.in/sites/default/files/CI1%202019%20Volume%201.pdf>

²⁹ 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.

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.

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 SCR 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 SCR 577, 650 (L'Heureux-Dubé & Gonthier JJ, dissenting in part) (Canada, Supreme Court).

⁴⁰ *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384.

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.

⁴³ 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>

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AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 1607 of 2015**

1. Bhawan Singh, S/o Gohadu Singh Gond, aged about 42 years,
2. Jai Singh, S/o Samaru Gond, aged about 52 years,
3. Sukhsen Gond, S/o Gayadin Gond, aged about 40 years,

[All resident of Village Dhhummatola, Police Station Marwahi, District Bilaspur (M.P.)]

---- **Appellants**
(In Jail)

Versus

State of Chhattisgarh, through Station House Officer Marwahi, Tehsil Pendra Road, District Bilaspur (Chhattisgarh)

---- **Respondent**

For Appellants	:	Mr. Ravindra Sharma, Advocate
For Respondent-State	:	Mr. Anmol Sharma, Panel Lawyer

DB: Hon'ble Shri Justice Sanjay K. Agrawal and
Hon'ble Smt. Justice Rajani Dubey

Order on Board**(11.05.2022)****Sanjay K. Agrawal, J**

1. This is extremely unfortunate case where though the appellants herein had been admitted to privilege of bail by order of this Court dated 29.04.2016 and were directed to furnish bail bonds with one solvent surety each for their release, but they could not furnish bail bonds on the ground of their poverty and being member of Scheduled Tribe community and are still in jail for more than six years despite bail have been granted by suspending their jail sentence and now in shape of **IA No.03** an application has been filed seeking modification of the aforesaid order dated 29.04.2016, permitting them to be released on personal bond(s).



2. Mr. Ravindra Sharma, learned counsel for the appellants submits that the family members of the appellants are not in contact with the appellants and, therefore, they have preferred the instant appeal through legal aid. They are poor villagers and belong to Scheduled Tribe community and are continuously incarcerated in jail since 11.08.2013, thus, they are unable to comply with the conditions stipulated by this Court in the order dated 29.04.2016 while granting bail to them and, because of which, they could not be released on bail. This fact has also been brought to the notice of the Secretary, High Court Legal Aid Services Committee by the jail authorities vide its letter dated 13.04.2022. He relied on an order passed by this Court in the case of **Pardeshi @ Ratiram @ Raturam and others vs. State of Chhattisgarh**¹ wherein this Court relying on the judgments of Supreme Court in the cases of **Moti Ram and others vs. State of M.P.**² and **Hussainara Khatoon and others (I) vs. Home Secretary, State of Bihar**³ directed the appellants therein to be released on bail on their executing only personal bond and exempted other conditions stipulated earlier while granting bail to the appellants therein. Hence, praying similar direction modification in the order dated 29.04.2016 is prayed for.

3. Learned State counsel submits that appropriate order in this regard be passed.

4. We have heard learned counsels for the parties, considered their rival submissions made hereinabove and also went through the record with utmost circumspection.

5. The question which arose for consideration before us is whether the appellants can be released on bail on their executing only personal bond

1 CRA No.1239 of 2019, dated 29.03.2022

2 (1978) 4 SCC 47

3 (1980) 1 SCC 81



without insisting them to furnish bail bonds alongwith sureties.

6. In order to decide the plea, it would be appropriate to notice Section 389(1) of CrPC by which sentence awarded to an accused person convicted for an offence can be suspended in pending appeal and he can be released on bail, which states as under:

“389. Suspension of sentence pending the appeal; release of appellant on bail.

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.”

7. A careful perusal of the provisions contained in Section 389(1) of CrPC would show that the Legislature has consciously empowered the Appellate Court to suspend the substantive jail sentence of a convicted person, for the reasons to be recorded in the order, pending final disposal of the criminal appeal filed by him, and if he is in confinement, he be released on bail or on his own bond as, such, it is absolutely discretionary in nature and it is for the Appellate Court to decide as to whether an accused can be released on bail or on his own bond by suspending his substantive jail sentence.

8. The Supreme Court in the case of **Moti Ram (supra)** considered the issue whether the Appellate Court is empowered to enlarge convicted accused on his own bond without sureties and in Para-3 of the judgment their Lordships framed three questions, out of which we are concerned here only with Questions No.(1), which states as under:

“3.(1) Can the Court, under the Code of Criminal Procedure, enlarge, on his own bond without sureties, a person undergoing incarceration for a non-bailable offence either as undertrial or as convict who has appealed or sought special leave?....”



Thereafter, their Lordships relying upon Gujarat Committee Report proceeded to answer the aforesaid question in Para-14, 18, 18A, 20, 27, 30 & 31 which reads thus:

“14. The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.

18. The Encyclopaedia Britannica brings out the same point even in more affluent societies:

"Bail, procedure by which a judge or magistrate sets at liberty one who has been arrested or imprisoned, upon receipt of security to ensure the released prisoner's later appearance in court for further proceedings .. Failure to consider financial ability has generated much controversy in recent years, for bail requirements may discriminate against poor people and certain minority groups who are thus deprived of an equal opportunity to secure their freedom pending trial. Some courts now give special consideration to indigent accused persons who, because of their community standing and past history, are considered likely to appear in court. [*Encyclopaedia Britannica, Vol. I, p.736 (15th Edn) Micro Edn.*]"

18A. Again:

"We should suggest that the Magistrate must always bear in mind that *monetary bail is not a necessary element of the Criminal process* and even if risk of monetary loss is a deterrent against fleeing from justice, it is not the only deterrent and there are other factors which are sufficient deterrents against flight. *The Magistrate must abandon the antiquated concept under which pre-trial release could be ordered only against monetary bail.* That concept is out-dated and *experience has shown that it has done more harm than good.* The new insight into the subject of pre-trial release which has now been developed in socially advanced countries and particularly the United States should now inform the decisions of the Magistrates in regard to pre-trial release. Every other feasible method of pre-trial release should be exhausted before resorting to monetary bail. The practice which is now being followed in the United States is that the accused should ordinarily be released on order to appear or on his own recognizance unless it is shown that there is substantial risk of non-appearance or there are circumstances justifying imposition of conditions on release .. *If a Magistrate is Satisfied*





after making an enquiry into the condition and background of the accused *that the accused has his roots in the community and is not likely to abscond, he can safely release the accused on order to appear or on his own recognizance*"

(emphasis added)

*** **

20. Thus, the legal literature, Indian and Anglo-American, on bail jurisprudence lends countenance to the contention that bail, loosely used, is comprehensive enough to cover release on ones own bond with or without sureties.

*** **

27. The slippery aspect is dispelled when we understand the import of Sec. 389(1) which reads:

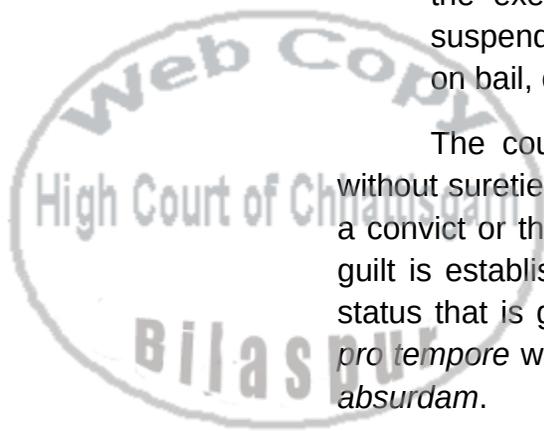
389 (1): Pending any appeal by a convicted person the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

The court of appeal may release a convict on his own bond without sureties. Surely, it cannot be that an under-trial is worse of than a convict or that the power of the court to release increases when the guilt is established. It is not the court's status but the applicant's guilt status that is germane. That a guilty man may claim judicial liberation *pro tempore* without sureties while an undertrial cannot is a *reductio ad absurdum*.

*** **

30. If sureties are obligatory even for juveniles, females and sickly accused while they can be dispensed with, after being found guilty, if during trial when the presence to instruct lawyers is more necessary, an accused must buy release only with sureties while at the appellate level, suretyship is expendable, there is unreasonable restriction on personal liberty with discrimination writ on the provisions. The hornet's nest of Part III need not be provoked if we read 'bail' to mean that it popularly docs, and lexically and in American Jurisprudence is stated to Mean, viz., a generic expression used to describe judicial release from *custodia juris*. Bearing in mind the need for liberal interpretation in areas of social justice, individual freedom and indigent's rights, we hold that bail covers both-release on one's own bond, with or without sureties. When sureties should be demanded and what sum should be insisted on are dependent on variables.

31. Even so, poor men- Indians are, in monetary terms, indigents- young persons infirm individuals and women are weak categories and courts should be liberal in releasing them on their own recognisances- put whatever reasonable conditions you may."





9. Similarly, the Supreme Court in the case of **Hussainara Khatoon (supra)** held that an accused can be released on bail on his executing personal bond also. Relying upon the decision of **Moti Ram (supra)**, Justice R.S. Pathak, though in his separate, but in a concurring opinion held in Para-8 as under:

“8. In regard to the exercise of the judicial power to release a prisoner awaiting trial on bail or on the execution of a personal bond without sureties for his appearance, I have to say this briefly. There is an amplitude of power in this regard within the existing provisions of the Code of Criminal Procedure, and it is for the courts to fully acquaint themselves with the nature and extent of their discretion in exercising it. I think it is no longer possible to countenance a mechanical exercise of the power. What should be the amount of security required or the monetary obligation demanded in a bond is a matter calling for the careful consideration of several factors. The entire object being only to ensure that the undertrial does not flee and hide himself from trial, all the relevant considerations which enter into the determination of that question must be taken into account (*Section 440, CrPC*). A synoptic impression of what the considerations could be may be drawn from the following provision in the United States Bail Reform Act of 1966:

In determining which conditions of releases will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offence charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings (*18 US S. 3146(b)*).

These are considerations which should be kept in mind when determining the amount of the security or monetary obligation. Perhaps, if this is done the abuses attendant on the prevailing system of pre-trial release in India could be avoided or, in any event, greatly reduced. See: *Moti Ram vs. State of M.P., (1978) 4 SCC 47.*”

10. Thus, in view of the provision contained in Section 389(1) of CrPC and in view of principles of law laid down by their Lordships of the Supreme Court in **Moti Ram (supra)** and **Hussainara Khatoon (supra)**, the Appellate Court in appropriate case is fully empowered to release the convict on personal



bond taking into account the nature and circumstance of offence charged, evidence available against the convict, his family background and financial condition etc, to ensure his appearance in Court as and when required.

11. Reverting to the facts of the present case in the light of principle of law laid down by the Supreme Court in the matters of **Moti Ram (supra)** and **Hussainara Khatoon (supra)**, it is quite vivid that the appellants being poor persons belonging to Scheduled Tribe community are in jail since 11.08.2013 and are not in contact with their family members and, therefore, they are unable to furnish bail bonds as directed by this Court vide order dated 29.04.2016 while granting bail to them. Accordingly, we deem it appropriate to direct that the appellants, namely, **Bhawan Singh, Jai Singh and Sukhsen Gond** be released on bail forthwith on their executing only personal bond of Rs.5,000/- (Rupees Five Thousand Only) and shall appear before the Registry of this Court on 16th August, 2022. They shall thereafter appear before the concerned trial Court on a date to be given by the Registry of this Court and shall continue to appear there on all such subsequent dates as are given to them by the said Court, interval being not less than 6 months, till the disposal of this appeal. It is ordered accordingly.

12. Accordingly, IA No.03 is **allowed**. Order dated 29.04.2016 stands modified to the extent indicated above.

13. A copy of this order be communicated to the concerned jail authorities by fax/e-mail.

14. While parting with the matter in this regard, the Member Secretary, Chhattisgarh State Legal Services Authority and the Secretary, High Court Legal Services Committee are directed to collect information from all the District Legal Services Authorities about the cases in which accused persons



have been enlarged on bail by this Court but are still in jail due to their inability to furnish bail bonds, as everyday we are coming across the cases in which despite order of this Court granting bail to the accused persons, they have not been released from jail and report be submitted on or before 13.06.2022. This exercise be done within a period of four weeks and matter be listed for consideration on 15.06.2022.

15. A copy of this order be also sent to the Member Secretary, Chhattisgarh State Legal Services Authority; Secretary, High Court Legal Services Committee and to all the District Legal Services Committees in the State for information and needful.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Rajani Dubey)
Judge



**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 1607 of 2015**

- Bhawan Singh, S/o Gohadu Singh Gond, aged about 42 years,
- Jai Singh, S/o Samaru Gond, aged about 52 years,
- Sukhsen Gond, S/o Gayadin Gond, aged about 40 years,

[All resident of Village Dhhummatola, Police Station Marwahi, District Bilaspur (M.P.)]

---- **Appellants**
(In Jail)

Versus

State of Chhattisgarh, through Station House Officer Marwahi, Tehsil Pendra Road, District Bilaspur (Chhattisgarh)

---- **Respondent**

HEAD NOTE

The Appellate Court while considering an application filed under Section 389 of Cr.P.C. for suspension of sentence and grant of bail is empowered to suspend the substantive jail sentence of a convicted person, for the reasons to be recorded in the order, pending final disposal of the criminal appeal filed by him, and if he is in confinement, he be released on bail or on his own bond (personal bond).

दण्ड प्रक्रिया संहिता की धारा 389 के अंतर्गत दण्डादेश के निलंबन एवं जमानत मंजूर किये जाने हेतु प्रस्तुत आवेदन पत्र पर विचार करते समय अपीलीय न्यायालय ऐसे कारणों को जो उसके द्वारा अभिलिखित किये जायेंगे, दोषसिद्ध व्यक्ति द्वारा की गई अपील के लंबित रहने तक, दोषसिद्ध व्यक्ति के मुख्य दण्डादेश के निलंबन का आदेश देने हेतु सशक्त है, और यदि वह व्यक्ति परिरोध में है तो अपीलीय न्यायालय आदेश दे सकता है कि वह जमानत पर या उसके अपने बंध पत्र पर छोड़ दिया जाए ।

2020 SCC OnLine Chh 161 : (2020) 214 AIC 355

In the High Court of Chhattisgarh at Bilaspur
(BEFORE SANJAY K. AGRAWAL, J.)

XYZ ... Petitioner;

Versus

State of Chhattisgarh, through the Secretary, Home Department
and Another ... Respondents.

Writ Petition (Cr.) No. 284 of 2020

Decided on August 18, 2020, [Order reserved on: 21-7-2020]

Criminal Law — Criminal Procedure Code, 1973 — Ss. 357-A, 357-B and 357-C — Victim compensation Scheme for women and children — Non-grant of compensation — Juvenile Justice Board has not made any recommendation to pay compensation in terms of S. 357A of Code — Whether petitioner (rape victim) is entitled for compensation as per Scheme of 2018 framed by State Government — Held, rape victim is entitled for compensation under S. 357A of CrPC r/w S. 33(8) of POCSO Act

Held :

It is mandatory duty of Courts to apply its mind to question of compensation in every criminal case, that too by recording reasons

— Since victim was minor and accused (juvenile) has been convicted for offences under Ss. 363, 366 & 376 of IPC and Ss. 3 & 4 of POCSO Act, petitioner (rape victim) and her family members were required to be rehabilitated to protect them — Recommendation ought to have been made by Juvenile Justice Board to DLSA or SLSA under S. 357A(2) of Code read with S. 33(8) of POCSO Act and R. 7 of POCSO Rules, 2012, but that has not been done despite clear cut mandate in that regard — Petitioner is rape victim, that too minor and she has been sexually assaulted when offence took place and she has suffered not only physically but mentally also, and considering gravity of offence and that she is required to be rehabilitated and further taking into consideration provisions contained in NALSA's Compensation Scheme of 2018 and also keeping in mind provision enumerated in S. 33(8) of POCSO Act r/w R. 7 of POCSO Rules, 2012/R. 9 of POCSO Rules, 2020 (w.e.f. 9-3-2020) and she has been traumatised heavily, petitioner is entitled for compensation under Scheme 2018 and not under Scheme of 2011 — Writ petition allowed — Protection of Children from Sexual Offences Act, 2012, Ss. 3, 4 and 33(8) — Protection of Children from Sexual Offences Rules, 2012, R. 7

— Juvenile Justice Board has not recommended for grant of compensation either under S. 357A(2) or (3) of Code, but that non-recommendation under S. 357A(2) or (3) of Code will not preclude High Court to consider and grant compensation to victim if it is brought to notice of High Court that criminal court neither granted compensation under S. 357 of Code nor made recommendation to DLSA or SLSA to grant compensation under S. 357A of Code.

Held :

A conjoint reading of S. 33(8) of POCSO Act r/w R. 9 of POCSO Rules, 2020 would show that Special Judge is empowered to direct for payment of compensation to victim/child for loss or pain which he/she has suffered — Quantum of compensation shall be calculated taking into consideration loss or injury suffered by victim and other related factors laid down in R. 7(3) of POCSO Rules, 2012 substituted by POCSO Rules, 2020 and shall not be restricted to minimum compensation amount as prescribed by Victims Compensation Scheme by State Government — It would also be clear that such compensation, interim or final, shall be paid either from Victims Compensation Scheme or any other scheme or fund established under S. 357A of Code.

Petitioner — rape victim (minor) at whose instance the accused (juvenile) has been found guilty and convicted for the criminal offences by the Juvenile Justice Board constituted under the Juvenile Justice (Care and Protection of Children) Act, 2015, but till this date she has not been paid a single penny towards compensation, either interim or final. Juvenile Justice Board also did not consider it appropriate to recommend to the District Legal Services Authority (DLSA) or the State Legal Services Authority (SLSA) in terms of Section 357A of the Code for grant of compensation to the petitioner

Key issue before the High Court:

i) Whether petitioner (rape victim) is entitled for compensation as per the Scheme of 2018 framed by the State Government which came into force with effect from 2nd October, 2018 as per the notification dated 4th February, 2019 by which date the Scheme has been brought into force or under the old scheme which was enforced with effect from 3-8-2011?

Held :

Section 357 of the Cr.P.C. is an important provision but Courts have seldom invoked it. This Section of law empowers the Court to award compensation while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. This power to award compensation is not ancillary to other sentences but is in addition thereto. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We therefore recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way."

[Para 12]

Hari Krishna and State of Haryana v. Sukhbir Singh, (1988) 4 SCC 551Considered

Held :

While the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 of the Code of Criminal Procedure would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family.

[Para 13]

Ankush Shivaji Gaikwad v. State of Maharashtra, (2013) 6 SCC 770,Relied on

Held :

The schemes specify maximum limit of compensation and subject to maximum limit, the discretion to decide the quantum has been left with the State/District Legal Authorities. It has been brought to our notice that even though almost a period of five years has expired since the enactment of Section 357-A, the award of compensation has not become a rule and interim compensation, which is very important, is not being granted by the courts. It has also been pointed out that the upper limit of compensation fixed by some of the States is arbitrarily low and is not in keeping with the object of the legislation.

It is the duty of the courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the court ought to direct grant of interim compensation, subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim. At the stage of final hearing it is obligatory on the part of the court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case.

[Para 17]

Suresh v. State of Haryana, (2015) 2 SCC 227.....Followed

Held :

Special Court upon receipt of information as to commission of any offence under the Act by registration of FIR shall on his own or on the application of the victim make enquiry as to the immediate needs of the child for relief or rehabilitation and upon giving an opportunity of hearing to the State and other affected parties including the victim pass appropriate order for interim compensation and/or rehabilitation of the child. In conclusion of proceeding, whether the accused is convicted or not, or in cases where the accused has not been traced or had absconded, the Special Court being satisfied that the victim had suffered loss or injury due to commission of the offence shall award just and reasonable compensation in favour of the victim. The quantum of the compensation shall be fixed taking into consideration the loss and injury suffered by the victim and other related factors as laid down in Rule 7(3) of the Protection of Children from Sexual Offences Rules, 2012 and shall not be restricted to the minimum amounts prescribed in the Victim Compensation Fund. The interim/final compensation shall be paid either from the Victim Compensation Fund or any other special scheme/fund established under section 357-A of the Code or any other law for the time being in force through the State Legal Services Authorities or the District Services Authority in whose hands the Fund is entrusted. If the Court declines to pass interim or final compensation in the instant case it shall record its reasons for not doing so. The interim compensation, so paid, shall be adjusted with final compensation, if any, awarded by the Special Court in conclusion of trial in terms of section 33 (8) of the Act.

[Para 18]
AST/NRS-19108

Bijoy alias Guddu Das v. State of West Bengal, 2017 Cri LJ 3893Considered

General Manager, Kerala State Road Transport Corporation, Trivandrum v. Mrs. Susamma Thomas, (1994) 2 SCC 176 : AIR 1994 SC 1631; *Nipun Saxena v. Union of India*, (2019) 2 SCC 703Followed

Advocates who appeared in this case :

Mr. Ashish Surana, Advocate for the Petitioner;

Mr. Mateen Siddiqui, Deputy Advocate General, Advocate for the Respondents/State.

The Order of the Court was delivered by

SANJAY K. AGRAWAL, J.:— Proceedings of this matter have been taken-up for final hearing through video conferencing.

2. This writ petition projects the helplessness of the petitioner herein - rape victim (minor) at whose instance the accused (juvenile) has been found guilty and convicted for the criminal offences by the Juvenile Justice Board constituted under the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, 'the JJ Act of 2015'), but till this date she has not been paid a single penny towards compensation, either interim or final, despite clear pronouncements of their Lordships of the Supreme Court in catena of judgments including that of *Suresh v. State of Haryana*¹ mandating the criminal courts to advert to Section 357A of the Code of Criminal Procedure, 1973 (for short, 'the Code') at the time of final hearing and to award appropriate compensation to the rape victim as a matter of rule to enable her and her family to rehabilitate compelling the rape victim/petitioner to file this writ petition asking for compensation from the State and its authorities.

3. The petitioner (rape victim) made a report against the accused (juvenile) for the offences punishable under Sections 363, 366 & 376 of the IPC and Sections 3 & 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, the POCSO Act') and ultimately, he was charged for those offences and also charge-sheeted, but though he was also charge-sheeted for the offences punishable under Sections 3 and 4 of the POCSO Act, but since the accused was juvenile, therefore, as per the provision contained in Section 34(1) of the POCSO Act, he was tried by the Juvenile Justice Board constituted under the Act of 2015 and ultimately, by judgment dated 2-3-2020, he was found guilty and convicted by the Juvenile Justice Board for offences under Sections 363, 366 & 376 of the IPC and Sections 3 & 4 of the POCSO Act as per the

provisions contained in the JJ Act of 2015 and also he was sentenced to fine of Rs. 1,000/-, but no order was passed directing payment of compensation to the petitioner (victim) as provided under Section 357 of the Code. The learned Juvenile Justice Board also did not consider it appropriate to recommend to the District Legal Services Authority (DLSA) or the State Legal Services Authority (SLSA) in terms of Section 357A of the Code for grant of compensation to the petitioner which compelled the petitioner to file this writ petition seeking compensation for her rehabilitation.

4. It is the case of the petitioner that she is a rape victim and the accused has also been found guilty by the Juvenile Justice Board, yet, she has not been paid even a single penny as compensation either as an interim measure or final, though Section 33 (8) of the POCSO Act read with Rule 7 of the Protection of Children from Sexual Offences Rules, 2012 clearly provides that in appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child, as such, she is entitled for compensation as per the compensation scheme floated by the State Government that is called as "the Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes, 2018" (for short, 'the Scheme of 2018').

5. Opposing the writ petition, the State Government has filed its return stating inter alia that the Juvenile Justice Board has not made any recommendation to pay compensation in terms of Section 357A of the Code and if compensation has not been paid, remedy of the petitioner is to file appeal under the proviso to Section 372 of the Code and as such, the writ petition as framed and filed is not maintainable and deserves to be dismissed.

6. Mr. Ashish Surana, learned counsel appearing for the petitioner, at the outset, replying to the preliminary objection, would submit that the judgment passed by the Juvenile Justice Board not awarding compensation under Section 357A of the POCSO Act to the petitioner would not be appealable by virtue of the provision contained in the proviso to Section 372 of the Code, as the accused has been tried as per the provision contained in the JJ Act of 2015 and against the judgment of conviction recorded and sentence awarded under the JJ Act of 2015, no appeal would lie under the Code. He would further submit that despite the decision of the Supreme Court in *Suresh* (supra) mandating the criminal courts to advert to Section 357A of the Code, the Juvenile Justice Board did not advert to Section 357A and failed to make recommendation to the DLSA or the SLSA for quantifying compensation, that would not preclude this Court in assessing compensation and granting compensation to the petitioner (rape victim) which she is otherwise entitled to. He would also submit that since Section 33(8) of the POCSO Act read with Rule 7 of the Protection of Children from Sexual Offences Rules, 2012 clearly provides for grant of additional compensation, but merely because the accused was tried as per the procedure laid down in the JJ Act of 2015, by virtue of Section 34(1) of the POCSO Act, the petitioner (rape victim) is still entitled for compensation, as trial of the accused under the Act of 2015 would not dis-entitle her to the benefit of compensation under Section 357A of the Code and Section 33(8) of the POCSO Act, because the substantive law providing for compensation will prevail over the procedural provisions. He would further contend that as per the Scheme of 2018, the petitioner - rape victim is entitled for compensation along with interest. He would also contend that in this case no compensation either interim or final was not granted to the petitioner, as nobody appeared on behalf of the prosecution/State before the Juvenile Justice Board to assist the Court and when the petitioner made application for assisting the prosecution/Court, that was rejected on the ground since the State is not represented, therefore, she cannot assist the Court. Such a practice on the part of the State Government deserves to be deprecated and appropriate order be also passed directing

the State in this regard and appropriate compensation be granted to the petitioner.

7. Mr. Mateen Siddiqui, learned State counsel, would submit that the writ petition as framed and filed is not maintainable in view of availability of efficacious alternative remedy in shape of proviso to Section 372 of the Code which provides for appeal against inadequate compensation granted to the victim. He would further submit that since no recommendation in terms of Section 357A(2) & (3) of the Code was made by the trial Court, no order/direction can be made in extraordinary jurisdiction to grant compensation to the rape victim/petitioner and even otherwise, if she is held entitled, then she would be entitled under the old Scheme i.e. the Chhattisgarh Victim Compensation Scheme, 2011 under which the rape victim is entitled for Rs. 50,000/- and as such, the writ petition deserves to be dismissed.

8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.

Answer to Preliminary Objections:—

9. It appears from the record that at the instance of the petitioner, the accused (juvenile) was tried for the aforesaid offences under the provisions of the JJ Act of 2015, as per the provision contained in Section 34(1) of the POCSO Act and the accused has been convicted and sentenced under the aforesaid provisions of law. The JJ Act of 2015 provides for appeal, but no such appeal lies under Section 101 of the JJ Act of 2015 at the instance of victim against non-grant of compensation. Section 101 (5) of the JJ Act of 2015 is not applicable to the instant case, therefore, appeal under the proviso to Section 372 of the Code is not available to the petitioner/victim. Even otherwise, proviso to Section 372 of the Code provides appeal against an order imposing inadequate compensation whereas, in the instant case, no compensation has been awarded to the victim, therefore, proviso to Section 372 of the Code is inapplicable to the petitioner (victim).

10. True it is that the Juvenile Justice Board has not recommended for grant of compensation either under Section 357A(2) or (3) of the Code, but that non-recommendation under Section 357A(2) or (3) of the Code will not preclude this Court to consider and grant compensation to the victim if it is brought to the notice of this Court that the criminal court neither granted compensation under Section 357 of the Code nor made recommendation to the DLSA or the SLSA to grant compensation under Section 357A of the Code. Thus, it is a fit case where this Court should step-in and consider grant of compensation to the petitioner (rape victim) in its writ jurisdiction. As such, both the preliminary objections raised herein-above by the learned State counsel, are hereby overruled.

11. Turning to the merits of the matter, it would be appropriate to notice the law relating to compensation to victim in this behalf. Section 357 of the Code provides that the trial Court at the time of conclusion of trial can grant compensation to the victim. Section 357 of the Code provides as under:—

“357. Order to pay compensation.—(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

- (a) in defraying the expenses properly incurred in the prosecution;
- (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;
- (c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act,

1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any *bona fide* purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section."

12. Despite the above-stated clear provision of grant of compensation to the victim at the time of conclusion of trial, the criminal courts were found reluctant to award compensation to the victims; noticing this apathy and inhibition, the Supreme Court in the matter of *Hari Krishna and State of Haryana v. Sukhbir Singh*² recommended to all courts to exercise this power of granting compensation liberally under Section 357 of the Code so as to meet the ends of justice by observing as under:—

"Section 357 of the Cr.P.C. is an important provision but Courts have seldom invoked it. This Section of law empowers the Court to award compensation while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. This power to award compensation is not ancillary to other sentences but is in addition thereto. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We therefore recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way."

13. The above-stated mandate/reminder of their Lordships of the Supreme Court qua the grant of compensation to the victim at the time of conclusion of trial, did not evince any interest in the criminal courts and apathy continued qua victims. In view of that situation, the Supreme Court in the matter of *Ankush Shivaji Gaikwad v. State of Maharashtra*³, held that it is the mandatory duty of Courts to apply its mind to the question of compensation in every criminal case, that too by recording reasons. It has been held as under in paragraph 66 of the report:—

"66. To sum up: while the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to

consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 of the Code of Criminal Procedure would involve a certain enquiry albeit summary unless of course the facts as merging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family."

14. Meanwhile, the Law Commission of India in its 154th Law Commission Report on the Code of Criminal Procedure made recommendation to insert Section 357A as Victim compensation scheme and consequently, accepting the said recommendation, Section 357A was inserted in the Code which reads as follows:—

"357A. Victim compensation scheme.—(1) Every State Government in coordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

(3) If the trial Court, at the conclusion of the trial, is satisfied that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the Victim has to be rehabilitated, it may make recommendation for compensation.

(4) to (6) xxx xxx xxx"

15. This provision has been brought into the statute book i.e. the Code of Criminal Procedure, 1973, by Amending Act 5 of 2009 and the amendment has been brought into force with effect from 31-12-2009. The object and purpose of the provision is to enable the Court to direct the State to pay compensation to the victim where the compensation under Section 357 was not adequate or where the cases ended in acquittal or discharge and the victim was required to be rehabilitated. The provision was incorporated on the recommendation of 154th Report of the Law Commission. It recognises compensation as one of the methods of protection of victims. (See *Suresh* (supra).)

16. At this stage, it would be appropriate to notice Sections 357B and 357C of the Code which read as under:—

"357B. Compensation to be in addition to fine under section 326A or section 376D of Penal Code, 1860.—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, 376AB, section 376D, 376DA and 376DB of the Penal Code, 1860.

357C. Treatment of victims.—All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 326A, 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or section 376E of the Penal Code, 1860, and shall immediately inform the police of such incident."

17. In *Suresh* (supra), their Lordships of the Supreme Court have clearly noticed that despite there being a clear provision in Section 357A of the Code, the award of compensation has not become a rule and interim compensation, though it is very important, is not being granted by the courts. It has been observed pertinently as under:—

"15. We are informed that 25 out of 29 State Governments have notified victim compensation schemes. The schemes specify maximum limit of compensation and subject to maximum limit, the discretion to decide the quantum has been left with the State/District Legal Authorities. It has been brought to our notice that even though almost a period of five years has expired since the enactment of Section 357 -A, the award of compensation has not become a rule and interim compensation, which is very important, is not being granted by the courts. It has also been pointed out that the upper limit of compensation fixed by some of the States is arbitrarily low and is not in keeping with the object of the legislation.

16. We are of the view that it is the duty of the courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the court ought to direct grant of interim compensation, subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim. At the stage of final hearing it is obligatory on the part of the court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case."

18. In the matter of *Bijoy alias Guddu Das v. State of West Bengal*⁴, the Calcutta High Court while dealing with the provisions of the POCSO Act qua the compensation to the victim, in paragraph 39 of the report, held as under:—

"39. The following directives are issued to the investigating agencies, prosecutors and the Special Courts so that the aforesaid provisions of law are followed in letter and spirit and fundamental right of dignity of a child victim and other basic human rights are preserved:—

1. to 8. xxx xxx xxx

9. The Special Court upon receipt of information as to commission of any offence under the Act by registration of FIR shall on his own or on the application of the victim make enquiry as to the immediate needs of the child for relief or rehabilitation and upon giving an opportunity of hearing to the State and other affected parties including the victim pass appropriate order for interim compensation and/or rehabilitation of the child. In conclusion of proceeding, whether the accused is convicted or not, or in cases where the accused has not been traced or had absconded, the Special Court being satisfied that the victim had suffered loss or injury due to commission of the offence shall award just and reasonable compensation in favour of the victim. The quantum of the compensation shall be fixed taking into consideration the loss and injury suffered by the victim and other related factors as laid down in Rule 7(3) of the Protection of Children from Sexual Offences Rules, 2012 and shall not be restricted to the minimum amounts prescribed in the Victim Compensation Fund. The interim/final compensation shall be paid either from the Victim Compensation Fund or any other special scheme/fund established under section 357-A of the Code or any other law for the time being in force through the State Legal Services Authorities or the District Services Authority in whose hands the Fund is entrusted. If the Court declines to pass interim or final compensation in the instant case it shall record its reasons for not doing so. The interim compensation, so paid, shall be adjusted with final compensation, if any,

awarded by the Special Court in conclusion of trial in terms of section 33(8) of the Act.

10. xxx xxx xxx"

19. The judgment of the Calcutta High Court in *Bijoy alias Guddu Das* (supra) was not only approved by the Supreme Court in the matter of *Nipun Saxena v. Union of India*³, but their Lordships were pleased to make the said judgment a part of its judgment mandating all concerned to issue necessary direction in that behalf. It was held as under:—

"45. The Calcutta High Court in *Bijoy case*⁴ has also given other directions to ensure that the provisions of the law are followed in letter and spirit, and the fundamental rights of a child victim and other basic human rights are protected. We are in agreement with all these directions. Though some of the issues dealt with in these directions do not strictly arise in this case, keeping in view the fact that we are dealing with the rights of children, we are annexing the directions issued by the Calcutta High Court as Annexure 1 to this judgment. We request all the Chairpersons and Members of all the Juvenile Justice Committee of all the High Courts in the country to go through the judgment of the Calcutta High Court and the directions issued therein and they may issue similar directions, keeping in view the particular needs of each High Court/State."

20. The Protection of Children from Sexual Offences Act, 2012 came to be enacted by the Parliament with effect from 14-11-2012 to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences. Sub-section (8) of Section 33 of the POCSO Act and Rule 7 of the Protection of Children from Sexual Offences Rules, 2012 which also provide for compensation read as under:—

Section 33(8) of the POCSO Act

"33. Procedure and powers of Special Court.—(1) to (7) xxx xxx xxx

(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

(9) xxx xxx xxx"

Rule 7 of the POCSO Rules, 2012 (substituted by the POCSO Rules, 2020 with effect from 9-3-2020)

Rule 9 of the *pari materia* POCSO Rules, 2020

"9. Compensation.—(1) The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.

(2) The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

(3) Where the Special Court, under sub-section (8) of section 33 of the Act read with sub-sections (2) and (3) of section 357A of the Code of Criminal Procedure, makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the following:—

- (i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;
- (ii) the expenditure incurred or likely to be incurred on his medical treatment for physical and/or mental health;
- (iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;
- (iv) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;
- (v) the relationship of the child to the offender, if any;
- (vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;
- (vii) whether the child became pregnant as a result of the offence;
- (viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;
- (ix) whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;
- (x) any disability suffered by the child as a result of the offence;
- (xi) financial condition of the child against whom the offence has been committed so as to determine his need for rehabilitation;
- (xii) any other factor that the Special Court may consider to be relevant.

(4) The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357A of the Code of Criminal Procedure or any other laws for the time being in force, or, where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

(6) Nothing in these rules shall prevent a child or his parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government."

21. A conjoint reading of sub-section (8) of Section 33 of the POCSO Act read with Rule 9 of the POCSO Rules, 2020 would show that the Special Judge is empowered to direct for payment of compensation to the victim/child for loss or pain which he/she has suffered. The quantum of compensation shall be calculated taking into consideration the loss or injury suffered by the victim and other related factors laid down in Rule 7(3) of the POCSO Rules, 2012 substituted by the POCSO Rules, 2020 and shall not be restricted to the minimum compensation amount as prescribed by the Victims Compensation Scheme by the State Government. It would also be clear that such compensation, interim or final, shall be paid either from the Victims Compensation Scheme or any other scheme or fund established under Section 357A of the Code.

22. In the State of Chhattisgarh with effect from 3-8-2011, the Chhattisgarh Victim Compensation Scheme, 2011 enacted under Section 357A of the Code was in force and the Schedule attached with the Scheme states as under:—

Schedule

S. No.	Details of Loss or Injury	Maximum Limit of Compensation
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1.	Loss of Life	1.00 Lac
2.	Loss of limb or part of body resulting 80% or above handicap or serious injury due to Acid Attack	50,000
3.	Loss of Limb or part of body resulting above 40% and below 80% handicapped	25,000
4.	Rape of Minor	50,000
5.	Rape	25,000
6.	Rehabilitation	20,000
7.	Loss of limb or part of body resulting below 40% handicap	10,000
8.	Injury causing several mental agony to women and child victim in cases like human Trafficking	20,000
9.	Simple loss or injury to child victim	10,000

23. The Supreme Court in the matter of *Nipun Saxena v. Union of India*⁶, in paragraph 9, held on 5-9-2018 that till the Scheme is framed, the NALSA's Compensation Scheme should function as a guideline to the Special Court for the award of compensation to victims of child sexual abuse under Rule 7 of the POCSO Rules of 2012. Paragraphs 2, 9, 10 and 11 to 15 of the report state as under:—

2. It has been brought to our notice that as far as children are concerned, no Scheme of this nature has been framed with regard to the victims of sexual abuse under the provisions of the Protection of Children from Sexual Offences Act, 2012 (for short "the POCSO Act").

9. Keeping this hiatus in mind, we are of the opinion, after hearing learned counsel for the parties as well as learned Additional Solicitor General, that NALSA's Compensation Scheme should function as a guideline to the Special Court for the award of compensation to victims of child sexual abuse under Rule 7 until the Rules are finalised by the Central Government.

10. The Special Judge will, of course, take the provisions of the POCSO Act into consideration as well as any circumstances that are special to the victim while passing an appropriate order.

11. We need not emphasise that the legislation is gender neutral and, therefore, the guidelines will be applicable to all children.

12. The Special Judge will also pass appropriate orders regarding actual physical payment of the compensation or the interim compensation so that it is not misused or misutilised and is actually available for the benefit of the child victim. If the Special Judge deems it appropriate, an order of depositing the amount in an interest-bearing account may be passed.

13. A copy of NALSA's Compensation Scheme as well as a copy of this order should be sent by the Registry to the Registrar General of every High Court with a direction that the Registrar General will circulate them to all the District Judges concerned for circulation to the Special Judges and the State, District and Taluka Legal Services Committees.

14. A copy of the Scheme and a copy of the order passed by this Court will also be sent by the Registry to all the Judicial Academies for information.

15. We also direct that the publicity should be given to the Scheme as well as the order passed by us on regular basis until the Rules are finalised by the Central Government. The learned Additional Solicitor General assures us that the needful will be done on a regular basis through all forms of media. Needless to say that the Scheme and the Guidelines will be operational from 2-10-2018.”

24. It would be appropriate to mention here that the National Legal Services Authority (NALSA) setup a committee and finalised the Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes and submitted before the Supreme Court on 24-4-2018 and on 21-5-2018, the said Scheme was accepted by the Supreme Court and called as “the Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes”. In the said Scheme, minimum limit of compensation provided to rape victim is Rs. 4 lakhs and upper limit of compensation is Rs. 7 lakhs. The Explanation appended to the said Rules provides that Chapter will not apply to the minor victims under the POCSO Act, 2012 qua compensation, as compensation issues are to be dealt with by the Special Courts under Section 33(8) of the POCSO Act, 2012 and Rule 7 of the POCSO Rules, 2012. Thereafter, pursuant to the direction of the Supreme Court in *Nipun Saxena* (supra) by order dated 5-9-2018 that “NALSA's Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes 2018” shall function as a guideline to the Special Court for the award of compensation to the victims of child sexual offence under Section 33(8) of the POCSO Act, 2012 and in exercise of the powers conferred by Section 357A of the Code, the State of Chhattisgarh has framed a scheme known as the Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes, 2018 with effect from 2-10-2018. Explanation appended to the Scheme provides that in case of Minor Victims under POCSO, it would be applicable. The Schedule attached to the said Scheme provides that in case of rape, minimum limit of compensation would be Rs. 4 lakhs and upper limit of compensation would be Rs. 7 lakhs. Serial No. 3 of the said Schedule reads as under:—

SCHEDULE APPLICABLE TO WOMEN VICTIM OF CRIMES

S. No.	Particulars of loss or injury	Minimum Limit of Compensation	Upper Limit of Compensation
3.	Rape	Rs. 4 Lakh	Rs. 7 Lakh

25. Now, the question is, whether the petitioner (rape victim) is entitled for compensation as per the Scheme of 2018 framed by the State Government which came into force with effect from 2nd October, 2018 as per the notification dated 4th February, 2019 by which date the Scheme has been brought into force or under the old scheme which was enforced with effect from 3-8-2011?

26. Admittedly, the Juvenile Justice Board while delivering judgment was required to consider and make recommendation under Section 357A(2) of the Code to the DLSA or the SLSA, as the petitioner is the rape victim and the accused has been found guilty and convicted, but the learned Juvenile Justice Board did not notice either Section 357 or 357A of the Code and did not make recommendation for disbursing the fine amount imposed by virtue of Section 357(1) of the Code and even did not notice Section 33(8) of the POCSO Act, 2012, though the Board convicted the accused (juvenile) under Sections 3 & 4 of the POCSO Act, 2012 and also did not make any recommendation for compensation under Section 357A of the Code, whereas it was obliged to do so. No reason has been assigned for not making recommendation for compensation.

27. Reverting to the facts of the case in the light of the above-stated statutory provisions and in the light of the aforesaid principles of law laid down by their Lordships of the Supreme Court in the aforesaid judgments, it is quite vivid that since the victim was minor and the accused (juvenile) has been convicted for offences under Sections 363, 366 & 376 of the IPC and Sections 3 & 4 of the POCSO Act, the

petitioner (rape victim) and her family members were required to be rehabilitated to protect them. Consequently, recommendation ought to have been made by the Juvenile Justice Board to the DLSA or the SLSA under Section 357A(2) of the Code read with Section 33(8) of the POCSO Act and Rule 7 of the POCSO Rules, 2012, but that has not been done despite the clear cut mandate in that regard. Taking into consideration that the petitioner is rape victim, that too minor and she has been sexually assaulted when the offence took place and she has suffered not only physically but mentally also, and considering the gravity of offence and that she is required to be rehabilitated and further taking into consideration the provisions contained in the NALSA's Compensation Scheme of 2018 and also keeping in mind the provision enumerated in Section 33(8) of the POCSO Act read with Rule 7 of the POCSO Rules, 2012/Rule 9 of the POCSO Rules, 2020 (w.e.f. 9-3-2020) and she has been traumatised heavily, the petitioner herein is entitled for total compensation of Rs. 7 lakhs under Scheme 2018 and not under Scheme of 2011. Apart from this, since she has not been paid any compensation at all, even interim or otherwise, and she is required to come to this Court to ventilate her grievances seeking the remedy of writ jurisdiction of this Court, she would also be entitled for interest from the date of judgment by the Juvenile Justice Board i.e. 2-3-2020 till the actual payment is made.

28. Accordingly, it is held that the petitioner will be entitled for compensation of Rs. 7 lakhs jointly from respondents No. 1 & 2 along with interest. Respondents No. 1 & 2 shall deposit the above-stated amount before the Special Judge (POCSO), Raipur within 30 days from today. The Special Judge (POCSO) shall disburse the said amount to the victim in accordance with the directions given by the Supreme Court in the matter of *General Manager, Kerala State Road Transport Corporation, Trivandrum v. Mrs. Susamma Thomas*² (paragraph 17) read with paragraph 12 in *Nipun Saxena* (supra) ((2019) 13 SCC 715).

29. The writ petition is allowed to the extent sketched herein-above. No order as to cost(s).

30. Before leaving the record, a note of caution is absolutely necessary to the criminal courts as well as for the State Government and its authorities. Despite clear mandate contained in Section 357A of the Code and mandate of their Lordships of the Supreme Court in this regard in the judgments cited (supra), the criminal courts are not even considering the question of compensation to the victims, particularly the rape victims which is not only disturbing, but warranting remedial steps to be taken forthwith. Similarly, in this case, none appeared on behalf of the prosecution to assist the Juvenile Justice Board and request made by the victim to assist, was turned down by the Juvenile Justice Board citing reason that the State is not represented, therefore, let the matter be placed before Hon'ble the Chief Justice for consideration,

1. for circulating a copy of this order to the judicial officers manning the criminal courts for perusal and needful action;
2. for sending a copy of this order to the Director, Chhattisgarh State Judicial Academy, Bilaspur to formulate a training programme for the judicial officers in this regard;
3. for sending a copy of this order to the Principal Secretary (Law) and the Director (Prosecution) to take effective and remedial steps to represent the State/interest of victim before all the Juvenile Justice Boards (if appropriate).

Head Note

Rape victim is entitled for compensation under Section 357A of the CrPC read with Section 33(8) of the POCSO Act.

बलात्कार पीड़िता दंड प्रक्रिया संहिता की धारा 357A सहपरित पाकसो अधिनियम की धारा 33(8) के अंतर्गत क्षतिपूर्ति प्राप्त करने की हकदार है।

¹ (2015) 2 SCC 227

² (1988) 4 SCC 551

³ (2013) 6 SCC 770

⁴ 2017 Cri LJ 3893

⁵ (2019) 2 SCC 703

⁶ (2019) 13 SCC 715

⁷ (1994) 2 SCC 176 : AIR 1994 SC 1631

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