Landmark Judgments on Violence Against Women and Children from South Asia

Supported by:

South Asia Regional Initiative/Equity Support Program
This Compilation of Judgments is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents do not necessarily reflect the views of USAID or the United States Government.
Acknowledgement

The Regional Action Forum on “Improving the Implementation of Laws Protecting Women and Children” is a platform of dedicated individuals/experts from government, civil society, the judiciary and academia from four countries – Bangladesh, India, Nepal and Sri Lanka. Supported by the SARI/Equity Program, the Forum members meet regularly to discuss and act upon common issues of importance for the region. Thus, the Forum membership agreed to undertake the compilation of progressive, precedent-setting judgments on violence against women and children from the four countries in the hope that this compilation would foster information sharing and replication of progressive judgments across the region for the benefit of women and children victims of violence. SARI/Equity acknowledges with gratitude the valuable contributions of the Regional Action Forum members, National Core Groups¹ and Consultants in the selection of the judgments and in the preparation of synopses for each of them and of various other materials. Special thanks go to the Editor of the Publication, Ms. Aparna Bhat, Member of the Regional Action Forum and Advocate at the Supreme Court of India, who consolidated the contributions into the current publication. We sincerely hope that it will become an “easy reference book” for judges, prosecutors, lawyers and concerned individuals and contribute to the development of a progressive jurisprudence in the region.

The AED-SARI/Equity Team

¹ For the list of members of the Regional Action Forum and its National Core Groups please see the back page of this document.
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PREFACE

Violence against women and children has no boundaries, regional disparities or cultural constraints. While its nature, causes and circumstances may have a given cultural background, violence against women and children unfortunately exists throughout the world without exception.

Attempts at addressing and combating violence against women and children have taken various forms including legislative interventions followed by judicial interpretations of the same. While the law and the legal system alone may not be sufficient to combat violence against women and children, in instances where cases are brought forward, the legal system needs to be well equipped to deal with each of those cases in a sensitive and expeditious manner. Laws are the reflection of a society’s needs at any particular time. They therefore change with the times. Likewise, the manner in which violence is being perpetrated changes in society. Therefore, the mechanisms that a society sets up to combat violence will have to take into account the varying ways in which violence is being perpetrated.

Experience sharing about handling such cases can provide greater insights into solving similar cases and in understanding the different ways in which problems can be addressed and good practices be arrived at. Unfortunately, exercises of experience sharing for prosecutors and the judiciary have hardly ever been considered. The present publication is an attempt to document the best practices of the superior judiciary in four South Asian countries, namely Bangladesh, India, Nepal and Sri Lanka.

At the First Meeting of the Regional Action Forum on “Improving the Implementation of Laws Protecting Women and Children” held at Colombo in May 2004, it was the unanimous view of all those present that there was a strong need to pull together the most progressive judgments in the area of violence against women and to disseminate them widely amongst practitioners so that the rich jurisprudence that existed in this part of the globe be shared and made use of throughout the region. It was agreed by all that this exercise should be a positive one, using only key judgments that have long lasting
implications and can be referred to as case law beneficial for espousing the cause of women and children; and that the number of judgments should be limited to a maximum of 30 judgments per country - at the Supreme Court or High Court level. It was also strongly felt that such a compilation had to be updated regularly – for example every six months - and that the publication must be made freely available both in print and electronic form.

Following that Colombo Meeting, a group of experts representing the four countries spearheaded the exercise of collecting judgments and preparing their synopses. Following that exercise the classification of the judgments under various categories was undertaken and the number of chapters decided. One of the challenges faced during the compilation process was the large number of judgments from the Indian Supreme Court compared to those of other countries. Given the mere geographic size of India and the number of cases filed, it is quite natural that more cases from India were available. In order to ensure equitable representation from all the four countries, only a select group of judgments from India has therefore been included here.

During research, it was also noticed that there were some excellent judgements from certain district courts in Nepal. Even though these do not have any precedential value, as apparently they are being referred to in a large number of cases, it was decided to include them as well.

This compilation is not completely reflective of the legal systems in the four countries since only reported judgments but no interim orders or “un-reported judgments” have been included. It is also possible that certain judgements which are widely used in certain regions have been inadvertently not included.

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| Bangladesh      | Bangladesh Society for the Enforcement of Human Rights (BSEHR) vs. Government of Bangladesh and others **Highlight**  
|                 | Establishing the rights of sex workers to an occupation and residence  
|                 | Guidelines on the rehabilitation of sex workers                          | 15          | 22                                                                                         |                                                                           |
| Bangladesh      | Mr. Abdul Gafur vs. Secretary, Ministry of Foreign Affairs, Govt. of Bangladesh and Anr **Highlight**  
|                 | Recognising repatriation as a fundamental right  
|                 | Emphasising the State’s responsibility in ensuring repatriation           | 17          | 46                                                                                         |                                                                           |
| India           | Vishal Jeet vs. Union of India **Highlight**  
|                 | Asked governments to set up advisory committees to make suggestions for the eradication of child prostitution  
|                 | Asked the central government to evolve schemes to ensure proper care and protection to the victim girls and children | 18          | 50                                                                                         |                                                                           |
| India           | Prerana versus State of Maharashtra and others **Highlight**  
|                 | Children rescued from brothels should be treated as “children in need of care and protection” under the Juvenile Justice (Care and protection of children) Act, 2000 | 19          | 56                                                                                         |                                                                           |
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<td>A lawyer representing the accused should not represent the victims</td>
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<td>Gave the benefit of doubt to the accused and not to the victim</td>
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<td>- Established that the absence of a charge of rape in the FIR is not an evidence that it was added later for embellishment;</td>
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<td>- Established the social responsibility of the State and other public institutions, and the appropriate punishments in case these officials failed to discharge their responsibilities;</td>
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<td>- Asked the state to provide appropriate monetary compensation to the victim</td>
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<td></td>
<td>- Unless it is proved otherwise, the statement of the prosecutrix has to be believed.</td>
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<td>• No prejudice would be caused to the rights of the accused, if they are convicted for a minor offence on the basis of evidence available, when they are charged for a major offence.</td>
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<td>• Established the rights of foreign nationals in Indian land, under the constitution</td>
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<td>• Extended the “tort” principle of vicarious liability even to a case of rape</td>
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<td>• Laid down parameters under which a case of rape has to be tried by taking into consideration the plight of the victims during and after the trial;</td>
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<td>• For the first time recognised the need for legal representation for the victim;</td>
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<td>• Laid down parameters about the treatment of the victims in police station;</td>
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<td>• Made it mandatory for the victim to get the help of a social worker;</td>
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<td>• Made it mandatory to maintain the anonymity of the victim’s identity</td>
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<td>• Established that in camera trials are mandatory in rape cases</td>
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<td>• Recognised that a delay in filing the FIR is not fatal to the case of</td>
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<td>the prosecution, given the social context</td>
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<td>• Recommended courts to focus on the broader probabilities of a rape</td>
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<td>case and not be swayed by minor contradictions or insignificant</td>
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<td>• Expanded the concept of compensation to be made available even when</td>
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<td>• Absence of the accused from the Court during the trial is not fatal to</td>
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<td>the final outcome, if the accused remains absent deliberately from the</td>
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<td>• Established the need for transparency and a visible administration of justice</td>
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<td>• Expanded the circumstances where in-camera trials should be used</td>
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<td>• Established procedures that would help child victims to testify at ease in court</td>
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<tr>
<td>India</td>
<td>Sheba Abidi versus State of Delhi and another</td>
<td>394 443</td>
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<td><em>Highlight</em></td>
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<td></td>
<td>• Established that child victims can testify outside the court environment</td>
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<td>• Child victims are entitled to get a support person during trial</td>
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<td>CEHAT and Ors. vs. Union of India (UOI) and Ors (India)</td>
<td>395 448</td>
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<td><em>Highlight:</em></td>
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<td>• Was instrumental in bringing into focus the issue of female foeticide and also direct the Government to make amendments in the law;</td>
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<td></td>
<td>• Monitored the problems relating to foeticide and law enforcement against it in the country;</td>
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<tr>
<td>Nepal</td>
<td>His Majesty’s Government on the F.I.R. of Bhakta Bahadur Singh versus Harilal Rokaya, a resident Leki Gaun at Ward no 7 of Kotdeval V.D. C in Bajhang District and others</td>
<td>396 465</td>
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<td><em>Highlight</em></td>
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<td>• Established the guidelines on how the statement in a rape case should be evaluated, particularly in cases of minor contradictions</td>
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<td>• Established that the judicial approach of imposing the burden of proof on the victim or the plaintiff does not suit the lifestyle of the women in the social context</td>
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<td>The State vs Md. Shafiqul Islam alias Rafique and another</td>
<td>477 489</td>
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</table>
| Bangladesh | **Highlight**  
- Emphasized the strong suspicion against the husband in case the wife died of assault in her husband’s house  
- The physical presence of husband at the relevant time is the minimum fact to make the husband liable | |
|          | Ajit Kuma Pramanik and others versus Bokul Rani Pramanik and others | 478 495 |
|          | **Highlight**  
- Expanded the definition of dowry to include demands made after marriage | |
|          | State vs Munir and another | 478 499 |
|          | **Highlight**  
- Burden of proof though with the prosecution, in cases where it is found that the accused had some special knowledge which only he could explain under what circumstances the wife was murdered the onus lies on him to explain. | |
|          | Munir Hossain vs State | 479 533 |
|          | **Highlight**  
- Death sentence in case of murder as a consequence of domestic violence | |

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<td>Abdul Motleb Howlader vs State</td>
<td>480 539</td>
<td>Emphasized the obligation of the husband to disclose the cause of death of his wife while she was living with him, failing which adverse inference may be drawn against him</td>
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<tr>
<td>Bangladesh</td>
<td>Ilias Hussain (Md) vs State</td>
<td>480 546</td>
<td>In case of an unnatural death of his wife, while in custody of the husband and while in his house, the husband has to explain under what circumstances the wife met with her death</td>
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<tr>
<td>India</td>
<td>State vs Kalu Bepari</td>
<td>481 549</td>
<td>Emphasized the obligation of the husband to disclose the cause of death of his wife while she was living with him, failing which adverse inference may be drawn against him</td>
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<tr>
<td>India</td>
<td>Hem Chand versus State of Haryana</td>
<td>482 557</td>
<td>Interpreted the circumstances where section 304B, IPC can be admissible, to include suicide</td>
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<tr>
<td>India</td>
<td>Dr. G.M. Natarajan versus State and others</td>
<td>482 561</td>
<td>Emphasised that in the case of harassment and death of a women under unnatural circumstances, the burden of proof is on the accused, and not on the prosecution</td>
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<tr>
<td>India</td>
<td>Pawan Kumar and others versus State of Haryana</td>
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<td><strong>Highlight</strong></td>
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<td>• Interpreted the circumstances where section 304B can be admissible, to include that place of residence at the time of suicide may not be relevant for punishment under section 304B</td>
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<td>Sanaboina Satyanarayana vs. Government of Andhra Pradesh and Ors</td>
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<td>• Established that those charged with crime against women and children should not be eligible for a remission of sentence</td>
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<td>Smt. Shanti and Anr. Versus State of Haryana</td>
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<td><strong>Highlight</strong></td>
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<td>• Interpreted the circumstances under which section 304B is admissible</td>
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<td>• Established section 304B is inclusive of 498A</td>
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<td>State of Rajasthan vs. Hat Singh</td>
<td>484 592</td>
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<td>• Interpreted the two sections 5 and 6 of the Rajasthan Sati (Prevention) Ordinance/Act, 1987 mutually exclusive</td>
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<tr>
<td>Nepal</td>
<td>Bachhi Bista vs. Kabindra Bahdur Bista and Others</td>
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<td><strong>Highlight</strong></td>
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<td>• Established that to determine fatherhood, the version of the mother may be considered true, unless proved otherwise</td>
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| Nepal   | His Majesty’s Government, Ministry of Law, Justice and Parliamentary Affairs vs. Forum for Women, Law and Development (FWLD)  
**Highlight**  
- Recognized that husbands who compel their wives to have sex can be charged with rape (Marital Rape) | 486 611     |          |          |
|         | Sapana Pradhan Malla and Others, on behalf of Pro-Public versus Ministry of Law, Justice and Parliamentary Affairs and others  
**Highlight**  
- Recognized the need to rectify sections in the laws that do not guarantee equal treatment to men and women | 486 625     |          |          |
| Sri Lanka | Annapurna Rana versus Gorakh Shamsher JB Rana and others  
**Highlight**  
- Defined and acknowledged the right to privacy for women, particularly in situations where proof is demanded | 487 629     |          |          |
|         | Chandrasena vs. Attorney General  
**Highlight**  
- The benefit of causing hurt due to grave and sudden provocation cannot be given to an accused who initiates the abuse | 487 640     |          |          |
Chapter I
The Court Hierarchy

Governed by the British Common Law System, the judicial systems in the four countries are quite similar. The structures are similar, as are the method of appointment of judges and the manner in which they function. However, the nomenclature used is very different. Interestingly, in aspects relating to women and children, there are a large number of complementing factors which can be used to enhance the quality of the judicial pronouncements.

Though culturally and geographically close to each other, unfortunately the use of each other’s judicial pronouncements as precedents has been very poor. There is a strong reliance on American and English judgments despite better interpretations and developments of law in this region. Considering the fact that laws are a general expression of society and have expressions of custom and religion intrinsic to a society’s set up, judgments from a similarly placed jurisprudence would have a more effective application. The judgments passed in the region arise out of similar circumstances, and in precedential value are equivalent in terms of acceptance in the sector and can be of greater persuasive value.

In order to understand the judicial pronouncements made and their implications, it is imperative to understand the structure of the courts in all the countries and the manner in which cases are brought before each one of them. Eventhough the structures are similar, it is important to understand them, more particularly by name and design as well as broadly recognise the manner in which they work. The brief introduction to each system below will provide a general idea about the judicial systems in the four countries and also introduce the concepts of the appointment of judges, the role of the government in these appointments, the nature of the appointments made, and the type of cases the judges can hear and adjudicate.
The Court Hierarchy

Bangladesh

The Constitution of Bangladesh provides that there shall be one Supreme Court comprising two divisions: the Appellate Division and the High Court Division. The Constitution further provides that the Supreme Court shall have a Chief Justice and such number of other judges as the President may deem necessary to appoint. The Chief Justice is, by tradition, the senior most judge who has not yet attained the age of 67 - the mandatory age of retirement for all judges of the Supreme Court.

The Appellate Division has the jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of the High Court Division. An appeal to the Appellate Division lies as of right where the High Court Division (a) certifies that the case involves a substantial question of law as to the interpretation of the Constitution; or (b) has sentenced a person to death or to imprisonment for life, or (c) has imposed punishment on a person for contempt of that Division; and (d) in such other cases as may be provided for by an Act of Parliament. In all other cases, an appeal lies only if the Appellate Division grants leave to appeal.

The High Court Division of the Supreme Court which sits in Dhaka, has both the original and the appellate jurisdictions. It also has what is recognised as provisional jurisdiction. Its original jurisdiction extends to the Admiralty, Company matters, and other matters that may be provided by Parliament. It has special jurisdiction in writ matters to secure and protect fundamental rights, and to provide for extraordinary remedies not imparted in the lower courts. Challenges to the constitutionality of legislation and administrative orders are filed in the High Court Division. The High Court Division’s revisional jurisdiction can be exercised in both civil and criminal matters originally heard before the subordinate courts.

Below the Supreme Court in the judicial hierarchy are subordinate courts, which are maintained at the District level - a territorial administrative unit. The Civil Courts Act established civil courts - each comprising a District Judge, an Additional District Judge, a Joint District Judge, and an Assistant District Judge. The criminal justice system is regulated by the Criminal Procedure Code. The tiers of the criminal court are enumerated as a Sessions Judge, an Additional Sessions Judge, and Assistant Sessions Judges. The Civil Courts are referred to as the District Judge Courts, and Criminal Courts are referred to as the Courts of Sessions. Though the nomenclature is different, the same judge functions as the District and Sessions Judge; or in other words, the same judge
discharges the functions of the civil and the criminal courts. The District and Sessions Judge has both the original appellate and the revisional jurisdictions in civil and criminal matters.

Out of 64 districts, the three districts of the former Chittagong Hill Tracts have a different court system for the reason that those were administered under the CHT Regulation Act 1900. Under this regulation, the Deputy Commissioner (District Administrator) discharged the function of a civil court of the first instance. Orders passed by the Deputy Commissioner were appealable before the Divisional Commissioner sitting at the city of Chittagong. The High Court Division had revisional jurisdiction against the order of the Divisional Commissioner. The Deputy Commissioner being the District Magistrate as well exercised jurisdiction in criminal matters. The Divisional Commissioner was the Ex officio Sessions Judge for criminal matters.

The Hill District Council Act was enacted in 1989 for the three Hill Districts, namely Rangamati, Khagrachori, and Bandarban. Under the Regulation Act of 1900 and under the new Act on public demand, this civil judiciary is being extended to the Hill Districts.

The Additional District Judge hears cases assigned to him by the District Judge. Cases are normally filed first at the Assistant Judge level. Additionally, specialised courts and tribunals exist, ranging from income tax to labour courts.

On the criminal side, most cases are initially tried before magistrates, although by statute the Sessions Judge has original jurisdiction to try those criminal matters that attract higher conviction. Magistrates are not required to be law graduates, and may have received little or no formal legal training. They are under the supervision and control of the Ministry of Establishment (Civil service), and the Supreme Court does not have any participation in their selection or supervision. The magistrates while discharging judicial functions are now posted and supervised by the Supreme Court.

The control of the judges’ career path, including the power of appointment, posting, promotion, grant of leave, and discipline has been vested in the President. Despite the fact that the Supreme Court maintains all records of a judge’s career and activities for supervision and evaluation purposes, it is the Ministry of Law that controls the career of the judges in practice. The issue of a separation of the judiciary from the executive organ of the state has been the subject of litigation that finally ended in December 1999 with a clear
An Appellate Division judgment requiring that the administration of the judiciary be separated from the executive. To date, the job remains unaccomplished.

For the High Court Division of the Supreme Court, judges are appointed by the President for an initial term of two years, and if their performance is satisfactory they may be confirmed. Judges of the Appellate Division are elevated from the High Court Division. In all judicial appointments, there is a requirement of a consultation with the Chief Justice of Bangladesh.

India

The Indian judicial system can be broadly divided into three tiers. Quite similar to the Bangladesh system, the Indian judicial system has one Supreme Court at the national level, many high courts at the State level, and subordinate courts at the District level. There are tiers within the subordinate courts which depend on a monetary jurisdiction in civil cases, and the nature of the offence in criminal cases. Though the administration of justice is largely independent of the state machinery, the resources to manage the system are provided by the State.

The High Court and the Supreme Court are created by the Constitution of India and are Constitutional Courts. These courts have both original and appellate jurisdiction.

Judges are appointed to the subordinate courts through competitive selection at various levels. There are written examinations and oral interviews. On the basis of their seniority, these judges can be elevated to the High Court. The judges at the High Court are appointed by a promotion from the lower courts, or directly from the Bar on the basis of the person’s experience and expertise in the Bar. A considerable number of judges in the High Court are appointed directly from the Bar. The judges of the Supreme Court are appointed both on the basis of their seniority in the High Courts, and from the Bar directly on the basis of merit. The Chief Justice of India is the final authority with respect to the appointment of judges to the High Courts and the Supreme Court. He/she can consult a collegium of the senior most judges with respect to any appointments. Till the mid nineties, the practice regarding appointments was that the Chief Justice would recommend persons for appointment as High Court or Supreme Court judges, and the Government would finally decide. In 1994, the Supreme Court passed a judgment wherein it held that the Chief Justice would have the final authority with respect to the appointment of judges, and that the Government could only make recommendations.
All criminal cases are first registered by the police and tried at the subordinate courts. Within the subordinate courts, there are certain tiers. For the criminal justice system, they can be broadly classified as magistrates and sessions judges. Within the magistrates themselves there are executive magistrates and judicial magistrates. The executive magistrates are normally from the police services and deal with certain kinds of cases. The cases are heard and tried by the magistrates and the sessions judges depending on the nature of the offence and the punishment that would follow. Crimes which are identified as major crimes are tried by the sessions judges and the other cases are tried by the magistrates. Routine matters like the production of accused, extending their remand etc., are handled by the magistrate even though the case may be triable by the session’s judge. Like in Bangladesh, the judicial magistrates and sessions judges can also be asked to try civil cases where they would be called a Civil Judge and an Additional District Judge, respectively. The judgments of the subordinate courts are not reported and therefore cannot be treated as precedents. The trial systems are governed by the Criminal Procedure Code and the Indian Evidence Act.

At every stage of the hearing, appeals can be preferred to the High Court and thereafter to the Supreme Court. This means that appeals can be preferred against a grant of bail or its rejection; they can be filed against an improper framing of charges, to include or exclude a witness, and the final judgment. The manners in which appeals can be preferred are also laid down in the Criminal Procedure Code.

Once the trial concludes, depending on its outcome, both the State and the accused have a right to file an appeal before the High Court or the sessions court as the case may be. The appeal to the High Court against an acquittal has certain conditions.

The appeals before the High Court are heard on the basis of the record available, and it does not record evidence. After hearing the appeal, the High Court can set aside the sentence, dismiss the appeal, or remand the matter back to the subordinate court to hear the case again on some aspects. The judgments of the High Court can be made reportable by the concerned judge. These judgments function as precedents in the jurisdiction in which they operate, and have a persuasive value in other jurisdictions.

A second appeal lies to the Supreme Court. There are various ways in which a case can be brought before the Supreme Court. One way is to file a statutory appeal, and another is to file a petition for special leave where the Court will...
hear about the admissibility of the appeal, and thereafter decide whether the case is fit to be heard as an appeal. Quite often, the cases can be finally disposed of without formally granting a leave to appeal. Most cases filed in the Supreme Court today are in the nature of special leave petitions. The power of the Supreme Court to entertain petitions on special leave derives from the Constitution of India. The judgment of the Supreme Court is binding on the entire country and also has precedential value.

Cases can also be brought before the High Court and Supreme Court directly, when it can be demonstrated that there was a violation of any fundamental right guaranteed under Part III of the Constitution. Part III of the Indian Constitution guarantees rights to the citizens of India. These are called fundamental rights, and the States have an obligation to uphold and protect these rights. Any violation of these rights can be enforced against the State by way of a Writ Petition in the Supreme Court and the High Court. These courts have powers to issue writs of habeas corpus, mandamus, certiorari and quo warranto. If a writ petition is filed in the High Court, that judgment can be challenged in the Supreme Court.

The Indian judicial system started a unique concept called the public interest litigation in the early eighties. This allows any person, group(s) of persons, or public spirited organisations to take up cases on behalf of those who cannot access the judicial system. It is also not necessary for a person approaching the Court to have an authorisation from these groups of persons.

In the last 25 years, the Supreme Court and the High Court have passed several impressive judgments which impacted on a wide range of issues via the mechanism of public interest litigation.

Nepal

The main feature of the Constitution of the Kingdom of Nepal, 1990 is to establish an independent and competent system of justice with a view to transforming the concept of the rule of law into a living reality. The power relating to justice in Nepal is exercised by judicial organizations in accordance with the provision of the Constitution. Article 85 (1) of the Constitution of the Kingdom of Nepal, 1990, provides three hierarchies of courts which are the Supreme Court, the Appellate Courts and the District Courts. Similarly, Article 85(2) states that the law may also establish special types of courts or tribunals to hear special types of cases. However, no special court or tribunal can be constituted to hear a particular case. Special courts have been established for
hearing special cases like matters relating to labour, revenue and other cases of an exceptional nature like those of corruption, drug smuggling etc. Section 3 of the Supreme Court Act, 1991 provides that the office of the Supreme Court shall remain in Kathmandu unless His Majesty permits the Chief Justice to form a Supreme Court Bench other than at Kathmandu. Section 5 of the Justice Administration Act, 1991 provides that His Majesty shall fix the number of the Appellate Courts within the country after consultations with the Ministry of Council. Currently, 16 Appellate Courts have been established in the country. Similarly, Section 3 of the Justice Administration Act, 1991 provides that there shall be a District Court in each District, each such District Court remaining in the headquarters of its district.

The Constitution of the Kingdom of Nepal, 1990 provides that the Supreme Court shall be the highest court in the judicial hierarchy, and all other courts and judicial institutions other than the Military Court shall be under the Supreme Court. The Supreme Court is the Court of Record. Any interpretation given to a law and any legal principle laid down by the Supreme Court in a hearing of a suit shall be binding on His Majesty’s Government and all offices and courts in the country.

His Majesty appoints the Chief Justice on the recommendation of the Constitutional Council and other judges of the Supreme Court on the recommendation of the Judicial Council. The tenure of the office of the Chief Justice is seven years from the date of appointment. The Chief Justice or any other judge can be removed from office for reasons of incompetence, misbehaviour or a failure to discharge the duties of his office in good faith by the House of Representatives which can, through a two thirds majority, pass a resolution for his removal - which is subsequently approved by His Majesty.

The Supreme Court of Nepal is assigned the following jurisdictions:
- Appellate jurisdiction – to hear the cases decided by Appellate Courts and others
- Revisional jurisdiction – revise the case if it is filed for revision by the parties
- Review jurisdiction – review the cases filed towards review
- Original jurisdiction – initiate the proceedings for a contempt of itself and of other subordinate courts or judicial institutions
- Sanctionable jurisdiction – hear the case of life imprisonment with confiscation of property and life imprisonment
- Writ jurisdiction – to protect the fundamental rights of the citizens if the legal provisions for such are deficient, and to declare law ultra vires on the grounds of an inconsistency with the Constitution
- Advisory jurisdiction – to issue an opinion to His Majesty if His Majesty wishes to seek opinion on any complicated legal question or and other law
- Supervisory jurisdiction – to supervise the judicial administration of inferior courts
- Other jurisdiction – to hear the petitions and reports under No 17 on Court Management of National Code etc.

The Appellate Court stands at a midpoint in the judicial hierarchy in the country. As stated above, His Majesty shall fix the number of Appellate Courts within the country after consultations with the Ministry of Council. At present, 16 Appellate Courts have been established in the country and one halting place in Okhaldhunga. The Appellate Court works with one Chief Judge and other necessary numbers of judges. His Majesty appoints the Chief Judge and other judges on the recommendation of the Judicial Council.

The jurisdiction of the Appellate Court is as follows:
- Original jurisdiction – to hear cases under No 29(8) on Court Management of the National Code, the Citizenship Right Act, 2011 and the Terrorist Disruptive Act (Control and Punishment) Act, 1991 etc.
- Appellate jurisdiction – hear in appeal the cases decided by District Courts of its territory
- Writ jurisdiction – protect the legal rights of the individual through the writ of mandamus, habeas corpus and injunction
- Sanctionable jurisdiction – hear the case of life imprisonment with confiscation of property and life imprisonment
- Other jurisdiction – hear the petition and reports under No 17 on Court Management of National Code etc.

The District Court is the court of the first instance in the judicial hierarchy. There are 75 District Courts, which translates to one District Court in each district. The District Court works with one Chief Judge and other required numbers of judges. It has the jurisdiction to hear civil and criminal cases. His Majesty appoints the chief judge and other judges in the District Courts on the recommendation of the Judicial Council. However, His Majesty may delegate His authority to the Chief Justice for the appointment of the District Judges that are to be made on the recommendation of the Judicial Council. Rule 3 A (1) of District Court Regulation, 1995 provides that the Supreme Court, if it thinks fit, can constitute the Bench to separate criminal and civil cases. Section 7 of the Justice Administration Act, 1991 provides that district courts have the authority to hear all cases that come in as Court of first instance.
Sri Lanka

The ancient Sinhalese possessed an elaborate judicial system. This was in part superseded in the Maritime Provinces during the Dutch period by the system of courts which the Dutch set up. In the British period, the courts initially set up during the Dutch period continued with slight modifications. Governor North’s Proclamation of 1799 abolished barbarous modes of punishment, insisted that legal proceedings must be in public, abolished the practice of obtaining confessions by torture, established a single system of courts, extended the jurisdiction of certain civil courts, gave appellate jurisdiction to the Court of Appeal with a right of appeal to the Privy Council in certain areas, and provided for the liberty of conscience and the free exercise of religious worship.

After the conquest of the Kandyan provinces in 1815, the existing judicial system was continued with modifications. The Sinhalese judicial officers continued to administer justice. After the 1817-1818 rebellion the powers of the chiefs were considerably curtailed, and judicial authority passed to a Board of Commissioners with Kandyan assessors to guide them. The Board supervised the Government Agents on whom the main task of dispensing justice fell.

The Charter of Justice of 1833 amalgamated the two systems of courts and set up a unified structure of courts for the entire country of Sri Lanka. The basic organisational pattern has been retained to this day, though several changes have been effected.

The present system has a three tier structure with sub-structures. There is a Supreme Court and a Court of Appeal with various High Courts, District Courts and Magistrate’s Courts. The Supreme Court and The Court of Appeal are based in Colombo. Additionally a Commercial High Court exists only in Colombo. There are also High Courts, District Courts and Magistrate’s Courts in each District.

The Supreme Court comprises the Chief Justice and a minimum of six and a maximum of 10 other Judges. This Court of the Republic of Sri Lanka is the highest and the final superior Court of Record in the Republic, and subject to the provisions of the Constitution, exercises –

- jurisdiction in respect of constitutional matters;
- jurisdiction for the protection of fundamental rights;
- final appellate jurisdiction;
The Court Hierarchy

- consultative jurisdiction;
- jurisdiction in election petitions;
- jurisdiction in respect of any breach of the privileges of Parliament; and
- jurisdiction in respect of such other matters which Parliament may by law vest or ordain.

By virtue of Article 120, and subject to its provisions, the Supreme Court has the sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution or not.

Constituted under Article 138 of the Constitution, the Court of Appeal possesses and exercises, subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which are committed by any Court of the First Instance, tribunal, or other institution; and the sole and exclusive cognisance, by way of appeal, revision etc of all causes, suits, actions, prosecutions, matters and things of which such Courts of the First Instance, tribunal or other institution may have taken cognisance of. The Court of Appeal also holds and exercises all such powers and jurisdiction, appellate and original, as Parliament may by law vest or ordain. This Court presently consists of a president and 6 – 11 other Judges.

The High Courts are set up under Article 138 of the Constitution. They comprise a minimum of 10 and a maximum of 40 Judges. They hold:

- original jurisdiction, all prosecutions on indictment (exercised by the Provincial High Courts in respect of offences committed within the Province); admiralty jurisdiction - ordinarily exercised in Colombo;
- commercial jurisdiction - vested by the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 ;
- jurisdiction vested by Article 111L(2) (incorporated by the 17th Amendment) to hear and determine an offence under Article 111L(1), i.e. influencing or attempting to influence any decision or order made by the Judicial Service Commission or influencing any member thereof.
- applications for the return of or access to a child under the Hague Convention on the Civil Aspects of International Child Abduction (exercised by the High Court of the Western Province)
- Appellate jurisdiction of Provincial High Courts - appellate and revisional jurisdiction in respect of convictions, sentences, orders entered or imposed by Magistrate’s courts and Primary courts within the Province; writ jurisdiction in respect of powers exercised under any law or under any
statutes made by the Provincial Council of that Province, in respect of any matter set out in the provincial Council list;


The District Courts are established under the Judicature Act, No. 2 of 1978 for each judicial district in Sri Lanka. The territorial limits of each judicial district are as determined by the Minister in charge of the subject of justice in consultation with the Chief Justice and the President of the Court of Appeal. There are 54 judicial districts in Sri Lanka. The sittings of the court are held in a convenient place within the territorial jurisdiction of the district, as appointed by the Minister by Regulation made under section 5(3) of the Judicature Act, No.2 of 1978. Every District Court is a court of record, and is vested with unlimited original jurisdiction in all civil, revenue, trust, insolvency and testamentary matters other than such matters as are assigned to any other court by law. Jurisdiction in respect of commercial disputes which are greater than Rupees 3 million in value and take place in the Western Province, is exercised by the High Court sitting in Colombo - vide the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996. All Judges of the District Courts are appointed by the Judicial Service Commission which is also vested with the power of dismissal and disciplinary control of the Judges.

Magistrate’s Courts are established under the Judicature Act, No. 2 of 1978 for each judicial division in Sri Lanka. The territorial limits of each judicial division are as determined by the Minister in charge of the subject of Justice in consultation with the Chief Justice and the President of the Court of Appeal. 74 judicial divisions exist in Sri Lanka. Sittings of the court are held in a convenient place within the territorial jurisdiction of the division, as appointed by the Minister by Regulation made under section 5(3) of the Judicature Act, No.2 of 1978.

Every Magistrate’s Court is vested with original criminal jurisdiction (other than in respect of offences upon indictment in the High Court), and is ordinarily empowered to impose sentences up to a fine of Rupees 1,500 and/or 2 years rigorous/simple imprisonment, unless power is vested in it to impose higher penalties by special provision. All Magistrates are appointed by the Judicial Service Commission, which is also vested with the power of dismissal and disciplinary control of the Judges.
The Court Hierarchy
CHAPTER II

Trafficking and Commercial Sexual Exploitation

Context

Trafficking of women and children for commercial sexual exploitation is one of the most lucrative and internationally organised crimes. Second only to drug trafficking, the number of persons trafficked for various forms of exploitation is increasing every day. The traffickers know no boundaries, and are operating through specialised networks. Going by the methods resorted to by them, it is vastly apparent that they are ahead of the law enforcement agencies. Though internationally recognised as a crime, trafficking remains a thriving business. Considering the trends and going by the number of women and children being trafficked for commercial sex it is apparent that the existing legal system has been unable to contain the problem. The question that follows is whether current laws are sufficient to deal with them. In view of the laws not keeping up to date with the growing trends in trafficking, their enforcement and judicial intervention consequently cannot keep pace with the traffickers.

The biggest problem of law enforcement in the domain of trafficking has been the lack of understanding of trafficking among law enforcement agencies. In many countries in the region and around the world, the law has not even defined trafficking. Consequently, law enforcement agencies are perplexed while handling the complex web of traffickers who operate through well planned networks. Secondly, since traffickers have not confined themselves to any specific geographical boundaries, it becomes even more complicated to prosecute them. In this background, while making law reform in trafficking it becomes critical to focus on extradition issues too. The third aspect relating to trafficking is repatriation and rehabilitation. There is not one protocol today which comprehensively addresses the rehabilitation and repatriation of the survivors of trafficking while protecting their identities. These problems facing law enforcement, and the fact that due process demands that principles of natural
justice be followed vis-à-vis traffickers, have resulted in very few convictions. The law has not actually helped any survivor.

There are innumerable international treaties and conventions addressing the issue. However, not one of them has been effective in tackling the problem. The laws in the region are not uniform. Though the problem is serious, judicial trends have not yet been adequately set in the entire region, including India. Considering the number of women and children being trafficked, the cases reported in the region are surprisingly low. There is also no jurisprudence on trafficking across borders, not enough extradition agreements and no judgment which has emphasized the need for strengthening these mechanisms.

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Synopses

Bangladesh Society for the Enforcement of Human Rights (BSEHR) vs. Government of Bangladesh and others

Highlight

• Establishing the rights of sex workers to an occupation and residence
• Guidelines on the rehabilitation of sex workers

On 14 March 2000, the High Court Division in Bangladesh, through this judgment addressed a broad spectrum of issues including the fundamental right to life and personal liberty, and the rehabilitation of sex workers. The right of sex workers to an occupation, to a residence compatible with the worth and dignity of a human being, and their rehabilitation has been viewed from a sensitive perspective in the judgment.

The facts of the case related to the incidents of 23 and 24 July 1999, when the police raided and barged into the rooms of the residents of Nimtoli and Tanbazar brothels in Narayanganj. The residents were asleep at the time, and, without giving them any time to organize their belongings, the police dragged them onto the streets. They abused and beat them and pushed them and their children into waiting buses. They were detained against their will in different vagrant homes and government shelters. According to the government authorities, this wholesale eviction was carried out with a view to “rehabilitate the sex workers”. In the vagrant homes, the inmates were denied the right to meet their family members and were allegedly tortured both physically and mentally. A writ petition, in the form of public interest litigation, was then filed in the High Court Division by several voluntary organizations.

In its judgment, the High Court acknowledged that “prostitution” was not an unknown concept or trade but an age-old profession, “perhaps as old as the dawn of human civilization”, though it is socially condemned in Bangladesh as in other parts of the world. The Court then held that sex workers consent to sexual intercourse, and while their profession might be socially looked down upon, it is not illegal under the law. The Court, however, cautioned that, “even if prostitution is not illegal in Bangladesh, it is never encouraged and State machineries are all out to prevent it by adopting various measures including rehabilitation schemes in consonance with our Constitutional mandate in its directive state policy that the State shall adopt effective measures to prevent prostitution”.

The Court reiterated the fundamental right to equal protection of law and protection of life and personal liberty enshrined, respectively, in Articles 31
and 32 of the Constitution and unequivocally censured such eviction, since they were citizens of Bangladesh, enrolled as voters and exercised the right of franchise.

The Court also observed that even if Article 11 of the Constitution, which refers to the dignity of the human being, may not be enforceable as a fundamental principle, the sex workers as citizens were clearly entitled to invoke enforceable rights under Articles 31 and 32 of the Constitution. The Court upheld the fundamental right of the protection of the privacy of the sex workers, saying that it should be remembered that nobody could violate the privacy of the inmates of any house or trespass into it except in accordance with the law.

The Court then referred to the interpretation of the right to life in the Indian case of *Olga Tellis vs. Bombay Municipal Corporation* and stated that the inmates of Nimtoli and Tanbazar had a guaranteed right to life and livelihood. It then stated that an important facet of the right to life was the right to livelihood, and the easiest way of depriving a person of a right to life would be to deprive him/her of the means of livelihood.

The Court emphasised that the wholesale eviction of sex workers from Tanbazar and Nimtoli had deprived them of their livelihood, which amounted to the deprivation of their right to life, making the act unconstitutional and illegal: “*We painfully observe that though the police are the protector of the oppressed, in the instant case they have failed to fulfil their obligation in protecting the rights of the dwellers of Tanbazar and Nimtoli. Even if a particle of the allegations against the police is found to be true or has any basis in the instant case, it is a shame for the nation.*”

With regard to the detention of the sex workers in the Vagrants’ Home in Kashimbarazar, the Court found that mere roaming around in any area would not bring the sex workers within the mischief of the Vagrancy Act unless they were also found for example, to be asking for alms in a public place. It held, without any hesitation, that these actions by the police treating some of the evicted inmates of Tanbazar and Nimtoli brothel as vagrants were carried out without any lawful authority.

Lastly, with respect to the rehabilitation of the sex workers the Court observed that any rehabilitation scheme must not be incompatible with the dignity and worth of a person. It must be designed to uplift personal morals and family life, to provide for jobs giving them an option to be rehabilitated, or to provide facilities for better education and economic opportunities in order to minimize the conditions that give rise to prostitution.
Mr Abdul Gafur vs. Secretary, Ministry of Foreign Affairs, Govt. of Bangladesh and Anr

Highlight
- Recognising repatriation as a fundamental right
- Emphasising the State’s responsibility in ensuring repatriation

In this case, a 15 year old Bangladeshi citizen disappeared from her village in March 1992. In November 1996 her family discovered that she had been abducted by child traffickers and taken to India against her will and was now in a women’s home in West Bengal. Acting through the Human Rights Bureau in Dhaka, her father (the petitioner) requested the Secretary, Ministry of Foreign Affairs (the first respondent) to arrange for her repatriation, but no steps were taken. The father then applied for a Writ petition ordering the first respondent to take over the custody of his daughter and to repatriate her to Bangladesh. It was argued on his behalf that Hasina was entitled to the protection of the first respondent under Article 27, 31 and 32 of the Constitution and that she had been deprived of such protection due to the inactivity of the respondents, despite their knowledge of her situation. The respondents did not file any affidavit denying the petitioner’s contentions, and did not appear in person in court.

Upholding the application, it was held that:
- The respondents’ absence at the hearing justifies the petitioner’s claim that they did not pursue the matter in the appropriate manner, and did not ensure that Hasina received “equal treatment” she was entitled to under Art 27.
- The respondents did not act according to the principle of fairness in relation to government action - a principle which requires that government functionaries must act according to the law and perform their duties in good faith. The concepts of fairness, fair play and legitimate expectation have been flouted by the respondents in the instant case.
- Article 31 entitles Hasina, as a citizen, to protection and assistance from the government, despite the fact that she is in another country, as she was taken out of Bangladesh against her will. The respondents should have taken the matter up at the state level and ensured that Hasina was returned home. They should also have kept the petitioner informed about developments in relation to Hasina.
- The first respondent is directed to take up the issue of Hasina’s repatriation with its counterpart in India within 60 days of receipt of a copy of this
judgment. The Registrar of the Supreme Court, High Court Division will monitor compliance and report the matter to this Bench in due course.

Vishal Jeet vs. Union of India

*Highlight*

- Asked governments to set up advisory committees to make suggestions for the eradication of child prostitution
- Asked the central government to evolve schemes to ensure proper care and protection to the victim girls and children

This is one of the leading judgments on the issue of trafficking of children into prostitution, decided by the Supreme Court of India. This was a public interest litigation filed seeking directions that cases of trafficking for commercial sexual exploitation should be investigated by the Central Bureau of Investigation. The petition asked:

- To institute an enquiry against those police officers under whose jurisdiction Red Light areas as well Devadasi and Jogin traditions are flourishing and to take necessary action against such erring police officers and law breakers;
- To bring all the inmates of the red light areas and also those who are engaged in “flesh trade to protective homes of the respective States and to provide them with proper medical aid, shelter, education and training in various disciplines of life so as to enable them to choose a more dignified way of life, and
- To bring the children of those prostitutes, and other children found begging in streets as also the girls pushed into the “flesh trade”, to protective homes and then to rehabilitate them.

After the hearing the case at length, the Court felt that, at that stage there was no need to refer the matter to the CBI. However, the Court passed directions with respect to the State and Central governments directing the concerned law enforcement agencies to take appropriate and speedy action to eradicate child prostitution. The Court also directed the governments to set up advisory committees to make suggestions for the eradication of child prostitution, to make rehabilitation programs for children who are victims, take steps to rehabilitate the victims, evolve schemes to ensure that proper care and protection is provided to the girls and children, devise machineries of their own to ensure that the programs are properly implemented and an advisory committee be set up to look at the customary practices closely.
**Prerana versus State of Maharashtra and others**

**Highlight:**
- Children rescued from brothels should be treated as “children in need of care and protection” under the Juvenile Justice (Care and protection of children) Act, 2000;
- A lawyer representing the accused should not represent the victims;
- Drew parallels between the Immoral (Traffic) Prevention Act and the Juvenile Justice (Care and protection of children) Act, 2000;

This is a judgment from the High Court of Bombay. This petition came to be filed following the release of minor girls to the custody of certain persons, pretending to be legal guardians of the rescued victims but represented in Court by the same lawyers representing the accused in the same case. Following a raid and rescue operation from a red light area, several young girls and children were rescued, and the perpetrators were arrested. During the pendency of these proceedings, the girls who were found to be under 18 years of age were kept in an observation home. A lawyer filed an application stating that these children should be released on the ground that they had not committed any offence and therefore could not be detained. This lawyer was also the lawyer for the accused. On his application, the children were released. Prerana, a NGO working with rescued victims/survivors of prostitution, filed a petition in the High Court as they apprehended that these children would be handed over to the accused and also that there was a clear case of conflict of interest as far as the lawyer was concerned. In this background, the High Court passed an order in which it gave the following directions:

- No Magistrate can exercise jurisdiction over any person under 18 years of age irrespective of the fact whether that person is a juvenile in conflict with the law or a child in need of care and protection, as defined by Sections 2(1) and 2(d) of the Juvenile Justice (Care and Protection of Children) Act, 2000. At the first possible instance, the Magistrates must take steps to ascertain the age of a person who seems to be under 18 years of age. When such a person is found to be under 18 years of age, the Magistrate must transfer the case to the Juvenile Justice Board if such person is a juvenile in conflict with the law, or to the Child Welfare Committee if such a person is a child in need of care and protection.
- A Magistrate before whom either persons rescued under the Immoral Traffic (Prevention) Act, 1956 or having been found soliciting in a public place are produced, should, under Section 17(2) of the said Act, have their ages ascertained the very first time they are produced before him.
When such a person is found to be under 18 years of age, the Magistrate must transfer the case to the Juvenile Justice Board if such person is a Juvenile in conflict with law, or to the Child Welfare Committee if such person is a child in need of care and protection.

- Any juvenile rescued from a brothel under the Immoral Traffic (Prevention) Act, 1956 or found soliciting in a public place should only be released after an inquiry has been completed by the Probation Officer.
- The said juvenile should be released only to the care and custody of a parent/guardian after such parent/guardian has been found fit by the Child Welfare Committee to have the care and custody of the rescued juvenile.
- If the parent/guardian is found unfit to have the care and custody of the rescued juvenile, the procedure laid down under the Juvenile Justice (Care and Protection of Children) Act, 2000 should be followed for the rehabilitation of the rescued child.
- No advocate can appear before the Child Welfare Committee on behalf of a juvenile produced before the Child Welfare Committee after being rescued under the Immoral Traffic (Prevention) Act, 1956 or found soliciting in a public place. Only the parents/guardian of such juvenile should be permitted to make representations before the Child Welfare Committee through themselves or through an advocate appointed for such purpose.
- An advocate appearing for a pimp or brothel keeper is barred from appearing in the same case for the victims rescued under the Immoral Traffic (Prevention) Act, 1956.

His Majesty’s Government on the FIR of Urmila Thapa Magar vs. Krishna Prasad Pudasaini

**Highlight**

- Interpreted one of the clauses of the Human Trafficking (Control) Act, 2043 BS which said that the crime of taking a person to a foreign land for trafficking would be established even if any person was arrested within the territory of Nepal, while in the process of taking the person to a foreign land
- Gave the benefit of doubt to the accused and not to the victim

In this case, the Supreme Court of Nepal observed that the reasoning that the concerned person should have been caused to reach a foreign land to establish the commission of such crime was contrary to the spirit of the Human Trafficking Activities (Control) Act, 2043 BS. Therefore, the judgment of the Appellate Court upholding the judgment of the initial District Court that since the defendants had not caused the complainant to reach a foreign land with the intention of selling her there, and as it did not fall within the definition of
human trafficking activities, the plaintiff’s accusation was annulled, is not in line to the extent that it is interpreted. The court established that “...crime in human trafficking would be established and such incident begins even if any person gets arrested within the territory of Nepal in the process of taking the concerned to a foreign land”. The court further emphasized that “The reasoning that the concerned person should have been caused to reach a foreign land to establish the commission of such crime is contrary to the spirit of Human Trafficking (Control) Act, 2043 BS”. Here, though the Court has clearly defined the provisions of Human Trafficking Activities (Control) Act in relation to reaching or not reaching a foreign land for the commission of crime, the benefit of the doubt was given to the accused.

**His Majesty’s Government on the FIR of Tara Devi Dahal vs. Durga Dhimal**

**Highlight**

- Burden of proof on the accused
- Victim’s statement should be considered trustworthy until otherwise proved by the defendant

In this case, the Court passed a judgment with remarkable sensitivity when dealing with the case against a trafficker who had trafficked a young girl into India.

In this case on human trafficking, the victim was sold in Bombay through allurement, and both the District Court and the Appellate Court held that the defendant should be imprisoned for 10 years. The case of the accused was that he was not a party to this act of human trafficking, and that his confession before the police was through torture alone. The courts have observed that the confession of crime by the accused before the police has been supported by what the victim-complainant maintains, though the accused has taken the plea that his signature and thumb impressions were taken by the police against his will through the use of physical force. It was also noticed by the Courts that no injury is seen in the injury form except for his statement that the entire body ached, which can not be sufficient to say that the confession of crime was through the use of physical force. In a case like human trafficking, the statement of victim-complainant needs to be considered trustworthy until otherwise proved by the accused. There was nothing on record to establish otherwise in favour of the accused. In the given situation, it cannot be held that he is not guilty.
Judgments

Bangladesh Society for the Enforcement of Human Rights (BSEHR) and Ors
Vs.
Government of Bangladesh and Ors

High Court Division
(Special Original Jurisdiction)

Judge
Md Fazlul Karim J.
Md Abdul Wahhah Miah J.

Date of Judgment: March 14th, 2000

Constitution of Bangladesh, 1972
Article 11, 31 & 32
Suppression of Immoral Traffic Act, Section 4

As the sex workers are now confined in Vagrant Home illegally terming them vagrant, the respondents have to release them forthwith so as to enable them to go on their own which is their fundamental right guaranteed under the Constitution. ..... (37)

Articles 31, 32 & 102

In writ jurisdiction the Court is unable to give any direction on the house owners except observing a caution that nobody should take the law in their hands violating the rights protected under the law and the fundamental rights under the Constitution.

Although the respondent nos. 1 and 4 have denied their involvement in the process of eviction and put the blame on the house owners and their hoodlums, but in a massive and wholesale eviction of the inmates of Nintali and Tanbazar, the District administration should not be allowed to shirk the responsibility in effectively maintaining the law and order and thus preventing the house owners and their hoodlums in evicting the sex workers of Tanbazar and Nintali to take law into their own hands. Thus, we also express our dissatisfaction over the passive role or inaction of the Local district Administration ..... (38)

Cases discussed – Olga Tellis vs. Bombay Municipal Corporation AIR 1986 (SC) 180; BLAST vs. Bangladesh 4 BLC 600 ..... (11)
Namul Huda with Sigma Huda and SAM Nasimul Haque, Advocates – For the petitioners

Obaidur Rahman Mustafa, Deputy Attorney General with Mushfiqur Rahman Khan, Assistant Attorney General – For the Respondents

Judgement

Md. Fazlul Karim J: This Rule was issued calling upon the respondents to show cause as to why the lifting of the sex workers in the early hours of 23.7.1999 from their residence at Tanbazar and Nishtali, Narayanganj by the District Administration with the help of the police and dislodging them and taking some of them to the Kashimpur Vagrant Home in the name of rehabilitation should not be declared to be taken/done in violation of their fundamental rights as to residence, profession, trade, calling, etc. and why their confinement in Vagrant Centre should not be declared illegal directing that the sex workers in custody be brought before the Court so that it may satisfy itself that they are not being held in custody without lawful authority or in an unlawful manner.

The petitioners are the Bangladesh Society for the Enforcement of Human Rights (BSEHR) Naripokkho (a women’s voluntary human rights organization); Bangladesh National Women Lawyers Association (BNWLA), a non-profit voluntary organisation, Bangladesh Manabadhikar Sangbadik Forum, a human rights journalist’s organisation and Ain-o-Shalish Kendra. ASK, a human rights and legal aid centre in consultative status with UNECOSOC. All the petitioners asserted themselves to be non-profit making voluntary organisations doing social welfare activities and are also representing 54 other organisations with like aims and objects, are engaged in protecting the vulnerable groups of people including those women involved in prostitution. A recent incident leading to the illegal forcible and violent ousting of prostitutes from their lawful residence has given cause to the petitioners to address the whole issue for protection and status of fundamental rights of citizens including women in prostitution and upholding the rule of law. The petitioners have alleged that the Government of Bangladesh is regularly taking measures to harass the women in prostitution and their children and to treat them as unwanted in the society hounding them from their peaceful occupation of house/rooms rented by them from the owners of the buildings. They regularly pay rent to the landlords as well as a large amount of money to different authorities including the law enforcing agencies and contribute to the development of the area, even by constructing mosques, schools, roads, etc. The petitioners have further alleged that the respondent continuously pick up the prostitutes from their residence, physically and verbally abuse them and without any cause illegally push them into vagrant homes.
violating their right to life and living and livelihood as protected under the law and the constitution. Such putting in the vagrant home is being done contrary to the provision of law ignoring the broad fact that the prostitutes are above the age of 18 years and in the camouflage calling the guardians and handing to them that they illegally abuse and provision of law under the Act of 1950. The respondents in their continuous efforts as detailed above suddenly on 23\textsuperscript{rd} July, 1999 at night and in early morning on 24\textsuperscript{th} July 1999 approximately at 3.00/4.00 AM while inmates of the area of Nimtali and Tanbazar, Narayanganj were asleep, the police raided and barged into their rooms and without giving them any opportunity to change or organise, dragged them out of their rooms and they informed the residents that the Member of Parliament of the area along with Deputy Commissioner, Superintendent of Police and Officer in Charge of Narayanganj Sadar Police Station, respondents 4, 5 and 6 respectively desired to meet them. When they went to meet the aforesaid persons, the policemen suddenly dragged them, abused and beat them and pushed them and their children into the waiting buses using filthy language. The petitioners further asserted that there was no female police personnel in the matter of carrying out the wholesale eviction of the prostitutes of Tanbazar and Nimtali.

The said news was published and highlighted in the various newspapers. Whereupon the petitioners on hearing of the barbaric attack and forcible removal of the women of Tanbazar and Nimtali and their children made attempts to trace out the whereabouts of the distressed residents and learnt the same has been done with a view to rehabilitation. The press reporting published by various dailies revealed that women and children were confined most illegally by respondent no.3 under the direction of respondent no.2, who have given instructions through inter ministerial meeting presided over by the Hon’ble Minister in Charge of Home Affairs on 20\textsuperscript{th} July, 1999. It has further been learnt that the respondent nos. 2 and 3 had circulated a questionnaire to the respondents of the said area with a view to ascertain as to how many of the residents are willing to give up their profession and opt for a rehabilitation programme and only 659 of the residents out of 1058 women served with the questionnaire among the 2800 prostitutes replied to the questionnaire. The petitioners have further alleged that the rehabilitation programme had the sole design of grabbing the rented premises occupied by the prostitutes at the behest of certain interested and vested quarters and out of 659 women willing to be rehabilitated only 267 women inmates were forcibly picked up and pushed into wrongful confinement. The petitioners have further asserted that in the process of forcible eviction of 2667 permanent residents as well as 300 casual residents of the area have been forcefully evicted driving them from their homes and living and livelihood putting them under the sky in inclement weather. The petitioners further asserted that such act of forcible eviction was not contemplated in law and that such act of eviction at this odd hour of night was
violation of their fundamental right of protection from arrest under the law. The petitioners attempted to meet the Assistant Commissioner, Deputy Commissioner and District Magistrate, Narayanganj District but failed because of the avoiding tendency of the said officials, rather they were faced with misbehaviour. Even complaints by some of the inmates of the evicted premises were not entertained until the intervention by some of the petitioners urging the authority to accept the same. Although the newspaper report was to the effect that the girls and women were picked up for the purpose of being rehabilitated elsewhere but surprisingly, the secret manner in which the so called rehabilitation programme was conducted leaves much scope for suspicion that there is more to it than a mere rehabilitation. As they were even deprived of their right to meet their family members but most of them received torture both physically and mentally. The report has further stated that the respondents are releasing the women and children from the vagrant homes along with a sum of Tk. 5,000.00 plus a sewing machine or alternatively a consolidated sum of Taka 7,000.00 but such act has resulted in a diabolical fraud of the authority played on the public. The act of playing with the respect and dignity of the children and women and letting them out on the street with much publicity and without protection have now greatly contributed to their inability to even return to their relatives. A visit to the vagrant home would reveal that the respondents have physically abused them in private parts of their bodies in the name of rehabilitation and are letting them free to go with so called family members without any verification as to their identity. The protest by the various organizations including parent organization of the petitioners went unnoticed to the residents of Nimtali and Tanbazar. The armed miscreants blocked the passage of the peaceful rally and then attacked them with arms and crackers forcing them to scatter here and there and the law-enforcing agency remained inactive. The petitioners have further stated that taking consideration of the enormity as well as the reality of the issue of prostitution the Government has chalked out a plan with the assistance of the United Nations Development Programme (UNDP) under Project No. BGD/97/029: Capacity Building, Poverty Alleviation and Sustainable Livelihood of the Socially Disadvantaged Women (SDW) and their children, and the project was addressed towards the empowerment of women and children living with brothel communities in Narayanganj, Jessore, Chittagong and Mongla to ensure that they can freely exercise the same rights and privileges as other citizens of Bangladesh. But prior to any step in the light of the said project the inmates of Nimtali and Tanbazar were forcibly evicted in a very inhuman manner resorting to physical assault and abuse. The petitioners being aggrieved by the wholesale illegal eviction of the prostitutes and their children from Tanbazar and Nimtali under Narayanganj Police Station in violation of their fundamental right to life and livelihood and their subsequent detention in Kashimpur Vagrant Home contrary
to the provision of Vagrancy Act, 1950 have moved this application and obtained the present Rule.

3. The Rule has been contested by respondent Nos. 2 and 3 by filing affidavits-in-opposition denying the allegations made in the Rule application and stating, inter alia, that prostitution is not permitted under Article 18(2) of the Constitution. Furthermore, sections 372, 366(a), 373 of the Penal Code and Section 41 of the Children Act, 1974 discourage child prostitution and all the activities relating to prostitution are punishable by law. Accordingly, unsocial activities and staying in the brothers is illegal and unconstitutional. The petitioners’ organization is fighting against the illegal and unconstitutional activities, which are not desirable from the conscience organizations like the petitioners’ as they should not indulge in activities promoting the illegal and immoral acts of anybody. Names of the inmates of the brothels were removed illegally and none of the sex workers were taken away from their living quarters houses forcibly nor was any of them abused or tortured. It has been asserted that with the help of women police only sex workers roaming around the Tanbazar and Nimtali area found to be vagrants were taken by the Magistrate concerned who declared 155 of them as vagrants and released 112 as not vagrants and then the vagrants were taken to the vagrant home by bus and handed over 155 to the vagrant authority under respondent nos. 2 and 3 and the rest out of 267 were released. The prostitution since prohibited under the Constitution, carrying on the profession staying or roaming and moving around the locality for sex business cannot be said to be the fundamental rights of the sex workers supported by law of land. The alleged eviction was not done by the authority, which does not amount to any sort of operation. The sex workers were found roaming in the open area in day and around Tanbazar and Nimtali brothers in broad day light on 24th July, 1999 but not at any unreasonable hours or late night following 23rd July, 1999 as alleged in the writ petition and in the process nothing cloak and dagger like happened as there involved no mystery adventure or secret plots. The press reporting as annexed in the writ petition cannot be taken into consideration by this Court sitting in this jurisdiction. Moreover, the said reports were denied and no decision was taken in any inter-ministerial meeting alleged to have been taken on the date mentioned and no instructions on the basis of the said decision was given and the same are strongly denied. But due to the misreporting in newspapers the respondents could not be blamed. The sex workers were not staying under the open sky in inclement weather and the questionnaires were circulated by the respondent nos. 2 and 3 with a bonafide intention to rehabilitate the willing sex workers which cannot now be blamed as the means of alleged evicting of the sex workers of Tanbazar and Nimtali brothel. It has been categorically stated, that shifting of the sex workers who were found vagrants were carried out through the process of law
by producing them before the concerned Magistrate who declared some of them vagrants under the law and being satisfied were sent to the vagrant home. It has further been stated that the prayer by the woman’s mother to ascertain the whereabouts of her daughter and grant daughter were duly received by the duty officer and the prayer was registered as GDE dated 28.7.1999 and the same was endorsed to sub inspector for taking necessary action and on enquiry have found them to be vagrants staying at vagrant home at Gazipur under the management of the respondents 2 and 3. The allegation against the respondents is merely on surmise and anticipation having no basis at all. The allegation of not allowing any people to visit any inmates of the vagrant homes at Gazipur or that the situation as created was a threat to the security of the said centre cannot be said to be a refusal of fundamental right of the petitioners to meet the inmates. They have asserted that in the process of taking from Narayanganj to Kashimpur it might have caused injury to some of the vagrants but the photographs which have been unfortunately printed in some newspapers had created misunderstanding that they were beaten by the police in the process of eviction and, as such, the injury being the distortion of fact has been denied. The brothels are the root of spreading HIV, AIDS and other STDs and various kinds of crime. The brokers are engaged in misguiding and enticing many innocent women and minor girls from the villages and ultimately selling them to the brothels and forcing them to adopt prostitution. Such prostitution is discouraged make embargo under the provision of the Constitution. The government being aware of the health hazards took up schemes for rehabilitation of the sex workers and was taking different appropriate steps to eradicate prostitution from the society by rehabilitating them phase-by-phase. It has further been stated that in June 1999 movement was started against such immoral activities in and around Narayanganj including processions, rallies and meetings participated by different social and religious organizations and individuals from all walks of life irrespective of religious and political affiliation. Meanwhile a sex worker named Jasmine was brutally killed by a customer at the brothel on the night following 30th June and following that murder tension was created in two brothels and the inmates got panicky. Law and order situation was deteriorated and the majority of the fallen women dispersed themselves and started roaming here and there. The sex workers remaining inside the brothel were denied water and power supply by the landlords of the of the houses of the brothels and many of the rooms were locked up by them and the condition rendered the entire brothels unfit for human habitation and the visitors of the brothels declined resulting in loss of business to earn their livelihood and they had no other alternative but to ask for alms for their subsistence. The deterioration of living condition, loss of business, life style and all other affairs inside the brothels had forced deterioration of the sex workers and the inmates of the brothel akin to vagrants for which they were picked up from the unsafe
place for their safety and security. The said situation around the Tanbazar and Nimtali area without any shelter and food and found indiscriminately carrying on their business became threat to the law and order situation and the respondent no.3 with the help of the respondent nos. 4 and 5 in order to normalize the said situation placed police personnel in different places of Narayanganj town and the said sex workers found roaming around were picked up by the police and placed them before the concerned Magistrate who declared them Vagrants under the Vagrancy Act and on enquiry released them being satisfied that they were not vagrants. The action and steps taken regarding the workers in question were done absolutely with a good, honest and bona fide intention for rehabilitating these socially disadvantaged women and to give them an opportunity to come out from the dark area to the normal life in the society and to prevent others likely to be forced and compelled to take up this ugly and unholy profession. It has further been asserted that the respondents did not do any unlawful action which is in contravention of the spirit of any provision of the Constitution and had not served the vested interests of any quarter in any way, and such assertions have been made in the writ petition due to political conflicts between different parties and individuals who have grabbed land and building for their own benefit following the Tanbazar and Nimtali incidents but dragging of the respondents into the said affairs is misconceived and misleading hence denied. The respondents are not in any way involved with the murder of a sex worker at Tanbazar brothel which raised tension among the sex workers and subsequent anti-brothel activities in collaboration with the owners of the building in the brothels of Tanbazar and Nimtali and disconnecting water and power line. The admitted position is that the political conflicts between different parties and individuals who tried to grab the land and buildings for their own benefit is the root of all evils and the respondents discharged their functions in accordance with law in protecting law and order situation in the area in order to save the life and health of the ousted inmates. The local administration discharged their function in accordance with law. It has further been asserted that the building owners, the landlords of the houses did not file any allegation against the respondents that their tenants have been forcibly evicted by them, even no case is pending before any court by the tenants against their eviction following the incidents in and around Tanbazar and Nimtali brothel on the date of alleged occurrence. The respondents cannot be held responsible on the basis of vague and indefinite allegation relying upon some press reporting and photographs, which are not the conclusive evidence of the facts.

4. The respondents Nos. 4, 5 and 6 contested the Rule by filing a separate affidavit in opposition denying the allegations made in the Rule application adopting almost all the statements made by respondent No.1 and have asserted
that the statement made in paragraph 9 of the Rule application is not correct, rather misleading and misconceived. It is stated that the alleged eviction was not done by the respondents which amounts to any sort of operation as alleged in the writ petition. They have asserted further that the sex workers who were found roaming in the open area in or around Tanbazar and Nimtali brothel were taken with the help of women police and handed over to the vagrant authority who after declaring some of them vagrants on 24.7.1999 released others. The allegation against the respondents that the sex workers were forcibly dragged out from their homes and beaten by the police in the name of taking them to meet with the respondents 4 and 5 at late night following 23rd July 1999 are emphatically denied. They have further asserted that the sex workers who were found roaming around outside Tanbazar and Nimtali were taken and handed over to the vagrant authority under the respondents 2 and 3 under the rehabilitation scheme with a bonafide and honest intention with a view to restoring and safeguarding their human rights which are being denied in the dark room of the brothels. They have further asserted that there was no instruction or decision received from respondent No.1 alleged to have been taken in any inter - ministerial meeting or that eviction was not done consequent thereto on the basis of the said decision.

5. The petitioners, however, by filing affidavit- in- reply reiterated the assertion made in the writ petition and denied the assertions made in the affidavits- in-opposition of the respondents and while asserting the statements made in the Rule application have stated that the respondents themselves admitted that the activities of the women in prostitution are work as they have referred to these women as sex- workers throughout their affidavits. The respondents in holding that sex- workers are vagrants and petitioners reiterated that the definition of vagrants does not include those engaged in earning their livelihood, and the women in prostitution were picked up in broad daylight when they were roaming around being displaced which is the right of all citizens as guaranteed by the Constitution and therefore denied that the same does not constitute a crime or fall within the purview of the Vagrancy Act and action on the part of the respondents related to the attack and forced eviction of women and children from their lawful residence in Tanbazar and Nimtali took place in the early hours of 24th July, 1999 before the break of dawn which has been sufficiently proved by the respondents not contradicting the press reports at any stage.

6. Mrs. Sigma Huda, the learned Counsel appearing for the petitioners, having taken us through the Annexures submitted that although Article 11 of the Constitution postulates that respect of dignity and worth of human person shall be guaranteed but the right to live and right to livelihood of the inmates of Nimtali and Tanbazar are the fundamental rights guaranteed under the Constitution. The respondents have a duty to protect the same from onslaught
by the interested quarters in as much as the District Administration as a duty to protect the inmates of Nimtali and Tanbazar to be evicted forcibly contrary to the provisions of Premises Rent Control Act and the ordinary law of the land protecting right of the tenants in as much as the right to life is a protected right under Articles 31 and 32 of the Constitution and the inmates of Tanbazar and Nimtali have as well the right to be equally treated under Article 27 and not to be discriminated as provided under Article 28 of the Constitution as they have equal right, public right but not a mere right of home. The learned Counsel has further submitted that women engaged in prostitution also enjoy the same right and obligation as of the ordinary citizen of the country and could not be evicted without due process of law from their home and hearth i.e. their rented premises, on the plea that prostitution is impliedly prohibited resorting to the constitutional provision that the State shall adopt effective measures to prevent prostitution in Article 18(2) of the Constitution providing the fundamental principles of state policy. The learned Counsel has further submitted that wholesale eviction of the sex workers from Tanbazar and Nimtali brothels at the early hours of the day is contrary to regulation 33 and 33(a) and sections 48 and 52 of the CrPC and has been done in contravention thereof i.e. the inmates were evicted without due process of law. The learned Counsel has further submitted that the wholesale eviction terming the sex - workers as vagrant contrary to the provision of law allegedly done by respondents 2 and 3 is violative of the fundamental right to freedom of movement of, the sex - workers. The learned Counsel has further submitted that the confinement of the sex - workers in and around Kashimpur vagrant house terming them to be vagrant has also offended their right to life and livelihood against their will.

7. Mr. Obaidur Rahman Mustafa, learned Deputy Attorney - General appearing for all the respondents, having taken us through the affidavit-in-opposition has, however, submitted that neither the District Administration including the police nor the respondent No.1 had anything to do with the matter of eviction of the sex- workers and inmates of Nimtali and Tanbazar at the early hours on 24.7.1999 as alleged inasmuch as the respondents in order to fulfil their constitutional obligation to prevent the prostitution by adopting the effective measure supplied questionnaire with the help of UNDP among the inmates of Tanbazar and Nimtali. The learned Deputy Attorney - General has further submitted that over an incident of killing of one Jasmine, a sex - worker in the brothel, commotion in and around erupted to evict the inmates of the Tanbazar and Nimtali brothels at the instance of the interested quarter and due to the fact most of the sex - workers had chosen to leave the area which rendered almost all of them vagrant roaming in and around the Nimtali and Tanbazar brothels for which police administration with the help of women police apprehended them and the attending Magistrate declared some of them vagrant and sent
them to the vagrant home at Kashminpur/ Gazipur in accordance with law. The learned Deputy Attorney-General has further submitted that the respondents did not deploy any police force in evicting the sex - workers from their home. The press reporting and the statement of the petitioners led to a disputed question of fact on the fact of denial by the respondents and the same cannot be resolved in this jurisdiction.

8. The inmates of Nimtali and Tanbazar brothels carrying on sex business are in common parlance engaged in prostitution. Prostitution is not an unknown concept or trade and is not a world apart. The profession of prostitution is an age-old profession, may be, since the dawn of the human civilization. The concept is also found in some of the religions and prostitution has thus existed in one form or other in all class based patriarchal societies. Accordingly, prostitution is expressly or impliedly admitted by the societies to be a profession. But prostitution in Bangladesh, as in other parts of the world, is socially condemned. This profession one of the oldest traces of the world has also found place in some of the Constitutions in the world, most providing provision against it. In spite of that the women engaged in prostitution are now being termed as sex - workers and are found in almost all societies in the world and Bangladesh is no exception. There are mainly three main classes of female prostitutes categorised on the basis of the structure within which they most operate, the degree of mobility and control over their lives, their earnings and amenities. At the lowest end of the scale are the streetwalkers and brothel - owned prostitutes. The streetwalkers operate independently or mostly through the pimps. The cage brothel prostitutes are attached to and found in place known as brothel, hiring the house on rental basis, brothel keepers run the brothels through pimps, procurers and retinue of thugs. The second category is the independently operating middle - class women mostly through pimps, most of them hold regular jobs but resort to prostitution regularly or intermittently in order to supplement their meagre income, carry on this sex business in any hired house in any locality. The third category is the upper middle class clandestine call girls who may have their own houses with other amenities including telephone. But basically the prostitutes or sex - workers or women in prostitution found in brothels are undoubtedly the ill-fated being victims of circumstances, namely, some are kidnapped into it, some become victim of pretended love and then brought into brothel, some are brought there with allurement, of job, some being frustrated not being able to obtain a job, some being helpless in the society find their place in brothel, some are the off - springs of the prostitutes and some being desperately sex crazy ultimately find place in the brothels. The case of brothel prostitutes is strictly confined to the brothels in the few years of entry into the profession, lest they should escape. The prostitutes or sex- workers of Nimtali and Tanbazar are no exception.
9. Although there is no law, yet absolutely prohibiting prostitution but Suppression of Immoral Traffic Act, 1933 (Bengal Act VI of 1933) made provisions for punishment for keeping a brothel or allowing premises to be used as a brothel with imprisonment for a term which may extend to 2 years, or with fine or with both. Brothel has been defined as any houses, part of the houses, room or place in which two or more females carry on prostitution or in which any girl under the age of eighteen years kept with intent that she shall at any age be employed or used for immoral purposes. The said Act further provided that the superintendent of Police has power to order discontinuance of house room or place as to brothels with notice to the owner, lessors, managers, lessee, tenant or occupiers. The said Act also made an offence punishable for living on the earning of the prostitution of another person, punishment for importing a female for prostitution, punishment for detention as prostitutes or in brothels, punishment for causing or encouraging or abetting seduction or prostitution of girl.

10. The, the said Act provided, inter alia, for punishment for any person who keeps or manages or acts or assists in the management of brothel or being the tenant, lessee, occupier or person charge of the premises, knowingly permits such premises or any part thereof to be used as a brothel or being the lesser or landlord, lets the same or any part thereof, with the knowledge that the same or any part thereof is intended to be used as a brothel. But the indulging in prostitution has not been thereby prohibited by the said Act of 1933. Unless prostitution is absolutely banned resort to the said Act would also allow the vice everywhere except certain areas. Similarly, our Penal Code and some other Special Statutes provided that kidnapping/ abducting or inducing any woman with intent that she may be compelled or knowing it to be likely that she may be forced or seduced to illicit intercourse shall be punished with imprisonment or fine or both and similarly, whoever by means of criminal intimidation or abuse of authority or any other method of compulsion, induces any woman to go from one place with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with other person shall be punished as aforesaid (section 266 Penal Code, section 9 of Nari-o-Shishu Nirjaton Ain, 1995 respectively) and section 372 Penal Code provides for punishment for selling minor girls under the age of 18 years for the purpose of prostitution or illicit intercourse or for any unlawful and criminal purpose etc. and under section 373 Penal Code buying, hiring or otherwise of girls for the purpose of prostitution or illicit intercourse, etc. have been made an offence punishable with imprisonment and fine and section 376 Penal Code provided punishment for rape i.e. sexual intercourse with a woman against her will without her consent etc. (Section 375 Penal Code)/ But the sex- workers prostitutes operate apparently allowing sexual intercourse with consent and their profession though socially looked down upon but the same apparently is
not an illegal one under the law of the land. The preamble of our Constitution pledges high ideals of trust and faith in the Almighty Allah and that the State religion is Islam but we are not subjected to Shariat Law making sexual intercourse even with consent between men and women, other than husband and wife, a heinous offence of Zina/ fornication punishable even with stoning to death but the same is not the law of the land to be enforced in the Courts of Law. However, though certain Shariat Laws have found place in our personal laws and those are part of our laws enforceable in the Court of Law. Even if prostitution is not illegal in Bangladesh, it is never encouraged and State machineries are all out to prevent it by adopting various measures including rehabilitation schemes in consonance with our Constitutional mandate in its directive state policy that the State shall adopt effective measures to prevent prostitution.

11. However, coming to the question of their alleged illegal eviction and their alleged confinement in Kashimpur vagrant home, our Constitution provides the right to protection of law under Article 31 and to enjoy the protection of the law and to be treated in accordance with law and only in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. Article 32 of the Constitution enshrines protection of right to life and personal liberty that no person shall be deprived of life or personal liberty save in accordance with law. The said fundamental protective rights enshrined that no action detrimental to the life, liberty, body, reputation or property or personal liberty of any citizen can be taken except in accordance with law, for a citizen enjoys the equal protection of law and is entitled to equal protection of law. Article 11 of the Constitution declares that the Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed. The evicted prostitutes of Nimtali and Tanbazar are citizens of Bangladesh, are enrolled as the voters and do exercise the right of franchise. Though prostitution is not a socially recognized profession in Bangladesh but impliedly the prostitutes initially get themselves enrolled with the local administration, sometimes swearing an affidavit expressing the desire to be a prostitute and get themselves confined to the place called brothel and get the required protection to continue in profession by the local and police administration, in spite of the provisions of Suppression of Immoral Traffic Act, 1933 whereby they are maintaining their earning/ livelihood which the State in the absence of any prohibitory legislation has a duty to protect and a citizen has the right to enforce that right enshrined in Articles 31 and 32 of the Constitution. Article 11 providing for dignity of human person though not
enforceable one but the sex-workers as a citizen have enforceable right under Articles 31 and 32. The right to life as envisaged in our Constitution under Article 31 which is similar to Article 21 of the Indian Constitution came up for consideration in their case of Olga Tellis vs. Bombay Municipal Corporation reported in AIR 1986 (SC) 180 wherein it has been held:

"As we have stated while summing up the petitioner's case, the main plank of their argument is that the right to life which is guaranteed by Article 21 includes the right to livelihood and since, they will be deprived of their livelihood if they are evicted from their slum and pavement dwellings, their eviction is tantamount to deprivation of their life and is hence unconstitutional. For purposes of argument, we will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important fact of that right is the right to livelihood because, no person can live without the means of living that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its context and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be as integral component of the right to live."

12. In view of the aforesaid proposition of law, the inmates of Tanbazar and Nimtali have a protected rights to life and livelihood i.e. important facet of the right to life is the right to livelihood and the easiest way of depriving a person of this right to life would be deprive him of means of livelihood to the point of abrogation. Thus, the said inmates upon their wholesale eviction from Tenbazar and Nimtali have as well been deprived of their livelihood, which amounts to deprivation of the right to life making the action unconstitutional and illegal.

13. Now to the problem they have been confronted with the wholesale eviction from their homes at the brothels at the early hours on 24.7.1999 the petitioners have alleged that the owners of the premises of Tanbazar and Nimtali with the
assistance of hoodlums and police had evicted them on that fateful night. The petitioners have alleged that on late Friday (23.7.99) night/early morning on Saturday (24.7.99) around about 3.00/3.30 a.m. when the residents of Nimtali and Tanbazar were sleeping in their rooms, a large numbers of policemen entered into the rooms and without giving any opportunity to change or organize themselves, dragged them out of their beds. The policemen informed them that a Member of the Parliament, Deputy Commissioner, Narayanganj, SP and OC of Narayanganj PS (respondents No. 4-6) desired to meet them. When these sex-workers went to meet them, the police suddenly dragged them, abused them, beat them and their children, forcibly pushed them into the waiting buses using filthy language and it was only when the girls and children were pushed into buses then few women police were found inside the buses to escort them to Kashimpur Vagrant Home. The allegations are supported by press reporting that the sex-workers were evicted at early hours of the day on 24.7.99 with the help of the police.

14. The petitioners have alleged that the respondents have carried out the eviction process with the assistance of police which the respondents 5 and 6 have categorically denied stating that one Jasmin was killed in the brothel arousing commotion amongst most of the sex workers who got panicky and were out of their homes and hearth and majority of them were dispersed and started roaming here and there and the owners of some of the houses in the brothels disconnected the water and electricity connection and many of them started roaming around as many of their rooms were locked up and the condition rendered the entire brothel unfit for human habitation and consequently the number of visitors dwindled, whereupon the sex workers could not earn their livelihood and started living as vagrants. The police collected about 267 of them and place them before the Magistrate, who on considering the facts and circumstances declared 155 of them as vagrants but directed 112 of them to be not vagrants and the vagrants were taken with the help of the lady police to get on buses and were put at Kashimpur Vagrant Home.

15. It should be remembered that nobody could violate the privacy of the inmates of any house or trespass into it except in accordance with law. Admittedly, the sex-workers were the tenants under their respective landlords and the Premises Rent Control Act, 1991 provides right *inter se* between the landlord and the tenants to evict a tenant or right of the tenant to continue in the premises so long he/she is not evicted in accordance with law. It may be observed that a man’s home is his castle and nobody could trespass or evict the inmates except in due process of law. The tenant so long she is not evicted, has the right to be on the premises and the State machinery should protect that right until she is evicted in due process of law. But the situation at Nimtali and Tanbazar had
been different as the inmates/tenants of the houses were mercilessly dragged out of the houses allegedly by the owners with the help of hoodlums and the police. Our Constitution has also enshrined that every citizen shall have the right subject to any reasonable restriction imposed by law in the interest of security of the State, public order, public morality or public health, to be secured in his home against entry, search or seizure. Thus, the fundamental right of the citizen to be secured in his home against entry has definitely been breached/violated in the instant case by the interested quarters in presence of the police, if not the police themselves were the violators. The photo clipping attached to the writ petition at least go to show that the police were mere onlookers at the heinous act of eviction of the sex-workers from their houses in the brothels.

Furthermore, it is not the case of the respondents that they have taken any action under the Suppression of Immoral Traffic Act, 1933 against owners, lessors, managers, lessee, tenants or occupiers in the brothels. The police is duty bound to protect the citizens in the event of their rights being violated but unfortunately, in the instant case the police did not take any step against the illegal eviction of the sex-workers from their homes at Tanbazar and Nimtali. Such wholesale eviction at the beginning of the 21st century when the civilization is at its peak would certainly blacken its institutions engaged in enforcing law and order and engaging in protecting and promoting rights of the citizen in a democratic welfare state. It is provided in section 2 of the Police Act, 1961 that no police force can work successfully unless it wins the respect and goodwill of the people and secures its co-operation. All ranks, therefore, while being firm in the execution of their duty must show forebearance, civility and courtesy towards all classes. Rudeness, harshness and brutality are forbidden. In spite of the above Police Regulation 33(a) and (b), it is unfortunate that there were allegations of violation of house of the sex-workers who were dragged out, mercilessly beaten and forcibly taken by bus to the Vagrant home by the police. We do not intend to go into the disputed question of facts, but we do express our disapproval of the police actions as to brutality/eviction of the sex-workers from their residence. The petitioners alleged that the sex workers were forcibly evicted at the dead of night hours on 23.7.99 and in the early hours of 24.7.99 which is supported by press reports appearing in daily newspapers. It is the cardinal principle of criminal jurisprudence that there should not be even any search with warrant into any house between dusk to dawn. Section 48 CrPC provides that nobody including the police officer should get admittance into any house unless there is notification of his authority and admittance. Similarly, whenever it is necessary to cause a woman to be searched, the search must be made by another woman with strict regard to decency. But in the instant case, the allegation against the police is against decency, forbearance, civility and courtesy, which they are duty bound to display as acts, actions and behaviour.
16. The respondents, however, claiming that they had nothing to do in the matter of eviction, have asserted that rather they have undertaken measure to rehabilitate on ascertaining some of them to be vagrants. Vagrant is defined in section 2(9) of the Vagrancy Act, 1943 that a vagrant is one such person found asking for alms in any public place, in such condition or manner as makes it likely that such person exists by asking such alms but does not include a person collecting money or asking for food or gifts for a prescribed purpose. Thus, in order to adjudicate as a vagrant there must be proof that a person is found asking for alms in public place in a manner that such persons exists by asking for such alms. In order to adjudicate a person as Vagrant the following procedure under the Act has to be adopted by the Magistrate.

17. Under Section 6 of the Bengal Vagrancy Act, 1943, any police officer authorized in this behalf by the District Magistrate may require any person who is apparently a Vagrant to accompany him to appear before a Special Magistrate.

18. Under Section 7 thereof, such Special Magistrate shall make a summary enquiry in the prescribed manner with the circumstances and character of such person and if after hearing such person he is satisfied that such person is a Vagrant, he shall record a declaration to this effect and shall forthwith send the declaration to the Controller and to the Officer-in-Charge of the receiving centre.

19. Under Section 8 thereof upon declaration as a Vagrant, he shall forthwith be sent to the nearest receiving centre when the Medical Officer of the centre medically examines the Vagrant and shall furnish a medical report regarding the health of bodily condition of the Vagrant. The medical report shall state the sex and age of the vagrant, whether he is leper, from what, if any communicable diseases other than leprosy the vagrant is suffering, whether the Vagrant is insane or mentally deficient and what is the general state of health or bodily condition of the Vagrant and for which, if any, of the prescribed types of work he is fit.

20. Under Section 9 on receipt of the medical report the officer-in-charge of the receiving centre shall as soon as the necessary arrangement can be made, send the vagrant together with the declaration and medical report to such Vagrant House as the Controller may by general or special order in this behalf direct and would be handed over to the Manager of the Vagrant Home and shall be detained until duly discharged under Section 18.

21. Section 18 provides that a Vagrant may be discharged from Vagrant’s Home under the order of the Controller or the Manager’s certifying that satisfactory employment has been obtained for such Vagrant, on its being shown
to the satisfaction of the Controller that such Vagrant has become possessed of an income sufficient to enable him to support himself without resorting to vagrancy, or a relative of such vagrant or a person who the Controller is satisfied is interested in the welfare of such vagrant, entering into a bond with or without sureties to look after and maintain such vagrant and to prevent him from resorting to vagrancy; for such other good and sufficient reason to be recorded by the Controller in writing.

22. From the above, it is clear that any police officer may require any person who is apparently a vagrant to accompany him to appear before a Special Magistrate who shall make a summary inquiry into the circumstances and character of such person and upon hearing, has to be satisfied that such person is a vagrant i.e. a person found asking for alms in any public place or wandering about or remaining in any public place in such condition or manner as makes it likely, that such person exists by asking for alms, the Magistrate shall record a declaration to that effect and shall forthwith send the same to the Controller of Vagrancy appointed under section 4(1) and to the officer-in-charge of the receiving Centre forthwith where he would be medically examined regarding his health or bodily condition and the report shall contain the sex, age, whether he is a leper, whether he has any other communicable disease, whether insane or mentally deficient, overall general state of health or bodily condition and for what type of work he is fit. Then the Vagrant would be sent to such Vagrant home as the Controller may order and handed over to the Manager of the vagrant home and would be detained there until discharged under the order of the Controller or the Manager certifying obtaining of a satisfactory employment for the vagrant or such vagrant has possessed of an income sufficient to support him or a relative is interested in the welfare of the vagrant entering into a bond with or without sureties to look after and maintain such vagrant or for such other good or sufficient reason to be recorded by the Controller in writing.

23. The petitioners in the instant case have alleged, *inter alia*, that the respondents have continuously picked up the women from their residence, physically and verbally abused and pushed them into vagrant homes with impunity irrespective of the fact that they have the fundamental right to remain in privacy of their home as well as to chose their place of abode and thereafter to release them without taking responsibility to secure their property during such illegal confinement. That most of the women pushed into vagrant home and illegally confined are adult having attained the age of 18 years are thereby major keeping them confined against their will and subsequently handing over to so called guardians are absolutely illegal. On late Friday (23.7.99) night/early Saturday (24.7.99) morning around approximately three/four a.m. when the residents of Nimtali and Tanbazar, Narayanganj were sleeping in their
rooms, a large number of policemen barged into their rooms and without giving them any opportunity to change or organize themselves, dragged them out of their beds. They (policemen) informed the residents that a member of Parliament with Deputy Commissioner, Superintendent of Police and the Officer-in-charge of local Sadar police station (respondent Nos. 4 – 6) desired to meet them. When the respondents went to meet them, the police suddenly dragged them, abused them and beat them and their children and forcibly pushed them into the waiting buses one after another, all the while using filthy language and on boarding the buses found few women police to escort them to the vagrant home. The petitioners further alleged that it was revealed by the press that the women and their children were confined most illegally by the respondent No.3 under the direction of the respondent No. 2 who was given instructions by an inter ministerial meeting presided over by the Minister-in-charge of Home Affairs on 20th July, 1999.

24. The respondents, however, in their Affidavit-in-Opposition have denied the allegations and asserted that none of the sex-workers was taken away from their living homes forcibly nor any of them was abused or tortured with the help of the policemen the roaming sex workers of Tanbazar and Nimtali who were found to be vagrant were taken to the Magistrate concerned who declared 155 of them as vagrants and released 112 of them out of total 267 and with the help of women police were handed over to the Vagrant Authority under respondent nos. 3 and 4 after they were declared vagrant by the Magistrate in broad daylight on 24th July, 1999 under a rehabilitation scheme with a bonafide, honest and the noble intention with a view to restoring and safeguarding their human rights which are denied in the dark rooms of the brothels and no instruction was received by the respondents of any alleged inter ministerial meeting and no such meeting was held for eviction of the sex workers.

25. In view of the allegations of the petitioners and denial of the respondents, one thing is very clear that whatever may be the background of the entire eviction process, the alleged declaration of 155 sex-workers as vagrants and their subsequent treatment as such was not in conformity with the provisions of sections 2(9), 6, 7, 8, 9 and 18 of the Vagrancy Act, 1943 as one of the requirements as detailed in previous paragraphs has been complied with as no inquiry as to character of such victims was ascertained or that there was nothing to show the satisfaction of the Magistrate and no paper or declaration as to Vagrancy has been produced and the averments of the respondents particularly of respondent Nos. 5 and 6 do not show that the victims were sent to the receiving centre or they were medically examined or with the Medical report and the Declarations were sent to the Vagrant home or that some of the alleged victims were released complying with the provision of section 18 of the Vagrancy Act, 1950.
26. But the affidavit-in-opposition reveal that the sex-workers were found roaming around and were taken and handed over to the Vagrant Authority. Mere roaming around in any area would not bring the sex workers within the mischief of section 2(9) of Vagrancy Act so as to adjudicate them as vagrant unless one is found to be a vagrant and other conditions for the purpose are complied with.

27. As have been asserted by the petitioners that the sex-workers being illegally evicted from their homes within Tanbazar and Nimtali brothels at the odd hours in the night following 23.7.99 and in the early morning of 24.7.99, mercilessly beaten, dragged out of their homes and were picked up by the police, and were taken to Kashimpur vagrant home by pushing them inside the standing buses and mercilessly assaulted them, the petitioners have annexed with the application the press release and the photographs of the sex workers and photograph of injuries allegedly caused by the police.

28. In view of the statement and press reporting of eviction in the early hours of 24th July 1999 and collecting them by the police on the very day belie the allegation that the sex-workers were asking for alms or wandering in such condition or manner as is likely that they were asking for alms and by no stretch of imagination in the facts and circumstances of the case, the evicted inmates of the Tanbazar and Nimtali could be termed or treated as Vagrants. In the absence of any regular proceeding attending Magistrate, we have no hesitation to hold that such actions on the part of police treating some of the evicted inmates of Tanbazar and Nimtali brothels as Vagrants has been done without any lawful authority and thus forcing them illegally into Kashimpur vagrant home.

29. The petitioners have alleged that upon hearing of the barbarian attack and forcible removal of the women (and their children) of Tanbazar and Nimitali and their children, the petitioners made attempts to trace the whereabouts of the displaced residents and it was only when the matter was reported in the press and the reporters interviewed the concerned officials then the petitioners learnt that the arbitrary and unlawful action were done in the name of rehabilitation of the prostitutes. It further revealed that the women and their children were confined at Kashimpur vagrant centre most illegally by the Director General, Department of Social Welfare, Respondent No.3 under the direction of the Secretary, Ministry of Social Welfare, respondent No.2 being instructed by an inter ministerial meeting presided by the Minister in charge of Home Affairs on 20.7.99 and prior to the incident respondent Nos.2 and 3 circulated questionnaire to the sex-workers of the concerned area to ascertain as to how many of the women and girls were willing to give up prostitution and for prostitutes who are engaged in unethical and immoral profession opposed to religious injunction particularly of Islam and should be done away with to
raise the socially unfortunate sex-workers from the social indignation and get them rehabilitated in the society in its effort to combat prostitution and with all attributes of a citizen. Otherwise, the prostitution shall always remain as a threat to the social, spiritual and physical well being of the people.

31. But on the face of allegations in the writ petition as detailed above and the manner the inmates of Nimtali and Tanbazar were illegally evicted from their home and hearth within the brothels and nothing has been produced before us to show that either any step under the Suppression of Immoral Traffic Act, 1933 or any appropriate procedure under the Vagrancy Act, 1950 was adopted for treating them as vagrants, the inmates of Tanbazar and Nimtali at the moment put in the Kashimpur Vagrant Home do not fairly and squarely come within the mischief of the definition of vagrants and we have no hesitation to hold that their confinement in the vagrant home in the name of rehabilitation has no sanction of law. We cannot also be oblivious of the fact that their eviction from their homes within the brothels carried out in the manner as alleged has not been done in due process of law.

32. The police action as alleged though has been denied by the respondent Nos. 4, 5 and 6 we have also observed about the authority and illegal action and behaviours of the police in a judgment of this Court in recent past in the case of BLAST vs. Bangladesh 4 BLC 600 in which one of us is a party, inter alia, that

“Although there are many credit/bright side of the police in our country but their discredits in present days are overshadowing the image, dignity, efficiency and credibility of the police as the involvement of the police in the incidents of torture, coercion, terrorism, harassment, extortion and even sometimes looting by putting barricade and plundering pedestrians and vehicles passing through road are rampant. This is due to the fact that police force is largely manned by untrained, ill-equipped and inadequately motivated personnel and due to their lack of proper training and motivation, in particular, a section of police finding it convenient to collude and make worldly gains.” Since the recent past the police are frequently put in the dock in their defence and the conscious citizens of the country are looking for a plausible explanation of illegal and inhuman behaviour of the Police. Police killing of students, public and women, tragic deaths in police custody have shocked the nation and their foolish actions sometimes put the democratic government into embarrassment. The horrifying incidents speak of the brutality and heartlessness of certain elements of our police force. Sometimes the vested quarter in the civil administration try to reassume the advantage out of the demoralized police in lieu of the condemnation of Police excess for their selfish motive in repression over the rivals.”

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At a seminar held on 10.1.95 in observation of Police Week Mr. Justice Mustafa Kamal as the chief guest and keynote speaker addressed the Police, inter alia that.

“I thought to myself, the police stands as the main accused in the eyes of the people since the British days, what new accused shall I discover? For many years past the police force has been showered with many advice – change your attitude, change your role as a servant and friend of the people, do not allow yourselves to be used in the interest of the political parties, be they in Government or in opposition, do not take the country to the bottom of the earth by playing the ruinous game of alliance, and sharing with the well organized gang of mastans, illegal subscription collector, drug dealers, illegal arms-holders, black marketers, terrorists and anti-social elements who flex their muscles in haughty arrogance outside the purview of civilian and military administration.

“Our attempt is not to belittle the image of the police as an institution but our endeavour is to regenerate the good and beneficial spirit in police and to revive the confidence of the people in police lest in coming years from their impressions, the people in the society do not consider that the police as an institution has outlived its utility and as such, to regain and enhance its glory and prestige which they lost by the passage of time through persistent abuse and excesses, it is high time that the Police Act, Ordinance, Code and Regulations should be strictly enforced, otherwise, it would go to demonstrate the condemnation of Police excesses”.

33. Even if a particle of the allegations against the police is found to be true or has any basis in the instant case, it is a shame for the nation, for the police has a positive duty to protect a citizen from being thrown away from their homes and the alleged hounding of them is against the conscience of the nation. It is a pity that at least the police are seen to be playing a passive role in the entire episode of illegal eviction and aiding/abetting the owners and hoodlums in their illegal acts crimes which is highly reprehensible. It is now an admitted fact that direct involvement of police in crime is rising alarmingly with members of law enforcing agencies getting involved in crimes and a special cell has been formed by the authority to tackle the situation (Daily Muktakantha, 24th May, 1999). Even from the finding of the survey conducted by Transparency International, it is found that 96% of the victims asserted to the effect that it was almost impossible to get help from the police without money or influence. But money or influence cuts both ways, it may either make them very active, as alleged in the instant case of illegal eviction, hounding them from their houses, dragging them out of their beds and beating them and pushing into the standing buses or acting in a passive role in the nature of aiding or abetting the
owners or hoodlums in the acts of illegal eviction, dragging them from their houses, standing as mere onlookers without taking any positive action in resisting the execution of illegal eviction. But it is sometimes heartening to learn, *inter alia*, some credit side of the police when a police sub inspector resigned protesting sharp deterioration of law and order situation in Jessore and massive violation of human rights. On the other hand, the police is in the dock in the past decades being accused of murder, rape, etc. even in police custody, which undoubtedly do not go to the credit of the police as an institution.

34. In the said decision (*4 BLC 600*) this Court has urged upon the authorities to take appropriate step in framing a Code of Conduct for the law enforcing agency immediately with the sole object of assuming the position of a shelter/support for the citizens in times of need and thus to wash away the bad name it has acquired through passage of time, in the light of Code of Conduct of Law Enforcing Agency adopted by the General Assembly of the United Nations by resolution 34/169 of 17th December 1979 and hoped that the authority should take immediate steps to establish a trustworthy, dignified strong and disciplined police force enjoying people’s confidence. But who cares and who cures. The police involvement is almost common phenomenon in aiding, abetting or participating in some of the heinous crimes throughout the country and under the circumstances as detailed in the foregoing paragraphs and alleged in the petition, police involvement in evicting, assaulted, injuring, etc. of the inmates of Nimtali and Tanbazar cannot be ignored and/ or brushed aside. The photographs and reports also go to show at least their presence in the area at the time of atrocious acts of eviction by the interested quarters. This illegal police action or deliberate police inaction in preventing misdeeds have prompted this court previously as well to sound a note of caution that people may think of alternative to the existing police administration for setting up a more humane, dependable, law enforcing, trustworthy and beneficial police institution. The police who are supposed to be the saviour of the victim, if themselves indulge in or become part to the atrocious/ heinous action at the behest of the interested quarters, the police institution is sure to incur the wrath of the helpless public. The police being saviour and protector, if acts otherwise the citizen will have no place to lodge their grievance and consequently would feel absolutely frustrated and would unfortunately dare to take law into their hands.

35. We painfully observe that though the police are the protector of the oppressed, in the instant case they have failed in fulfil their obligation in protecting the rights of the dwellers of Tanbazar and Nimtali. The petitioners have alleged that the police men informed the residents that a Member of the Parliament from Narayanganj area, the Deputy Commissioner, the Superintendent of police and the officer-in-charge of Narayanganj, Sadar Police
Station, the respondents 4-6 respectively desired to meet them and when the said inmates went to meet them the policemen suddenly dragged them, abused them, beat them and forcibly pushed them into the standing buses. The allegation though denied but the District Executives of both Civil and Police Administration, who execute and supervise the policies of the Government and the enforcement of the laws and engaged in maintenance of law and order, had a duty to see that the citizens are not harassed in this manner. The sex-workers were dealt with by the house owners and their hoodlums allegedly in connivance with the local police but the onerous task of enforcement of the law that no man should be evicted except in due process of law, rest upon the local civil and police administration. We do not find any reason on record as to why the said members in the services of the Republic remained so inactive or passive, may be at the behest of the local Member of Parliament or the house owners of the Tanbazar and Nimtali. The local administration should have realized that they could not ignore the provisions of the law in maintaining law and order in the area by preventing the violators from taking law into their hands and should have taken appropriate action against the wrong doer. By remaining passive they themselves connived with the wrongdoings of the interested quarters. We hope the authorities in the high ups would look into the matter in order to set its own chain of administration at right, which is the constitutional obligation of the Executive Government in a democratic country in promoting the causes of civil society.

36. In view of the above, we are constrained to hold that the forcible taking away of the sex workers and putting them into the Kashimpur Vagrant Home at Gazipur have been done without any lawful authority in derogation of their right to life or livelihood and contrary to dignity and worthy of the human person, as they do not come squarely within the mischief of the definition of Vagrant under the Vagrancy Act, and no proceeding in accordance with law or any finding was arrived at as to the vagrant nature on material in order to put them in Kashimpur Vagrant Home. We also like to put on record that the petitioner by way of Supplementary Affidavit has further asserted that the sex-workers are still operating at Daulaldra and Rajbari. Although their consent had been taken for improvement of their conditions upon rehabilitation but the rehabilitation scheme must not be incompatible with their dignity and worthy of human person but designed to uplift personal morals, and family life and provision for jobs giving them option to be rehabilitated or to be with their relations and providing facilities for better education, family connection and economic opportunities in order to do much to minimize the conditions that gave rise to prostitution. But not in the way as has been done in respect of the sex workers of Nimtali and Tanbazar. All the respondents should co-ordinate themselves with UNDP or other connected organizations formulating and
adopting a durable rehabilitation scheme to start with a pilot scheme for the purpose of the sex workers of the country with a sense of security and then the government should come out with legislation prohibiting prostitution and or soliciting prostitution and strictly enforce the laws in solemn observation of the constitutional obligation adopting effective measures to prevent prostitution. This court being the upholder/protector of the rights of the citizens has duty to see that the rights including the fundamental rights of any citizen are not being violated by any means.

37. As the sex- workers are now confined in Vagrant Home illegally terming them to be Vagrant, we direct the respondents to release them forthwith so as to enable them to go on their own according to their choice, which is their fundamental right guaranteed under the Constitution.

38. The police has a duty as instrument of demonstrative welfare of the country but as we have observed earlier, the police at least have failed to resist the owners of the houses at Tanbazar and Nimtali and their hoodlums in preventing the eviction of the sex-workers from their dwelling houses and the action of house owners do not have any sanction of law, not being in due process of law. But in this jurisdiction we are helpless to give any direction on the owners except mere observing a caution that nobody should take the law in their hands, so as to violate the rights protected under the law and the fundamental rights guaranteed under the Constitution. Although the respondent Nos. 1 and 4 have denied their involvement in the process of eviction and put the blame on the house owners and their hoodlums but in a massive and wholesale eviction of the inmates of Nimtali and Tanbazar, the District Administration should not be allowed to shirk the responsibility in effectively maintaining the law and order and thus preventing the house owners and their hoodlums in evicting the sex workers of Tanbazar and Nimtali to take law into their own hands. Thus, we also express our dissatisfaction over the passive role or inaction of the Local District Administration.

39. In the result, the Rule is made absolute in part without any order as to costs and accordingly, we direct the respondents 2 and 3 that they shall forthwith release the sex workers now detained in Kashimpur Vagrant Home allegedly treating them as Vagrants.

Let a copy of this judgment be sent to the Hon’ble Minister, Ministry for Home Affairs and Director General, Department of Social Services.
Mr. Abdul Gafur  
Vs.  
Secretary, Ministry of Foreign Affair,  
Govt. of Bangladesh and another

High Court Division  
(Special Original Jurisdiction)

Judge  
Mozammel Hoque  
Md. Hassan Ameen, J.J.

Writ Petition No. 4031 of 1997

Date of Judgment: The 14th of August, 1997

Result: Rule absolute with directions

Constitution of Bangladesh, 1972

Article – 102

Petitioner’s daughter Hasina Begum aged about 15 years was missing since March, 1992. In November, 1996 it was learnt that she was being lodged a Women’s Home at Lilua, West Bengal, India. She was a victim of atrocities and violence perpetrated by women traffickers. Her father approached the Government of Bangladesh for bringing her home but to no avail.

The High Court Division directed the Secretary, Ministry of Foreign Affairs to initiate appropriate actions at the state level for effecting repatriation of victim Hasina Begum and to inform the developments to the petitioners from time to time.  

(Para-7)

Mrs. Seema Zahur, Advocate for the Petitioner.

Mr. Md. Mahhub Ali, A.A.G., for the Respondents

Judgement

Md. Hasan Ameen, J: This Rule was issued calling upon the respondent No. 1 to show cause as to why he shall not be directed to take steps to take over the custody of Hasina Begum presently in the custody of the Lilua House No. 1. 8 Street Road, MMM. House, Lilua, P.S. Bali, District-Howrah, West Bengal, India and the Respondents should not be directed to repatriate her to Bangladesh and hand over to her father (petitioner) in Bangladesh and / or pass such other or further order or orders pass as to this court may seem fit and proper.
2. Facts in short necessary for the purpose of disposal of this writ petition may be stated as follows:-

That the elder daughter of the petitioner namely Hasina Begume aged 15 years was lost from village Arichpur, Tongi in March, 1992 and her whereabouts could not be known in spite of best effort by the petitioner. However in the month of November, 1996 he met a lady who came from India told him that his daughter is in M.M.M. House, situated in No. 8 street, Post Lilua under police Station Bali, District-Howrah, India. The petitioner then wrote a letter to Chairman, Human Right Bureau, Dhaka to bring back his daughter on 21.11.96 (Annexure-A). The further case of the petitioner is that Bangladesh Jatiyo Mahila Aynjibi Samity somehow managed to meet with his daughter and requested the Additional Secretary under the Respondent No.1 through letters dated 27.1.97 and 25.3.97 about the victim Hasina and some others for their repatriation who had been taken out of Bangladesh by child traffics on false pretext and perpetuated heinous crime upon her vide Annexures-B and C. In the meantime the victim Hasina sent a letter to her maternal grand father to get her back from the said home where she is passing her days in great distress. The Jatiya Mohila Aynjibi Samity further wrote a letter to “Sanlap”, a woman’s right centre, a social registered non-government organisation society in India for accurate information of the victim Hasina who sent information that Hasina aged 23 years was admitted in Lilua Home on 25.11.92 with reference to Bhagabongola P.S. C/No. 72/92 dated 19.3.92 under section 366/365/372/34 IP( G. R. No.258/912) through Fax Annexure but the Respondents did not take any step for repatriation of the victim. Hence the petitioner has been forced to file this writ petition for speedy and efficacious relief.

3. The Respondents did not turn up in this court in spite of due service of notice upon them which proves their negative attitude toward the issue.

4. We have heard Mrs. Seema Zahur, the learned Advocate for the petitioner who took us through the writ petition along with the Annexure referred thereto. Mrs. Seema Zahur the learned Advocate for the petitioner submits that the victim Hasina Begum a citizen of Bangladesh having been abducted from Bangladesh and taken to Calcutta detained in custody is legally entitled to get protection of law under Articles 31 and 32 of the Constitution of Bangladesh through the High Commission of Bangladesh in India to provide her legal support. She further submits that the victim girl being a citizen of Bangladesh is entitled to be looked after by the Respondent No. 1 in Calcutta, India, as Article 31 makes an obligation on the part of the government to give protection to its citizen in any party of the government to give protection to its citizen in any part of the world and that she has been denied her right to get equal protection of law by the Respondents in spite of their knowledge under Article
27 of the Constitution. She finally submits that much time has passed by this
time and it is now high time to direct the Respondents for making negotiation
in state level for repatriation of the victim who has got not fault of her own in
such state of affairs.

5. It may be recalled that the Respondents did not file any affidavit denying
the contentions of the petitioner and as such the allegations so brought thereto
remained uncontroversial i.e. there is no denial that the victim is not a
Bangladeshi and that she crossed the border and entered in to the territory of
India at her own will. In order to refresh our memory we may be permitted to
quote the relevant provision of the Constitution. The Article 27 provides that
“all citizens are equal before law and are entitled to equal protection of law”
Article 31 runs as follows:

“To enjoy the protection of law, and to be treated in accordance with law and
only in accordance with law, is the inalienable right of every citizen, wherever
he may be and of every other person for the time being within Bangladesh and
in particulars no action detrimental to the life, liberty, body, reputation or
property of any person shall be taken except in accordance with law”.

This particular provision of the Constitution is in aid of the petitioner and the
in action of the Respondents is a clear proof of denial of any assistant to the
petitioner by the Government agency who (victim) is languishing in foreign
soil in connection with a case.

6. The absence of the respondents justifies the claim of the petitioner that they
(respondents) did not take any step in the matter through state agency, which
proves in equal treatment towards its citizen. The principle of fairness in
government acting requires the government functionaries must act according
to law and must perform their duties on good faith, public accountability and
acceptance demand that government action must correspond to good conscience
and fair play. In the instant case, we are constrained to hold the concept of
fairness, fair play and legitimate expectation have been found by the
Respondents and minimum fairness was not exhibited in dealing with the case
which is unfortunate no doubt. The common expectation is that the Respondents
would take up the matter in state level in order to bring back the victim, a
citizen of this country who is languishing in foreign territory for no fault of her
own for more than 5 years. The respondents ought to have taken steps long
ago and kept the petitioner informed about its result. In the circumstances we
find no word to console the petitioner save and except to disapprove the actions
and behaviour of the Respondents.

7. In the premises of the above facts and circumstances the Rule is made
absolute. Let the Respondents be directed to initiate action in the matter through
state level for repatriation of the victim Hasina Begum and inform the result to the petitioner from time to time. Considering the facts of the case we make no order as to cost.

8. Let the Respondent No. 1 be directed to take steps to repatriate the victim Hasina Begum after taking upon the matter with their counterpart in India within 60 days from receipt of copy of this judgment with compliance to the Registrar of the Supreme Court of Bangladesh. High Court Division who will report the matter to this Bench in due course.
Appellants: VishalJeet
Vs.
Respondent: Union of India and others

In The Supreme Court of India

Judges
S.R. Pandian
K. Jayachandra Reddy, JJ.

Writ Petition (Criminal) No. 421 of 1989

Decided On: 02.05.1990

ORDER

S. Ratnavel, Pandian, J.

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

2. The averments made in the writ petition on the basis of which these directions are prayed for can be summarised thus:

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

3. The petitioner has cited certain lurid tales of sex with sickening details alleged to have been confessed by some children and girls either escaped or rescued from such abodes of ill-fame. After giving a brief note on Devadasi system and Jogin tradition, the petitioner states that this system and tradition which are still prevailing in some parts of the country should be put to an end. The ultimate plea of the petitioner is that the young children and girls forcibly pushed into ‘flesh trade’ should be rescued and rehabilitated.

With this petition, the petitioner has filed 9 affidavits said to have been sworn by 9 girls who claim to be living in the brothel houses, pleading for rescue and a list of names of 9 girls who are mortally afraid to swear the affidavits. Be it noted that no counter has been filed by any one of the respondents.

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

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

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

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

8. In this connection, it is significant to refer Article 39 which relates to “Directive Principles of State Policy” under Part IV of the Constitution. Article 39 particularises certain objectives. Clause (f) of Article 39 was substituted by Forty-Second Amendment Act, 1976. Among the objectives mentioned under clauses (a) and (f) of Article 39, we will confine ourselves only to certain relevant objectives under those two clauses, which are sufficient for the purpose of this case. One of the objectives under clause (e) of Article 39 is that the State should, in particular, direct its policy towards securing that the tender age of children are not abused. One of the objectives under clause (f) is that the State should, in particular, direct its policy towards securing that childhood and youth are protected against exploitation and against moral and material abandonment. These objectives reflect the great anxiety of the Constitution makers to protect and safeguard the interests and welfare of the children of our country. The Government of India has also, in pursuance of these constitutional provisions of clauses (e) and (f) of Article 39, evolved a national policy for the welfare of the children.

9. It will be appropriate to make reference to one of the principles, namely, principle No. (9) formulated by the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on November 20, 1959. The said principle reads thus: “The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.”
10. Before the adoption of SITA, there were enactments in some of the States for suppression of immoral traffic, but they were not uniform nor were they found to be adequately effective. Some States did not have any law on the subject.

11. With the growing danger in society to healthy and decent living with morality, the world public opinion congregated at New York in a convention for suppression of traffic in persons for exploitation for immoral purposes. Pursuant to the signing of that convention on May 9, 1950, our Parliament has passed an Act called “Suppression of Immoral Traffic in Women and Girls Act, 1956” which is now changed as “The Immoral Traffic (Prevention) Act, 1956” to which certain drastic amendments are introduced by the Amendment Acts of 46 of 1978 and 44 of 1986. This Act aims at suppressing the evils of prostitution in women and girls and achieving a public purpose viz. to rescue the fallen women and girls and to stamp out the evils of prostitution and also to provide an opportunity to these fallen victims so that they could become decent members of the society. Besides the above Act, there are various provisions in the Indian Penal Code such as Sections 366-A (dealing with procuration of minor girl), 366-B (dealing with offence of importation of girl from foreign country), 372 (dealing with selling of minor for purposes of prostitution etc.) and 373 (dealing with the offence of buying minor for purposes of prostitution etc.). The Juvenile Justice Act, 1986 which provides for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles contains a specific provision namely Section 13 which empowers a police officer or any other person or organisation authorised by the State Government in this behalf of take charge of any neglected juveniles and bring them before the Board constituted under this Act which Board under Section 15 has to hold an enquiry and make such orders in relation to the neglected juveniles as it may deem fit.

11A. In spite of the above stringent and rehabilitative provisions of law under various Acts, it cannot be said that the desired result has been achieved. It cannot be gainsaid that a remarkable degree of ignorance or callousness or culpable indifference is manifested in uprooting this cancerous growth despite the fact that the day has arrived imperiously demanding an objective multidimensional study and a searching investigation into the matter relating to the causes and effects of this evil and requiring most rational measures to weed out the vices of illicit trafficking. This malady is not only a social but also a socio-economic problem and, therefore, the measures to be taken in that regard should be more preventive rather than punitive.

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

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

14. Bhagwati, J. (as he then was) in Lakshmi Kant Pandey v. Union of India, MANU/SC/0054/1984 while emphasising the importance of children has expressed his view thus:

“It is obvious that in a civilized society the importance of child welfare cannot be overemphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a ‘supremely important national asset’ and the future well-being of the nation depends on how its children grow and develop.”

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

1. All the State Governments and the Governments of Union Territories should direct their concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference.

2. The State Governments and the Governments of Union Territories should set up a separate Advisory Committee within their respective zones consisting of the Secretary of the Social Welfare Department or Board, the Secretary of the Law Department, sociologists, criminologist members of the women’s organisations, members of Indian Council of Child Welfare and Indian Council of Social Welfare as well as the members of various voluntary social organisations and associations etc., The main objects of the Advisory Committee being to make suggestions of:
(a) The measures to be taken in eradicating the child prostitution, and
(b) The social welfare programmes to be implemented for the care, protection,
treatment, development and rehabilitation of the young fallen victims namely the children and girls rescued either from the brothel houses or from the vices of prostitution.

3. All the State Governments and the Governments of Union Territories should take steps in providing adequate and rehabilitative homes manned by well-qualified trained social workers, psychiatrists and doctors. line, we have suggested under direction No. (2) the main object of which is to evolve welfare programmes to be implemented on the national level for the care, protection, rehabilitation etc. etc. of the young fallen victims namely the children and girls and to make suggestions of amendments to the existing laws or for enactment of any new law, if so warranted for the prevention of sexual exploitation of children.

4. The Central Government and the Governments of States and Union Territories should devise a machinery of its own for ensuring the proper implementation of the suggestions that would be made by the respective committees.

5. The Advisory Committee can also go deep into Devadasi system and Jogin tradition and give their valuable advice and suggestions as to what best the Government could do in that regard.

6. The copies of the affidavits and the list containing the names of 9 girls are directed to be forwarded to the Commissioner of Police, Delhi for necessary action.

7. We may add that we are not giving an exhaustive list of the members for the constitution of the committee. Therefore, it is open to the concerned Government to include any member or members in the committee, as it deems necessary.

8. We hope and trust that the directions given by us will go a long way towards eradicating the malady of child prostitution, devadasi system and jogin tradition and will also at the same time protect and safeguard the interests of the children by preventing the sexual abuse and exploitation.

9. So far as the remaining prayer regarding rehabilitation of the children of prostitutes is concerned, we 'understand that a similar issue is raised in a separate writ petition bearing W.P'. No. 824/88 pending before this Court and this Court is seized of the matter and also has given an interim direction on 15-11-1989 for setting up a committee to go into the question from various angles of the problems taking into consideration the different laws relevant to the matter and to submit its report.
Appellants: Prerana
Vs.
Respondent: State of Maharashtra and Ors.

In The High Court of Bombay

Judges
A.P. Shah
Ranjana Desai, JJ.

Cri. Writ Petition No. 788 of 2002

Decided On: 07.10.2002

Judgment

Smt. Ranjana Desai, J.

1. Rule. Respondents waive service. By consent of the parties, taken up for hearing forthwith.

2. The petitioner is a registered organisation established in 1986. It does work in the red light areas of Mumbai and Navi Mumbai with the object of preventing the trafficking of women and children and rehabilitating the victims of forced prostitution. This petition is filed in public interest to protect children and minor girls rescued from the flesh trade against the pimps and brothel keepers keen on re-acquiring possession of the girls.

3. The 1st respondent, State of Maharashtra has established institutions for the care, protection and rehabilitation of women and children rescued from the flesh trade. The Government Special Rehabilitation Centre for Girls at Deonar is one such institution for the care and protection of child victims of forced prostitution. The 2nd respondent is the Probation Officer appointed under the Probation of Offenders Act, 1958 for the Government Special Rehabilitation Centre for Girls. The 3rd respondent, V.P. Jaiswal is an advocate, who, it is alleged, has appeared for the brothel keeper as well as the minor girls rescued from the brothel.

4. The facts, which give rise to the present petition, may be shortly stated. On 16-5-2002, the Social Service Branch raided the brothel at Santa Cruz. Four persons, who are alleged to be brothel keepers/pimps, were arrested. Twenty-four females were rescued. The four arrested accused were charged under Sections 3, 4 and 7(2)(a) of the Immoral Traffic (Prevention) Act, 1956 (“PITA” for short) under C. R. No. 00/02 (later converted to SP/LAC No. 20/2002 of 16-5-2002) by Social Service Branch. The twenty-four rescued females were
not charged, but were taken into custody under Sections 15 and 17 of PITA for the purposes of ascertaining their age and family background.

5. The accused as well as the rescued females were produced before the learned Metropolitan Magistrate at Esplanade on 17-5-2002. The 3rd respondent appeared on behalf of the four accused. The accused were remanded to police custody and the rescued females were sent to the Government Special Rehabilitation Centre for Girls at Deonar so that they may be medically examined and enquiries be made about their parents and guardians. The learned Magistrate, in his order dated 17-5-2002, noted that the Investigating Officer as well as the Addl. Police Prosecutor had submitted that the detention of the rescued girls is necessary in the corrective home for further examination by medical officer and for making further enquiries about their parents and guardians. He also recorded that the 3rd respondent strongly opposed the application for sending the rescued girls to the corrective home at Deonar. The order indicates that the 3rd respondent argued that the concerned officer had not followed Sections 15 and 16 of the PITA and therefore the girls should be released immediately. So far as accused 1 to 4 are concerned, it appears that the 3rd respondent argued that their further interrogation is not necessary as the owner of the brothel was known to the officer and he can be called for interrogation at any time.

6. The learned Magistrate, after considering the arguments, observed that custody of accused 1 to 4 was necessary to know from where they had procured the girls. Having regard to the provisions of Section 15 of the PITA, the learned Magistrate observed that the girls can be sent to the registered Medical Practitioner for the purpose of “ascertainment of their age, for detection of injuries and result of sexual abuse or presence of any sexually transmitted diseases”. In view of this, the learned Magistrate remanded accused 1 to 4 to Police custody till 24-5-2002 and 24 girls along with the report were sent to Shaskiya Manika Sudharak Griha, Deonar for medical examination, to be kept there till 27-5-2002. A direction was given to the Probation Officer of the said Home to make enquiry with the help of the petitioner about the parents and guardians of the rescued girls and also to make enquiry with the girls and to file his report on or before 22-5-2002.

7. On 20-5-2002 the rescued females were sent for ossification test in which, 14 of them were found to be adults and remaining 10 were found to be juveniles (under 18 years of age). Of the 10 minor girls six were from Meghalaya, three from Andhra Pradesh and one from Assam.

8. The four accused were released on bail on 24-5-2002.

9. On 27-5-2002, the twenty-four rescued girls were produced before the learned Metropolitan Magistrate at Esplanade. According to the Petitioner, the 3rd...

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respondent appeared on behalf of the rescued females and pleaded that they should be released. The 2nd respondent stated that further time was required to complete the home studies then in progress as all the girls were from distant places. By order dated 27-5-2002, the learned Magistrate released the adult females and directed that the juvenile females be produced before the Juvenile Court on 28-5-2002.

10. On 28-5-2002, the juvenile females were produced before the Child Welfare Committee as the Juvenile Justice Board sits only on Mondays and Fridays. According to the petitioner, 3rd respondent appeared on behalf of the minor females before the Child Welfare Committee and prayed that the minor rescued females be sent for another age verification test. The Child Welfare Committee conceded to the request and passed orders, but directed that the rescued girls be produced before the Juvenile Justice Board on the next date in accordance with the order dated 27-5-2002.

11. Admittedly, the minor rescued females were produced before the Juvenile Justice Board at Bombay Central Court on 29-5-2002, when the Board adjourned the matter to 13-6-2002. During the interregnum, the minor females remained in the care and protection of the Special Rehabilitation Centre for Girls at Deonar. The police surgeon refused to conduct the age verification test of these girls as he had already conducted one, a few days earlier.

12. The minor females were produced before the Juvenile Justice Board on 13-6-2002 at Bombay Central Court. According to the petitioner, 3rd respondent filed a vakalatnama dated 13-6-2002 on behalf of the minor girls. He filed a discharge application and prayed that the minor girls be discharged on the ground that they had not committed any offence and had been in custody for over a month. This was opposed by the 2nd respondent and the police. The 2nd respondent prayed for time as she had corresponded with the organisations in the States from where the rescued girls had come and was awaiting their response. On that day no parents or guardians of these minor girls were present in the court. By order dated 13-6-2002, the Board discharged the minor girls. While releasing the minor girls, the Board noted that the 3rd respondent had made an application for discharge of the girls on the ground that they had not committed any offence and they were in custody for more than a month. The order notices that the 2nd respondent and the police had opposed the said prayer. The learned Judge, presiding over the Board, then observed that he had personally asked every detained girl and all the girls had shown eagerness to be released. He further observed that under such circumstances it seemed to him that further detention of the girls was illegal and unwarranted because they had not committed any offence and they were victims of circumstances. He therefore ordered their release forthwith with condition that they shall not
enter into the local jurisdiction of Social Service Branch. Thus the minor girls were released from the Court itself. The 2nd respondent could not, therefore, take the minor girls to the Government Special Rehabilitation Centre for Girls at Deonar. It is in these circumstances, being shocked at the manner in which the rescued girls, though they were minors, were released contrary to the provisions of law that the petitioner has rushed to this Court.

13. We have heard at some length Ms. Mahrukh Adenwalla with Mr. Y.M. Choudhari for petitioner, Mr. P. Janardhan, learned Additional Advocate General with Mr. I.S. Thakur, A.P.P. for respondent 1 and Mr. V.M. Thorat, learned counsel appearing for respondent 3. Respondent 2 is served. None has represented respondent 2.

14. Ms. Adenwalla urged that some of the rescued girls being under 18 years of age are victims and cannot be treated as accused. Under Section 8 of the PITA soliciting in a public place is an offence. The same provision cannot be applied to juveniles. The learned counsel urged that the law does not permit a girl under 18 years of age to consent to sexual intercourse. Hence, a child cannot be charged for soliciting as in the eyes of law, her consent has been vitiated. She also drew our attention to certain provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (“the JJA” for short). She submitted that the said Act aims at providing proper care, protection and treatment of children under 18 years of age. ‘Juvenile’ or child is defined under the JJA as a child who has not completed 18 years of age. A child who is said to have committed an offence is described as a juvenile in conflict with law and destitute children who are likely to be grossly abused or tortured or who are mentally or physically challenged, are described as children in need of care and protection. She submitted that a juvenile in conflict with law has to be produced before Juvenile Justice Board and a child in need of care and protection has to be produced before the Child Welfare Committee. Thus, the JJA deals with two types of children, juveniles in conflict with law and children in need of care and protection. A juvenile girl found soliciting can be categorised both as a juvenile in conflict with law under Section 2(1) as well as child in need of care and protection under Section 2(d)(vi). The learned counsel contended that considering the fact that the girls under 18 years of age are victims of circumstances and are forcibly brought into flesh traffic by traffickers, who may include their family, relatives and friends, such girls cannot be treated as accused. They would more appropriately fall in the category of children in need of care and protection under Section 2(d) (vi). She submitted that it is, therefore, necessary that all such girls should be produced before the Child Welfare Committee and not before the Juvenile Justice Board. This is because it is necessary to rehabilitate these girls rather than penalise them, for they are forced into these activities.
15. Referring to the facts of the case on hand, the learned counsel contended that entire matter has been handled in very casual manner. She submitted that the ossification test indicated that the girls were minors. They were taken charge of from a brothel. They were clearly victims of circumstances, acting at the dictates of the brothel keeper. They were therefore children in conflict with law and ought to have been produced before the Child Welfare Committee. They were wrongly produced before the Juvenile Board. The learned counsel further urged that the Juvenile Board fell into a serious error in releasing them. It could not have done so without recording a finding that they were not minors but adult females. Having regard to the provisions of the JJA, it was obligatory on the part of the Juvenile Board to send them to protective home. By releasing them, the Juvenile Board has driven them back to the flesh trade.

16. The learned counsel also contended that the conduct of respondent 3, advocate Shri Jaiswal is objectionable. Shri Jaiswal appeared for the brothel keepers, who are accused and got them released on bail. He also appeared for the victim girls, who were not accused. There is certainly a conflict of interest between the brothel keepers and the victims and the learned advocate could not have appeared for both. Ms. Adenwalla submitted that respondent 3 is guilty of professional misconduct. Respondent 3 even appeared before the Juvenile Justice Board and argued that the girls should be released. Serious note will have to be taken of the conduct of respondent 3. The learned counsel also contended that the rescued girls will have to be traced and hence this Court should direct that the investigation should go on. The learned counsel urged that this Court should issue necessary guidelines/directions which can be followed by the investigating agency and the Courts, while dealing with similar cases.

17. Mr. V.M. Thorat, the learned counsel appearing for respondent 3 contended that it is true that respondent 3 appeared for the rescued girls, but that does not amount to professional misconduct. He submitted that the girls were claiming to be adults. The girls and the four accused were claiming to be innocent and wanted to be released on bail. They were not making any allegations against each other. Respondent 3 was briefed at the last moment. There appeared to be no conflict between them and hence respondent 3 filed applications for all. No professional misconduct can be attributed to him. Respondent 3 has filed affidavit in this Court justifying his conduct and supporting the Court’s orders. We shall advert to it at the appropriate stage.

18. Mr. Janardhan, the learned Addl. Advocate General supported the petitioner. He also emphasised the need for this Court to issue necessary directions to prevent recurrence of such events in future. He has taken us through the affidavit of Shabana Irshad Shaikh, Sub-Inspector of Police, Social Service Branch, Crime Branch, C.I.D. Mumbai. We shall refer to it shortly.
19. Before we deal with the rival contentions, it is necessary to have a look at the relevant provisions of law. We may first refer to certain provisions of the Constitution. Article 15(3) of the Constitution empowers the State to make any special provision for women and children. Under Article 23 of the Constitution, traffic in human beings is prohibited and any contravention of this provision is an offence punishable in accordance with law. Two important Directive Principles of State Policy are found in Article 39(e) and (f). They read as under:

“39(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; (f) That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.”

20. Article 48 imposes on the State a primary responsibility of ensuring that all children until they complete the age of 14 years are provided free and compulsory education. Chapter IV-A which was inserted in the Constitution by the Constitution (42nd Amendment) Act, 1976 introduced fundamental duties in the Constitution. Article 15A (a) states that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. The intention of the Constitution makers is clear. Stated in plain words, it means that women and children have to be protected. Trafficking in them has to be prevented and stopped. They must be allowed to develop in free and healthy conditions.

21. Various legislative measures have been taken to give effect to this intention. The Suppression of Immoral Traffic in Women and Girls Act, 1956 was a step in that direction. It was amended by Act No.44 of 1986. The title of the said Act was changed to the Immoral Traffic (Prevention) Act, 1956 (“PITA” for short). The purpose of this Act is to inhibit or abolish commercial vice namely, the traffic in persons for the purpose of prostitution as an organized means of living. We will refer to only the relevant provisions. Section 2(aa) of the PITA defines “child” to mean a person who has completed the age of sixteen years and Section 2(cb) defines “minor” to mean a person who has completed the age of sixteen years but has not completed the age of eighteen years. Section 2(f) states that “prostitution” means the sexual exploitation or abuse of persons for commercial purposes and expression “prostitute” has to be construed accordingly. Section 2(b) defines “corrective institution” to mean an institution in which persons who are in need of correction may be detained. Section 2(g) defines “protective home” to mean an institution in which persons who are in need of care and protection may be kept. The PITA provides for punishment
for keeping a brothel or for allowing premises to be used as a brothel (Section 3), for living on the earning of prostitution (Section 4), for procuring, inducing or taking persons for the sake of prostitution (Section 5), for detaining a person in premises where prostitution is carried on (Section 6), for prostitution in or in the vicinity of public places and seduction of a person in custody (Section 7). Section 8 will have some relevance. It provides for punishment for seducing or soliciting for purpose of prostitution. Section 9 provides for punishment for seduction of a person in custody. Under Section 10-A depending on circumstances, a female offender may be sent to a corrective institution for a term by a Court in lieu of sentence.

22. Section 14 makes offences punishable under the PITA cognizable. Under Section 15(4) a police officer is entitled to enter any premises if he has reasonable grounds for believing that the offence punishable under the PITA has been or is being committed in respect of a person. Under Section 15 (5-A) any person who is produced before a Magistrate has to be examined by a registered medical practitioner for the purposes of determination of the age of such person, or for detection of any injuries as a result of sexual abuse or for the presence of any sexually transmitted diseases. Under Section 16 a Magistrate may direct that such a person be rescued from such a place and produced before him. Section 17 provides for intermediate custody of persons rescued under Section 15 or 16 and if such a person is in need of care and protection, the Magistrate can direct that he or she may be detained in a protective home. Section 20 provides for removal of prostitute from any place. Protective homes are provided under Section 21. Section 22-B provides for summary trials.

23. Taking note of increasing world wide awareness of the problems of children particularly, problems of a girl child and various world conventions resolving to take measures to put an end to immoral traffic in children to some of which, India is a party, the legislature enacted the juvenile Justice (Care and Protection of Children) Act, 2000 (“JJA” for short). As its preamble reads, it is an Act to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection by providing for proper care, protection and treatment by catering to their developmental needs and by adopting a child friendly approach in the adjudication and disposal of matters in the best interest of children and for their ultimate rehabilitation to various institutions established under the said Act. It is necessary to refer to some relevant provisions of this Act, to appreciate the gradual change in the approach of the legislature towards destitute and erring children.

24. The JJA is a child friendly Act. It simply makes two categories of children. Under Section 2(k) juvenile or child means a person who has completed 18 years of age. Section 2(a) defines child in need of care and protection. In this
category are children who are not involved in any offence but who are neglected, abused and are victims of circumstances. Section 2(d) (i) to (ix) describe the type of children who fall in this group. For the purposes of the present case it is necessary to read 2(d) (vi). It defines child in need of care and protection to mean a child who is being or is likely to be grossly abused, tortured or exploited for purposes of sexual abuse or illegal acts.

25. Section 2(1) says that a juvenile in conflict with law means a juvenile who is alleged to have committed an offence. Section 4 provides for Juvenile Justice Board. Section 10 states that as soon as a juvenile in conflict with law is apprehended by police, the matter has to be reported to a member of the Board Section 15 of the JJA provides for the orders that may be passed against a juvenile who has committed an offence. The Board may, inter alia, ask the juvenile to go home after advice or provide for his counselling or direct that he may be sent to a special home. Under Section 16, a juvenile who has completed the age of 16 can be kept in a safe custody, but in no case can a juvenile be sentenced to death or life imprisonment. Under Section 20 cases which are pending on the date on which the JJA has come into force, shall be continued in the respective courts where they are pending, but if the court finds that juvenile has committed an offence, it shall record a finding to that effect and send the juvenile to the Board which shall pass orders as if it has been satisfied that the juvenile has committed the offence.

26. Under Section 29 of the JJA, the State Government may constitute a Child Welfare Committee. A child in need of care and protection has to be produced before the said Committee as per Section 32. If such a child has no family of ostensible support, the Committee may direct that the child may be remanded to children’s home or shelter home. Chapter IV of the JJA is devoted to rehabilitation and social integration of children.

27. The JJA therefore intends improving the lot of children, be they children in need of care and protection or juveniles in conflict with law. The officers dealing with them have to be specially trained and instructed. Procedure to be adopted while dealing with them is different. The thrust is on rehabilitation. Adoption, foster-care, sponsorship or lodging them in after-care organisations are the options open to the authorities. Even where they are involved in offences they are not to be treated as offenders, but merely as children who have strayed their path for want of guidance. We will have to examine the present case against this background.

28. In almost all cases, where girls are rescued from a brothel, it is found that they are forced to submit to prostitution by brothel keepers. Cases are not unknown where young women from far of corners of India have to leave their homes and come to city like Bombay in search of bread. They are a burden to
their parents. Their marriages cost money. They are neglected and unwanted. Many a time they are brought to cities with false promises of better future and sold to brothel keepers. Once they are in the trade, it is impossible for them to get out of it. If it is a brazen case of voluntarily soliciting in public attracting Sections 7 or 8 of the PITA such girls can be described as children in conflict with law and will have to be produced before Juvenile Justice Board. Otherwise such girls can more aptly fall under Section 2(b) (v) of the JJA as children in need of care and protection i.e., children who are being or who are likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts and they will have to be produced before the Child Welfare Committee. While dealing with both these categories of minors a kindly approach is needed. Their reformation or rehabilitation must be the object. The provisions of the JJA will have to be strictly followed.

29. If the facts of the present case are examined, we find that the provisions of the JJA are completely ignored. Shabana Shaikh, Sub Inspector of Police, Crime Branch CID Mumbai has stated that the brothel was raided on 15-5-2002. Four brothel keepers were arrested on the spot. Twenty four girls were found in the premises. Against the said accused Special LAC No. 20/02 under Sections 3, 4, 7(2)(a) of the PITA, was registered. On 17-5-2002, the four accused as well as the twenty four girls were produced before the Additional Chief Metropolitan Magistrate’s 3rd Court, Esplanade, Mumbai. The learned Magistrate remanded the four accused to police custody till 24-5-2002 and twenty four girls were sent to Shaskiya Mahila Sudhar Griha with a direction that their medical examination be carried out.

30. On 20-5-2002, the medical examination of the girls was carried out. Ten girls were found to be minors. On 24-5-2002, the four accused were released on cash bail. On 27-5-2002, the twenty four girls were produced before the learned Magistrate. Four major girls were released and ten minor girls were ordered to be produced before the Juvenile Court on 28-5-2002.

31. On 28-5-2002, the Probation Officer produced the ten minor girls before the Juvenile Welfare Board. Respondent 3, Advocate Jaiswal appeared for the minor girls and argued for their release claiming that they are not minors. The Board ordered their re-examination and the matter was adjourned to 13-6-2002. On 11-6-2002, the Probation Officer produced the said ten girls before the Medical Officer of Nagpada Police Hospital for their re-examination to ascertain their ages. The Medical Officer expressed opinion that he had already examined them in detail and issued a certificate as to their age with a margin of error of 6 months on either side. According to the Medical Officer the certificate was issued after physical examination, ossification test, X-ray examination as per procedure prescribed in H. S. Mehta’s Book of Medical
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32. With this report the said girls were again produced before the Juvenile Court, Mumbai on 13-6-2002. Respondent 3 again appeared for them and argued for their release. The Probation Officer opposed their release and contended that she had made correspondence with different Non-Governmental Organisations of different States about the girls and hence they may be detained for further 15 days. The Board released the girls on the condition that they shall not enter into the local jurisdiction of Social Service Branch.

33. We express our displeasure at the manner in which this case has been handled by the Board. First of all if the girls were minors and they were not involved in any offence, they could not have even been described as juveniles in conflict with law. They were children in need of care and protection as per the provisions of the JJA. They ought to have been produced before the Child Welfare Committee once their minority was confirmed. Assuming they had to be produced before the Magistrate to seek orders for their production before the appropriate forum, the Magistrate should have directed their production before the Child Welfare Committee and not before the Juvenile Justice Board because they were minors and not accused. Assuming further, that they could have been produced before the Juvenile Justice Board, there was no warrant for the Board to release them because the record before the Board clearly indicated that the girls were minors. The Board could have released them, without conditions, only if they were majors. Because they were minors, the Board was duty bound to follow the procedure prescribed under the JJA. The Board ought to have given due consideration to the request of the Probation Officer that they should not be released because she was awaiting information about them from the States from where they had come. This request was obviously made to explore the possibility of finding out their parents so that their custody could be entrusted to them with some conditions. Surprisingly the Board released them on a condition that they shall not enter into the local jurisdiction of Social Welfare Branch.

34. We have referred to the relevant provisions of the JJA which make it evident that both, a juvenile in conflict with law or a child in need of care and protection have to be dealt with, keeping in mind the possibility of their reformation and rehabilitation. The JJA provides for Protective Homes or Special Homes where such girls have to be kept for safe custody, because the fear is that they may be driven back to the brothels. The Board should have been alive to this. By asking the girls not to enter into the local jurisdiction of Social Service Branch, the Board has treated them as confirmed prostitutes. Such orders can be passed under Section 20 of the PITA which empowers a Magistrate to order removal of prostitutes from any place and prohibit them from entering the local jurisdiction.
from re-entering it. We wonder how the Board could have passed such harsh order to the detriment of the minor girls. The learned Magistrate presiding over the Board has observed that he had personally asked the girls and they had shown eagerness to be released. There is no provision under the JJA whereunder, the Board can release the minor girls because they desired to be released without giving a thought to their rehabilitation and the frightening possibility of their re-entry into brothels.

35. Another disturbing facet of the matter is that it is at the request of respondent 3, who had appeared for the brothel keepers, that the Board released the girls. Having appeared for the accused, respondent 3 could not have appeared for the victim girls who were not the accused. This was sufficient indication that the girls would be driven back to the brothels, and the Board should have realised this. The Board committed the greatest blunder in entertaining such an application and releasing the girls pursuant thereto. The Board ought to have sent them to the Protective Home as requested by Probation Officer. In our opinion greatest injustice has been done to the minor girls.

36. We are also of the opinion that it was improper on the part of Advocate Jaiswal to appear for the accused as well as for the victim girls. To us there appears to be a clear clash of interest between the accused and the victim girls. We have perused the affidavit filed by him in this Court. Through the affidavit respondent 3 has justified his conduct. We are not happy with the explanation offered by respondent 3. The tenor of the affidavit strikes a very unhappy note. Respondent 3 was present in the Court. We have also heard his advocate. Even in this Court we witnessed a defiant approach of respondent 3. We may not be however understood to have expressed any final opinion on the conduct of respondent 3, as in our opinion, the proper authority to consider this is the Bar Council of Maharashtra. We will therefore refer his case to the Bar Council to conduct appropriate enquiry and arrive at its conclusions without getting influenced by our observations about his conduct.

37. We feel that the following directions may prevent recurrence of such events in future. (A) No Magistrate can exercise jurisdiction over any person under 18 years of age whether that person is a juvenile in conflict with law or a child in need of care and protection, as defined by Sections 2(1) and 2(d) of the Juvenile Justice (Care and Protection of Children) Act, 2000. At the first possible instance, the Magistrates must take steps to ascertain the age of a person who seems to be under 18 years of age. When such a person is found to be under 18 years of age, the Magistrate must transfer the case to the Juvenile Justice Board if such person is a juvenile in conflict with law, or to the Child Welfare Committee if such a person is a child in need of care and protection. (B) A Magistrate before whom persons rescued under the Immoral Traffic
(Prevention) Act, 1956 or found soliciting in a public place are produced, should, under Section 17(2) of the said Act, have their ages ascertained the very first time they are produced before him. When such a person is found to be under 18 years of age, the Magistrate must transfer the case to the Juvenile Justice Board if such person is a Juvenile in conflict with law, or to the Child Welfare Committee if such person is a child in need of care and protection. (C) Any juvenile rescued from a brothel under the Immoral Traffic (Prevention) Act, 1956 or found soliciting in a public place should only be released after an inquiry has been completed by the Probation Officer. (D) The said juvenile should be released only to the care and custody of a parent/guardian after such parent/guardian has been found fit by the Child Welfare Committee to have the care and custody of the rescued juvenile. (E) If the parent/guardian is found unfit to have the care and custody of the rescued juvenile, the procedure laid down under the Juvenile Justice (Care and Protection of Children) Act, 2000 should be followed for the rehabilitation of the rescued child. (F) No advocate can appear before the Child Welfare Committee on behalf of a juvenile produced before the Child Welfare Committee after being rescued under the Immoral Traffic (Prevention) Act, 1956 or found soliciting in a public place. Only the parents/guardian of such juvenile should be permitted to make representations before the Child Welfare Committee through themselves or through an advocate appointed for such purpose. (G) An advocate appearing for a pimp or brothel keeper is barred from appearing in the same case for the victims rescued under the Immoral Traffic (Prevention) Act, 1956.

38. We are anxious about the safety of the minor girls who are released. The statement made by the learned A.G.P. that the investigation will go on and vigorous efforts will be made to trace the minor girls has reduced our anxiety to some extent.

39. We have already indicated that respondent 3’s conduct in this case needs to be examined by the Bar Council. We therefore direct the Bar Council of Maharashtra to conduct an inquiry into respondent 3, Advocate Jaiswal’s conduct in this case, as per law. We make it clear that our observations about his conduct are prima facie observations and the Bar Council of Maharashtra should examine his case, after giving him a notice and after giving him an opportunity of hearing in accordance with law, without being influenced by our observations.

40. The petition is disposed of with above directions.
His Majesty’s Government on the F.I.R. of
Urmila Thapa Magar ………. Appellant Plaintiff

Vs

Resident of Dhading District, Ugrachadi Village Development
Committee, Ward No.9 presently residing at Narayanghat
Lilachowk, Gopal Prasad Dahal
Resident of Chitwan District, Bharatpur Municipality, Ward No.
3, Man Kumari Biswakarma —1
Resident Ibid, Ward No. 2, Ram Sharan Pudasaini ………1
Resident Ibid Krishna Prasad Pudasaini ……………
Opponent Defendant

The Supreme Court
Division Bench

Judges
The Honourable Justice Mr. Keshav Prasad Upadhyay
The Honourable Justice Mr. Bhairab Prasad Lamsal

Criminal Appeal Number 1610 of the Year 2051 BS

Date of Judgment: The 16th day of Bhadra of the Year 2054 BS.

Law Suit: Human Trafficking

A brief description of the case which has been filed against the judgment of the
Appellate Court Hetauda, for review together with review evidence in
accordance with part (B) of sub clause (1) of Clause 12 of the Judicial
Administration Act, 2048 BS from the side of the plaintiff His Majesty’s
Government is as follows.

The complaint report states: “That on the night of Baisakh 25, 2050 BS., Man
Kumari Biswakarma and Gopal Prasad Dahal on the false pretext of taking me
to Butuwal made me board the bus from Narayangarh. However, their real
intention was to take me to the city of Bombay, India and sell me. However,
their heinous intentions were averted by a police check at that particular moment,
and I was saved. I therefore submit an application for action against the crime
of human trafficking.

I had just come from Kathmandu, and being slightly acquainted with Man
Kumari, boarded the bus with her on her assurance that she was taking me to
Butwal. The bus tickets having been purchased by another man, I did not
know that tickets for India instead, had been purchased. It was only upon an
enquiry by the police that I came to know that they had intended to take me to
Bombay to sell me.” This is the statement document of the complainant Urmila
Thapa Magar before the investigating officer.

68 | Trafficking and Commercial Sexual Exploitation
The statement document of Man Kumari Biswakarma before the investigating officer that the complainant was being taken to Bombay of India for sale in accordance with prior consultations at the residence of Ram Sharan Pudasaini on Baisakh 23, 2050 BS., states:

“I had brought the complainant from Kathmandu and we held consultations amongst my paternal uncle Ram Sharan, Gopal Prasad, Man Kumari and myself at Narayangarh to take her to Bombay of India to sell her, and we were caught when we were on the way to take the complainant to Bombay, is the statement document of Krishna Prasad Pudasaini before the investigating officer.”

The statement document before the investigating officer by Gopal Prasad and Man Kumari confirming the identity of Ram Sharan Pudasaini.

“In line with prior consultations amongst Krishna Prasad, Gopal Prasad, Man Kumari and I for taking the complainant to Bombay of India for sale, my nephew Gopal Prasad and Man Kumari had boarded the bus along with the complainant when the police got hold of us and arrested us. “ The statement document of Ram Sharan Pudasaini before the investigating officer.

The affidavit of the seizure of Indian Rs. 600 states:

“The complainant Urmila Thapa works for a carpet industry at Baudha in Kathmandu. Since we stay together, we know each other well. She is the sister of my friend. On the 20th of Baisakh, Krishna Prasad Pudasaini who is an elder brother by relation went to Kathmandu and told me that I was called by my father, which is why I sought the company of Urmila and went to Narayangarh along with her. I returned to Kathmandu on the 24th. Urmila was at her father’s residence”, as per the statement document of Rita Khadka to the police.

On the return of the defendant Man Kumari from Bombay, as it was reported that the defendants Gopal Prasad, Ram Sharan, Krishna Prasad along with Man Kumari were staying together, and that they were not people of special position, and the fact that they were going to Bombay was divulged upon their arrest, we are of the opinion that they were taking the complainant to Bombay for sale and that all the four defendants are not people of good character, states the public enquiry statement of recognizance.

With the intention of selling the complainant Urmila Thapa Magar at Bombay in India, Ram Sharan Pudasaini ordered through his distant nephew, defendant Krishna Prasad and brought Urmila under some pretext to his residence in Narayanghat. The defendant Ram Sharan kept her at his residence for two days and after consulting Man Kumari Biswakarma (who had spent seven years at a brothel in Bombay) and Gopal Prasad Dahal (who was well known to two other girls who sell girls in Bombay) Gopal Prasad Dahal and Krishna Prasad
Pudasaini made the complainant board the night bus bound for Butwal with the intention of taking her to Bombay in India through the Krishnanagar border after mutual consultations amongst Ram Sharan alias Mote Sharma, Krishna Prasad, Gopal Prasad and Man Kumari Biswakarma alias Syani. After they had boarded the bus bound for Butwal, the defendants Man Kumari and Gopal Prasad who were accompanying the complainant were arrested, and the other defendant Krishna Prasad Pudasaini escaped at the behest of Gopal. The four defendants had committed a crime as per Clause 4 (B) of The Human Trafficking (Control) Act, 2043 BS, the accusation claimed, seeking punishment for the defendants in accordance with clause 8 (2) of the same Act.

“I was at Phulchowk of Narayangarh on the night of 2050/1/15 BS and when I was about to proceed to Butwal on the understanding that my husband was there, I came across the complainant in the same bus. Thereafter the police arrested us on the charges that we were going to Bombay. During the time of the arrest Gopal Prasad was with us as he wanted to buy cucumbers from Butwal. The police arrested the complainant, Gopal and myself. We were not taking her to Bombay and I should not be punished as I have not sold her” – the statement of the defendant Man Kumari Biswakarma alias Syani at the initial district court.

“I had seen the complainant throughout the day on 23rd day of Baisakh, 2050 BS, at the house of Ram Sharan in Narayangarh. When Man Kumari and I boarded a bus for Butwal at 11 PM on the 25th day of Baisakh, 2050 BS, the complainant Urmila also boarded the same bus. When we asked her where she was going, she replied that she was going to visit her mother in Butwal, and sat with Man Kumari on one seat. I sat in the other seat. Urmila then told us that some hooligans were following her, and requested us to say that she was in our group as she needed our protection. The police made us disembark from the bus, and there was no one present except for the complainant, Man Kumari and myself at that time. We did not come across Krishna Prasad and Ram Sharan at that time. I was not taking the complainant for sale; I am innocent and let me be cleared of the charges” – the statement of defendant Gopal Prasad Dahal at the district court.

“The complaint and statement made by Urmila Thapa is baseless, I do not recognise Man Kumari. Krishna Prasad is my nephew, and since I have not committed the crime as per the accusation claim, I should not be punished” – the statement of defendant Ram Sharan Pudasaini at the district court.

“I have not allured Urmila Thapa Magar and I have not taken her for sale; I have never done anything like alluring girls and selling them, and as I have not committed a crime as per the accusation claim, I should not be punished” – the statement of defendant Krishna Prasad Pudasaini at the district court.
Bir Bahadur Lama, the witness of defendant Ram Sharan and Bishnu Prasad Humagain, the witness of defendant Krishna Prasad had signed a testimony in accordance with the order of the district court.

There is no need to give any opinion on the plaint submitted by the plaintiff as it is claimed on the basis of an irrelevant Act. The presented law suit is annulled as per Section 180 of chapter on Court Procedure - the judgment dated 2051/1/13 of the Chitwan District Court.

The defendants were arrested by the police at Narayanganth while boarding a bus bound for Butwal. The denial of the accusations by the defendants on the ground of sheer coincidence does not hold good as the complainant Urmila Thapa in her complaint application dated 2050/1/26 BS states that Gopal Prasad Dahal and Man Kumari Biswakarma were arrested when they had boarded the bus bound for Butwal from Narayanganth, and as in the police report, the Plaintiff His Majesty’s Government has taken the claim against the defendants as per Clause 4 (B) of The Human Trafficking (Control) Act, 2043 BS, and the provision of Clause 4 (B) of the said Act provides that any person who intends to sell a person in a foreign land will also be considered a culprit in the act of human trafficking.

While considering the fact as to whether or not the defendants resorted to the said activity, as the complainant and the defendants were arrested in the bus bound for Butwal from Narayanganth, it is obvious that the defendants were in the process of taking the complainant with the purpose of selling her, as is directed by the said Act. However, the defendants had not boarded the bus bound for a foreign land - as specified in the Act that the sale has to take place in a foreign land. Therefore, as the plaintiff’s side has not been able to establish that the defendants were taking the complainant to a foreign land, it cannot be said that the defendants had resorted to the activities within the definition of Human Trafficking and hence, the judgment of the initial Chitwan District Court dated 2051/1/13 BS annulling the claim has been upheld by the judgment of Appellate Court, Hetauda.

As there is an error in relation to Clause 12 (1) (A) of the Judicial Administration Act, 2048 BS in the judgment by the Appellate Court, Hetauda an application letter of His Majesty’s Government requesting also for evidence has been received.

The Chitwan District Court had annulled the lawsuit on the basis of the explanation of sub clause (2) of Clause (4) of Human Trafficking (Control) Act, 2043 BS that the concerned person has to be taken to a foreign land with the objective of trafficking in humans, and the said judgment was upheld by the Appellate Court, Hetauda. However, the Act does not specifically provide...
that the concerned person has to be actually taken to a foreign land, and the attempt itself to do so is punishable, which is why there is an error in the interpretation of Clause (4) of the said Act. Therefore, the evidence-receipt for the review has been granted in accordance with Part (A) of Sub Clause (1) of Clause 12 of Judicial Administration Act, 2048 BS. The order of this Court to executed in accordance with Law.

The learned Government Advocate present on behalf of the plaintiff, His Majesty’s Government, Mr. Narendra Pathak pleaded that in the present case, which is presented to the bench as per the serial of the cause list as per the rules, the concerned person need not necessarily be taken to a foreign land in order to establish a crime of human trafficking, and it is not the purport of Human Trafficking (Control) Act, 2043 BS. A crime of human trafficking can be established if a person is moved from one place to another within Nepalese territory with an intent to traffic in humans, and that as there is an error in the judgment in annulling the plaintiff’s claim by the initial Appellate Court, Hetauda, the same needs to be quashed.

Here, while studying the document file along with the appeal, a judgment needs to be given as to whether or not the judgment of the Appellate Court, Hetauda was in line with the explanation, that in order to establish a crime of human trafficking the concerned person needs to be taken to a foreign land with an intention of sale; and that the activity was not in accordance with the Act. The Appellate Court, Hetauda upheld the decision of an annulment of the plaintiff’s claim by the Chitwan District Court – and hence an appeal on behalf of His Majesty’s Government.

It is observed in the present case that it needs to be established whether a person needs to be taken to a foreign land for the commission of a crime of human trafficking; or would it still be a crime if a person is moved within the territory of Nepal with an intent of trafficking in humans. The Human Trafficking (Control) Act, 2043 BS has prohibited activities on trafficking in humans, and Part (B) of Clause 4 of the said Act prohibits taking any person to a foreign land with an intent to traffic in humans, and such activity is established as a crime. The crime would be established if any person is arrested within the territory of Nepal in the process of taking any person for sale in a foreign land even if the concerned has not reached such foreign land. That is why a crime in human trafficking would be established, and such an incident would begin even if any person is arrested within the territory of Nepal in the process of taking the concerned to a foreign land.

The reasoning that the concerned person should have been caused to reach a foreign land to establish the commission of such crime is contrary to the spirit of Human Trafficking (Control) Act, 2043 BS. Therefore, the judgment of the
Appellate Court, Hetauda, upholding the judgment of the Chitwan District Court that since the defendants had not caused the complainant to reach a foreign land with the intention of selling her there, and as it did not fall within the definition of human trafficking activities, the plaintiff’s accusation is annulled, is not in line to the extent that it is interpreted. Now, whether or not the defendants had committed the crime as per the claim of the plaintiff, the defendants have denied the allegations against them in a statement given to the Court. The defendants were arrested by stopping the bus bound for Butwal from Narayangarh whereas the complainant’s mother lives in Butwal. There is no complaint indicating any specific crime against the defendants. The police had arrested the defendants on the basis of suspicion, and initiated action against them. As the accusation against the defendants is not admissible beyond any reasonable doubt in proof on the aforesaid basis, it is decided that the defendants, Gopal Prasad Dahal, Man Kumari Biswakarma, Ram Sharan Pudasaini and Krishna Prasad Pudasaini be acquitted from the plaintiff’s accusation. The judgment for an annulment of the Appellate Court, Hetauda to the extent that it is not in line with the plaintiff’s claim is thus quashed.

File and submit the documents as per rules.

Signed

Bhairab Prasad Lamsal
Justice

I concur with the above opinion.

Signed

Keshab Prasad Upadhyaya
Justice
Appellant
Defendant: Permanent resident of Morang District, Rajghat VDC, Ward No. 9, presently at the Jail branch in Biratnagar, Durga Dhimal
Versus
Opponent
Plaintiff – His Majesty’s Government on the F.I.R. of Tara Devi Dahal

Supreme Court
Division Bench

Judges
The Honourable Justice Laxman Prasad Aryal
The Honourable Justice Kedar Nath Acharya

Criminal Case No. 1042 of the year 2051 BS
Date of Judgment – 053/12/12/3 BS

Law Suit: - Human Trafficking

The confession of the defendant to the police supports the issues raised by the victim-complainant. Despite the stand taken by the defendant that the police had resorted to torture and obtained his signature against his will, and that the injury investigation form was filled in on the basis of the complaint that his entire body ached as a result of physical injury was considered, the stand that the confession was obtained through torture does not hold good. The issue raised by the victim-complainant in cases like human trafficking needs to be considered truthful until proved otherwise by the defendant. The defendant has not been able to prove otherwise from the proof attached in the document. In the given situation, it cannot be said that he is not the culprit.

From the side of the Appellant: Learned Advocate Mrs. Urmila Panthi

From the side of the plaintiff:
Adopted Precedent:

Judgment
1. Justice Laxman Prasad Aryal: The brief description and facts of the appeal to this court against the judgment of the Appellate Court, Biratnagar, in accordance with clause 9 (1) (Kha) of Judicial Administration Act, 2048, is as follows:

2. Two men namely Babu Ram Chaudhary and Durga Dhimal allured me on 2045/6/7 BS and Babu Ram Chaudhary (One of the two defendants) convinced me that he would make me his wife and life-partner, and took me from Urlabari
to Kakarvita via Siliguri to Hajipur in India, and, while staying in a Hotel at Hajipur, he did all that is done between a husband and wife, looted my chastity, and took me to Patna, India, from there on 045/6/9 BS and sold me for Rs. 16,000 to a woman called Mala belonging to the Lama community at a place called Kamaripur, and left me there. And, since the Indian police brought me to Birganj, I reached home on 046/4/26 BS, and therefore, the complaint report dated 046/5/13 BS of Tara Dahal demanding appropriate legal action and punishment against Babu Ram Chaudhary, Durga Dhimal, and other associated conspirators who allured, deceived me on the pretext of making me his wife and sold me for Rs. 16,000 to Mala Lama at Kamaripur of India, thus encouraging human trafficking.

3. The ruling of Morang district court for investigation and collection of evidence.

4. “I was known to Babu Ram Chaudhary and Durga Dhimal as they used to frequently visit our village. On coming across them at the Urlabari bazaar, Babu Ram Chaudhary told me that he would make me his life partner/wife, and urged me to go to Patna and as Durga Dhimal also allured me for the same, I went with them from Urlabari by bus on 046/6/7 BS through Kakarvita, Pani Tanki and Siliguri of India, reached Hajipur, strolled around throughout the day, and stayed at a lodging house together with Babu Ram who looted my chastity during the night as if we were husband and wife. We reached Patna at 9’o clock the following morning, and boarded a train along with Babu Ram & Durga Dhimal to reach Kamaripur of Bombay on 045/6/10 BS. Babu Ram and Durga Dhimal took me to a house in Kamaripur where I came to know upon enquiring with a woman in that house, that they had sold me for Indian Rupees 16,000. The police came to investigate when I started crying and screaming, and as I had told them in detail as to what had happened with me, they took me to the customs office in Raxaul, India on 2046/4/26 BS, and, therefore, I have come to lodge a complaint. I have not been impregnated by Babu Ram, and I request for action to be taken against the defendants who were involved in selling me” - the statement document of complainant Tara Devi Dahal with the Police on 2046/5/13 BS.

5. The statement was attested by Morang District Court on 2046/5 13 BS.

6. The police report showing the arrest of the defendant Durga Dhimal is attached.

7. “I came across the complainant Tara Devi, who was already known to me, when I was strolling about in the Urlabari bazaar near my home. When I introduced her to my friend Babu Ram, the understanding to solemnise a marriage between Tara Devi and him (Babu Ram) was reached, and with the
understanding that we would meet each other in the weekly bazaar convening the following week, we returned to our homes. There were no consultations or discussions in relation to selling her in Bombay. When we met each other at the following week’s weekly bazaar, all of us were in agreement to go to Patna, and set off on the journey from Kakarvitta through Hajipur where we stayed overnight. Babu Ram sought Rs. 1,000 from an unknown person on 2045/6/10 BS. On discussions with the land lady Mala Lama, Tara Devi was sold for Rs. 16,000 and Babu Ram pocketed the money. We returned home and he gave me Indian One Hundred Rupees and I have not been given the rest of the money. I have not sold any other girl and I do not know whether or not Babu Ram has sold any other” – the statement of defendant Durga Dhimal on 2046/5/20 BS with the Police.

8. “The complainant was introduced to me by Dhruba Bhattarai; I did not know her earlier. He had told me that there was a girl who could be taken for sale, and that the matter was settled with her, which is why I went to Urlabari bazaar by bus on the date and time mentioned in the complaint. There I met all the persons mentioned above. Tara along with Dharmadhoj reached the bazaar, and upon enquiring with her as to what was her opinion to my making her my wife, she replied in the affirmative. Then five of us, Dhruba Bhattarai, Durga Dhimal, Dharmadhoj, and I including Maane set off on the journey. There was no police enquiry. We reached Siliguri, boarded a train and reached Patna the following morning, and, I slept with the complainant and sexual intercourse was carried out. The rest of the people slept in a different room. On waking up in the morning, we boarded a train, reached Bombay after two days, and went to the house of Mala Lama, and after discussions with her, the matter was settled for Rs. 10,000. Our travel expenses including those of Durga were calculated and settled, and the remaining amount was distributed equally amongst us. I had taken Tara with the assurance that I would make her my wife and had not given her any inducement or hope for money and that I am presently in the jail on charges of human trafficking upon the complaint of Durga Raut” – the statement document of defendant Babu Ram Chaudhary with the Police.

9. No one had witnessed the complainant Tara Dahal being sold or having been attempted to be sold by Babu Ram, Durga and Dharmadhoj including Dhruba, and that they do not seem to be in the trade of human trafficking – A public inquiry report.

10. The defendants Durga Dhimal, Babu Ram Chaudhary Dhruba Bhattarai have committed a crime in accordance with part (A) of clause 4 of Human Trafficking Activities (Control) Act, 2043 BS as it was proved that they had allured the complainant Tara Dahal and sold her abroad, and therefore they should be punished as per the clause 8 (1) of the same Act – A police report.
11. “I have not allured the complainant Tara Dahal to sell her in India, have not received any share for the same, I know her but not Babu Ram, I was coerced by force against my will to sign the document made at the district police office, I am innocent as I am not involved in selling Tara Devi; I do not know why I am accused” – the statement made by defendant Durga Dhimal at the Morang District Court.

12. “I neither know the complainant Tara Devi, nor do I know the defendants, Babu Ram and Durga Dhimal, I have not taken the complainant to Bombay in India to sell her there, I have not obtained any share for the same; I do not know why Babu Ram accused me of the same, I am innocent” – the statement at the court of defendant Dhruba Bhattarai.

13. The injury investigation case form document of defendant Durga Dhimal is attached here.

14. “I do not know the complainant Tara Dahal; I was at my field in Jhumka on 2045/6/7 BS, I did not meet Tara Dahal on the said day nor had I taken her to India on the pretext of making her my wife. I do not know who took her where to sell her, and the statement with the police is against my will, this has been charged against me by way of a complaint report implicating me as the culprit as my wife is the niece of Ram Bahadur Karki, and the police has accused me because of an altercation with them in the state offence case against me when I used to live at Gaura Daha of Jhapa” – the statement at the court of defendant Babu Ram Chaudhary.

15. It has been established that defendants Durga Dhimal, Babu Ram Chaudhary were under custody for enquiry and the defendant Dhruba Bhattarai was to be present on the specified date as per the ruling of the Morang District Court.

16. The testimony documents of the complainant Tara Dahal, Min Bahadur and Gajendra Bhumal Thapa, witnesses of Dhruba Bhattarai; Bodhman Jakra Dhimal, Kashi Ram Dhimal, witnesses of Durga Dhimal, are included.

17. The document, on an application made by defendant Durga Dhimal to the Koshi Zonal Court, Dharan for the annulment of the unlawful order with a request to keep him on date for attendance with the order from the said court to do or cause to do as per law is included.

18. The document showing evidence on commission (testimony) by the witnesses of defendant Babu Ram is included.

19. The statement made at the court by defendant Babu Ram stating that he had not written the letter and that it may be investigated by the experts for forgery.
20. Defendants Durga Dhimal and Babu Ram Chaudhary had sold the complainant Tara Devi Dahal and that they needed to be punished with 10 years of imprisonment in accordance with clause 8(1) of the Human Trafficking Control Act, 2043 BS as the same is a crime as per clause 4 (A) of the said Act – the judgment of the Morang District Court.

21. “I am not satisfied with the initial judgment as it was grossly mistaken and I should be acquitted from the accusation” – appeal of defendant Durga Dhimal.

22. “The initial wrong judgment be reversed and I should be acquitted from the accusation” – appeal of Babu Ram Chaudhary.

23. The proof that the statement of the defendants to the police was not in accordance with their will, has not been submitted. The injury form filled in by defendant Durga Dhimal, and attached with the document, does not prove that he was wounded while in police custody, or that his statement to the police was not in accordance with his will. In addition, the testimony submitted by the complainant to the Morang District Court stating that the complaint submitted by her is as stated and written by her, does not show that the defendants were innocent. Thus the judgment of the Morang District court, which had held that the appellant defendants Durga Dhimal and Babu Ram Chaudhary were culprits, and that the decision of imprisonment for them for 10 years was upheld by the Appellate Court, Biratnagar on 2050/11/16 BS.

24. The appeal to this court of the appellant defendant Durga Dhimal for acquitting him from the accusations as the Morang District Court was because that instead of acquitting me, it punished me with ten years of imprisonment on the basis of a false complaint and that the judgment of Appellate court, Biratnagar held no legal validity.

25. In the present lawsuit, which has been submitted in accordance with the rules and procedures, the learned advocate in favour of the defendant, Urmila Panthi argued that the statement to the police that was against the will could not be taken as evidence in accordance with clause 9 (2) of Evidence Act, 2031 BS. The complainant while answering the question at the time of giving her testimony at the court said that she did not know Durga, and that Durga and Dhruba had not committed any crime. She has not mentioned in the testimony that Durga and she went together. She therefore argued that the Judgment of the Appellate Court Biratnagar, was an error that needed to be annulled, and that the defendant should be acquitted from the accusations.

26. The court has to now decide on hearing the aforesaid plea on whether or not the judgment of the Morang District Court for 10 years of imprisonment to the defendants Durga Dhimal, Babu Ram Chaudhary and Dhruba Bhattarai in accordance with Clauses 4 (1) and 8(1) of The Human Trafficking (Control)
Act, 2043 BS for alluring and selling the complainant, and the subsequent validation by the Appellate Court, Biratnagar are valid.

27. While considering the judgment in this case, the court need not pronounce anything in relation to the defendant Babu Ram Chaudhary as there is no appeal to this court. Now, while considering the judgement in relation to the appellant Durga Dhimal, it is found that the complainant in her complaint report had stated that the defendant Durga Dhimal had allured her initially, and on reaching Bombay had instructed her to stay at the residence of the purchaser Mala Lama, until Babu Ram Chaudhary arrived. The same description was documented with the Police and the complainant had signed the testimony in the court stating that the complaint report was as instructed by her and that the signature and thumb impressions were her own. The situation of the incident is such that it cannot be said that all the incidents in the process of moving from Urlabari to the residence of Mala Lama in Bombay, that is the place of sale, were fabricated, and that there was no involvement of the defendant Durga Dhimal in the same. The Complainant had stated that sexual intercourse with the defendant took place while staying at the lodge, and that there was no role of the defendant Durga Dhimal towards the same. This shows that there was no malevolent intention of the complainant towards the defendant. Though the defendant had taken the plea that the complainant while giving testimony to the court had stated in the 9th question of the cross examination that she did not know him, the fact that the complainant had recorded on the 3rd question of the cross examination that she knew every one other than Dhruba Ram nullifies the stand taken by the defendant. Similarly, it was recorded on the 6th question of the cross examination that Durga Dhimal was traced at Urlabari and was taken to the police station, and as this statement is corroborated by the attached file documents, it cannot be established that the defendant Durga Dhimal was not known to the complainant, and that he should not be punished for the crime of trafficking on humans.

28. The confession to the crime by the defendant to the police is supported by what the victim-complainant maintains, though the defendant has taken the plea that his signature and thumb impressions were taken by the police against his will through the use of physical force, no report of any injury is seen in the injury form (case form) except for his statement that his entire body ached, which cannot be interpreted to mean that the confession to the crime was obtained by the use of physical force. In a case like human trafficking, the statement of the victim-complainant needs to be considered trustworthy until otherwise proved by the defendant. Nothing in the attached file document is admissible in proof to establish otherwise in favour of the defendant. In the given situation, it cannot be held that he is not the culprit.
29. Therefore, the judgment of the Appellate court, Biratnagar upholding the judgment of the initial Morang District Court specifying 10 years of imprisonment for the defendant is in line, and is held valid. The appeal plea of the appellant does not hold good.

File and submit the document as per rule.

I concur with the above opinion.

Justice Kedarnath Acharya

Done on the 12th day of Chaitra of the Year 2053 BS
CHAPTER III
SEXUAL ASSAULT AND RAPE

Context

Being one of the worst forms of violence against women and children, sexual assault - unlike trafficking for commercial sex - has received more judicial attention. In the last few years some remarkable guidelines have been developed to handle cases of rape and sexual assault, and these have also contributed towards positive changes in the law.

One of the radical changes has been the judicial dicta given to disregard the antecedents of a woman. The traditional conservative approach attaching undue importance to the antecedents of the woman, any previous animosity between the two parties has now been set aside and is strongly disapproved of. The Indian Supreme Court has also given adequate rights to the complainant that include representation, counselling, and compensation.

All the courts in the region have expressed a great deal of concern and sensitivity in cases of sexual assault, and have tried not to be limited by the technicalities of the criminal justice system. Wherever required and possible, the courts have provided directions to ensure that there is no further oppression of the victims and that justice is delivered. A few critical areas where the judiciary has made significant modifications are listed below. The details of each are provided through the judgments included in the chapter.

Two interesting developments have also occurred in respect of the award of compensation and in keeping the identity of the victim concealed. All across the region, the courts have recognised the trauma, pain and suffering that rape victims go through, and have acknowledged the need for compensation. The courts have asked the State to establish formal systems (compensation boards etc.) for such purposes. The courts have also suggested that compensation be given to the victim irrespective of conviction or acquittal, and even be provided while the trial is going on. It must be noted here that the Nepalese Law on Rape provides that half of the property of the rapist falls to the victim. This provision is unique in the region.

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Time and again, the courts have suggested that the State and courts deal with the cases of rape with the utmost sensitivity. The Supreme Court of India categorically mentioned that the court (judge) should not be a silent spectator while the victim of the crime is being cross-examined by the defence. The recording of evidence in the court must be effectively controlled. Judges have gone ahead and provided support persons, in camera trials, and other supportive measures to the victims to ensure that they do not continue to be persecuted during the trial process.

Despite this, the conviction level remains alarmingly low.

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Synopses

Moinul Haque and Anr. vs. the State

Highlight

- Death sentence for rape

Policemen Moinul Haque and Abdul Sattar were sentenced to death in the sensational rape and murder case of garment worker Yasmin in 1995, and this judgment from the Appellate Division confirms it.

A garment worker was going to Dinajpur from Dhaka by bus on the night of August 23, 1995. She got down from the bus at a place called Doshmile by mistake. At about 4:30 am the accused picked up the complainant and offered to reach her to her destination. The girl reluctantly went in their vehicle. The following day, her dead body was found.

The appellant, who was a assistant sub inspector, made a general entry in the police records, recording that she had jumped from their vehicle and was found dead and they, out of nervousness left her beside the road.

In the post mortem report, it was revealed that the girl was raped and the cause of her death was asphyxia as a result of throttling followed by head injury.

The court held that even though there were no eye witnesses, the fact that the accused police men had custody of the victim will prove the fact that they had indeed raped and murdered her.

Al Amin vs. State

Highlight

- Established that the absence of a charge of rape in the FIR is not an evidence that it was added later for embellishment;
- Established the social responsibility of the State and other public institutions, and the appropriate punishments in case these officials failed to discharge their responsibilities;
- Asked the state to provide appropriate monetary compensation to the victim;

A, a female college student, filed a report with the police (the first information report), alleging that the appellants had committed acts outraging her modesty by taking photographs of her nude with a male student, against their will. The incident allegedly took place within the college premises, and was reported to two college professors. A subsequently made a statement before a magistrate alleging that the appellants had raped her. The appellants were charged with rape under s 6(3) of Nari-O-Shishu Nirjatan (Bishes Bidhan) Ain (XVII of
Although acquitted of rape on the grounds, *inter alia*, that the victim’s allegation was not credible because the first information report made no reference to it and that it was uncorroborated by one of the testimonies, the appellants were convicted of committing immoral acts under section 9(ka). The appellants appealed against their conviction, but although entitled to do so, the state did not appeal against the rape acquittal on behalf of the victim. In confirming the sentence and conviction under s 9(ka) in the case of four of the appellants, it was held that:

- The absence of the charge of rape in the first information report is not evidence that it was added for embellishment. A girl in a tradition-bound non-permissive society would be extremely reluctant to admit to any incident which is likely to reflect upon her chastity, for fear of being ostracised by society. Moreover, it is only the evidence adduced in court by a witness at the time of trial that amounts to substantive and legal evidence, not the first information report.
- The testimony of a victim of sexual assault is vital, and unless there are compelling reasons which necessitate corroboration of her statement, the court should find no difficulty in convicting an accused on her testimony alone, if it inspires confidence and is found to be reliable. Evidence on a point is to be judged not by the number of witnesses produced but by its inherent truth; one credible witness outweighs the testimony of a number of other witnesses of indifferent character. It is also improper and undesirable to treat the victim’s testimony with suspicion and for her to be considered an accomplice.
- Given that the victim’s reliability as a witness and the fact that the evidence clearly established that she had been the victim of rape, the appellants’ acquittal was perverse, unreasonable and unfounded, and proper punishment should have been imposed. As the State did not appeal against the acquittal, however, the court cannot impose proper punishment under section 6(3) by converting the order of acquittal into an order of conviction.
- It is lamentable that the State did not appeal to the High Court division on behalf of the victim. The government should take appropriate action against those persons who were entrusted with the responsibility and duty for so doing.
- It is also lamentable that the two college professors failed in their responsibility to bring the incident to the notice of the police authorities. Their silence, inaction and overall conduct portray a shocking and dismal picture, and it is in the public interest that the government should take appropriate action against them.
- Rape violates a victim’s fundamental right to life and human dignity. Punishing the perpetrators is insufficient; adequate monetary compensation...
Sexual Assault and Rape should be awarded so as to redress the wrong and damage caused to the victim and her family. In assessing the level of the damages, the compensatory rather than the punitive element should be emphasised.

Azad Miah and Md. Azad vs. The State

**Highlights**
- If the confessional statement was recorded as per the provisions of the Code of Criminal Procedure, then the trial is not vitiated.

The victim was escorted by the accused at the instance of her maternal uncle as it was late in the night. The accused was the neighbour of the victim. The victim’s dead body in nude was found subsequently. A complaint was filed and the accused was charged by the police. The confessional statement of the accused was recorded by the magistrate. The High Court Division found the confessional statement true and voluntary. The accused was sentenced to death. The accused challenged the same on the ground that the statement was extracted by means of torture.

The Court held that the statement was taken as per the provisions of the law and the allegation of torture was not substantiated.

Abdus Sobhan Biswas vs. State

**Highlights**
- Unless it is proved otherwise, the statement of the prosecutrix has to be believed.

The accused was a member of a Union Parishad. The victim’s husband having known the accused well, allowed her to accompany the accused to the office of the Deputy Commissioner, Rajbari to collect some relief amount.

While on this journey, he checked into a hotel claiming to be the husband of the victim and sexually assaulted the victim. The victim raised hue and cry at which the hotel manager and hotel boy rushed to the scene and saw part of the crime.

The following day the victim informed the incident to her husband and a complaint came to be filed. In the trial, the accused contended that the victim owed him some money and he was forcing her to execute certain documents. As the victim did not want to execute these documents, she made the allegation.

The trial court held the accused guilty of the offence.

In the appeal, the counsel for the accused contended that the judgement of the trial court was based on conjectures and surmises and therefore not tenable.
The Court held that even though the act of rape has not been corroborated by any other witness, the Court can act on the statement of the victim. It further held that the victim, a helpless village woman would be telling the truth as she had nothing to gain by making any false statement.

Bazlu Talukder vs. The State

**Highlights**

- Benefit of the doubt given to co-accused cannot be a ground to set aside a well founded conviction against the principal accused.

The victim was kidnapped and sexually assaulted by the accused alongwith other persons. Three days after this incident, she was handed over back to her step father. She informed her step father about the incident and a complaint was filed. The trial court sentenced the Appellant to fourteen years of rigorous imprisonment. The Appellant and the other accused filed an appeal before the High Court. Giving benefit of the doubt, the High Court acquitted two of the four persons. The Appellant contended that there was no corroborative evidence and as the High Court had given benefit of the doubt to two of the accused, the same ought to have been extended to the Appellant as well.

Rejecting this contention, the Court held that the High Court had rightly come to the conclusion that the Appellant was the person primarily responsible for kidnapping and sexually assaulting her and therefore, his conviction was right and should stand.

Rajib Kamrul Hasan and 3 others vs. State

**Highlights**

- No prejudice would be caused to the rights of the accused, if they are convicted for a minor offence on the basis of evidence available, when they are charged for a major offence.

The victim was assaulted in her college canteen by the Appellant. The Appellants demanded from her companions some money and on his refusal to give the same, they took the victim and her friend to a studio and took their photographs in the nude. They also threatened the victim that they would exhibit the photographs and took some money from her. The victim thereafter went and gave her exam. When she went home, she was taken ill. She informed her brother of the incident after she recovered and a complaint came to be filed. The trial court sentenced the Appellants to ten years rigorous imprisonment and fine. The same was confirmed by the High Court.

The trial court came to the conclusion that though the prosecution was not able to prove its charge of rape, it has been able to prove other charges of committing an immoral act.
The question before the Appellate Court was when the prosecution had not specifically charged the accused with a particular offence, can they be convicted of that offence and if this sentence prejudices the rights of the accused.

The Court held that as the appellants were charged of a graver offence and the evidence proved only a minor offence. The graver charge of rape gives to the Appellants notice of all the circumstances going to constitute minor offence in relation to the victim. Therefore the sentence and the conviction has not prejudiced the rights of the accused.

**Chairman, Railway Board & Ors vs. Chandrima Das & Ors**

*Highlight*
- Established the rights of foreign nationals in Indian land, under the constitution
- Extended the “tort” principle of vicarious liability even to a case of rape

A foreign national was gang-raped in the railway premises by a group of persons, some of them employees of the Railways. A practicing advocate of the High Court filed a petition under Article 226 of the Constitution of India against the Railways and the Government of West Bengal, claiming compensation for the victim and for the relief of eradicating anti-social and criminal activities at Howrah Railway Station. The High Court awarded a sum of Rupees ten lakhs as compensation for the victim as it was of the opinion that the rape had been committed in a building belonging to the Railways, and had been perpetrated by Railway employees.

The Railways contended that it would not be liable to pay compensation to the victim who was not an Indian national. It also contended that the commission of the offence by the persons concerned would not make the Railways or the Union of India liable to pay compensation to the victim of the offence. Further, since it was an individual act of those persons, they alone could be prosecuted and punished upon being found guilty. It was also contended that for claiming damages for the crime perpetrated on the victim, the remedy lay in the domain of private and not public law and therefore, no compensation could be legally awarded by the High Court in a proceeding under article 226 of the Constitution and that too at the instance of a practicing advocate who, in no way was concerned with or connected to the victim.

The Court held that the argument that the victim was a foreign national and, therefore, no relief under public law could be granted to her as there was no violation of the fundamental rights available under the Constitution must also fail for two reasons; first, on the ground of Domestic Jurisprudence based on
Constitutional provisions and secondly, on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights 1948.

The victim who was not a citizen of this country was nevertheless entitled to all the constitutional rights available to a citizen so far as the ‘right to life’ was concerned. She was entitled to be treated with dignity, and was also entitled to the protection of her person as guaranteed under Article 21 of the Constitution. As a national of another country, she could not be subjected to a treatment below her dignity, and neither could she be subjected to physical violence at the hands of government employees who outraged her modesty. The right available to her under art 21 was thus violated. Consequently, the State was under a Constitutional liability to pay compensation to her. The judgment passed by the High Court allowing compensation to her therefore could not be said to have suffered from any infirmity.

The employees of the Union of India who are deputed to run the Railways and to manage its establishments including the railway stations are essential components of the Government machinery. If any of these employees commits an act of tort, the Union Government of which they are employees, can, subject to other legal requirements being satisfied, be held vicariously liable to the person wronged by those employees.

**Delhi Domestic Working Women’s Forum vs. Union of India (UOI) and Ors**

*Highlight*
- Laid down parameters under which a case of rape has to be tried by taking into consideration the plight of the victims during and after the trial;
- For the first time recognised the need for legal representation for the victim;
- Laid down parameters about the treatment of the victims in police station;
- Made it mandatory for the victim to get the help of a social worker;
- Made it mandatory to maintain the anonymity of the victim’s identity;

The Delhi Domestic Working Women’s Forum case is the leading case which laid down very significant and radical protocols in cases of rape and sexual assault. Four women were brutally raped by seven army officers while travelling on a train from Ranchi in Bihar (now Jharkhand) to Delhi. The petition was brought to the Supreme Court by a group representing female domestic workers in Delhi. The Supreme Court in its judgment described the women as “helpless…at the mercy of the employers and police”. At one point during the case, the lawyers could not find the women at all, though there had been some indication that they were somewhere in Uttar Pradesh. The Supreme Court issued directions to the State of Uttar Pradesh to help find them, but the state’s police did not cooperate. Understanding the complications a woman
has to undergo in cases of rape and the manner in which the state machinery operates, the Court laid down the following guidelines in cases of rape.

- 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, prepare her for the case, and assist her in the police station and in the court, but to also provide her with guidance as to how she might obtain assistance of various kinds from other agencies; for example, mind counselling or medical aid. It is important to secure a continuity of assistance by ensuring that the same person who looked after the complainant’s interests in the police station represented her up to the conclusion of the case;
- 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, and the guidance and support of a lawyer at this stage and later whilst she was being questioned would be of great assistance to her;
- 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;
- 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;
- 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;
- In rape trials, the anonymity of the victim must be maintained, as far as necessary;
- It is necessary, having regard to the Directive Principles contained under 38 (1) of the Constitution of India to set up Criminal Injuries Compensation Board, as rape victims frequently incur substantial financial losses. Some are for example too traumatised to continue in their employment.
- Compensation to victims shall be awarded by the court upon the 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 the pain, suffering, and shock, the loss of earnings due to pregnancy, as well as the expenses of child birth if this occurred as a result of the rape.

The Court directed the National Commission for Women to draft a scheme for the compensation of victims of rape.
State of Punjab vs. Gurmit Singh and Others

Highlight
• Established that in camera trials are mandatory in rape cases
• Recognised that a delay in filing the FIR is not fatal to the case of the prosecution, given the social context

This is a case where the Supreme Court set aside the acquittal, convicted the accused, and held that holding these trials “in camera” were mandatory in such cases. It was also strongly suggested that hearings should be conducted by lady judges as far as possible. With respect to the treatment of the complainant by defence counsel, the Supreme Court has specifically directed that the courts must not sit as “silent spectators” during cross-examination; rather, they must ensure that cross-examination is not made a means of harassment or cause humiliation to the victim of a crime.

The Supreme Court was careful to take into account the social context of the complainant in dealing with the issue of delay in reporting. It held:

“The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family...The conduct of the prosecutrix...appears to be most natural. The trial court overlooked that a girl, in a tradition-bound non-permissive society in India, would be extremely reluctant even to admit that the incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down on by the society. Her not informing the teachers or her friends at the examination centre under the circumstances cannot detract from her reliability.”

The Supreme Court has advised the lower judiciary that, even if the victim girl is shown to be habituated to sex, the Court should not describe her to be of a loose character.

Balwant Singh and Ors vs. State of Punjab

Highlight
• Held that the mere absence of an injury does not prove that no resistance was offered by the rape victim

In this case, it was argued that a complainant in a rape case is expected to offer resistance which would normally cause injury, and that where such injury is not present there could have been no rape. The Court held, however, that: “[the complainant] was not expected to offer such resistance as would cause
injuries to her body…it cannot be said that whenever resistance is offered there must be some injury on the body of the victim.”

State of Andhra Pradesh vs. Gangula Satya Murthy

**Highlight**
- Recommended courts to focus on the broader probabilities of a rape case and not be swayed by minor contradictions or insignificant discrepancies

A poor helpless woman was raped and throttled to death. The respondent and she knew each other, and on the evening of her death she had visited his house where her body was later discovered. The respondent was brought before the police where he admitted his guilt in an extra-judicial confession and a letter to the respondent from the victim was produced. The Sessions Court found the Respondent guilty on circumstantial evidence and convicted him. However, the High Court upon appeal acquitted the perpetrator. The State thereafter filed an appeal before the Supreme Court. The reasoning given by the High Court was that there was a possibility that the death was due to consumption of poison, and the other injuries had been sustained after death. They found some discrepancies in the details of the confession and the evidence resulting from the inquest. They also assumed that the sexual intercourse was controversial, as there were questions over physical signs of resistance.

The Supreme Court held that the High Court erred in its judgment about the possibility of death being attributed to a means other than by throttling. Further, the High Court wrongly cast a stigma on the victim’s character. The High Court had no basis to disturb the findings of fact of the lower court. It is distressing that the High Court chose to advance “fragile” reasons to upset a well-reasoned conclusion by the Trial Court.

The Supreme Court held that:

“Courts should show great responsibility when trying an accused on a rape charge and deal with such cases with the utmost sensitivity. The Courts should focus on the broader probabilities of a case and not be swayed by minor contradictions or insignificant discrepancies. This is heightened by the fact that violence against women and rape is on the increase. Finally, evidence must be dealt with in the totality of the background of the entire case and not in isolation.”

P. Rathinam Vs. Union of India (UOI) and Ors, Writ Petition (Criminal)

**Highlight**
- Expanded the concept of compensation to be made available even when the trial is going on;
The principle of compensation was applied and extended in this case. However, the important aspect is that the Court held that the compensation would be payable even when the trial is pending. The Supreme Court granted interim compensation to the victim while the trial was still pending. The Court held that the victim could apply for more compensation if required.

**His Majesty’s Government vs. Deepak Bhandari**

*Highlight*
- Established the sufficiency of medical evidence in a rape case, thus shifting the burden of proof on the accused

In a gang rape case, the District Court acquitted the defendants for a lack of evidence, and the Appellate Court subsequently upheld that decision as well. However, the Supreme Court overturned the acquittal verdicts of the lower courts and convicted all the defendants for the alleged offence on the grounds of the medical examination report, which confirmed penetration and a rupture of the hymen of the complainant, and the testimony of the two minor eyewitnesses.

In the process of the disposal of the case, the apex court observed that as the doctor who had examined the complainant had given a report and also testified before the Court that there had been penetration inside the vagina of the victim and her hymen was ruptured, it could not be presumed that she had not been subjected to sexual intercourse.

The defendants could not show any such animosity which could provoke the victim to falsely implicate the defendants in a case of rape which was concerned with a matter like her own chastity.

Only because the victim did not struggle to protect her chastity against the gang of the five accused, it could not be assumed that she had given her consent for sex. Thus the acquittal verdict of the lower court confirmed by the Appellate Court was erroneous, and was therefore overturned.

**His Majesty’s Government, Ministry of Law, Justice and Parliamentary Affairs vs. Forum for Women, Law and Development (FWLD)**

*Highlight*
- Established that the rape of a sex worker be considered as an equally serious crime as that committed against any other woman

Following the criminalisation of marital rape, the Supreme Court ruled that rapists of sex workers should be given a punishment equal to that of other rapists. Currently, individuals who rape sex workers pay a fine of just over six
dollars or serve a year in jail, which is only a fifth of the prison sentence other rapists face.

NGO FWLD had challenged the Chapter (No.7) on Rape of the National Code which reads as, “whoever commits rape to a prostitute in any manner with physical force without her free will and consent shall be punishable with fine up to Rupees 500 or with imprisonment up to one year whereas in case of rape of other women punishment is up to five years of imprisonment.” The Supreme Court has declared the above provision ultra vires, considering it unconstitutional and discriminatory against women.

His Majesty’s Government on the F.I.R. of Pratap Shahi vs Shree Prasad Upreti

Highlight
• Laid down comprehensive ground as to how a rape should be addressed by the judiciary in light of various international human rights laws
• Restricted the disclosure of the identity of the rape victim

This is a case where the Principal of the school has raped his own student, a minor who was living in the hostel of the school in his direct custody and guardianship. The court has done a comprehensive ground on how the issue of rape should be addressed by the judiciary and why the traditional approach on rape needs a decent burial. The court has taken a comparative perspective and has profusely quoted international human rights law and decisions of the court in neighbouring jurisdictions. The court has also imposed restrictions against the disclosure of the identity of the minor. The case is also important in view of the fact that the court has taken into consideration various factors while imposing punishment. This case gives a new jurisprudential perspective with regard to the legal literature on rape in Nepal. It should be noted that the decision of the district court in this case has been confirmed by the Court of Appeal and the Supreme Court.

Madhukar Rajbhandari vs His Majesty’s Government on the F.I.R of Bhawana Pyakurel

Highlight
• Called upon the judiciary to view rape cases in a proper social and psychological perspective

This is a case of the gang rape of girls working in a factory by youngsters of the neighbourhood who barged into their room late at night, threatened, and raped them. Even though all the victims lodged the F.I.R., at the start all of them except one shied away from giving evidence in court. Therefore, all the courts (District, Appellate and the Supreme Court) could convict only one of
the accused whom the victim said in court had raped her. Another accused who latched the door from inside was punished for complicity. The decision is important considering that it was the first time that the court tried to analyse the case from a human rights perspective. Speaking for the Court, Justice Kedarnath Upadhaya called upon judges to “understand the nature of the crime of rape in a proper perspective.” He observed; “factors such as the age of the victim … the physical and mental trauma that the victim has to bear with, and the social derision that the victim and her family have to face, the monstrous nature of the offender are important considerations.” He was of the view that where a fearful condition has been created, signs of struggle may not be present on the victim.

**His Majesty’s Government on the F.I.R. of Ratna Devi Shrestha vs Kumar Dongol and others**

**Highlight**
- Established the evidential value of medical examination

This is a case where a young woman was gang raped by three accused who had prior acquaintance but no enmity with the victim. In the encounter she sustained a few physical injuries, but the doctors conducting medical examination opined that they could not be certain if she had been raped. Although the accused had confessed to the crime to the police, they retracted it in the court. Here the judge, analysing the statement of the victim, said that the reason for the injuries and the non-existence of enmity between them accorded a credible importance to the statement of the victim and punished the accused with four years imprisonment. This case is significant from the perspective of the court having dealt at length with the evidential value of medical examination.

**Piyasena and two others vs. The Attorney-General**

**Highlight**
- In a case of series of attacks, it is sufficient if one single charge is made out by the prosecution.

In an interesting case which came up before the Court of Appeal, the Appellants, had challenged the order of their conviction on some technical grounds. According to the case of the prosecution, the prosecutrix was raped by the Appellants three times. However, during trial, they were indicted for one single charge of rape. The case of the Appellants-accused was that as there was one single charge, it was not clear to them as to which incident they were being charged for and the corroborative evidence relating them to the incident was not adequate.
Rejecting their contention, the Court held that although each accused had committed three distinct acts of rape, these acts constituted a series of acts in one continuing transaction. Hence it was legitimate to indict each accused in a single charge of rape;

**Rajapakse vs. The State**

**Highlights**
- Absence of the accused from the Court during the trial is not fatal to the final outcome, if the accused remains absent deliberately from the Court.

The Appellant was accused of having abducted the victim in order to force or induce her to engage in illicit intercourse and also of abetting an unknown person in the commission of rape on the victim.

The trial court heard the case and proceeded with the trial in the absence of the accused. He found the accused guilty and sentenced him to imprisonment for a term of five years on first count and imprisonment for a term of 15 years on the second count.

The appellant filed the appeal before the Court of appeal contending that there was no evidence that the Appellant was absconding and therefore as the trial was bad in law.

The court held that the Appellant was arrested by the Army and the charges were read out to him. After the Appellant secured bail, he chose to remain absent at the trial and therefore his absence was deliberate and therefore the trial was not faulty.

**Rajapakse, Jayasinghe, Priyadharchana, Priyashanta Perera, Jayatillake vs. Hon the Attorney General**

**Highlight**
- The phenomena of “disappearance in custody” was brought to light through this judgment.

Many people disappeared after being arrested by members of the security forces in north and east Sri Lanka. After April 1997, disappearances were increasingly reported in the Jaffna peninsula.

Among the victims was 18-year-old Krishanthy Kumarasamy from Kaithady who was taken into custody at an army check-point between Chundikkuli and Kaithady on 7 September 1996, while returning home after sitting for an examination paper, along with her mother, minor brother and a friend. Later their bodies were found in shallow graves.
Nine members of the security forces were arrested on suspicion of being responsible for the killings and of an attempted cover-up. The accused in this case were convicted in the High Court of Sri Lanka *inter alia* of offences under Section 357 of the Penal Code, (abduction with intent that the victim may be compelled or knowing it to be likely that she would be forced or seduced into illicit sexual intercourse), under Section 364 (rape) and Section 296 of the Penal Code (murder).

Medical and other evidence suggested that Krishanthy had been raped and then killed in custody. The Supreme Court dismissed the appeal of five former soldiers and a policeman and upheld the death sentenced by the Colombo High Court. This landmark case has been an important factor in bringing the phenomenon of “disappearances” in Sri Lanka to attention.

**Ajith Fernando Alias Konda Ajith and Others vs the Attorney General**

**Highlight**
- Failure to call a State Witness did not prejudice the case

In this judgment of the Supreme Court, the accused were found guilty of abduction, gang rape and murder.

It was held that the failure to call a State Witness did not prejudice the case. At this point an order was made permitting the accused to call the said witness as a defence witness. The defence did not proceed to call the said witness as a defence witness.

The words of Section 400 are that every person accepting a pardon shall be examined as a witness and the failure to do so would vitiate the trial and conviction. This particular witness was given a conditional pardon by the Attorney General under 256(1) of the Code of Criminal Procedure and not examined as a witness.

The courts held that the said witness was not directly or indirectly concerned with, or privy to the offence under inquiry. Thus the question was if the said witness should have been given a pardon. However the courts held that there was no miscarriage of justice as, had the State called him as a witness it would have been prejudicial to the accused. Therefore the defence was given the option of calling him as a witness.

**Keerthi Bandara vs Attorney General, Court of Appeal**

**Highlight**
- Established the conditions under which the Turnbull Rule can be applied
- Established the conditions under which the Best Evidence Rule can be applied
On count two, the accused, an inspector of Police attached to the Horana Police Station, was charged of committing rape on Willegoda Liyanage Lalitha Ranjini, an offence punishable in terms of section 364 of the Penal code. The accused was also charged with having at the same place and time and in the course of the same transaction, intentionally abetted persons unknown to the prosecution, to commit the offence of rape on the said Wilegoga Liyanage Lalitha Ranjini; and that he thereby committed an offence punishable in terms of Section 102 read with Section 364 of the Penal Code. The learned trial Judge sentenced the accused to a rigorous imprisonment of 12 years and five years respectively, for the two offences.

The court held that if the evidence volunteered by the prosecution witness is accepted as truthful, the identification is not effected in a fleeting glance or a fleeting encounter. The court clarified that the Turnbull Rule applies wherever the case against the accused depends wholly or substantially on the accuracy of one or more identifications of the accused which the defence alleges to have been mistaken. Where the accused asserts and alleges that it is not a mistake but a frame up (like in this case) no useful purpose would be served by considering the “Turnbull” guidelines.

The Best Evidence Rule would completely exclude the oral evidence of a Police Officer in regard to the contents of a matter which is required by law, and which in fact has been reduced to writing to be led after refreshing his mind from the document without the document being marked.

The Turnbull rules require the consideration of the following

- the visibility and lighting conditions at the time of the offence
- the distance of the eyewitness from the perpetrator
- the duration of the observation of the crime by the eyewitness
- whether the observation of the crime was impeded
- whether the perpetrator was known to the eyewitness
- the duration between the sighting of the offence and the reporting of the incident
- the reasons the eyewitness recalls that the perpetrator was at the scene of the crime
Judgments

Another .......... Petitioner
Md Fazlul Karim J
Amirul Kabir Chy J
Moinul Haque (Md)
Vs
State ..........................

Respondent

Appellate Division
(Criminal)

Judge
Syed JR Mudassn
Husain CJ

Date of Judgment: March 13th, 2004

Nario-o-Shishu Nirjatan (Bishesh Bidhan)
Act (xviii of 1995) Section 6 (4)
Penal Code (XLV of 1860) Section 32

Amirul Kabir Chowdhury J; Criminal Petition for Leave to Appeal No 162 of 2001 preferred by condemned prisoner Md Moinul Haque while Petition No. 171 of 2001 is at the instance of other condemned Petitioner Md Abdus Sattar. Both the petitions are against the judgement and order dated 27.5.2001 and 28.5.2001 passed by a Division Bench of the High Court Division accepting the Death reference No. 14 of 1997. By the said judgement Criminal Appeal No 1704 of 1997, Jail Appeal No. 1721 of 1997 preferred by condemned prisoner Md Moinul Haque, and Jail Appeal No 1720 of 1997 filed by condemned prisoner Md Abdus Sattar have also been dismissed. Another condemned prisoner Sree Amirita Lal Barman filed Criminal Appeal No 1722 of 1997 which has also been dismissed by the same judgment. In the meantime, the aforesaid Sree Amirita Lal Barman is said to be dead.

2. Both the petitions arising out of the same judgment are disposed of by this judgement.

3. The condemned Petitioners along with another were tried under Section 6 (4) of Nari-o-Shishu Nirjatan (Bishesh Bidhan) Act, 1995, hereinafter referred to as the Act, on the charge of committing gang rape upon one Yasmin, and causing her death. Prosecution case, in brief, is that one Yasmin aged about 18 years, was on 24.8.1995 going from Dhaka to Dinajpur bus she boarded on a bus going to Panchagarh from Dhaka and therefore, supervisor of the said
bus took her to a tea stall owner at a place known as ‘Dash Mile Point’ requesting him to facilitate the girl to go to Dinajpur by any bus bound for Dinajpur and that after a while a police pick-up came there driven by accused constable Amrita Lal Barman (since dead) who was accompanied by ASI Moinul Haque sitting beside him and constable Abdus Sattar sitting in the back side of the said pick-up and that the three police personnel came down from the pick-up seeing the crowd discussing about the girl and made queries as to what had happened there and they found the girl and one Sree Joyenta Kumar Chakravarty (PW-6) who was also a co-passenger in the aforesaid bus and that while the aforesaid police personnel came to know that the girl was on her way to Dinajpur they volunteered to take her in their pick-up so that she could reach her destination through them and asked the girl to board on and though the girl was hesitant at first but later she boarded on the pick-up and the pick-up left the place, but on the following morning her dead body was found beside ‘Dash MileMaha Sarak’ near BRAC office at North Gobindapur and the aforesaid ASI Moinul Haque made General Diary No 957 dated 24.8.1995 with Kotwali Police Station informing of the incident and adding that she jumped from the pick-up and was found dead and then they out of nervousness left her beside the road and came back and that Dafader Ahmed Ali@ Bhelu(PW 11) also gave information of the dead body to the said Police Station on the basis of which another General Diary was entered. Thereafter, UD Case No 82 of 1995 dated 24.8.1995 was started. Inquests being held post-mortem examinations took place and a regular case being Kotwali Police Case No 6 dated 4.9.1995 was started. Inquests charge was framed under section 6(4) of the Act to which they pleaded not guilty claiming to be tried and then the Tribunal recorded evidence and convicted them under Section 6(4) of the Act as already mentioned above and made the Death Reference which being accepted dismissing the appeals, the two condemned prisoners Md Moinul Haque and Abdus Sattar preferred the instant petitions.

4. In support of the Petitions Mr Abdul Malek, learned Senior Advocate appeared with Mr Kazi Shahadat Hossain, Advocate. In their submissions they assailed the impugned judgment submitting, inter alia that prosecution failed to prove the case which is improbable and that there being two different medical reports, the first one being favourable to the accused, they ought to have been given the benefit and that the High Court Division committed error in not properly sifting the evidence of witnesses, specially the evidence of PW 1, the informant, and the case disclosed in the first information report itself has not been considered. It has been further submitted that according to PW 1, the victim jumped within 2/3 minutes of her boarding the pick-up and in
that case the accused did not get chance to rape her and the sign of rape disclosed in the medical reports, if any, indicates that she had been raped earlier by PW6 Sree Joyenta Kumar Chakravarty on their way from Dhaka.

5. Lastly, it has been argued that the judgment is based on moral conviction in lieu of legal conviction because the circumstances do not support the prosecution case which do rather support the defence case.

6. In support of the submissions Mr Kazi Shahadat Hossain cited the decisions in the cases of Shah Khan Vs State reported in 18 DLR (WP) 91, Abdur Rashid Vs State 27 DLR (AD) 311, Muslimuddin & ors vs State in 38 DLR(AD) 311, Saidur Rahman Neutron and others vs State in 45 DLR 66, Siraj Mal and other vs State in 45 DLR 688, Shahidhan Biswas & ors vs State in 1988 BLD(AD) 154 =40 DLR (AD) 291, State vs Khadem Mondal in 1990 BLD (AD) 228.

7. Mr Abdur Rezaque Khan, the learned Additional Attorney General, opposing the Petitions, on the other hand, submits that this is a case of custodial death, death of the victim caused while she was in the custody of the accused, and therefore, the onus lies on them to explain the circumstances leading to her death but in the instant case the explanation offered by the defence that the victim jumped from the running pick-up has been belied by the circumstances revealed and referring to the materials on record including the Postmortem Reports dated 24.8.1995 and 30.8.1995 coupled with the evidence of PWs 45, 46, and 49, he submits that from the post mortem reports and the evidence there is clear sign of rape on the victim girl and that, according to the Medical Reports, her death was due to asphyxia as a result of throttling followed by head injury and she was raped. He, however, submits that there is no eye-witness to prove the charge levelled against the accused but the circumstances are so well knit that the circumstances so revealed indicate no other hypothesis than that of the guilt of the accused and there being clear circumstantial evidence of commission of rape and subsequent death under the custody of the condemned prisoners, the High Court Division rightly accepted the Reference and so, there is no illegality in the impugned judgement.

8. It appears that the prosecution produced 50 witnesses while the defence did not adduce any evidence. The defence case disclosed in the cross-examination is that the victim herself jumped from the pick-up within 2/3 minutes of her boarding on the pick-up and she being found dead, they felt nervous and being unable to take decision kept her dead body beside the road and they are innocent.

9. PW 1 Md Afzal Hossain is the informant of the case who in his evidence narrated the occurrence following the geneal diary lodged by condemned
prisoner Moinul Haque. Thereafter, he added that the victim Yasmin was found on the road to the east of Sadhana Adibashi Government Primary School and that as a result of adverse reaction in the locality the dead body of Yasmin was disinterred and fresh inquest was made by Selina Shadat, Magistrate (PW 21) and another post mortem examination took place by a Medical Board head by Dr Motlub Ahmed (PW 45) wherein PWs 46 and 49 were also members. PW 2 Most Sharifa Khatun, mother of Yasmin, identified her. PW 4 Khoshed Alam, supervisor of the bus belonging to Hasna Transport, deposed that the bus proceeded from Dhaka to Panchagarh on 24.8.1995 and they found that Yasmin, one of the passengers in the bus, was to go to Dinajpur and so he got down from the bus at about 3:30 AM at ‘Dash Mile Point’ and handed her over to the Tea Stall owner. PW 6 Sree Joyenta Kumar Chakravarty deposed that he came to Gabtali to go to Dinajpur and boarded on the bus in question belonging to Hasna Transport and got down from the bus at aforesaid Dash Mile Point and saw that PW4 Khoshed Alam got down from the bus with the girl and requested the shopkeeper to help her to go to Dinajpur through any bus bound for Dinajpur and that some time after a police pick-up came there, and the three accused police personnel came down from the van and enquired of them and they asked the girl to board on the pick-up but the girl was hesitant and while the driver rebuild her she boarded on the pick-up and that in the front seat of the van two of them were sitting while one was sitting at the back. In cross-examination, he stated that he went to Dhaka for admission in Notre Dame College and he denied that the eloped with the girl. Similarly, PW 7 Md Jabed Ali, having a betel leaf shop at ‘Dash Mile Point’, narrated how the girl was taken in the pick-up of the accused police personnel. He also stated that the Sadhana Adibashi Government Primary School was at a distance of about 500 to 600 yards off from his shop where the supervisor of the bus handed over the girl to him. He stated in cross-examination that after ½ minutes the supervisor again came down and requested the boy i.e. PW 6, to take care of the girl. PW 9 Md Hafizul Islam, PW 12 Md Nurul Huda, PW 13 Md Abdur Rahim and PW 31 Kazi Hares in their deposition corroborated the fact as to carrying the victim girl in the pick-up of the accused. PW 11 Ahmed Ali alias Bhelu, a defader, on seeing the dead body near Sadhana Adibashi Government Primary School gave information to the police station. From his evidence it appears that Sadhana Adibashi Government Primary School is situated about 100 yards off towards north from the place where the dead body was found. PW 13 Md Abdur Rahim in his evidence deposed that he was manager of the Tea Stall of one Jainal, situated at ‘Dash Mile Point’ who corroborated other witnesses as to carrying the victim girl by the accused police personnel and further deposed that on the following morning a boy gave him sandal which was found in the school field of the aforesaid Sadhana Adibashi Primary School and the said sandal belonged to the deceased Yasmin and it had subsequently
been seized by the police. From the evidence of PW 45 Dr Motlub Ahmed, PW 46 Dr. Kamrun Nessa and PW 49 Dr Amirul Hossain Chowdhury it appears that the medical board after holding post mortem examination found a number of injuries including, “both the labia majora and minora found congested with three finger dilatation of vaginal canal with congestion”. The report further reveals that on dissection trachea oesophagus and both the lungs were found highly congested. Membrane found congested. The doctors holdings the post mortem examination opined that death was due to asphyxia following by inter cranial haemorrhage as a result of throttling following by head injury and she was raped.

10. On examination of the evidence of witnesses including PWs 4,6,7,9,12 and 13 it is evident that Yasmin was taken under the custody of three accused police personnel. It is also not denied by them. From the evidence it is also clear that her dead body was found on the following morning beside the road. The accused do not deny this aspect also. Their case is that she jumped from the running pick-up while the pick-up was proceeding towards Dinajpur. But there is no evidence whatsoever in support of the said story made by defence. From the medical reports it appears that there is sign of rape of the victim girl before her death and the death has been caused by throttling. The defence has suggested to PW 6 that on the way from Dhaka he had sexual intercourse with her. The suggestion, however, has been denied by the witness. It is nobody’s case that after starting from Gabtali, Dhaka there was any occasion for PW 6 to take her to any other place and to have sexual intercourse with her and so that suggestion appears to be a desperate and vain bid to save the skin of the accused. The bus did not stop anywhere on the way to facilitate the commission of the offence alleged against PW 6. There being no evidence nor any circumstance appearing in support of such wild suggestion, we are of the view that the plea raised by the defence has no leg to stand. The girl being in the custody of the accused and later being found dead lying beside the road and from medical evidence there being sign of rape, the usual conclusion is that of commission of rape on her and causing her death which is based on the evidence mentioned above.

11. Now the question is, as to who has/have committed it? In view of the medical evidence mentioned above the defence suggested that PW 6 had sexual intercourse. But we have already found that the suggestion has not been proved and that it has been established that the accused personnel took custody of the girl who was found dead lying beside the road having sign of rape on her. The accused did not deny as to the custody. The explanation given by them has already been found to be fake and concocted. As such, we cannot but find that the accused cannot be absolved of the guilt.

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12. From the side of the condemned prisoners it has been argued that the prosecution case is improbable and that it has failed to prove the case. In view of the what has been stated above the submission has no substance. In view of the evidence mentioned above the prosecution appears to have succeeded to prove the case beyond reasonable doubt and, as such, it cannot be said that the prosecution case is improbable.

13. It has been submitted that 2(two) Medical Reports being different from one another, the one favourable to the accused is required to be considered in favour of the accused giving benefit thereof to the defence. The High Court Division has considered the point as follows:-

“Since the first post mortem report also found the perineum and the vagina congested and since the first report also found the blood and clots inside the injury Nos. 1 and 2 , we do not find any conflict in substance between the two post-mortem reports and thus the reports exhibit A and 14 and the evidence of PWs 45, 46 and 49 have proved beyond all reasonable doubt that the victim was subjected to rape and then done to death by throttling. This is also supported by the first inquest report prepared by the investigating officer of the UD Case No 82 of 1995 exhibit II which shows abrasion and laceration in the private part of the victim”. The submission as to non-consideration of the Medical Report favourable to the defence, has been correctly addressed and, as such, this submission does not sustain”.

14. The learned Advocates of the condemned prisoner claimed that in the impugned judgement there is no sifting of evidence but it appears that the High Court Division while accepting the Reference elaborately discussed the evidence sifting the same. Much emphasis has been laid on behalf of the condemned prisoners pointing out the evidence of PW1 Md Afzal Hossain and placing some portions from the first information report, lodged by the said witness, indicating that the deceased jumped from the pick-up. It has been argued that this portion of the evidence has not been considered properly and , as such, the High Court Division committed error. It appears that PW1 Md Afzal Hossain, a police officer, was deposing in the case in which three police personnel were facing trial. It is on record that Police did not cooperate properly in the disposal of case for obvious reasons. PW 21 Selina Shadat, a Magistrate, deposed that she tried to get assistance of police while disintering the dead body of the deceased but in spite of repeated requests police did not cooperate and therefore, she had to take shelter of BDR and with the help of BDR she succeeded to disinter the dead body. Be that as it may, PW1 himself admitted in his evidence that the portion of his statement as to jumping of the girl from pick-up, etc had been made following general diary lodged by ASI Moinul Haque who himself was an accused and is now a condemned prisoner.
On going through the whole judgement we find that the High Court Division, as already mentioned above, examined the evidence and sifted the same legally and thus came to the decision.

15. It has been argued that the victim jumped from the pick-up within 2/3 minutes from the time of her boarding the vehicle and so how she could be raped before death. It is in evidence that at about 4:00 AM she was picked up by accused on their van and accused Moinul lodged the General Diary at 6:25 AM. It appears that the place of occurrence is about 6 kilometres from the police station. There is no explanation as to what had happened during this long time from 4:00 AM upto lodging the Diary at 6:25AM though the distance from the place of occurrence to the police station is only 6 kilometres. There being such a gap and no satisfactory explanation coming from the side of the accused, the argument of the learned Additional Attorney-General that during the time it was very much possible for the accused to commit rape at any place in between the place of recovery of dead body and ‘Dash Mile Point’, cannot be brushed aside.

16. It has lastly, been argued that there is no ingredient of section 6(4) of the Act and as such, the High Court Division committed error in convicting the condemned prisoners under the aforesaid provision of law. It appears that the High Court Division quoting the aforesaid provision of law observed.

“It appears that section 2(C) of the Act provides that word rape carries the same meaning as referred to in section 375 of the Penal Code. It appears that definition of rape in the special law remains the same as was defined in Act 45/1860, that means that the prosecution must prove in this case that the victim was subjected to sexual intercourse against her will and without her consent.

We have already considered the presence of multiple injuries on the body of the victim as well as in the perineum and in the labia majora and minora of the vagina of the victim girl including various marks of violence on her shoulder which clearly shows that she was subjected to sexual intercourse against her will and without consent. Therefore, we have no hesitation to hold that the ingredients of section 375 of the Penal Code have been proved beyond all reasonable doubt. The girl was raped and then done away to death which has been proved by evidence of throttling as her teeth was found beaten. No other explanation is coming forth other than, of course, the theory of jump as disclosed by exhibit 13, the GD No. 957, which is divorced from reality.

In order to constitute rape mere penetration in the membranous passage or channel leading from uterus to the vulva is sufficient and presence of spermatozoa or even injuries or marks of violence or tearing of hymen is not at all necessary to prove rape”.

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17. Regarding the guilt of the condemned prisoners the High Court Division further observed:

"the learned Advocate appearing for the appellant Abdus Sattar submits that GD No 957 cannot be believed in piece in isolation of the other part. It must be believed as a whole or not at all. In this connection the learned Deputy Attorney-General has referred to the case of *State vs Mushtaq Ahmed* reported in *PLD 1973 SC 418* wherein it was held – "Moreover, it has been ruled by this court in a number of recent cases, that having regard to the social conditions obtaining in this country, the principle falsus in uno, falsus in omnibus cannot be made applicable to the administration of criminal justice and therefore Courts are under a duty to sift "chaff from the grain". In the light of the decision reported in *PLD 1973 SC 418* we hold that the plea of jump is inconsistent with the facts proved. Therefore, it can be ignored and the other facts appearing in Exhibit 13, GD No 957 may be and should be believed. It is true that exhibit 13 is a report only by the accused Moinul Haque where it also includes names of 2 others to prove what role was played by each of the 3 (three) accused in the rape and killing of the victim. In such circumstances should each of the 3(three) accused be found guilty under section 6(4) of the Act?"

18. As we have already seen that the 3 condemned prisoners were in the pick-up. All the 3(three) were seen getting down from the pick-up which is material exhibit III at 5:55AM at Kotwali Police Station as stated by the eye-witnesses. It is not necessary to prove individual overt act to connect them with the offence under Section 6(4) which, according to us, provides for punishment both for individual as well as for constructive liability of a gang. It is very pertinent to note the word ‘gang’ and the word ‘cause death’ as has been used to make not only the acts but also omission as defined in section 32 of the Penal Code punishable under Section 6(4) of the Act”. The other argument that there has been a moral conviction rather than a legal conviction does not appeal to us at all as we have found that the conviction is based on sufficient evidence and, as such, is legal.

19. The inculpatory facts finished by the circumstances appearing from the evidence as discussed above are incompatible with the innocence of the Petitioners. The defence taken by them that after finding the victim Yasmin dead they took her dead body from the pick-up to the roadside and kept it there appears to be untrue and therefore the High Court Division disbelieved the same. In view of the circumstances revealed we do not find any reason to hold any other view.

20. We have perused the decisions cited on behalf of the Petitioners. In the decision in *18 DLR (WP) 91* the facts are distinguishable. Moreover, in the
present case the post mortem report indicate that there are clear signs of rape upon the victim. So the decision is not applicable in the present case.

21. Regarding the decision reported in 1988 BLD (AD) 154 = 40 DLR (AD) 291, it appears that the order of conviction was set aside as there was no appreciation of the evidence of the witnesses or the circumstances in which Mazid, an accused, received a fatal injury was explained which thereby remained a moisture and therefore, the judgment was set aside but in the instant case the facts are different.

22. Regarding the decision reported in 1990 BLD(AD) 228 it appears that this court held that in a charge of murder moral conviction is not substitute for legal evidence. But, in the instant case, there being strong circumstantial evidence incapable of explanation upon any other reasonable hypothesis than that of the guilt of the Petitioners this decision also does not help the defence as in the present case there is no moral conviction as we have already mentioned above. The other decisions cited on behalf of the Petitioners have no bearing with the facts of the present case.

23. On perusal of the impugned judgment we find that the High Court Division came to a correct finding and there is nothing to interfere. We, therefore, do not find any substance in the Petitions.

The two petitions are accordingly dismissed.
Ali Amin and 5 other…………………..  
…………………………………..Appellant  
Vs  
State………………………..Respondent

High Court Division  
(Criminal Appellate Jurisdiction)

Judge  
Md. Abdul Mannajn  
AK Badrul Huq J

Date of Judgment: December 10th, 1998

Code of Criminal Procedure (v of 1898) Section 154  
The First Information cannot be treated as the first and the last word of a prosecution case Weight is to be given to the legal evidence adduced by a witness before the court at the time trial ………..(34)

Evidence Act (I of 1872) Section 156  
The testimony of the victim of sexual assault is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the court should find no difficult in acting on the testimony of a victim of sex crime alone to convict an accused where her testimony inspires confidence and is found to be reliable.

One must remain alive to the fact that in a case of rape no self respecting woman especially a collage girl would come forward in a court just to make a humiliating statement against her honour and dignity such as involved in the commission of rape upon her. The court must not cling to fossil formula and insist a corroborative testimony, even if, taken as a whole the case spoken to by victims of sex crimes strikes a judicial mind as probable Judicial response to Human Rights cannot be blunted by legal bigotry. ………..(37)

Interpretation of Statutes  
The Rule of reasonable construction must be applied while construing a Statute. Literal and grammatical construction should be avoided if it defeats the manifest object and purpose of the Act and leads to injustice. There must be a liberal interpretation and construction in favour of the persons for whose benefit the Act has been enacted. The court must adopt beneficial Rule of construction, which would promote the purpose of the Act, rather than dry literal construction,
which could in many cases defeat the purpose of the law. Law is a social science and it reflects social ethos. ……(55)

Nari-Oshishu Narijatn (Bishes Bidhan) Ain (XVII of 1995) Section 6(3) & (ha) (Ga)

Code of criminal Procedure (V of 1898) Section 236 & 237

An offence under a particular section if not proved but some other offence is made out by the prosecution, the accused persons can be very well convicted and sentenced for the other offences proved before the court through legal evidence.


Evidence Act (I of 1872),

Section 134

Law does not require any particular number of witness to prove a case and conviction may be well-founded even on the testimony of a solitary witness provided his credibility is not shaken. …(74)

Nari-O-Shishu Nirjatan (Bishen Bidhann) Ain (XVII of 1995), Section 22

On a reading of the provision contained in section 22 of the Ain, it is manifest that in the Ain there is no penal provision. In the absence of any penal provision, the conclusion of trial within 90 days cannot be treated as mandatory, rather the same is a mere directory. …. (76)

Evidence Act (I of 1872)

Section 9

The non-holding of the Test Identification Parade cannot affect the identification of the accused Shamim Hossain by the victims at the time of trial and the statement made by the witnesses are the legal and substantive evidence in the eye of law. …. (79)

Nari-O-Shishu Nirjatan (Bishen Bidhann) Ain (XVII of 1995). Section 9

This is a stringent law enacted for awarding proper punishment upon criminals for the offences affection women and children. The Bengali word “…………………….. means in English” immoral and “disregardful of
morality”. The word “immoral” must be construed liberally and the court must adopt that construction which “suppresses the mischief and advances the remedy”.

We ourselves have seen the two nude photographs. The nude photographs are shocking nature of crime and are indecent of the highest degree and also revolting. The photographs clearly manifest that the victims were helpless and were very much fearful. The acts squarely fall within “immoral” acts being the crime under section 9(ka) of the Ain of 1995. The word “……………….” Of which English Translation is “employed” must not be construed strictly rather the same must be construed liberally and literal meaning is to be avoided to give effect to manifest object and purpose of the Ain, the object being the punishment of the offenders of heinous crime affecting children and women. …(84 & 87)

Evidence Act (I of 1872).

Section 9
Long abscondence and non-submission to the process of the court speaks a volume against the accused persons and clearly suggest their involvement in the crime. Abscondence of the accused persons furnished corroboration of the prosecution case and evidence. …(92)

Section 3
Benefit of doubt to the accused should be available provided there is supportive evidence on record. For creating doubt or granting benefit of doubt. The law would fail to protect the community, if fanciful possibilities are admitted, thus, deflecting the course of justice. …(97)

Judgment
AK Badrul Huq J: For the last few decades, in spite of big talks and tall words of respect and dignity of women and protecting them from various onslaughts of heinous nature, the women are being subjected to torture, acid burning, dowry repression, rape and other crimes violating human dignity of the victims of crimes. Now-a-days, crime against women in general and rape in particular is on the increase. This has caused anxiety to Legislators, Judiciary and Law enforcing agencies who have attempted to resurrect them from social choke. There has been legislation in this regard without much effect. This has led to the passing of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983. In spite of that large number of crimes like acid burning, dowry, cruelty and rape continued. Then came the stringent law, Nari-O-Shishu Nirjatan (Bishes Bidhan) Ain, 1995 which was enacted for the
punishment of heinous offence committed to women and children by the offenders. It seems, in spite of stringent legislation, the criminals and offenders are indulging legislation, the criminals and offenders are indulging in heinous crimes not because of any short coming in law but under the protective principle of Criminal Jurisprudence of Benefit of doubt. Of course, innocent persons are also trapped or brought in with ulterior motive. But the objective of the stringent legislation that the persons committing such crimes should not escape proper punishment must be also borne in mine. This places an arduous duty on the court to separate innocent persons from the offenders. The court is to deal such case with circumspection, scrutinize evidences and materials or record with utmost care. The present matter is one such where similar questions have been raised including question to interpretation of the stringent law and liberal construction of words keeping in view the purpose of the legislation.

The prosecution in this case presents before us an unfortunate story of commission of rape and taking of obscene two nude photographs of two unfortunate victims, Smritikana Biswas, a college girl and Ripon, a college boy offenders within the premises of Brojomohan College, Popularly known as BM College, Barisal founded by Mahatma Ashwini Kumar Dutta, a great political leader and educationist, wherein Dictums, “Satya” (Truth), “Prem” (Love) and “Pabitrata” (Purity) has been engraved in front of the main college building under construction situated on the southern side of the College Canteen within the College Premises.

By six appeals, being Criminal Appeal no.694 of 1996 by convict-appellant Al Amin, Criminal Appeal No 691 of 1996 by convict-appellant Abdur Razzak, Criminal Appeal No. 695 of 1996 by convict appellant Md Shamim Hossain (Shamim), the property of the judgment and order of conviction and sentence dated May 21,1996 recorded upon them by Nari-O-Shishu Nirjatan Daman Bishes Adalat, Barisal for commission of offence under section 9(ka) of Nari-O-Shishu Nirjatan (Bishes Bidhan) Ain, 1995 has been challenged.

All the appeals having arisen out of a common judgment, these have been heard together and are being disposed of by this common judgment.

In these appeals Nari-O-Shishu Nirjatan (Bishes Bidhan) Ain, 1995 will be referred to as Ain of 1995 and Nari-O-Shishu Nirjatan Daman Bishes Adalat will be referred to as Bishes Adalat.

Keeping in view that the anonymity of the victims of crime should be maintained for the purpose of saving them from further embarrassment, repeating their names are avoided any they are described in this appeal as victim A and A1 respectively.
The convict appellants Rajib Kumrul Hassan alias Mithun, Arif, Maksudul Alam Alias Nantu, A1 Amin and the Accused Ashrafuzzaman alias Biplob alias Chega Biplob (absconding) and accused Mainul Islam alias Mamun (acquitted) stood arraigned under section 6(3) of the Ain of 1995. The convict-appellants Shamim Hossain and Abdur Razzak stood charged under section 14 of the said Ain.

A brief reference to the prosecution case as unfolded during the trial is set out below:

The principal victim A (PW 2) was a student of Barisal Government Women College at the time of occurrence and she appeared in the Higher Secondary Education in the year 1995. She, for the collection of notes of Home Economics, went to BM College, Barisal at about 11-00 AM on 9-8-1995 and in the college premises she was talking with victim A1 (PW 3), who was cousin brother of her friend Lovely (PW 4). Victim A1 (PW 3) was with his friend Nizam. When victim A (PW 2) was talking with Victim A1 (PW 3), accused Maksudul Alam alias Nantu, A1 Amin, Ashrafuzzaman alias Biplob alias Chega Biplob, Arif, Rajib Kamrul Hassan alias Mithum, Anisur Rahman alias Read alias Reaz, Mamun and other persons encircled victim A (PW 2), victim A1 (PW 3) and Nizam to go to a building under construction situated on the southern side of BM College canteen. The accused persons in the building, also, had beaten victim A1 (PW 3) and Nizam. Nizam was freed by the accused persons on taking Taka 215.00 from him. Victim A1 (PW3) was taken to the bathroom under construction and the accused persons kept him on guard. Victim A (PW 2) was also on guard by the accused persons. The accused Nantu, Read, A1 Amin, Arif, Biplob made victim A undressed forcibly and completely made naked and, thereafter, committed rape on her. Thereafter, the Cameraman accused Shamim Hossain was brought there. Victim A1 (PW3) was also undressed and made naked by the accused persons. Two obscene nude photographs of Victim A (PW 2) and victim A1 (PW 3) were taken. The nude photographs are marked a Material Exhibits …and …… . Professor Sayed of Barisal BM College along with ‘Aya’ visited the place of occurrence. Some accused persons took victim A1 (PW3) out of the building Victim A (PW 2) was taken to the room of Principle and Professor Sayeed for coming to the College premises. Victim A fell ill and approached a Doctor named Dr. Nurul Islam (PW 10) who gave a prescription and also supplied a Medical Certificate which is Exhibit 12. Victim A approached accused Shamim Hossain for the said two nude photographs. Shamim Hossain Demanded Taka 5,000.00 form her. She, thereafter, approached accused Abdur Razzak of fuji Colour. Razzak demanded Taka 1500.00. Victim A had no money with her and as such could not take back the nude photographs.
The commission of crime made by the accused persons was published in papers at Barisal and on the basis of that, Two GD entries being 1198 dated 22.8.95 and 1268 dated 23.9.95 had been registered with Kotwali Police Station, Barisal. The victim A on 18.9.95 presented a Report with Matbaria Police Station stating occurrence dated 8.9.95 and the same was sent to Kotwali Police Station, Barisal which was registered as Kotwali Police Station Case NO.21 dated 19.9.95. During investigation of the said case it revealed that the occurrence was mistake of fact 1 Md. Nazrul Islam, thereafter, submitted final Report and being Information Report with Kotwali Police Station, Barisal, Exhibit 5.

The victim A1 (PW2) on 5.10.95 made a statement before the Magistrate, first class, Barisal which was recorded under section 164 of the code of criminal procedure, Exhibit 7, wherein it is stated that he along with Victim A (PW2) and Nizam was taken to the Building under construction situated on the southern side of the college canteen and he and victim A were made undressed and naked by the accused persons and two obscene nude photographs were taken by them. He detailed the description of the accused persons in the said statement and through paper could know their names.

The victim A (PW 2), also on 15.1095 made statement before the Magistrate, First Class, Barisal (PW 7) which was recorded under section 164 of the code of Criminal Procedure. In the said statement she stated that the accused persons forcibly took her, Victim A1 (PW 3) and Nizam to the building under construction situated on the southern side of the College canteen. Victim A1 (PW 3) and Nizam were beaten by the accused persons. Thereafter, Nizam was freed. The accused persons confined Victim A1 (PW 3) in one room and kept her in another room under guard. The accused persons forcibly made her undressed and completely made naked and committed rape on her. Firstly, Maksudul Alam alias Nantu, then Read, then Biplob and then Mithun committed rape on her. Further statement is that on the order of the accused Nantu, cameraman accused Shamim Hossain came to the place of occurrence and Victim A1 (PW 3) on being made undressed and naked lay him on her body forcibly and took two nude photographs. The accused persons them left the building with victim A1 (PW3). Within a short period Professor Sayeed of Barisal BM College along with some other and ‘Aya’ took her to the room of the principal of the College where she was rebuked for her going to the college premises.

The prosecution, with a view to connect the accused persons with the crime, examined 10 witnesses.

As accused Rajib Kamrul Hassan Mithun, A1 Amin, Arif, Maksudul Alam Nantu, Ashrafulzaman alias Biplob alias Chega Biplob and Anisur Raham alias
Read alias Reaz were absconding on the commencement of trial, Mr Abdul Mannan Howlader, the leaned Advocate was engaged as State Lawyer to defend absconding accused persons.

PW 1 Md. Nuzrul Islam is the author of First Information Report dated 3.10.95. he was the Office-in-charge of the Detective Branch of Barisal. He gave testimony that on 22.8.95 he was appointed as the Officer-in-charge of the Detective Branch of Barisal. On the basis of a Press News published in different News papers of Barisal publishing the commission of rape in the BM College Premises on a girl Victim A (PW2), Shitanath Mallick, Inspector of Detective Branch of Barisal (PW 9) on 22.8.95 registered a GD Entry, Exhibit 1 and on the basis of that GD Entry he started investigation. On interrogation to accused Shamim Hussain, he disclosed that two nude photograph were in his possession. Accused Abdur Razzak on interrogation admitted possession of the nude photograph with him. He seized the said two nude photographs from the possession of accused Abdur Razzak in presence of witnesses. He proved his signature on the Seizure List, which is Exhibit 2. Further testimony is that the First Information Report registered with Mathbara Police Station was registered as Kotwali Police Station Case No. 21 dated 19.9.95 and in the said First Information Report Nantu, A1 Amin, Arif, Mithun, Read and Mamun were made accused persons. Sitthath Mallick (PW 9) recorded the statement of victim A1 (PW3) under section 164 of the Code of Criminal Procedure. The First Information Report lodged by victim A (PW 2) having suffered from mistake of act and also contradictory to law, Final Report was admitted and he himself as informant laid the First information report with Kotwali Police Station, Barisal, Exhibit 5. In the cross-examination he stated that in the Report lodged by victim A, the commission of rape on her was not stated. Nizam could not be traced out. Long days having elapsed once the date of commission of rape, victim A (PW) could not be examined by a Doctor and alamat of rape could not be seized. It is in his evidence also meet the victim A (PW 2) did not disclose the name of accused Arif in the commission of rape upon her.

PW 2 is victim A. She testified that in the year 1995 she passed HSC in Second Division from Barisal Government Women College. She went to the BM College premises for obtaining practical note on the subject of Home Economics. She met victim A1 (PW 3), the cousin of her friend Lovely Begum (PW 4) and Victim A 1 was also a HSC candidate. He was with his another friend Nizam. It is her testimony that Nantu and 6/7 persons came out from the college canteen and encircled her and Nizam. Victim A1 (PW 3) then came in front of the college canteen. The accused persons forcibly took her, victim A1 (PW 3) and Nizam to the building under construction situated on
the southern side of the college canteen. In the building victim A1 (PW) and Nizam were beaten and Nizam, thereafter, was freed on taking Taka 200.00 from him. The positive testimony is that she was made undressed and naked by Nantu, Readu, A1 Amin, Mithun, Arif and Biplob. Firstly Nantu, then Read, then Biplob, then Mithun committed rape on her. She lost her sense. On regaining her sense accused accused A1 Amin committed rape on her. One of the accused persons ordered to bring a cameraman there. Victim A1 (PW.) was also made undressed and naked and twoside photographs of them were taken. The cameraman was identified by her as Shamim Hussain. She also identified the two nude Photograph, Exhibits ........ and.......... to be of he and victim A1 (PW 3). It is also the evidence that on refusal to lie down on the floor, she was forced to lie down there and, thereafter, in a naked position Ripon was laid on her body. They left the building sometimes after the commission of the rape with victim A1 (PW 3). Professor Sayeed of BM College along with some other persons entered into the room i.e. the place of occurrence and in the meantime she got herself dressed. She was taken to the room of the Principal through ‘Aya’ and in the presence of the Principal and other persons she disclosed the occurrence. Professor Sayeed rebuked her for coming to MB College premises Further statement is that she having fallen ill went to the chamber of Dr. Nurul Islam (PW 10) who gave her a prescription. To recover the nude photographs she went to Shaik Studio and approached cameraman Shamim Hussain for handing over the same to her. Shamim Hussain demanded Taka 5000.00 in lieu of photographs. Accused Shamim Hussain disclosed that the nude photographs were in Fuji Colour. She went to Fuji Colour and demanded the said two nude photographs from accused Abdur Razzak. During trial accused Abdur Razzak was identified when he was on the dock. She stayed at barisal upto 20.9.95. Thereafter, went to her village at Matbaria. There she fell ill and also suffered tension. Further testimony is that on seeing the news in the National papers, of the occurrence, she sent information to her brother Rathan. Ratan came from Dhaka and in consultation with him, taking into consideration of her future and honour, she laid report alleging outraging of her modesty. She proved the Report which is Exhibit 4 and her signature is Exhibit 6. The victim a faced grueling cross-examination from the side of the accused personas. In the cross-examination she stated that on the day of occurrence the class stood suspended but practical classes were going on. She gave statement before a Magistrate which was recorded under section 164 of the Code of Criminal Procedure disclosing the commission of rape upon her and also the taking of the nude photographs by the accused persons. She categorically denied the suggestion that on rape was making statement of the commission of rape at the instance of the police personnel. She categorically stated that she could know the names of the accused persons from the conversation held amongst themselves when they
addressed themselves by names. She categorically stated that out of fear of the accused persons, she and victim A1 could no shout. Being apprehensive of her honour and dignity she did not disclose the incident of commission of rape upon her and also of taking nude photograph to the authority of the college hostel. She also denied the suggestion that in order to defame Golam Mowal (uncle of accused Mithun), Mithun had been made an accused in the case.

PW 3 is victim A1. He gave testimony that in the year 1995 he was a HSC candidate from Barisal BM College. The victim A (PW2) was made acquainted with him on 7.8.95 at Barisal Airport. The accused persons had beaten him and Nizam and he along with victim A and Nizam were forcibly taken to the building under construction situated on the southern side of the BM College Canteen. The victim A was kept confine in one room. The victim A was kept confined in one room. The positive testimony is that he heard utterings of victim A who entreating and begged humbly to the accused persons. It is also the positive testimony that he was undressed and made naked by the accused persons and was forcibly taken by the side of victim A (PW 2) who was sitting on a Orna …….. in a naked on the opposite direction, and, she having refused to sit by his side, was given kick and, thereafter, one nude photograph was taken and another photograph. Exhibits ….. and……. He also identified accused Biplob, mithun, arif, Nantu, Al Amin and Shamim but failed to identify accused Mamum standing on the dock. In cross-examination he stated that out of fear he could not inform the Principal of the incident. This witness also faced the grueling cross-examination put forward from the side of the accused persons but the testimony could not be discredited.

PW 4 is friend of Victim, A (PW 2) who is also the cousin sister of victim Al (PE 3). Her testimony is that victim A (PW 2) told her that some boys outraged her modesty in making her naked a taking nude photographs.

PW 5 is Foez Ahamed who was Magistrate, First Class at Barisal at the relevant time. This witness recorded the statement of victim Al under section 164 of the Code of Criminal Procedure. He proved the said statement which marked as Exhibit 7.

PW 6 is Smriti Rani Gharami who was Magistrate, First Class at Barisal at the relevant time. She recorded the statement of victim A under section 164 of the Code of Criminal Procedure She Proved the said statement which is exhibited Exhibit 8. In the cross-examination she state the victim A stated to her that through the conversation held amongst the accused persons she could know the name of acused Mamum, Mithun, Biplob, Amin, Nantu and Read alias Reaz. In cross-examination she stated that victim A stated to …….that nude photographs were taken with Victim A
PW 7 is Kamal Uddin Talukder who was Magistrate at the relevant time. He stated that victim was asked to be produced on 2.10.1995 subsequently on 5.10.1995.

Pw 8 Md Yunus is a formal witness filled up the First Information Report column proved his signature appearing therein.

PW 9 is Sitanath Millick who was charge of the Detective Branch Office of Barisal gave testimony that on getting news as to outrag…..of the modesty of a girl named Smritikana Bis….. of Barisal Women College, he registered GD E….. No. 1198 dated 22.8.95. He proved the Ge En….. Which is marked as Exhibit I. Further testimony that he seized photographs from accused Abdul Razzk by way of Seizure List in the presence witnesses. He endeavoured to recover the negative of the photograph but failed. He prepared sk….. map on the basis of Kotwali Police Station Case 21. He recorded the statement of the witness under section 161 and also got the statement Victim A1 recorded under section 164 and also got the statement Victim A1 recorded under section 164 of the Code of Criminal Procedure. He denied the suggested put forward from the side of the accused persons that he collusively created the subsequent case and the investigation conducted by him is not proper.

The last witness is PW 10 Dr Nurul Islam who was attached to Barisal Medical Collage Hospital at the relevant time. He examined victim A and the following:

Chest pain  Abdomen pain, Dysuria (Painful miction), Physical assault, Restlessness, Generalised body ache.

He prescribed medicine and issued certificate. He proved the certificate and his signature appearing on the certificate which is marked as Exhibit 12.

The plea of the defence which came out from the trend of the cross-examination appeared to be that the accused persons had been falsely implicated in the case. The plea of alibi was also taken by accused Maksudul Alam alias Nantu.

The direct evidence regarding the commission of crime was furnished in the testimonies of crime was furnished in the testimonies of the two victims PW 2 and PW 3 who were the most competent witnesses to prove the crime against the accused persons. It is worthy to state that both the victim faced grueling cross – examination advanced from the side of the accused persons. But the credibility and truthfulness of their testimonies could not be shaken at all by the cross-examination.

The positive and unimpeachable testimony of the victim A (PW 2) is that the accused Nantu and other accused persons decided to take her, victim A1 PW 3 and Mizan to a room and threatened them to go to a room with them and
then took them to the building under construction situated on the southern side of the College Canteen. Mizan was, thereafter, freed on Taka 250,00,00 from her. Ripon was kept in bathroom of the said building Riad, A1 Amin, Mithun, Arif and Biplob (Chega Biplob) undressed her and made her naked. Then first Nantu, then Riad, then, then Biplob and the Mithun committed rape on her. She lost sense. She, thereafter, regained sense. Then A1 Amin committed rape on her. One cameraman who was identified by her as accused Shamim Hossain cam. The victim Al (PW 3) was also made undressed and naked by the accused persons and two nude photographs were taken of her and victim A1. It is also positive testimony that she was asked by the accused persons to lie down and as she refused to do so, she was forcibly laid and the victim A1 was placed on her body and two nude photographs were taken. On scanning eh evidences it emerges that PW2 did not state the name of accused Arif in the commission of rape upon her.

The victim Al (PW3) also gave the positive and credible evidence that he heard mutterings of victim A (PW 2) who was entreating and humble begging to the accused persons. He was undressed and made naked in naked position he was taken to victim A (PW 2). He saw victim A (PW2) in naked state and on and on seeing him, she move herself on the opposite direction. Further unimpeached evidence is that victim A (PW 2) was ordered by the above stated accused persons to lie down and as she refused to lie down a kick and was forcibly laid down and place him on her naked body. Two nude photographs were then taken.

Besides the ocular version of the incident, the prosecution also tendered in evidence the statement of victim A and Victim A1 record under section 164 of the Code of Criminal procedure who pleaded not guilty of the charge leveled against them. No witness was examined on behalf of the defence.

The accused persons present in the court were examined under section 342 of the Code of Criminal procedure who pleaded not guilty of the charge leveled against them. No witness was examined on behalf of the defence.

The Bishes Adalat found that the PW 2 was not raped and the prosecution could not prove the charge of rape. It then found that found that the commission of offence under section 9(ka) of the Ain of 1995 have been well proved and found accused appellants Maksudul Alam Nantu, Arif, Shamim Hossain, Rajib Kamrul Hassan Mithun, Al amin and also accused Ashrafuzzaman alias Biplob alias Chega Biplob (absconing), Anisur Rahman alias Riadalais Reaz (absconing) guilty of the offence under section 9(ka) of the Ain, 1995 and convicted and sentenced each of them of suffer Rigorous imprisonment for 10 years and also to pay a fine of Taka 5000.00, each in default, to suffer
Rigorous Imprisonment for a further period of 2 years. It also found accused-appellant Abdur Razzak guilty of the offence under section 9(ka) and convicted him there under and sentenced him to undergo Rigorous Imprisonment for a period of 7 years in default, to suffer Rigorous Imprisonment for further period of 6 months. The adalat found accused Mamun not guilty of the offence and acquitted him of the charge leveled against him and set him at liberty if not wanted in connection with any other case.

One of the reasons which weighed the Bishes Adalat in recording the finding that the prosecution could not prove the charge of rape is that in the First Information Report Dated 18.9.1995 laid by PW 2, the commission of rape had not been stated and only in the statement recorded under section 164 of the code of Criminal Procedure, the commission of rape had been disclosed and the belated statement was unworthy of credit and the story of commission of rape is nothing but subsequent embellishment. The finding is not sustainable at all.

In sexual offences delay in laying First Information Report can be due to variety of reasons particularly the reluctance of the victim of crime or her family members to go to the police and complain about the incident which concerns the reputation of the victim and the honour of her family. It is only after giving a cool thought that a complaint of sexual offence is generally lodged. A girl in a tradition-bound non-permissive society in Bangladesh would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred being conscious of being ostracized by the society and or being looked down upon by the society. In the normal course of human conduct an unmarried girl would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate to anyone else on powered by a feeling of shame and her ……inclination would be to avoid talking about it to an one least the family name and honour is brought controversy.

The occurrence took place on 8.9.1995 is in the evidence that on the publication of commission of the offence by the accused person in the papers, the unfortunate victim A (PW 2) …an information to her bother Ratan at Dhaka and Ratan came from Dhaka and taking in… consideration of her future and honour, she only he modesty was outraged. The relevant portion extracted hereunder: …………………………………………………………...

In this context it must be remembered that the First Information report is not the encyclopaedia. It is neither the beginning no the ending of every case. It is only a complaint to …the law or order in motion. It is only initiative to move the machinery and to investigate into cognizable offence. It is only at
the investigation stage that all the details can be gathered and filled up. The First Information Report thus, cannot be treated as the first and the last word of a prosecution case. So, to reject the case of commission of rape upon victim A on the ground of non-mentioning the fact First Information report to record an inadequate appreciation of the criminal investigation and weight is to attached to the legal evidence in the case itself. Legal evidence is the evidence which is adduced by a witness before the Court at the time of trial and not the statement made in the First Information Report. PW 2 categorically stated that Nantu, mithun, Re……..Biplob and Al Amin committed rape upon her. This conduct of the Victim A in not laying the Report of the traumatic experience she undergone. Immediately after the incident and not disclosing the commission of rape in the said Report taking into consideration of honour and dignity of herself and her family appears to be most natural and the same is the normal course of human conduct. It is only at the investigation stage commission of rape had been disclosed by making statement recorded under section 164 of the Code of Criminal Procedure and the matter is in accord with the natural human conduct of an unmarried female. The Bishes Adalat was not justified in discarding the prosecution for victim A’s non-disclosure of the commission of rape upon her.

The next ground taken by the Bishes Adalat in not finding the accused persons guilty for the commission of sexual assault on victim A was that the victim Al (PW 3) did not testify the commission of rape on victim a rather he stated outraging the modesty of the victim A. The victim Al (PW3) is not witness to the commission of rape by the accused persons upon victim A. He did not state that he witnessed the commission of rape his testimony was to the effect that victim AI was entreating to the accused persons. The approach of the Bishes Adalat in the matter of appreciation of evidence totally lacked objectivity.

One of the main ground canvassed by the Bishes Adalat to discard to prosecution case was that the testimony of PW 2 did not get any ……from any of the witnesses and no ….could be put on the said uncorroborated …. The ground on which the Bishes Adalat approached the matter is not at all sound and the decision on this question suffers from perversity.

Corroborative evidence is not an …..component of judicial credence in every case of rape. Corroboration as a condition for medical reliance on the testimony of a victim of sex crime is not a requirement of law but merely a evidence of prudence under a given circumstances. The rule is not that corroboration s essential before there can be a conviction. The testimony of the victim of sexual assault is vital and unless there are …..reasons which necessitate looking for ….. Reasons which necessitate looking for …..of her statement
the court should find no difficulty in acting on the testimony of a victim of sex crime alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of the statement of a victim of sexual assault before putting reliance upon the same, as a rule, in such cases, amounts to adding insult to injury. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and even more reliable. It must not be overlooked that a woman or a girl subjected to sexual assault is not accomplice to the crime but is a victim of sex assault and it is improper and also undesirable to test her testimony with certain amount of suspicion, treating her as if she was an accomplice. The testimony of the victim of sex crime must be appreciated in the background of the case and given set of facts and circumstances with realistic diversity and not dead uniformity. It will be appropriate to bear in mind that in assessing the testimonial potency of the victim’s version, human psychology and behavioral probability must be looked into. The inherent bashfulness and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant improbabilise the hypothesis of false implication. No woman or girl of honour will implicate another person for the commission of rape on her since she sacrifices thereby what is dearest to her. (Emphasis ours). One must remain alive to the fact that in a case of rape no self respecting woman especially a college girl would come forward in a court just to make a humiliating statement against her honour and dignity such as involve in the commission of rape upon her. The court must not cling to fossil formula and insist a corroborative testimony, even if, taken as a whole the case spoken to by victims of sex crimes strikes a judicial mind as probable Judicial response to Human Rights cannot be blunted by legal bigotry.

In this regard on aspect of the matter must be taken into consideration. There is no case of the defence that the victim A is a girl of questionable character or a girl of loose moral character and that there was animosity between the victim A, her family and the accused between the victim A, her family and the accused persons or their families. No suggestion even had been made to that effect. It is unimaginable that the victim A, a young college girl would subject herself to the ignominy and embarrassment in the society by making allegations to the effect that the accused persons committed sexual … on her. It completely defies human probabilities.

Rape is the ‘ultimate violation of the self.’ It is a humiliating event in a woman’s life which leads to fear for existence and sense of powerlessness. Rape is not merely a physical assault. It is destructive of the whole personality of the victim. A rapist not only violates the victim. A rapist not only violates the victim’s personal integrity but leaves indelible marks on the very soul of the helpless female of girl. The Court, therefore, shoulders a great responsibility
while trying an accused on the charge of rape. The court must not get swayed by insignificant defects in the prosecution case in throwing out an otherwise reliable prosecution case. It is well worthy to recall that if the testimony of the victim of sex crime inspires conviction can be safely based on the solitary testimony of the victim of sexual assault. Rape for a woman whether major or minor is deathless shame and must be dealt with as the gravest crime against Human dignity. (Emphasis ours)

In the case in our hand a careful analysis of the statement of victim A has created an impression in our mind that she is a reliable and truthful witness and her testimony suffers from no infirmity or blemish whatsoever. There cannot be any hesitation in acting upon her testimony alone without looking for any corroboration.

The other ground which weighed with the Bishes Adalat in disbeliefing the prosecution on the question of commission of rape was that in the event of commission of rape upon victim A by seven (7) persons, her vagina was to be ruptured and sign of rape would have bee apparent but that did not so happen. Another view taken was that victim A would not have been able to move to the office room of the Principal of the College.

It is in the testimony of the victim A (PW 2) that five (5) persons namely Nantu, Biplab, Reax, Mithun and A1 amin committed rape on her. There is no testimony that seven (7) persons raped her. The approach of the Bishesh Adalat is absolutely wrong. The case in our hand is a case of gang rape. In a case of gang rape or in other words, in case of rape if the number of rapist is more than one, usual conduct of the rapists would be that they would overpower the victim in such a manner so that the victim could not move and in that circumstances there might not be any sign of injury on the vagina as no resistance could be offered and the vagina might no be ruptured. Absence of any injury on the private parts of the victim cannot lead to conclusion that no rape was committed. It must be borne in mind that penetration itself is sufficient to constitute the sexual intercourse to the offence of rape. Since the case is of gang rape, resistance was absolutely impossible as because woman is always weaker that man. Normally in almost all the case there were more than one accused persons and the circumstances and situation is quite different. It is in the testimony of PW 1 that since long days passed, alamats of rape could not be seized. The victim A was examined by PW 10 Dr. Nazrul Islam who on examination found chest pain, abdomen pain, physical assault, dyshuia etc. the possibility of alleged rupturing of vagina of the victim A in the event of commission of rape by five (5) persons on ther could be gathered and elicited by the defence, even by the Bishesh Adalat its self in search of truth. The Bishes Adalat, for that purpose, was expressly vested by section 165 of the…
Evidence act with the right to put question. But…that was not done. The Bishesh Adalat was not …expert on medical science and, therefore, it was….absolutely incompetent to say anything on this subject and it travelled beyond its jurisdiction is assuming the function of a Medical expert in recording the finding that in the event of…commission of rape by seven (7) (actually five)…. Persons vagina of victim A was required to be… ruptured. The Bishesh Adalat was also wrong ….holding that it was not possible on her part to go to the room of the Principal of the College in the…absence of any legal evidenced its own views and there is no logic nor any reason to hold the said views…Reasons are the soul of law. The decision of the …Bishes Adalat is founded on mere supposition surmises and conjectures.

From the above conspectus, it clearly emerges that the prosecution had been able to establish the charge of commission of rape upon victim A and no other conclusion then that of guilt of the accused persons can follow from the prosecution evidences and the approach of the Bishes Adalat in not finding the offenders guilty of the said crime, inspite of the unimpeached and truthful testimony of the victim A, is perverse, unreasonable and unfounded and proper punishment was required to be imposed upon them. The decision of the Bishesh Adalat amounted to passing an order of acquittal of the charge of rape and the acquittal of the rapists added to the sense of injustice. The message is loud and clear that the offenders must not have escaped and would have been punished for the heinous crime.

The State did not prefer any appeal against that portion of the decision of the Bishes Adalat by which it found that no rape was committed on victim A and the prosecution failed to establish the charge of rape upon her. We asked the learned Deputy Attorney-General to post us which the information what were the considerations on the part of the State for not presenting an appeal before the High Court Division the learned Deputy Attorney-General could not state anything in this regard. It is lamentable that in a case of gang rape upon a College girl by the offenders within the premises of a college where the crime had been well established, the State did not move to the Higher court i.e. the High Court Division. The persons in the helm of affairs in this regard must be posted with the liability of not presenting an appeal against that portion of the decision whereby the offenders were not found guilty of the charge of rape and appropriate action must be taken against them for not discharging their duties and responsibilities. It must be remembered that the persons entrusted with these duties and responsibilities must be alive to the said duties and responsibilities. We record the observation that the Government will take appropriate actions against the persons who did not discharge their duties and responsibilities. Since the state did not prefer any appeal against that portion
of decision recorded by the Bishesh Adalat in not finding the culprits guilty of the crime, in the exercise of appellate authority, in deciding the appeals presented by the convicts against that portion of order awarding conviction and sentence upon them for the crime under section 9(ka) of the Ain, 1995 we cannot impose proper punishment upon the offenders for the crime of rape under section 6(3) of the Ain By converting the order of acquittal into an order of conviction.

The only question now survives for determination in all the appeals is whether the Bishesh Adalat acted upon principles consistent with the safe dispensation of criminal justice in awarding punishment under section 9(Ga) of the Ain upon the convict-appellants on the facts, circumstances and legal evidence on record.

The sustainability of awarding of conviction and sentence are assailed from different angles.

The learned Advocates appearing for all the appellants directed their efforts in assailing the conviction and sentence upon the appellants under section 9(Ga) of the Ain advancing common contentions which are as follows:

The conviction on the basis of the Subsequent First Information Report which is an embellishment ling after the alleged occurrence by submitting final report cannot be sustained in law.

The learned Judge failed to appreciate that there is no evidence on record upon which the appellants can be convicted under section 9(Ga) of Ain, 1995 and, as such, the conviction and sentence is liable to be set aside.

No case of abduction had been made out by prosecution and the conviction and sentence for the abduction of victim A cannot be upheld.

The Basic charge under section 6(3) of the Ain, 1995 having fallen to the ground, the appellants could not be convicted for the commission of another offence under section 9(ka) of the Ain, 1995 and as such, the conviction is absolutely illegal.

Important and vital witnesses had not been examined by the prosecution and the non-examination of those vital witnesses raised a presumption against the prosecution case.

Besides the common contentions advanced by the learned Advocate of all the appellants, argument has been also pressed into service on behalf of the appellant of Criminal Appeal no. 694 of 1996 that the trial having not been
concluded within the specified period of 90 days, the same became absolutely void and the conviction and sentence upon the accused-appellants having been absolutely without jurisdiction, the same cannot be maintained in law.

Much stress has been laid from the side of the appellant of Criminal Appeal No. 687 of 1996 and Criminal Appeal no, 695 of 1996 that convict- appellants Rajib Kamrul Hassan alias Mithun and Arif were not identified by PW 2 and PW 3 and as such they cannot be posted with the liability of the commission of offence under section 9 (Gs) of the Ain, 1995.

From the side of the appellant in criminal Appeal No. 1114 of 1996 it has been contended that TI Parade was required to be held for the identification of the said appellant and without TI Parade it was not at all possible to connect appellant Shamim Hossain in the commission of crime alleged.

Argument has been put forward from the side of the appellant in Criminal Appeal no. 691 of 1996 that no offence that had been committed by appellant Abdur Razzak and the Seizure List witnesses, in whose presence the nude photographs were seized, were not examined to substantiate the seizure of the nude photograph from him.

In repelling the contentions so raised, it is submitted on behalf of the State that the offence against the accused-appellants are of heinous in nature and the prosecution could successfully, through legal evidences, could connect the accused-appellants with the commission of crime;

In approaching the appeals it would be profitable to notice the purpose and object of Nari-o-Shishu Nirajtan (Bishesh Bidhn) Ain, 1995 which is a stringent law enacted by Special Statute and the relevant provision of law embodied in the said Ain. The purpose and object is contained in the preamble which is extracted hereunder: …………………………………………………

The said stringent law was enacted to provide an effective check on the commission of heinous crimes to woman and children by the offenders which were continuing despite the prevailing law i.e. The Cruelty to Women (Deterrent Punishment) Ordinance, 1983. The object is the punishment of the criminals and offenders for the offences affecting the women and children and they cannot escape appropriate punishment.

It will be worthy of recall that a statute is an edict of the legislature. The elementary principle of interpreting or construing a statute is to gather the “means or sentential legis” of the legislature. Interpretation postulates the search for the true meaning of the words used in the statute as a medium of expression to communicate the particular thought for which the statute is enacted. The
Rule of reasonable construction must be applied while construing a Statute. Literal and grammatical construction should be avoided if it defeats the manifest object and purpose of the Act and leads to injustice. In other words, it may be coined that there must be a liberal interpretation and construction in favour of the persons for whose benefit the Ain or Act has been enacted. The court must adopt beneficial Rule of construction which would promote the purpose of the Act, rather than dry literal construction which could in many cases defeat the purpose of the law. Law is a social science and it reflects social ethos.

It has already been pointed out that the Ain of 1995 is a stringent law providing special provision special provision for the punishment of the commission of heinous crime and the provision of the said law are not to be interpreted and words used therein are not be construed like other statutes. There must be liberal interpretation and construction in awarding proper and appropriate punishment upon the offenders of crime especially offenders for sexual assault.

Let us now notice the relevant provision of law embodied in the Ain after nothing the purpose and object of the same. Section 9 of the Ain reads thus: ........................................................................................................................................

In section 9(ka) the meaning of the word …. is needed to be seen. The English translation of the Bengali word….is immoral, disregardful of morality, not conforming to, or opposed to morality. In Chambers 20th Century Dictionary “Immoral” reads thus: inconsistent with disregardful or morality: in the Chambers Dictionary New Edition “Immoral’ stated hereunder: inconsistent with accepted principles or standard, wrong, evil, unscrupulous, Dissolute: In the New Shorter Oxford English Dictionary, “Immoral” run thus: not consistent with or not conforming to accepted moral principles: In Corpus Juris Secundum 42, “Immoral” is stated hereunder. “Contrary to conscience or the divine law; dishonesty; contrary to good order or public welfare; hostile to the welfare of the general public; inconsistent with purity or good morals; inconsistent with rectitude, or inimical to the right or common interests of other; morally evil or impure; not consistent with, or not conforming to, moral law or requirement; not having a moral nature or character; opposed to or violating morality; dissolute non-moral or unprincipled not decent; not moral, unjust, vicious, or wicked. “Immoral” has been held equivalent to, or synonymous with, “corrupt”, “deprave,” “dissolute,” “impure,” “indecent,” “unchaste” and sometimes “unprofessional.” It is the antonym of, or is contradistinguished from, “decent,” “good”, “moral,” “right,” and upright.

“immoral,” thus, is stated “non-consistent with,” or not conforming to moral law or requirement” “opposed to or violating morality,” “morally evil or impure,” “unprincipled.” “vicious,” “dissolute,” indecent’.
Section 20 (2) reads thus: ………………………………

Section 20(2) enjoins that the Court (Bishes Adalat) would conclude trial of the case within Ninety days (90) from the date of receipt of the case for holding trial.

Section 23 runs thus: …………………………………………

Section 23 mandates that notwithstanding anything contrary to the provisions of the Ain the provisions of the provisions of the Ain the provisions of the Code of Criminal Procedure would be applicable and the court would be treated as the court of Session.

We now propose to address ourselves to the first branch of contention advanced from the side of all the appellants that the conviction based upon belated prosecution story on the basis of a suo motu First Information Report cannot be sustained in law.

Every criminal trial is a voyage of discovery wherein truth is the quest. The first Information Report is the initial stage of that voyage. The legal position as to the object, value and use of First Information Report from the point of view of the information is to set the criminal law in motion and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps for tracing and bringing to book the guilty party. The First Information Report is never considered a substantive piece of evidence. It can only be used to corroborate or contradict the information’s evidence in the court. Evidence adduced in the court by a witness at the time of trial is the substantive and legal evidences (Emphasis put). In the First information Report lodged by PE2 victim A it is stated that nude photographs of herself and Pw3 victim A 1 were taken by the accused persons and the statement to that effect is very much positive and categorical. In her testimony victim A (PE 2) in no uncertain terms stated the unfortunate event of taking the nude photographs. The testimony of Pw 2 had been well supported by the credible testimony of victim A 1 (PW3). Moreover, the statements recorded under section 164 of the Code of Criminal procedure both by victim A and victim A1 (Exhibits 7 and j8) are in the same line as stated by PW 2 and PW 3 in their legal testimonies before the court. So, it cannot be said at all that First Information Report dated 3.10.95 is subsequent embellishment as to the commission of crime of taking nude photographs by the accused persons. The fries branch of contention, thus, fails having been without any substance.

Let us now turn to the second branch or contention that there are no evidences no record upon which the appellants could be convicted no record upon which
the appellants could be convicted for the commission of offence under section 9 (ka) to the Ain, 1995.

It is profitable recalled that the evidence adduced before the court at the time of trial is the legal and substantive evidence (emphasis ours) The unfortunate Victim A (PW 2) in her testimony unequivocally stated that accused Nantu, Rez alias Reaz, Biplab, Mithun and Al-Amin committed rape upon her and then a cameraman (accused Shamim Jussain) was called for taking the nude photograph of herself and victim A1 the cameraman (accused Shamim Hossain) took their two nude photographs The statement made by PW2 with respect to taking nude photographs had been well corroborated by the testimony of PW3. A faint attempt was made from the side of the appellant of Criminal Appeal No 687 of 1996 raising the plea is was Maksudul Alam alias Nantu who could be posted with the liability of taking the nude photographs in as much as at his instance the cameraman accused Shamim Hossain was called on to the place of occurrence to have the nude photographs and the appellant Mithun of the said Criminal Appeal could be at all posted for the said liability. On a close analysis of the legal evidences of Pw2 and PW3 it came to light tht accused Nantu, Reaz, Biplab, Mithun and A1 Amin committed rape. It was not at all suggested by the accused Mithun that at the time of taking the nude photograph he had not been there. The conclusion with can be drawn is that the accused Al-Amin and Shamim Hossain Participated in the commission on crime of taking nude Photographs which square falls within the offence described in section 9(ka) of the said Ain, 1995. the second branch of contention, also, fails.

Let us now turn to the third branch of contention that no case of abduction had been made out.

For the purpose of appreciating the contention so raised, the legal term or ward Abduction may be conveniently looked into. Abduction is defined in section 362 of the Penal code which is quoted here under:

“Whoever, by force compels, or by any deceitful means iduces any person to go from any place, is said to abduct that person”

On a bare reading of section 362 of the code it is evidently clear that the said section requires two essentials:

(a) Physically compulsion, or inducing by deceitful means; and

(b) the object of such compulsion or inducement must be the going of person from any place.

It is the consistent evidence of both PW 2 and PW 3 that they were forcibly taken from the place in front of the College canteen to the building under
construction situated on the southern side of the canteen and the crime was also committed there. On a reading of the ingredients of abduction as defined in section 362 of the Penal Code it cannot be at all suggested that no case of any abduction could proved by the prosecution. From the assessment of evidences of the PW 2 and PW3, the two commission of offence of abduction had arrived is the commission of offence of abduction had been well proved and established. This contention, also, goes as being without any merit.

The other question debated on behalf of the accused-appellants now remain to answered. The question is that the appellants having been charged under section 6(3) of the said Ain of 1995 could not be convicted for the offence under section 9(ka) of the Ain.

True it is that the accused persons except accused Shamim Hossain and Abdur Razzak stood charged under section 6(3) 1995. The legal evidences of Pw2 and PW3 had been detailed …. From the above evidence it has been proved …the accused Nantu, Biplab, Reaz, Mithun, A1…. and Shamin Hssaain are the authors of the commission of crime of taking nude photographs of the victim A1. it is not that no evidence had been led as to the commission of the said crime or offence. It is to be borne in mind that an offence under a particular section if not proved but some other offence is made out by the prosecution, the accused persons can be very well convicted and sentenced for the other offence proved before the court through legal evidence and the same is permissible is view of the provisions of section 236 and 237 of the code of Criminal Procedure (Emphasis put). The charge under section 6(30) If, at all fails, the above accused persons can be convicted under section9(Ga) of the Ain if the offence of the said section is established by the prosecution notwithstanding that the accused persons were not specifically charge under the said section. This proposition of law is well settled in the case of Begu vs emperor, AIR1925 PC 130 which is the basic authority on this proposition of law. There is plethora of authorities on this proposition of law. Muhammand Anwar and another vs State, 1952 scr 839 = AIR 1952 SC 167 and Najam Faraghi vs State of West Bengal (1998) 2 SCC 45 may profitably be referred to as some of the authorities. The question debated, thus stand, answered.

The last common contention that important and vital witnesses had not been examined by the prosecution and this non-examination raised a presumption against the prosecution case now remains to be considered.

Law does not require particular number of witnesses to prove a case and conviction may be well founded even on the testimony of a solitary witness provided his credibility is not shake by any adverse circumstances appearing on the record against him and the court, at the sometime, is convinced that he
his a truthful witness. As a general rule, a court can act on the testimony of a single witness of indifferent character, evidence on a point is to be judged not by the number or witnesses produced but by its inherent truth. The well known maxim which is a Golden Rule the “evidence has to be weighed and not counted” has been given statutory placement in section 134 of the Evidence Act which provides as under:

“134. No particular number of witnesses shall in any case be required for the proof of any act.”

This section makes a departure from the English Law which a number of statutes still prohibits convictions for certain categories of offence on the testimony of a single witness.

The occurrence took place in a building under construction situated on the southern side of the college canteen within the college premises. When the occurrence took place inside the building it would be futile to expect the prosecution to produce any outsiders as witnesses. The two victims were the only competent witnesses to prove the prosecution case. It is matter of common knowledge that now-a-days persons do not come forward to give testimony against the criminals for the fear of inviting enmity with them. The two victim PW2 and PW3 in clear terms narrated the commission of crime by the accused persons and their testimonies are of unimpeachable character. The prosecution succeeded by substantially proving the case on the basis of the evidence of PW2 and PW3 and for the proof of the case no other witness was required to be examined. For the proof of the prosecution case, the prosecution was not bound to examine any other witness and the non-production of any other witness did not destroy the evidence of PW2 and PW3.

We now propose to deal with the contention raised on behalf of the appellant in Criminal Appeal No.694 of 1996 that since the trial was not concluded within the statutory period of 90 day, the conviction and sentence awarded in a trial which was concluded beyond the statutory period of 90 days is void. The contention is absolutely devoid of any merit. On a reading of the specific provision contained in section 22 of the Ain, it manifests that in the Ain there is no penal provision. In the absence of any penal provision, the conclusion of trial within 90 days cannot be treated as mandatory, rather same is a mere directory.

Next comes the argument pressed from side of the appellant of Criminal Appeal No 1114..1996 that no Test Identification of Parade was for the identification of the appellant Shamin Hossain and without Test Identification Parade was not possible to connect him with the crime.
Section 9 of the Evidence Act deals with the relevancy of facts, necessary to explain introduce relevant facts. It says, inter alia, facts which establish the identity of anything or person whose identity is relevant in so far as they are necessary for the purpose, are relevant. The evidence of identification, thus, is a relevant piece of evidence under section 9 of the Evidence where evidence consists of identification of accused person at his trial. The statement of witness made in the court with respect to identification Parade is not a substantive piece of evidence but only a corroborative evidence. It fall in the realm of investigation. The substantive of legal evidence is the statement made in the court during trial. The purpose of the identification Parade is to test the observation grasp, memory, capacity to recapitulate what he seen earlier. The strength and trustworthiness of the evidence of the identification and to asserted whether it can be used as reliable corroborative evidence of the witness identifying the accused would be decided at the time of trial before the court.

True it is that no Test Identification Parade was held for the identification of the acute Shamin Hossain. But the fact remains the victim (PW2) and victim A1 (PW3) saw the acute Shamin Hossain at the time of taking their photographs and he was very much identified them when he was on the dock at the time of trial. The non-holding of the Test Identification of accused Shamin Hossain by victim A and victim at the time of trial and the statement made by witness are the legal and substantive evidence the eye of law. We are of this view that the non-holding of Test Identification Parade did not affect merit of the decision of the case. The contention raised got no force and the same stands rejected.

We shall now pass on the two fold missions advanced from the side of appellant in criminal Appeal no. 691 of 1996 that, (1) the seizure of the nude photographs from his possession could be proved by calling the Seizure List witnesses and as such the seizure of the nude photographs from the possession, (ii) he cannot be charged for the commission of the said crime. The points raised shall considered when the case of the said appellant should be dealt with independently.

This brings to the pertinent question whether the awarding of punishment upon the principals consistent with the safe dispensation of criminal justice when the offenders of the heinous crime are menace to the community, the society, the …and the mankind.

“Crime” in Black’s Law Dictionary, Sixth section of Penal Law, an offence against state. A ____ may be defined to be any act done in violation those duties which an individual owes to the community and for the breach of which the law has provided that the offender shall make satisfaction to the public. A
crime or public offence is an act committed or omitted in violation of a law holding or commanding it:

Crime in Warton’s Law Lexicon, Fourteenth section, read hereunder: it must be described as ….of right when considered in reference to evil, tendency of such violation as regards the community at large but this definition is too wide; and would include any evil act, or movement …..or not it is punishable in law:

Crime is therefore, stated as an act or …..which is prohibited by law as injurious to the public and punished by law. Crime is wrong of a public character and it possesses element of evil which affect the public as a whole and not merely an individual. To put it differently, crime is an act deemed by law to be harmful to the society in general, even though its immediate victim is an individual.

The purpose and object f the Ain of 1995 and already been stated in the forgoing paragraphs. It had been pointed out that the said ain is a stringent law which was enacted for awarding proper punishment upon criminals for the offences affecting women and children. It had, also, been pointed out that there must be liberal interpretation of the Statute and liberal construction of words and literal construction must be avoided if the same defeats the manifest object and purpose of the Ain. It had already been noted that the Bengali word…….. is in English immoral and disregardful of morality. The word immoral must be construed liberally and the court also must adopt that construction which suppresses the mischief and advances the remedy.

On seeing News Item published in some daily Newspapers of Barista of the commission of crime upon the victim A with in the premises of BM College, Barista, PW 9 who was in current charge of Sub-Inspector, Office o the Detective Branch, Brurial registered two GD Entries Exhibits 1 an 3 with Kotwali Police Station. He seized the nude photographs, material Exhibits .. and…. From the possession of accused Abdur Razzak but the negatives could north be recovered. The taking of the two nude photographs by the accused persons had bee testified by the victim A (PW 2) and A1 (PE 3) who in clear terms and language narrated the story of taking the nude photographs. The PE2 and PW 3 faced the grueling cross-examination from the accused persons but their testimonies could not be shaken at all. The victim A (PW2) in on uncertain terms while narrating he act crime on her by the offenders stated:…………………………………………………..

The statement of victim A (PW2) had been well corroborated by the statement of victim A1 (PW3)
Having scrutinized and scanned testimonies of PW2 and PW3 we are of the positive view that they are credible and truth witnesses and their evidences are absolutely … of credit and the same can be unhesitating accepted by the court. The bishes adalat also accepted their evidence one question commission of crime under section 9(ka) of the act of 1995

We ourselves have seen the two nude photographs. The nude photographs are shocking nature of crime and are indecent of the high degree and also revolting. The photographs clear manifest that the victims were helpless and were very much fearful. The acts squarely falls with immoral acts being the crime under section 9(ka) of the Ain of 1995. the word …. Which English Translation is employed must not construed strictly rather the same must be construct liberally and literal meaning is to be avoided to girl effect to the manifest object and purpose of the Ain the object being the punishment of the offenders heinous crime affecting children and women.

In this context one vital aspect of the matter must not be overlooked. The victim A and were two college students ate the relevant time. The victim A was a College girl of Barisal women College. The victim A1 was a college boy of BW college Barisal. They are definitely self respective boy and girl and they would never allow themselves to have their nude photographs out of their form consent and would have kept the same under the possession of accused Shamim Hossain and Abdul Razzak and also would come forward in the …. Just to make humiliating statement against the honour and dignity and also of their family.

In the forgoing paragraphs it has been stated that the commission of the offence abduction and been proved and established by truthful testimony of PW 2 and PW3 who were most competent persons to prove the said charge abduction . The two nude photographs Exhibit….. and … are shocking nature of crime and the same shocks. Conscience of all the citizens of the land. Also shocks the judicial conscience. This is a crime against the society and against the humanity a whole. The offenders are menace to the society. Social stability and order require to be regulated by proceeding against the offender. It is necessary to … maximum punishment under the law of the …. as a measure of social necessity which work as …… to other potential offender. It will be a …. Of justice to allow the offenders to escape ….. when faced with the unfortunate event of present one and the truthful testimonies of the statement two victims PW 2 and PW3 to allow offender to escape the penalty of law would be under the just icing system of our country suspect the citizens will loose confidence in the courts. (Emphasis put)
In this unfortunate case the unfortunate term were two collage going students at the time commission of crime. Victim is a person who is elected to misfortune by another. The criminal ….. system to day is basically concerned with criminal. Since the central object of legal process is promote maintain the public confidence in administration of justice, therefore there is an … for giving a well defined status to and the victim of the crime under the criminal the interest of the victim in getting the offender cannot be ignore or completely ordinate to the interest of the accused who is …to have an order of acquittal on the appeal of criminal jurisprudence of benefit of…. Imposition of appropriate punishment of the criminals is the response of the courts to the ……… Cry for justice against the criminals difference to the right to the victim of crime is being the faith of the society in general and the ….of crime in particular in the criminal justice etc. The rights of the victim of crime are … to be recognized in our country. It will help …… the rise in the crime rate and also bring ability to the criminal justice system. The object …. Should be to see that the crime does …. Unpunished and the victim of crime as well as society has the satisfaction that justice had been done to it. Justice demands that court should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. Courts must not only see the right of the criminals but also the rights of the victims of crime and the society at large while considering imposition of appropriate punishment.

Another aspect which relates to the involvement of the accused persons in the commission of crime now requires to be considered. There had been press news naming the accused persons. Charge sheet was laid on 2.11.95 warrant of arrest and proclamation and attachment were issued on 14.11.95. Evidence of four witnesses including PWs2 and 3, the two victims of the Crime, was recorded on 4.496 and only on the date the accused Rajub Kamrul Hasan alias Mithun, Arif and Nantu appered before the court but the accused Al-Amin, although, remained absconding during the whole period of trial and the was tired in absentia. The accused Al-Amin presented appeal on surrendering himself to the process of law on being convic5ted and sentenced. The other two accused persons Ashrafuzzaman alias Biplab alias Chega Biplab and Ansir Rahman alias Riad alias Reaz had been absconding all through during trial and they were tried in absentia and after conviction and sentence did not surrender to undergo the sentence and are still absconding. It is, thus manifestly clear that the accused Mithun, Nantu, Arif and Al-Amin were fugitive from law and justice and Biplab and Reaz are still fugitive from law and justice. Long abscondence and Non-submission to the process of the court speaks a against the accused persons and clearly suggest their involvement in the crime. Absconndence of the accused persons furnished corroboration of the prosecution case and evidence.
Before adverting to the authorities cited on behalf of the appellant in Criminal Appeal NO. 675 of 1996 we shall answer to plea taken by the defence that the accused persons had been implicated falsely at the instance of the police or to put it differently, that the victim A (PW 2) gave false evidence against the accused persons being influenced by the police. The plea is absolutely unsustainable and does not stand to any logic. It was not at all suggested that the police got enmity with the accused persons. It was not also suggested that the victims. It was not also suggested that the victims PW 2 and PW 3 got any enmity with the accused persons. Then what prompted the police or the victims to implicate the accused persons in the commission of crime when the dignity and honour of two college student were very much involved.

The primary duties of the policemen are the are the prevention and detection of crime, protection of the persons and their properties, and also maintenance of law and public order. In order to carry out those sacred duties, the policemen are clothed with the powers of investigation arrest, search, seizure, examination of witnesses and to lay charge-sheet in the court of law. Now-a-day police force fitting into the general picture of a welfare state playing its allotted role in a progressive and enlightened democracy is conceived. The police indeed is the guardian and the standard bearer of law. People want to see the police men as their guardians. (Emphasis ours). Bearing in mind the solemn duties and the sacred trust the society place upon them, the police personnel played a high sense of responsibility. On seeing the News Item published in some daily papers of Barisal of the commission of crime upon victim A in the premises of BM College, in performance of the solemn duties, the police registered two GD Entries with Kotwali Police Station, Barisal and started investigation to unveil the truth and punish the offenders and upon proper investigation laid charge sheet against accused persons. In this context the role of the press is highly praiseworthy. The press as a part of fair and honest journalism and as the conscience keeper of society, published the news of the commission of the crime upon victim A by the offenders in the Daily papers at Barisal. It was also not suggested that the press with an ulterior motive published the said news. Again it must not be also overlooked that the victim A (PW 2) would never do an act by which her honour and dignity would be brought to controversy through publication of news Item in the paper in bringing disgraceful allegations against the accused person. The same is also the position with other victim Al.

Let us now advert to the authorities placed by the learned Advocate for the appellant in Criminal Appeal No. 675 of 1996. It is well recognized that each and every judgment is to be made applicable in the facts and circumstances of each and every case and there cannot be any general application of enunciation.
of any proposition of law decided in any case. Keeping in view the above settled proposition of law it now needs be seen whether the authorities referred to got any relevancy and applicability in the facts and circumstances of the case in our hand. The First case is Shafuqul Islam vs State, 50 SLR 581. in the said case offence alleged to have been committed is under section 9(Ga) of the Ain, 1995. the question of abduction forced allurement and other offences were alleged to be have committed by the offences were alleged to have been committed by the offences were alleged to have been committed by the offender of that case. On going through the cited case it appears that the case got no manner of application in the fact and circumstance of the instant case. The next case is Muslimuddin and others vs State, 38 DLR (AD) 311. In that case it was decided that in point of time the information carried to the police by somebody is the First Information Report within the meaning of section 154 of the Code of Criminal Procedure and all subsequent information fall within the purviews of section 161 of the Code of Criminal Procedure True it is the case in our hand there had been two Gd Entries registered with Kotwali Police station, Barisal on the Basis of a News Item published in the daily papers at Barisal disclosing the commission of crime of victim A by some offenders in the premises of BM College. In the Report lodged by victim A dated 18.9.95, the commission of the crime with respect to the taking of the nude photograph had been positively and categorically stated and disclosed. The nude photographs were seized and during investigation the offence came to light on the biases of investigation. Charge sheet had been laid. In the evidence the guilt had been well established. It is worthy of recall again that the First Information Report is not the end of any criminal case and the principal object of the First Information Report is only to make a report to the police to set the criminal law into motion. The principle of law decided in the said case, though undisputed, the facts and circumstances of cited case being quite distinguishable in the facts and circumstances of the case in our hand the appellants cannot have any …. From the said case. It is now to be seen whether the guilt of the convict appellants could be established against them and whether any of them can be blessed with an order of acquittal of the charge leveled against them on the principle of criminal jurisprudence of benefit of …. To resolve the question we propose to divide the cases into two groups. Criminal Appeal no 694 of 1996 by appellant A1- Amin, Criminal Appeal No. 687 of 1996 by appellant Rajib Kamrul Hassan alias … Criminal Appeal no 765 of 1996 by …….Moksudul Alam alias Nantu and Criminal Appeal no 1114 of 1996 by appellant Shamim Hossain alias Shamim fall in the first group. Criminal Appeal no 695 of 1996 by appellant Aarif and criminal Appeal No. 691 of 1996 by apapellant Abdur Razzak come under the second group.
The principle of benefit of doubt accepted in England as a matter of public policy in available is an accused on the same ground or to the same …. In our country, Proof beyond reasonable. ….does not mean proof beyond the shadow of a doubt. This doubt is not an imaginary doubt. Benefit of doubt to the accused would be available provided there is supportive evidence on record, for creating doubt or grant in benefit of doubt, the evidence is to he such which may lead to such doubt. The law should fail to protect the community, the society, if fanciful possibilities is admitted thus, deflecting the course of justice.

We now direct our attention to the first group of appeal. The evidence and material on record had been discussed and detailed in the forgoing paragraphs. The commission of crime by the convict appellants of the first group of appeals namely AlAl-Amin, Mithun, Nantu and Shamim had been established by the direct truthful, unimpeached and convincing testimonies of the victim A (PW 2) and victim A 1 (PW 3) and also other material brought on record. PW 2 and PW 3 gave a vivid and graphic account of the unfortunate incident that happened to them. The3 overall view of the entire picture presented before us, the evidences and materials on record ……….. excludes any hypotheses of innocence of the appellants and suggest only guilt ant guilt only. The same bring to an inescapable conclusion that the prosecution could prove the commission of crime under section (ka) of the Ain of 1995 beyond any pale of reasonable doubt and the guilt of the appellants had been well established. The awarding of conviction and sentence upon the appellants having been well founded both on law and fact and the same having been in the safe dispensation of criminal justice, does not warrant any interference by us in the exercise of our appellate authority.

Then comes the second group of appeals for resolution of the controversy. The second group the Criminal Appeal No. 695 of 1996 by appellant Arif may be taken up first. On a careful perusal of the testimonies of victim A A (PW2) it appears that PW 2 in her testimony did not state that appellant Arif committed rape on her. The same statement had been also made by her in the statement recorded under section 164 of the Code of Criminal procedure before the learned Magistrate, First Class, Barisal. PW1, the maker of the suo motu First Information Report dated 30.10.95 and the Investigating Officer also testified that PW 2 did not name Arif in the commission of crime upon her. In the face of these evidences it is difficult to suggest that the appellant Arif was in the place of occurrence and participated in the commission of crime. The prosecution, thus, failed to connect the appellant Arif in the commission of crime beyond reasonable doubt. The appellant Arif is entitled to an order of acquittal of the charge leveled against him;
Now comes the Criminal Appeal no 691 of 1996 by the appellant Abdur Razzak. The appellant Abdur Razzak appeared to have played not part in the commission of offence under section 9 (ka) of the said Ain, 1995. No part could be attributed to him in taking the nude photographs of the victims. True it is that the photographs had been recovered from his possession in the presence of witnesses stated in the Sezure List. But no seizure list witness came forward to support the seizure of the nude photographs from his possession. The prosecution, thus, failed to bring home the charge against appellant Abdur Razzak and an order of acquittal may also be recorded for him.

Before parting with the matter we are inclined to make some observation in public interest and also in the interest of dispensation of criminal justice. But before that another vital aspect must be looked at which is the conduct of principal and professor Sayeed (Saidur Rahman) of BM College, Barisal.

Through the testimony of the victim A (PW 2) it came to light that Professor Sayeed (Saidur Ramhaman) along with a Aya and 2/3 persons came to the place of crime and victim A was taken to the room of the principal of the College where she disclosed the commission of crime upon her by the offenders. Her further positive evidence was that she was rebuked by them for her going to the College premises. The commission of crime within BM College premises was published in the Daily Newspaper of Barisal. The Principal of the college and Professor Sayeed (Saidur Rahman) were under a solemn duty and obligation, and also, a responsibility to bring the unfortunate matter to the notice of Administrative functionaries of the District for taking legal action against the culprits in accordance with the law of the land or could lay a report of Information oto the Administrative functionary, i.e. the Police authorities. It is lamentable that nothing had been done by them and they failed to discharge their solemn duties and responsibilities. It reveals manifestly that they tried to bury the incident but the same could not be so because of the praiseworthy and commendable role of the press who as the conscience keeper of the society and the nation rose to the occasion and published the incident in the New Paper. These two gentlemen being Professor of the college are parting education and teaching morality. They are known as the teachers of morality. By the silence, non action and the overall conductor of the two professors a dismal picture is portrayed and the same shocks the conscience of the citizens of the land. This matter must be treated drastically. In public interest we record the observations that the Government will take appropriate action against the Principal and Professor Sayeed (Saidur Rahman) of BM College, Barisal in the way it deems fit.

We now pass on to the observations which are catalogued hereunder: (i) Now-a-day there has been a spurt in crimes to sexual offences. The teen age girls
specially become the victims of the said offences. Law on the subject had been made more stringent in our country by the enactment of Nari-O-Shishu Nirijatan (Bishes Bidhan) Ain, 1995 in the said Ain the definition of rape contained in section 375 of the penal code, was made the definition of rape. The definition of rape should be amended to remove certain loopholes and inadequacies and to ensure that consent should be vitiated unless is real and given out of free choice. The law of rape should be more realistic. (ii) A woman who is raped undergoes two crises, one the rape and the other the subsequent investigation and trial. The first one seriously wounds her honour and dignity and my often ruin her physically. The victim of sexual ass........ or the prosecutor should be protected from the glare of embarrassing publicity during investigator as well as trial stage. Victim of sex crime has to undergo certain tribulation. These begin with treatment by the police and continue through a male dominated criminal…… justice system. Investigations are conducted generally by a male police officer. The victim of sex crime feel shy and embarrassed to supply information and other materials of the traumatic experience she had during the commission of crime. She would feel more easy and less embarrassed if the investigation conducted by a female police officer. Now – a- day there are good number of female police office and even there is lady Superintendent of police in our country. The investigation of the officer of sexual assault on a girl or women can easily conducted by a female police officer more female/lady Police Officers may appointed to serve the purpose. (iii) Like investigations of the crime Lady Police Officers, the victim of rape should be medically examined by the Lady Doctors saving her from further embarrassment. It is never be a difficult job to get a lady doctor available for the purpose of examination of the victim of sex crime. (iv) In our country trial of rape cases are held in open courts where public have easy access since courts are and always have been public avenues. The courts cannot control their own process by regulating the publicity of the proceeding with a view to protecting the innocent and safeguarding privacy interests. In open court the victim of sex crime would never feel ease and would be hesitant or bashful to testify properly and frankly. Trial of rape cases should be held in camera and that should be the rule. In a trial in camera, the victim of sex crime will not only be more comfortable and easy to answer the questions put to her by the defence but the same would save her from any further embarrassment which may cause to her. Trial in camera would not only be in keeping with the self respect of the victim of sex crime but that will also improve the quality of the testimony of the victim. The improved quality of testimony of the victim would also assist the court in arriving at the truth and in coming to a just decision. This will also advance the interest to the proper administration of justice. In this context it will be also worth considering that it is desirable that the cases of sexual assault on the women are tried by Lady Judges, wherever
available and possible so that the victim of sexual assault gives testimony with greater ease and also assist the courts to properly discharge their duties without allowing the truth to be sacrificed at the alter of rigid technicalities while appreciating the evidences in each case. Nari-O-Shishu Nirjatan (Bishesh Bidhn) Ain 1995 came into force on 17-7-1995 and since then the crime of rape are being tried under provisions of the said Ain By Bishes Adalat and the Presiding Judge of the Bishesh Adalat got the status of a Sessions Judge. Lady Sessions Judges are few in number and the Few lady sessions Judge may not be appointed as the judge of the Bishesh Adalat. In the fitness of the matter, nor Lady Session Judges may be appointed for the said purpose. (v) Every citizen of the land got the fundamental right to life. Rape is a breach of the victim’s fundamental right to life. It is the violation of human dignity of the victim. Rape is an indictable crime. Mere punishment of the offenders of sexual assault cannot give much solace to the victim and her family member. Adequate monetary compensation upon the offenders may redress the wrong and damage caused to the victims and the family members. In the assessment of compensation, the emphasis has to be on the compensatory rather than the punitive element. The quantum of compensation will depend upon the peculiar facts of each and every case. No rigid formula may be evolved. This compensation has to be awarded independently having no nexus which the provision of imposition of fine embodied in the Penal code and the same has to be inserted in the Ain itself. A permanent mode of compensation has to be worked out. The government may consider the matters under observations. With the above observations another fundamental matter is dispensation of criminal justice has to be noticed now. The treatment of the victims of sexual assault in the court by the defence lawyer during cross-examination must not be over looked. In total disregard of the provisions of the Evidence Act regarding the relevancy of facts, some defence lawyers attempt to cast a stigma on the character of the victim of sex crime and twist the interpretation of events given by her so as to make her appear inconsistent with her allegations. The court must not sit as a silent spectator while the victim of sex crime is being cross-examined by the defence. The court must effectively control the recording of evidence in the court. The court must ensure that cross-examination is not made a means of harassment and causing humiliation to the victim of sex crime. In case of sexual assault, the victim is supposed to be too ashamed and even nervous and confused to speak and her silence or confused stray sentences may be wrongly interpreted as discrepancies and contradiction in her testimony. We are informed by the learned advocates appearing on behalf of the appellants that the two convicts Ashrafuzzaman alias biplab alias Chega Biplab and Anisur Rahman alias Riad alias Reaz did not yet submit to undergo the sentence nor
they were apprehended by the police for the purpose of serving out the sentence. Record reveals that the two convicts remained absconding all through and they were tried in absentia. They are fugitive from law and justice. They must be apprehended. The police administration and Bishesh Adalat will take proper step in securing their arrest to put them in the jail to undergo the sentence awarded upon them.

On the premises of discussion made above and reasons stated, the conclusion which flows are:

The prosecution could establish the charge of commission of rape upon establish the charge of commission of rape upon victim A and the decision of the Bishesh Adalat in not finding the guilty of the said crime in spite of the convincing and credible unimpeached testimony of the victim A is unfounded and perverse and proper punishment was required to be imposed upon them and the said decision caused injustice to the victim A and her family. Since the state did not prefer any appeal against that portion of the decision recorded by bishesh adalat in not finding the culprits guilty of the crime, in the exercise of appellate authority in appeals, presented by the convicts against that portion of order awarding conviction and sentence upon them for the crime under section 9(ka) of the Ain, 1995, we cannot impose proper punishment upon the offenders for the crime of rape under section 6(3) of the said Ain by converting the order of acquittal into an order of conviction.

The over all view of the entire picture presented before us, legal evidences and other materials brought on record totally excludes any hypothesis of the innocence of the convict appellants, Al Amin, Mithun, Nantu and Shamim and the same bring to an irresistible conclusion that the prosecution could bring home the charge of crime under section 9(ka) of the Ain of 1995 beyond any shadow of doubt and the guilt of those appellants had been well proved. The awarding of conviction and sentence upon them having been well founded on law and fact and the same being in the safe dispensation of criminal justice, does not warrant any interference by us. The Criminal Appeal No. 694 of 1996 by convict appellant Al Amin, Criminal Appeal no 687 of 1996 by convict appellant Rajub Kamrual Hasan alias Mithun, Criminal Appeal No 765 of 1996 by convict appellant Maksudual Alam Alias Nantu and Criminal Appeal No. 1114 of 1996 by convict appellant Md Shamim Hossain (Shamim) stand dismissed. The judgment and order of conviction and sentence recorded upon them are hereby maintained and confirmed.

The prosecution failed to connect the convict appellant Arif of Criminal Appeal No. 695 of 1996 in the commission of crime beyond reasonable doubt. The criminal Appeal no. 695 of 1996 is allowed and the judgment and order of
conviction and sentence upon him dated 21.5.1996 is set aside. The appellant Arif acquitted of the charge levelled against him and set at liberty forthwith if not wanted in connection with any other case.

The prosecution failed to bring home the charge against the appellant Abdur Razzak of Criminal Appeal No. 691 of 1996 and the said appeal is allowed. The judgment and order of conviction and sentence upon him dated 21.5.1996 stand set aside. The appellant Abdul Razzak is acquitted of the charge laid against him and is set at liberty forthwith if not wanted in connection with any other case.

Let a copy of the judgment be forwarded for taking necessary steps and appropriated action in the light of the observations made in the body of the judgment to:

The Secretary, Ministry of Education to the Government to the people’s Republic of Bangladesh,

The Secretary, Ministry of Law, Justice and Parliamentary affairs, to the Government of the People’s Republic of Bangladesh,

The Secretary, Ministry of Home Affairs to the Government of the People’s Republic of Bangladesh,

Nari-O-Shishu Nirijatan Bishesh Adalat, Barisal

The Superintendent of Police, Barisal.
Azad Miah alias Md. Azad …Petitioner
Versus
The State …Respondent

Appellate Division
(Criminal)

Mainur Reza Chowdhury –J.
Mohammad Gholam Rabbani-J.
Md. Ruhul, Amin –J.

Judgement

Section 6(2) – Offence of rape and murder –appropriate punishment
Code of Criminal Procedure, 1898.
Section 164 and 364 – Confessional Statement of accused – Procedure of recording.

Jail Petition No. 4 of 2000.
(From the Judgment and order dated 17th April 2000 passed by the High Court Division in Jail Appeal NO. 1077 of 1996).

Truth is the essence of evidence. Confessional statement of an accused in relation to the admission of his guilt for commission of rape and murder when found voluntary and true can well form the basis of conviction. In the instant case the chain of events leading to rape on her and thereafter committing murder of the victim have been well proved by consistent evidence and also by judicial and extra judicial confession beyond all reasonable doubt. Since no mitigating circumstances transpired during trial, the sentence of death awarded by the trail court and confirmed by the High Court Division has been held by the Apex Court to be perfectly justified.

In the evidence of the witnesses as to making of extra judicial confession regarding causing death of victim Jaura Begum by the convict by throttling nothing is notice to discard the said evidence or in other words to doubt the truth and reliability of the fact as to which the said witnesses have deposed.

There is another incriminating matter against the convict and the same is his confessional statement that was recorded by PW18. Magistrate. As seen from the evidence of the said witness that the confessional statement was recorded by him upon due compliance of the provisions of Section 164 and 364 of the Code of Criminal Procedure. The High Court Division upon scrutiny
of the evidence of PW 18 and the confessional statement has found the same true and voluntary. The only suggestion made to the PW18 was that the confessional statement was a product of torture but the witness (PW18) denied the same  

In the background of the facts and circumstances of the case and the evidence on record we do not find any extenuating circumstance to commute the sentence confirmed by the High Court Division to some other sentence … (Para 16).

Judgement

MD Ruhul Amin-J : Convict prisoner’s sentence of death having been confirmed on acceptance of the reference, being Death Reference No. 11 of 1996 and dismissal of Jail Appeal NO. 1077 of 1996 that was preferred against the sentence of death, by a Division Bench of the High Court Division by the judgment and order dated 17th April, 2000. The reference was made by the learned Additional Session Judge and Judge of Nari-O-Shishu Nirjatan Daman Bishesh Adalat, Comilla upon convicting the convict-prisoner under section 6(2) of Nari-O-shishu nirjatan(Bishesh Bidhan) Act,1995, herein after referred to as the act by the judgment and order dated 22nd July ,1996 in Nari o-Sishu Nirjatan Daman Bishesh Tribunal Case No. 1 of 1995.

2. Facts in the background of which the condemned prisoner was put on trial to answer the charge under Section 6(2) of the Act, in short are that on 31st August, 1995 in the evening at about 7 p.m. Jahura was sent by her mother with cake (Pitha) to Jahura’s maternal grand –mother Julekha Bibi’s (P.W.10) house at a distance of about ½ kilometer on the north east, that Jahura’s maternal uncle, Momtaz Mia (P.W.7) found Jahura on her return to her house at the rail gate and requested the convict Azad Mia, neighbour of Jahura, to take her to her house, that at about 10 in the night Korban Ali, the informant (P.W.1) heard hue and cry on the north of his house and then while he and others proceeded towards the field then saw convict and many others were raising alarm about finding dead body of a girl by the side of the grave yard on the east of the house of Ramjan Ali Sawdagor and that thereupon P.W.1 and others went to the place where the dead body of the girl was lying and there the informant and others found nude dead body of a girl, that at the place of occurrence Momtaz Mia (P.W.7) maternal uncle of the deceased came and he disclosed to the persons present at the place of occurrence, that the deceased girl was his niece and that also disclosed that in the evening of 31st August, 1995 the deceased with cake went to his mother and that on her way back to her house he saw Jahura Begum at the rail gate and that on query the deceased disclosed that she went to PW7’s house with cake and that if she finds any body of her acquaintance she would go to her house, that at that time P.W. 7 saw Azad, neighbour of the deceased Jahura Begun and requested him to take
the deceased to her house and that the convict took the deceased with him for taking her to her house and that thereafter he went to the bazaar.

3. P.W. 7 having had disclosed the said facts Kalu Miah (P.W.3) and others of convict’s village brought the convict from his house at the place of occurrence and there in presence of P.W.s.1, P.W. 3 and P.W. 7 and others confessed that while he was taking Jahura to her house he committed rape on the deceased against her will and that she having had tried to raise hue and cry he killed her by throttling.

4. P.W. 1 lodged ejahar on 1st September 1995 at 11.30 a.m. with Laksham Police Station and thereupon Laksham P.S. Case No. 1 dated 1st September, 1995 was started under Section 302 of the Penal Code read with Section 7 of the Cruelty to Woman (Deterrent Punishment) Ordinance, 1973.

5. On completion of investigation P.W.22 Sub-Inspector of Police attached to Laksham P.S. submitted charge sheet against the convict under Section 302 of the Penal Code and Section 6(2) of the Act.

6. At the trial charge was framed under Section 6(2) of the Act.

7. Prosecution in all examined 22 witnesses including official witnesses. P.W. 13 Medical Officer, who held post mortem examination, P.W.14 S.I. of Police who filled up the FIR Form and proved the FIR which was recorded by ASI Shahjahan attached to Lakshman PS P.W. 15 PSI attached to the Laksham PS held inquest of the dead body of Jahura Begum, P.W. 16 Constable who escorted the dead body to the morgue, P.W. 17 another constable who accompanied the P.W. 16, P.W.18, Magistrate 1st Class, Comilla recorded the confessional statements of the convict on 3rd September 1995. P.Ws. 4,11,12, 17, 19, 20 and 21 were tendered and the defence did not cross-examine them. The convict was arrested on 1st September 1995.

8. Matter of sending Jahura Begum to her grant mother’s house has been proved by P.W. 6 mother and P.W. 10 grand mother of victim Jahura Begum.

9. Fact of handing over the victim to the convict in the evening of 31st August, 1995 has been proved by P.W. 7 maternal uncle of the deceased and he has been corroborated by P.W.8.

10. P.W. 7 having had disclosed at the place of occurrence handing over of the deceased to the convict, he was brought from his house at the place of occurrence by the villagers and that he confessed as to causing death of Jahura in presence of the persons present at the place of occurrence in the very night of the incident has been proved by P.W.1, P.W .3 and P.W. 7 and that also by P.W.8., 11. P.Ws. 1, 2, 3, 5 6,7 8, 9 have stated about the finding of dead body of Jahura Begum by the side of graveyard.

Landmark Judgments on Violence Against Women and Children from South Asia | 145
12. In the evidence of the witnesses as to making of extra Judicial confession regarding causing death of victim Jahura Begum by the convict by throttling nothing to discard the said evidence or in other words in doubt the reliability of the fact as to which the said witnesses have depose.

13. There is another incriminating matter against the convict and the same in his confessional statement that was recorded by P.W.18, Magistrate. As seen from the evidence of the said witness that the confessional statement was recorded by him upon due compliance of the provisions of section 164 and 364 of the Code of Criminal Procedure. The High Court Division upon scrutiny of the evidence of P.W.18 and the confessional statement has found the same true and voluntary. The only suggestion made to the P.W. 18 was that the confessional statement was product of torture but the witness had (P.W. 18) denied the same.

14. In confirming the sentence of death of the condemned prisoner that was passed by the learned Judge of the Noari –O Shishu Nirjatan Daman Bishesh Adalat Comilla in Nari-O-Shishu Nirjatan Daman Bishesh Tribunal Case No. 1 of 1995 no error of law or illegality has been committed by the High Court Division since no infirmity or irregularity in consideration of the material evidence in finding the condemned prisoner guilty of the offence charged and tried has been noticed by us.

15. On consideration of the evidence of the witnesses mentioned herein before and that on perusal of the judgment of the High Court Division we are of the view that the High Court Division has committed no error of law in confirming the sentence of death that was passed by the Court of Additional Sessions Judge and Nari-O-Shishu Nirjatan, Daman Bishes Adalat, Comilla in Nari-O-Shishu Nirjatan Daman Bishesh Tribunal Case NO. 1 of 1995.

16. In the background of the facts and circumstances of the case and the evidence on record we do not find any extenuating circumstances to commute the sentence confirmed by the High Court Division to some other sentence.

17. In the result Jail Petition No. 4 of 2000 is dismissed. The judgment and order of the High Court Division dated 17th April 2000 passed in Death Reference NO. 11 of 1996 and the Jail Appeal No. 1077 of 1966 is affirmed.
Abdus Sobhan Biswas … Appellant  
Vs  
State …. Respondent  

High Court Division  
(Criminal Appellate Jurisdiction)  

Judgment  
Md. Hassan Ameen J.  
Tariq ul Hakim  

August 11th 2002  

Nari-O-Shishu Nirjatan (B Bidhan) Ain,(XVII of 1995)  
Section 6(1)  

In the absence of evidence to the contrary the only inference that can be drawn is that the victim, a helpless village woman is telling the truth about her shameful ordeal in the hands of the accused as she has nothing to gain by making false statements, about subjecting herself to the ignominy of being raped.  

The accused being a Union Parishad Member Commanded respect from a poor man like the informant and allowed the victim to go with the accused to Rajbari. The accused seems to have taken advantage of the situation and instead of taking her to the Deputy Commissioner’s office took her to a residential hotel and kept her there with him in the same room. The defence argument of total denial is not credible in the face of corroborating statements by P.Ws. 7 and 8 that she was kept in the residential hotel at night in the same room, prior to which the accused introduced himself to the hotel staff as the husband of the victim. (19, 22 and 23)  

Al-Amin Vs. State 1999 BLD 307= 51 DLR 154 (Al- Amin Vs. State) relied.  

ABM Nurul Islam, Advocate for the Accused -Appellant.  


Judgement  

Tariqul Hakim, J: This criminal appeal at the instance of accused-appellant Abdus Sobha Biswas son of Late Harun-or Rashid Biswas, is directed against the judgment and order dated 18.112.1997 passed by the learned Nari-O-Shishu Nirjatan Daman Bishes Judge, Nari-o-Shishu Nirjatan Damon Bishesh Adalat No.2 Rajbari in Nari-O-Nirjatan Daman Case No. 20 of 1997 arising of GR No. 588 of 1996 convicting the (Accused-appellant )Under Section6(1)
Sexual Assault and Rape

2. The prosecution case is that the informant on 18.11.1996 in good faith at the suggestion of the accused appellant allowed his wife Rashida to accompany the accused to the office of the Deputy Commissioner, Rajbari to collect charitable relief of Taka 1800 since his homestead was burnt in a fire. On 19.11.1996 after reaching Rajbari the appellant told the victim in the evening that the money will be paid the following day by the Deputy Commissioner’s office and that they have to stay at Rajbari over night. The accused appellant then took the victim to a residential hotel by the name Al Quddus where he introduced himself as the husband of the victim and rented Room No. 110. At about 12.00 mid night he raped the victim against her will the victim raised hue and cry and the hotel manager and hotel boy Abdur Razzak and Md Ali Bhutto rushed to the room and heard and saw the matter. On the following morning the victim returned home and reported the occurrence to her husband who filed a complaint case before a Magistrate having the competent jurisdiction at Rajbari who sent, the petition to Rajbari Police Station for treating it as an first information report and accordingly, the aforesaid PS Rajbari case was started.

3. The police took up investigation, visited the scene of the said occurrence, prepared sketch map with separate index, seized alamats by preparing seizure list, produced the victim before Medical Officer for holding medical examination, recorded statements of the prosecution witnesses under Section 161 of the Criminal Procedure Code and finally submitted charge-sheet against the accused as prima facie case under Section 6(1) of the said Ain was made out.

4. The case recorded ultimately came to the file of the present trial Court who on the basis of materials available on record framed charge under the aforesaid section of law and read it over to the accused in the dock to which he pleaded not guilty and demanded trial.

5. The prosecution examined 9 witnesses all of whom were cross-examined by the defence. After close of the prosecution witness the accused appellant was examined under Section 342 of the Code of Criminal Procedure to which he repeated his innocence. The defence did not adduce any evidence.

6. The defence case is total denial of the allegation. The further defence case is that, the victim P.W. 3 entered into an agreement with the appellant on 5.10.1996 for the sale of 22 decimals of land for Taka 25,000 out of which she took an advance of Taka 17,000 but she did not execute the necessary documents subsequently in spite of his requests. The defence totally denied
that the accused took the victim to Rajbari for collecting relief money or stayed with the victim at Al Quddus Hotel.

7. That the learned Trial Court thereafter in consideration of evidence on record as well as facts and circumstances of the case, found the appellant guilty for the offence charged and convicted him there under and sentenced him for the aforesaid term as well as to pay fine with a default clause as mentioned above. Being aggrieved and satisfied thereby the accused appellant has come up with the present appeal which is opposed by the respondent State represented by the learned Assistant Attorney –General Mr. Md. Robiul Karim.

8. Mr. ABM Nurul Islam, the learned Advocate for the accused appellant took us through the first information report, charge-sheet, deposition of prosecution witnesses, impugned judgment and other material papers / documents as available in paper book and submits that this is a case of no evidence, but the learned trial court arrived at a decision on conjectures and surmises. He further submits that the victim was never raped by the accused appellant and the impugned judgment and order is not sustainable in law.

9. Mr. Md. Robiul Karim, the learned Assistant Attorney General, appearing on behalf of the respondent State, opposes the appeal contending inter-alia that the offence alleged has been proved by the victim herself and as such the impugned judgment and order of conviction calls for no interference by this Court. He further submits that the accused’s presence with the victim in the hotel has been corroborated by the other P.Ws and, as such the prosecution case has been proved beyond all reasonable doubt. Finally the learned Advocate for the accused appellant submits that the trial court’s sentence of life imprisonment is harsh and under Section 423 of the Code of Criminal Procedure this court may reduce the same. The leaned Assistant Attorney General however, has poured out that under Section 6(1) of the Ain the sentence prescribed for the offence is imprisonment for life or death and accordingly there is no scope of reducing the sentence passed by the trial court in this case.

10. P.W.1 the RMO of Rajbari Sadar Hospital deposed that he examined the victim on 11.12.1996. In cross examination he admitted that he did not find any external injury on the body of the victim.

11. P.W.2 the informant and the husband of the victim deposed that the accused had assured him that an amount of Taka 1800 was sanctioned by the Deputy Commissioner. Rajbari as relief and that the victim should accompany the accused to the Deputy Commissioner’s office for collecting the same. He further deposed that on 19.10.1996 as per request of the accused he gave him Taka 300 for traveling expenses and in good faith allowed his wife to go with him to Rajbari. The following day, that in on 20.10.1996, the victim returned
home and reported to him that the accused has taken her to a hotel by the name Hotel Al Quddus at Rajbari and kept her at Room No. 110 and raped her there at night. He further deposed that he informed the incident to the local people and requested that a salish be held but the accused did not turn up at the salish. In cross he stated that his wife used to address the accused as Kaka (uncle) and accordingly, in good faith he allowed his wife to accompany the accused to Rajbari. He denied the allegation that he asked the accused to purchase any land or that his wife took any advance part payment of the sale price of the land or even that he is refusing to hand over the land after taking money in exchange of it.

12. PW 3 the victim deposed that the accused claimed to have arranged 1800 Taka as relief money from the office of the Deputy Commissioner Rajbari and accordingly, to collect her to go with the accused for this purpose. She further deposed that on reaching Rajbari the accused told her that the money could be collected the following day; she wanted to return home the same day but the accused prevented her from doing so on the excuse that there was no transport available at the time. She then deposed that the accused then took her to a hotel by the name Al Quddus where the accused introduced himself as the husband of the victim and that he returned Room No. 110 and they stayed there at night. She further deposed that at 12 midnight the accused raped her against her will. The following morning she was put on the bus by him (accused) and she returned home and reported the matter to her husband. She further stated that the accused did not accompany her on her return journey. In cross examination she denied having come to Rabjari before and said she did not inform the matter of being raped to anybody at the hotel out of fear for her life. She also stated that the accused threatened her with a knife but she admitted that she did not receive any injury on her body. She further denied having sold 22 decimals of land and receiving any money for it.

13. PW 4 Amjad Hossain another Union Parishad member stated that the victim informed him that the accused took her to Rajbari and raped her in the night whilst in a hotel. In cross he denied giving false evidence out of enmity with the accused.

14. PW 5 the mother of the victim stated that her daughter was taken to Rajbari by the accused for collecting the relief money from the deputy Commissioner’s office. On the night of the occurrence the victim did not return home. The following morning at about 8.00 am her daughter returned home. She further deposed that the victim informed her that the accused raped her at the hotel where they stayed at night. In cross she stated that the accused discouraged her from accompanying the victim, as it would cause unnecessary expense and time.
15. PW 6, Shahidul Islam deposed that the hotel register of the Al Quddus hotel was seized by the police soon after the occurrence and kept in his custody. In cross-examination he stated that he signed the seizure list. He further stated that on page no. 292 of the said hotel register being date 19.11.1996 the names of the victim and the accused are written in Serial Nos. 1 – 2 indicating them to be occupants of the said hotel on that date.

16. PW 7 he manager of the hotel deposed that at about 8.30 pm. on 19.11.1996 the accused and the victim came to the said hotel and the accused introduced himself as the husband of the victim and paid for one night’s stay at rented room no. 110 that night and stayed together. In cross he stated that he did not hear any shouting or commotion at night and that both of them left the hotel at 5.00 in the morning.

17. PW 8 the hotel boy deposed that on 19.11.1996 the accused and the victim came to the hotel at night and stayed in Room No. 110. The accused introduced himself as the husband of the victim. In cross he stated that he was working at the hotel for the last eight months and that he sleeps at night at the hotel office. He further said that the accused and the victim stayed together during the night in the same room but he did not hear any shouting or commotion at the time. He further stated that the victim did not tell him anything about the accused at that time.

18. PW 9 the Sub-Inspector of Rajbari Thana and investigation officer of the case after investigation submitted charge-sheet against the accused. This is all about the evidence on record.

19. The occurrence of rape has been challenged by the defence. Even the appellant’s presence at the place of occurrence has not been admitted. It however, appears that the victim was allowed to go with the accused by her husband in good faith to Rajbari for collecting relief money from the office of the Deputy Commissioner, Rajbari. It also appears that the victim and the accused spent the night of occurrence in the residential hotel in the same room. It further appears that the accused being a Union Parishad Member commanded respect from a poor man like the informant and allowed the victim to go with the accused to Rajbari. The accused seems to have taken advantage of the situation and instead of taking her to the Deputy Commissioner’s office took her to a residential hotel and kept her there with him in the same room. The defence argument of total denial is not credible in the face of corroborating statements, by PWs 7 and 8 that she was kept in the residential hotel at night in the same room, prior to which the accused introduced himself to the hotel staff as the husband of the victim.

20. The defence argument that the informant filed the instant case out of enmity resulting from an agreement for the purchase of 22 decimals of land belonging
to the victim for which a part payment was paid by the accused to the victim is not substantial by any evidence. It is therefore, difficult to believe such a story in the absence of at least a receipt for the said part payment and/or evidence of those persons who witnessed the transaction.

21. The medical examination of the victim made on 11.12.1996, several days after the occurrence is of no value. Although PW 1 the medical doctor found no evidence of rape this may be due to the fact that the medical examination was done long 21 days after the occurrence and the victim, an adult married woman, is unlikely to bear any trace of rape after such a long period.

22. The act of rape, as claimed by the victim, has not been corroborated by the testimony of any other witness. The general rule is that the court cannot act on the testimony of a single witness provided his/her credibility is not shaken by adverse circumstances. Accordingly, the testimony of the victim who knew the accused from before, and who used to address him as Kaka (uncle) is sufficient in the absence of other evidence against her character to treat her statement as being true. This view finds support in the decision reported in 1999 BLD 307 = 51 DLR 154 (Al-Amin Vs State) where a number of Criminal Appeals were deposed of by a single judgment. In the said case their Lordships observed.

“Corroborative evidence is not as imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of a victim of sex crime is not a requirement of law but merely a guidance of prudence under given circumstances. The rule is not that corroboration is essential before there can be a conviction. The testimony of the victim of sexual assault is vital and unless there are compelling reasons which necessitates looking for corroboration of her statement, the Court should find no difficulty in acting on the testimony of a victim of sex crime along to convict an accused where her testimony inspires confidence and is found to be reliable”.

23. Thus in the absence of evidence to the contrary the only inference that can be drawn is that the victim, a helpless, village woman is telling the truth about her shameful ordeal in the hands of the accused behind locked doors of the Hotel Al Quuddus on the night of the occurrence. She has nothing to gain by making false statements about subjecting herself to ignominy and embarrassment of being raped by the accused.

24. Although it is stated in the first information report that the accused created hue and cry and commotion at the hotel on the night of the occurrence but the PWs 7 and 8 hotel manager and hotel boy respectively clearly denied the same, showing a discrepancy between the ejaahar and the evidence, this is a
minor matter and does not make any material change in the nature and character of the circumstances of the offence. The first information report is merely a statement to get the investigation machinery into motion. It is never conclusive evidence. The witnesses’ statements and other alamats from the evidence for the trial and conviction and in the instant case that portion of the first information report which does not support the evidence will have to be disregarded. Accordingly, the fact that the PWs 7 and 8 heard no shouting commotion and the same being corroborated by testimony of the victim that she did not scream shout on the night of the occurrence, in fear of accused, leads one to believe that, in fact, she not shout and create any commotion on the night the occurrence. In the face of total denial by accused of ever having stayed at the said hotel the night of the occurrence this discrepancy between the first information report statement and evidence of PWs 7 and 8 does not reduce the weight of the other evidence adduced against the accused for the offence charged.

25. Thus in view of the matters, aforesaid our opinion the trial court has rightly found the accused appellant guilty of rape as charged contravention of section 6(1) of the Nari-O-Shish Nirjatan (Bishes Bidhan) Ain,1995 and sentence him to imprisonment for life.

26. As for the learned Advocate for the appellant’s submission that in the fact any circumstances of the case the sentence passed by the trial court is too harsh and the same may be reduced as per provision of section 423 of the Criminal Procedure Code, we are of the opinion that though as per the language of Section 423 of the said code the appellate Court has a discretion to alter sentence passed by the Trial Court such discretion limited to cases where the statute does not stipulate a minimum term. Since section6(1) of the said Act clearly stipulates that a person found guilty thereon will be punishable with death or imprisonment for life therefore there is no room for reducing the sentence of imprisonment for life passed by the trial Court.

As a result this Appeal is dismissed. Send down the LC records along with a copy of judgment to the Trial Court concerned immediate for information and necessary action.
Sexual Assault and Rape

Bazlu Talukder … Petitioner
Versus
The State … Respondent

Appellate Division
(Criminal Jurisdiction)
A M Mahmudur Rahman and Mahmudul amin Chudhury, JJ.
Criminal Petition For Leave To Appeal No.229 of 1998
Date of Judgment The 25th of August, 1999
Result Petition dismissed
Penal Code, 1860 (XLV of 1860) Section-376
Cruelty To Woman (Deterrent Punishment) Ordinance, 1983 (LX of 1983) Section –4(b)(c)
The High Court Division on consideration of evidence of PWs rightly found that accused-petitioner Bazlu raped victim Mahinur Bengum and that it was Bazlu who wanted to marry the victim girl Mahinur Begam and as such the finding of conviction and sentence of the High Court Division are based on proper appreciation of evidence on record.
Respondent : Not represented

Judgment

A M Mahmudur Rahman, J.: This petition for leave to appeal by the accused petitioner is from the judgment and order dated 24.7.1995 of a Division Bench of the High Court Division passed in Criminal Appeal No.2252 of 1992 dismissing the appeal of the accused-petitioner.

2. The accused-petitioner along with others were placed on trial before the Special Tribunal, Madaripur in Special Tribunal Case No.13 of 1992 on a charge under section 376 of the Penal Code read with section 4(c) of the Cruelty to Women (Deterrent Punishment) Ordinance 1983 on the accusations, inter alia, that the accused-petitioner along with other accused armed with deadly weapons kidnapped Mahinur Begum aged 15 years on 18.9.90 at about midnight. After 3 days of the occurrence she was given back to her step-father Abdur Rashid. She complained that she was raped by other accused persons including the present petitioner.
3. The trial court by its judgment and order dated 26.11.92 convicted the accused petitioner under sections 4(b) and 4(c) of the Ordinance and sentenced him to suffer rigorous imprisonment of 14 (fourteen) years and to pay a fine of Tk. 5000/- in default to suffer R.1. for further 1 (one) year.

4. The accused-petitioner and others against the judgment and order of the trial court preferred the aforesaid criminal appeal in the High Court Division and a Division Bench of the High Court by the impugned judgment and order dismissed the appeal in so far as it relates to the accused petitioner and allowed the appeal of the other two accused.

5. Syed Ziaul Karim, learned Advocate for the petitioner, submits that the learned Judges of the High Court Division were wrong to pass the impugned judgment and order inasmuch as the F.I.R. lodged by the father of the victim on 19.9.90 was a premeditated one as from evidence it appears that victim Mahinur Begum was recovered by police on 22.9.90 and in that view of the matter the conviction of the petitioner cannot be sustained in law, that the manner of occurrence as alleged by the prosecution is doubtful in view of the evidence on record, that there was no corroborative evidence in respect of commission of rape by the accused petitioner, that the learned Judges of the High Court Division wrongly came to a finding that only the accused-petitioner raped the victim although the victim girl deposed that accused-petitioners. Bazlu Talukder. Hemayet Talukder and Badal Talukder raped her and that as co-accused Hemayet Talukder and Badal Talukder were acquitted by the High Court Division on benefit of doubt the petitioner is entitled to acquittal on the same reasoning and that the impugned judgment and order suffer from non-consideration and misreading of evidence on record.

6. It appears that the learned Judges of the High Court Division on consideration of evidence of PWs rightly found that accused petitioner Bazlu raped victim Mahinur Begum and that it was Bazlu who wanted to marry the victim girl Mahinur Begum and ultimately came to the following finding ………that appellant Bazlu was the prime kidnapper and forcibly had sexual intercourse with Mahinur and that the other convicts are entitled to the benefit of doubt.”

7. As the finding of conviction and sentence of the High Court Division are based on proper appreciation of evidence on record we do not find any reason to interfere with the same on any of the submissions of the learned Advocate.
Rajib Kamrul Hasan and three others……Appellants
Vs
State………Respondent

Appellate Division
(criminal)

Judgment
Latifur Rahman C J
M Amin Choudhury
M Reza Choudhury J
January 31,2001

The petition is dismissed

Natri-o Shishu Nirjatan (Bishesh Bidhan)Ain (XVIII of 1995)

Sections 6(3) and 9(ga)

The offence of rape failed but from the evidence on record it transpired that the appellants committed immoral acts with respect to the women.

Here in this particular case the accused was charged with a major offence of rape having severity of punishment, but in evidence it transpired that the accused appellants performed minor offence in relation to the victim woman which provided a lesser punishment and in the facts of the case it is a cognate offence which have the main ingredients of immoral act as PW 2 Shiriti Kona Biswas was made naked along with PW 3 Ripon and they were placed in nude position and their photographs were taken. This is highly an immoral act in relation to the women as contemplated in section 9(Ka) of the Ain and as such, there is no legal bar in convicting the appellants for the minor offence when the same transpired in evidence.

(From the Judgment and order dated 9-10 the December, 1998 passed by the High Court Division in Criminal Appeal Nos. 687,694 and 765 of 1996)

Code of Criminal Procedure (V of 1898)
Sections 236, 237, 238 and 337

The accused raised no objection on the score of defect in charge at any stage of the trial. The objection raised for the first time in the Appellate Division is not entertain able by virtue of explanation appended to section 537 of the Code of Criminal Procedure.
Adverse Remarks

Before making observations and giving directions High Court Division acted illegally in not giving any notice to the appellants which is a gross violation of the principle of natural justice and consequently, the remarks should be expunged.

State Vs Abdul Mannan, 44 DLR (AD) 173; MG Rabbani and another vs Government of Bangladesh, 31 DLR (AD) 163 ref. .................. (23 & 24)

Abdul Malek, Senior Advocate, instructed by Azra Ali, Advocate-on-Record for the appellant in Criminal Appeal Nos. 18-19 of 1999.


Judgment

Latifur Rahman CJ: Criminal Appeal No. 18 of 1999 has been filed by accused-appellant Rajib Kamrul Hasan, Criminal Appeal No. 19 of 1999 has been filed by accused-appellant Al-Amin, Criminal Appeal No. 30 of 1999 has been filed by the accused-appellant Maksudul Alam alias Nantu and Criminal Appeal No. 31 of 1999 has been filed by appellant Mokbuluddin Ahmen, former Principal of University College, Barisal and Professor Syeed (Saidur Rahman) Principal, BM University college, Barisal. All these appeals are disposed of a common judgment. Criminal Appeal Nos. 18, and 30 of 1999 arise from the judgment and order dated 10.12.98 passed by a Division Bench in the High Court Division upholding the conviction of Rajib Kamrul Hasan. Al Amin and laksud alam under section 9 (Ga) of Nari-o-aishu Nirjatan (Bishes Bidhan) Ain, 1995 and sentencing each of them to suffer rigorous imprisonment for 10 years each and to pay a fine of Taka 5,000.00 arising from the order of conviction and sentence passed by Nari-o-Shishu Nirajatan Daman (Bishesh Bidhan) Judge, Barisal in case No. 5 of 1995 on 21.5.96. Criminal Appeal No. 31 of 1999 arises from making certain observations by the Judges of the High Court Division against Mokbuluddin Ahmed and Professor Sayeed (Saidur Rahman).

2. The prosecution case, in short, is that Shiriti Kona Biswas lodged an first information report on 18.9.95 at 22-15 hours at Motbaria Police Station against 8 accused persons on the allegations that on 9.8.95 at about 11-00 am she went to Barisal BM College to procure notes on the subject of Home
Economics. In the college premises she was talking to Ripon, cousin of her friend. Lovely and at that time Nizam, a friend of Ripon was present. In the meanwhile, the accused persons came and surrounded them and thereafter they took her, Ripon and Nizam to the southern side of the canteen. They assaulted Nizam and took all three of them in to the under-construction house contiguous to the canteen. The accused persons after assaulting Nizam allowed him to go. They assaulted Ripon and took away his gold chain which was on his neck. The they demanded Taka 10,000.00 from Ripon and on his refusal to pay the money accused Nantu brought accused Shamim from ‘Shawan Studio’ and two of the accused forced them to lie down on point of dagger and took their nude photographs. The accused also threatened that they would exhibit the photographs to others. The accused persons took away Taka 300.00 from her vanity bag and asked her and Ripon to go away from the town. She stated that after completing her examination she went home and fell ill. Thereafter the first information report was lodged in consolation with her brother.

3. The defense case is that, they are innocent and that they have been falsely implicated in this case by the police to the instance of their enemies. On behalf of accused Rajib Kamrul Hasan it was specifically suggested that he was implicated in the case to damage the reputation of his father and uncle Golam Mowla who was a political leader. The case has been started by his political rivals to damage the carrier of Rajib Kamrul Hasan.

4. The prosecution examined in all 10 witnesses to substantiate the charge. Pw 1 is the informant; PWs 2 and 3 are the alleged victims.

5. As already noticed, the conviction and sentence passed by the trial Court was upheld by a Division Bench of the High Court Division.

6. Mr. Abdul Malek, learned Advocate appearing for the accused-appellants in Criminal Appeal Nos. 18-19 of 1999 primarily submits that charge having been framed for commission of rape under section 6 (3) of the said Ain. The conviction and sentence under section 9 (Ga) for committing an offence of immoral act is illegal and not sustainable in law.

7. Syed Ziaul Karim learned Advocate appearing in Criminal Appeal No. 30 of 1999, adopted the argument of Mr. Abdul Malek.

8. The accused-appellants were charged under section 6 (3) for committing rape on PW 2 Shiriti Kona. The learned trial Judge on consideration of the evidence on record found that the prosecution failed to prove the offence of rape against the appellants. But from the evidence on record the Tribunal Judge found that the prosecution has been able to prove an offence under
section 9 (Ka) against the appellants and consequently, found them guilty under section 9 (Ga) of the said Ain.

9. The only question remains to be decided is whether the prosecution has been able to prove the ingredients of an offence under section 9 (Ka) of the said Ain, although no charge was framed under that section and whether the appellants were prejudiced at the trial for not framing any charge.

10. We will now confine ourselves only to the question as to whether there are ingredients of an offence under section 9 (Ka) and whether for not framing any charge the appellants were prejudiced in their defense.

11. Nari-o-Shishu Nirjatan Daman (Bishesh Bidhan) Tribunal framed charge against the accused-appellants and others for commission of rape on PW 2 Shiriti Kona Biswas. The prosecution failed to prove the charge of rape. The evidence that was adduced in the trial clearly shows that on 9-8-95 at about 11-00 am PW. 2 Shiriti Kona Biswas went to Barisal BM College to procure notes on the subject of Home Economics. From the evidence it transpired that in the College premises she was talking to Ripon who is a cousin of her friend and at that time Nizam and Ripon were present. In the meantime the accused-appellants and other came and surrounded them and thereafter they took her, Ripon and Nizam on the southern side of the canteen. They assaulted Nizam and took all three of them into the under-construction house contiguous to the canteen. The accused appellants and others after assaulting Nizam allowed him to go. They assaulted Ripon and took away his gold chain which was on his neck and demanded Taka 10,000.00 from Ripon and on refusal to pay the money appellant Nantu brought accused Shamim from ‘Shawan Studio’ and two of the accused forced them to lie down on point of dagger and took their nude photographs. The accused persons also threatened them they would exhibit the photographs to others. The accused persons took away Taka 300.00 from her vanity bag and asked her and Ripon to go away from the town.

12. We will now refer to the material cross-examination by the defense to see whether the accused-appellants knew what is the case against them.

13. Pw 1 Md. Nazrul Islam, a police officer of Criminal Investigation Department Police, Barisal Deposited in cross-examination that accused Shamim admitted to him that they took photographs in Fuji color and the photo is lying with Razzaque. He of course admitted that he did not ask anybody from “Shawan Studio” with regard to photographs of Shiriti Kona Biswas. He denied that he started false case against the accused persons. Pw 2 Shiriti Kona Biswas (victim girl) deposed about taking of nude photographs of Ripon and her. She also proved the nude photographs, marked Exhibit 1 in cross-examination she denied the defense suggestion that her photograph was not
taken by the accused persons. PW 3 Ripon deposed in examination in chief that he was made naked and he was placed over Shiriti Kona Biswan and nude photograph was taken by the cameraman. In the cross-examination he denied the defense suggestion that the cameraman did not take their photographs. Pw 4 Lovely Begum admitted in cross-examination that Shiriti Kona told her that the accused appellants, insulted her and they having refused to give money the accused appellants took photographs of Ripn and Pw 2 Shiriti Kona Biswas by making them naked. PW 9 Satinath Mollick, the investigating officer, denied the defense suggestion that he did not seize photographs from “Shawan Studio”.

14. From the examination in–chief and the cross-examination of these material witnesses it is palpably clear that the accused appellants knew the positive case against them and they cross-examined accordingly. Thus the question of prejudice does not at all arise in the facts of the present case.

15. Mr. B Hossain, the learned Deputy Attorney-General appearing for the State, cited a number of decisions and submitted that accused appellants knew what is the prosecution case against them and they having not raised any objection on the score of defect of charge, the same is not entertain bale for the first time before this Division. Further, from the evidence on record the charge of rape was not proved by an offence of committing immoral act, that is, taking nude photographs of Shiriti Kona and Ripon was established by the evidence on record. Although the appellants were not specifically charged under section 9 (Ka) of the Ain which is an offence of immoral act, but on evidence such an offence transpired and the defense cross-examined all the witnesses. In that view of the matter the question of prejudice caused to the appellants for not framing any specific charge was not very material as because they know what is the case against them and they cross-examined the witnesses on that point. We will now refer to the cases cited by Mr. B Hossain. In the case of ‘Muhammad Farooq vs State & DLr (SC) 135 their lordships held that when a person is charged with one offence, he may be convicted of another no prejudice is caused to the accuse. The material consideration is the question of prejudice at in the present case the appellant’s cross-examined all prosecution witnesses and they know the allegations against them. It is true that the present appellants were not charged with offence of immoral act as prescribed in section (Ka) of the Ain but he fact remains that they took nude photographs of Shiriti Kona Biswas and Ripn. In the case of Kalu and another vs State DLR(ADF) 161 their lordships by applying of division of section 236 and 237 of the Code of Criminal Procedure held that although the accused persons were charged under sections 302/34 of the Penal Code, but from the evidence an offence under section 201 of the Penal Code having been made out it was held that conviction under section 1 was legal.
16. In the case of Shaikh Manzar Masud vs Etc, PLD 1984 SC (AJ&K) 107 it was held as follows: In criminal cases even if the accused is charged with one offence he can be convicted for committing another offence, if such other offence is made out of the facts, proved it is not a major offence as compared with the offence with which the accused was originally charged and the accused is not prejudiced by conviction for such other offence. Whether in the aforesaid eventuality an accused is likely to be prejudiced in a particular case depends upon the particular facts of that case.

17. In the case of Nadir Shah Vs. State, 1980 MR 402 it was held that errors or omissions in proceedings in stating the charge or omission in such behalf is not material unless the accused in fact was misled by such errors or omissions and failure of justice has occurred.

18. Mr. Abdul Malek further submits that the accused appellant having been specifically charged under section 6(3) of the Ain which speaks of rape and punishment there under and the same having been disbelieved the appellant cannot be convicted under section 9 (Ga) of the Ain for committing an illegal and immoral act which is not a cognate offence to rape.

19. As a matter of fact the offence of rape failed but from the evidence on record it transpired that the appellants committed immoral acts with respect to the women namely, PW 2 Shiriti Kona Biswas. From the evidence it appeared that in respect of the same woman the accused appellants committed another offence of taking nude photograph of Shiriti Kona Biswas and Ripon placing them one after another to blackmail them and that act itself is immoral. Hence by application of section 237 of the code of criminal procedure, a conviction can legally be sustained in a case of such nature. Further, the accused persons raised no objection on the score of defect in charge at no stage of the trail. The objection having been raised for the first time in the Appellate Division it is not entertain able by virtue of explanation appended to section 537 of code of criminal procedure. We find that the accused appellants were not at all misled for not framing specific charge under section 9(Ka) of the Ain and there was no failure of justice as the appellants knew the case against them and they cross examined the material witnesses in that regard. As a matter of fact, the charge was framed for major offence of rape in which sentence of death imprisonment for life is prescribed whereas in section 9(Ga) the imprisonment extends to imprisonment for life or 10 years with minimum sentence of 7 years along with fine. So the accused was in fact charged with major offence but in evidence minor offence transpired. The graver charge of rape gives to the appellants notice of all the circumstance going to constitute minor offence in relation to victim woman. PW 2 Shiriti Kona Biswas.
20. It will be profitable to notice section 238 of the code of Criminal procedure which reads as follows.

238. When offence proved included in offence charged.

(1) When a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a combination minor offence and such combination is proved, he may be convicted of the minor offence, through he was not charged with it.

(2) When a person is charged with an offence and facts are provided which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

This section is an exception to the rule that a person cannot be convicted of an offence with which he is not charged. Here in this particular case the accused was charged with a major offence of rape having severity of punishment but in evidence it transpired that the accused appellants performed minor offence in relation to the victim woman which provides a lesser punishment and in the facts of the case it is a cognate offence which have the main ingredients of immoral act as PW 2 Shiriti Kona Biswas was made naked along with PW 3 Ripon and they were placed in nude position and their photographs were taken. This is highly an immoral act in relation to the women as contemplated in section 9(Ka) of the Ain and such there is no legal bar in convicting the appellants for the minor offence when the same transpired in evidence.

21. From the evidence on record we have found that no gross miscarriage of justice has occurred in this case as because the appellants knew what is prosecution case against them and they were allowed to cross examine the witnesses at length by the appellants counsel. Thus on a careful consideration of the materials on record we find that prosecution has been able to prove that accused appellants Rajib Kamrul Hassan, Ali Amin and Maksudul Alam are guilty of committing an offence under section 9(Ka) and as such they have been rightly convicted under section 9(Ga) of the Ain and consequently their appeals are dismissed.

22. Criminal Appeal No. 31 of 1999 filed by appellant Mokbuluddin Ahmed and Professor Sayeed (Saidur Rahman) relates to certain observations made by the learned judges of the High Court Division while disposing the appeals of the appellants and giving certain direction to the secretary ministry of education of the Government of Bangladesh.

23. Mr. Abdul Wadud Bhuiyan the learned Advocate appearing for these two appellants, submits that the appellants are neither accused nor witnesses in this case and before making such observations and giving such directions the learned judges of the high court division acted illegally in not giving any
notice to the appellants which is the gross violation of the principle of natural justice and consequently the remarks should be expunged and direction to take action are liable to be set aside.

24. In the case of state vs. Abdul Mannan, 44 DLR (AD) 173, unnecessary remarks were expunged which were irrelevant for the disposal of the appeal. In the case of MG Rabbani and another vs. Government of Bangladesh. 31 DLR (AD) 163 it is observed that adverse remarks being extraneous to the merit of the appeals were not called for in the facts of the case.

25. Thus we expunged the remarks and set aside the directions.

Accordingly criminal appeal Nos. 18, 19 and 30 of 1999 are dismissed. The conviction and sentence are maintained. Criminal Appeals No, 31 of 1999 is allowed.
Sexual Assault and Rape

Appellants: The Chairman Railway Board & Ors.

Vs.

Respondent: Mrs. Chandrima Das & Ors.

Hon’ble Judges:

S. Saghir Ahmed and R.P. Sethi, JJ.

In The Supreme Court of India

C.A. No. 639, of 2000 (Arising out of SLP(C) No. 16439 of 1998)

Decided On: 28.01.2000

Acts/Rules/Orders

Constitution of India - Articles 1, 2, 3, 5, 7, 9, 12, 14, 15, 16, 20, 21, 22 and 226

Cases Referred

Landmark Judgments on Violence Against Women and Children from South Asia


Case Note

Constitution - right to life - Article 21 of Constitution of India - whether right to life extends to foreign citizens - whether Government of India can be made vicariously liable to compensate for offence of rape committed by its employees - foreign citizens are entitled to protection under Article 21 - offence of rape is violation of fundamental right to life - constitutional liability to pay compensation arises where rape is committed with foreign national by employees of Government abusing their authority.

Judgment

S. Saghir Ahmad, J.

1. Leave granted.

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

3. The facts as noticed By the High Court in the impugned judgment are as follows:

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

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

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

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

of Private Law and not under Public Law and, therefore, no compensation could have been legally awarded by the High Court in a proceeding under Article 226 of the Constitution and, that too, at the instance of a practising advocate who, in no way, was concerned or connected with the victim.

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

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

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

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

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

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

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

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

12. In the instant case, it is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved. Smt. Hanufa Khatoon was a victim of rape. This Court in Bodhisatwa v. My. Subdhira Chakroborty, [1996] 1 SCC 490 has held “rape” as an offence which is violative of the Fundamental Right of a person guaranteed under Article 21 of the Constitution. The Court observed as under:

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

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

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

16. In S.P. Gupta and Ors. v. Union of India and Ors., AIR (1982) 149 = [1981] Supp. SCC 87, the law relating to locus standi was explained so as to give a wider meaning to the phrase. This Court laid down that practicing lawyers have undoubtedly a vital interest in the independence of the judiciary; they would certainly be interested in challenging the validity or constitutionality of an action taken by the State or any public authority which has the effect of impairing the independence of the judiciary.” It was further observed that “lawyer’s profession was an essential and integral part of the judicial system; they could figuratively be described as priests in the temple of justice. They have, therefore, a special interest in preserving the integrity and independence of the judicial system; they are equal partners with the Judges in the administration of justice. The lawyers, either in their individual capacity or as representing some Lawyers’ Associations have the locus standi to challenge the circular letter addressed by the Union Law Minister to the Governors and Chief Ministers directing that one third of the Judges of the High Court should, as far as possible, be from outside the States.”

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

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

19. It was next contended by the learned counsel appearing on behalf of the appellants, that Smt. Hanuffa Khatoon was a foreign national and, therefore, no relief under Public Law could be granted to her as there was no violation of the Fundamental Rights available under the Constitution. It was contended that the Fundamental Rights in Part III of the Constitution are available only to citizens of this country and since Smt. Hanuffa Khatoon was a Bangaladeshi national, she cannot complain of the violation of Fundamental Rights and on that basis she cannot be granted any relief. This argument must also fail for two reasons; first, on the ground of Domestic Jurisprudence based on Constitutional provisions and secondly, on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights, 1948, which has the international recognition as the “Moral Code of Conduct” having been adopted by the General Assembly of the United Nations.

20. We will come to the question of Domestic Jurisprudence a little later as we intend to first consider the principles and objects behind Universal Declaration of Human Rights, 1948, as adopted and proclaimed by the United Nations.
General Assembly Resolution of 10th December, 1948. The preamble, inter alia, sets out as under:

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

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

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

Whereas the people of the United Nations have in the Charter affirmed their faith in fundamental human rights, IN THE DIGNITY AND WORTH OF THE HUMAN PERSON AND IN THE EQUAL RIGHTS OF MEN AND WOMEN and have determined to promote social progress and better standards of life in larger freedom.

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

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

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

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

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

Furthermore, NO DISTINCTION SHALL BE MADE ON THE BASIS OF THE POLITICAL, JURISDICTIONAL OR INTERNATIONAL STATUS OF THE COUNTRY OR TERRITORY to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty.
Article 3 - Everyone has the right to life, liberty and security of person.

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

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

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

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

(a) Physical, sexual and psychological violence occurring in the family including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”

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

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

24. The International convenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the above words in those Declarations and Covenants have to be such as would help in effective implementation of those Rights. The applicability of the
Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence.

25. Lord Diplock in Salomon v. Commissioners of Customs and Excise, [1996] 3 All ER 871 said that there is a, prima facie, presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations. So also, Lord Bridge in Brind v. Secretary of State for the Home Department, [1991] 1 All ER 720, observed that it was well settled that, in construing any provision in domestic legislation which was ambiguous in the sense that it was capable of a meaning which either conforms to or conflicts with the International Convention, the courts would presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it.

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

“Judges and lawyers have duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women.”

27. But this situation may not really arise in our country.

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

29. The Fundamental Rights are available to all the “citizens” of the country but a few of them are also available to “persons”. While Article 14, which guarantees equality before law or the equal protection of laws within the territory of India, is applicable to “person” which would also include the “citizen” of the country and “non-citizen” both, Article 15 speaks only of “citizen” and it is specifically provided therein that there shall be no discrimination against any “citizen” on the ground only of religion, race, caste,
sex, place of birth or any of them nor shall any citizen be subjected to any
disability, liability, restriction or condition with regard to access to shops,
public restaurants, hotels and places of public entertainment, or the use of
wells, tanks bathing ghats, roads and places of public resort on the aforesaid
grounds. Fundamental Right guaranteed under Article 15 is, therefore, restricted
to “citizens”. So also, Article 16 which guarantees equality of opportunity in
matters of public employment is applicable only to “citizens”. The Fundamental
Rights contained in “Article 19, which contains the right to “Basic Freedoms”,
namely, freedom of speech and expression; freedom to assemble peaceably
and without arms; freedom to form associations or unions; freedom to move
freely throughout the territory of India; freedom to reside and settle in any
part of the territory of India and freedom to practise any profession, or to
carry on any occupation, trade or business, are available only to “citizens” of
the country.

30. The word “citizen” in Article 19 has not been used in a sense different
from that in which it has been used in Part II of the Constitution dealing with
“citizenship”. (See : State Trading Corporation of India Ltd. v. The Commercial
Tax Officer and Ors., AIR (1963) SC 1811 = [1964] 4 SCR 99. It has also been
held in this case that the words “all citizens” have been deliberately used to
keep out all “non-citizens” which would include “aliens”. It was laid down in
Hans Mutter of Nurenburg v. Superintendent Presidency Jail Calcutta, AIR
(1955) SC 367 (374) = [1955] 1 SCR 1284, that this Article applies only to
“citizens”. In another decision in Anwar v. State ofJ&K, AIR (1971) 337 =
[1971] 1 SCR 637 = [1971] 3 SCC 104, it was held that non-citizen could not
313, it was held that Article 19 does not apply to a “foreigner”. The Calcutta
High Court in Sk. Md. Soleman v. State of West Bengal and Another, AIR
1965 Calcutta 312, held that Article 19 does not apply to a Commonwealth
citizen.

(1971) 3 SCC 104 (already referred to above), it was held that the rights under
Articles 20, 21 and 22 are available not only to “citizens” but also to “persons”
which would include “non-citizens”.

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

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


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

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

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

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

39. Learned counsel for the appellants then contended that the Central Govt. cannot be held vicariously liable for the offence of rape committed by the employees of the Railways. It was contended that the liability under the Law of Torts would arise only when the act complained of was performed in the course of official duty and since rape cannot be said to be an official act, the Central Govt. would not be liable even under the Law of Torts. The argument is wholly bad and is contrary to the law settled by this Court on the question of vicarious liability in its various decisions.


41. Reliance placed by the counsel for the appellants on the decision of this Court in Kasturi Lal Ralia Ram Jain v. State of A.P., AIR (1965) SC 1039 =
Landmark Judgments on Violence Against Women and Children from South Asia

[1965] 1 SCR 375, cannot help him as this decision has not been followed by this Court in the subsequent decisions, including the decisions in State of Gujarat v. Memon Mahomed Haji Hasan and Smt. Basava Kom Dyamogouda Patil v. State of Mysore (supra). The decision in Kasturi Lal’s case was also severely criticised by Mr. Seervai in his prestigious book -Constitutional Law of India. A three-Judge Bench of this Court in Common Cause, A Regd. Society v, Union of India, [1999] 6 SCC 667 also did not follow the decision in Kasturi Lal’s case (supra) and observed that the efficacy of this decision as a binding precedent has been eroded.

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

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

44. No other point was raised before us. The appeal having no merit is dismissed with the observation that the amount of compensation shall be made over to the High Commissioner for Bangladesh in India for payment to the victim, Smt. Hanuffa Khatoon. The payment to the High Commissioner shall be made within three months. There will be no order as to costs.
Appellants: Delhi Domestic Working Women’s Forum
Vs.
Respondent: Union of India (UOI) and Ors.

In the Supreme court of India
Writ Petition (Crl.) No. 362 of 1993

Decided On: 19.10.1994

Hon'ble Judges:
M.N. Venkatachaliah
C.J., S. Mohan and S.B. Majmudar, JJ.

Counsels
For Appellant/Petitioner/Plaintiff: R. Venkataramani and S.M. Garg, Advs.

Acts/ Rules/ Orders
Constitution of India - Articles 14, 21 and 32; National Commission for Women Act, 1990 - Section 10; Indian Penal Code, 1860 - Sections 341 and 376

Case Note
Criminal – violence against women – Articles 14, 21 and 32 of Constitution of India, Section 10 of National Commission for Women Act, 1990 and Sections 341 and 376 of Indian Penal Code, 1860 – women domestic servants subjected to indecent physical assault by army personnel in train – writ petition filed by women’s forum to espouse pathetic plight of such victims – trial in such cases not to be frustrated by prolongation of investigation – National Commission for Women called upon to engage itself in drafting scheme providing relief to victims of such cases – subsequently Union of India to take necessary steps as regards framing scheme for compensation and rehabilitation to ensure justice to victims of such crimes of violence.

Judgment
S. Mohan, J.

1. This public interest litigation invokes the benign provision of Article 32 of the Constitution of India, at the instance of the petitioner Delhi Domestic Working Women’s Forum to espouse the pathetic plight of four domestic servants who were subject to indecent sexual assault by seven Army personnel.

2. The incident, with a filmy background, has outclassed even the movies. On 10th of February, 1993, six women, by name, Usha Minz, Shanti, Josphine Kerketta, Rosy Kerketta, Nilli and Lili, domestic servants, were travelling by
“I was coming from my home town to Delhi by Muri Express. On 10.2.93 at about 11.00 PM, the Muri Express was at the Khurja Railway Station. At that time, I along with my village girls (1) Usha Minz d/o John Minz (2) Shanti d/o Siri Anuas Minz (3) Josphine Kerketta d/o Junus Kerketta (4) Rosy Kerketta d/o Remis Kerketta (5) Nilli Ross d/o Boas Minz, was travelling in SHI Coach. I slept at Berth No. 50. Our friend, Shanti, woke up and told that some persons were teasing her. When I and my remaining friends got up, we saw that about 7/8 army ‘jawan’ had come near us. Then we all friends got up and sat on our respective seats. Then all those armymen began to molest us. First they - two sikhs and 6 cleaned shaved men made me and my five friends sit on lower seats and then kissed and hugged us and lured on our body and breasts. On our objection they caught us from our hair and began to beat us. When we tried to cry, they shut our mouths. Then they threatened me and my friends that in case we will make any hue and cry they will throw us out of the running train and will kill us. On this we got frightened and sat there. From these 8 army men - two sikhs and 6 clean shaved, one sardar and one clean shaved man forcibly made me to lie down on the lower berth and on the other adjacent lower berth another sardar took another girl and one clean shaved fauji took Rossy to bath room. Two other army men made Shanti to lie down on the nearby seat. Another two men tried to take Usha and Nilli but both sat under the seat to hide themselves. Thereafter, first Sardar Fauji (whose name has been disclosed in the court as Dhir Singh s/o Puran Sing, PO : Dostpur, PS : Kalanaur, Distt: Gurdaspur (Punjab) forcibly put off my cloth and removed underwear, raped me. After him another clear saved fauji, whose face is round and height is about 5’ 8” raped me. My friends, Shanti and Rosy were also forcibly raped by remaining army men. Thereafter, we tried to lodge a report with the police on the way, but nobody listened us. When the train stopped at New Delhi Railway Station, then I and my friends attempted to catch these persons. They all got down and ran here and there. However, I and my friends could catch hold of aforesaid sardar Dhir Singh, who had raped me. We all caught him. In the meanwhile, some persons gathered there. Some Army Officers and Policemen overpowered him and took him to MCO office. Then after a while they came in Station and handed over Shri Dhir Singh to you. Sardar Dhir Singh has raped me and his colleagues have raped my friends.”

3. This formed the basis of the first information report for offences under Section 376B read with Section 341 I.P.C. which was registered at the Police Station New Delhi Railway Station (Crime & Railways) as No. 049 of 1993 at 6.35 A.M. On 11th February, 1993. It appears after registering the F.I.R. the six rape victims were sent for medical check up.
4. The members of the petitioner-Forum went in groups to all the addresses given by the police to meet the victims. In none of the places they were allowed to meet the victims though the employers admitted gaining knowledge about the rape and the victims were with them. The petitioner-forum is very much concerned as the victims are its members, to get the needed social, cultural and legal protection. Further, the victims are helpless tribal women belonging to the State of Bihar at the mercy of the employers and the police. They are vulnerable to intimidation. Notwithstanding the occurrence of such barbaric assault on the person and dignity of women neither the Central Government nor the State Government has bestowed any serious attention as to the need for provision of rehabilitatory and compensatory justice for women. In such matters this Court has been affording relief. It is in this context the writ petition under Article 32 of the Constitution of India is moved. The grounds urged in support of the writ petition are as follows:

5. Speedy trial is one of the essential requisites of law. In a case of this character such a trial cannot be frustrated by prolongation of investigation. Therefore, this Court has to spell out the parameters of expeditious conduct and investigation of trial; otherwise the rights guaranteed under Articles 14 and 21 of the Constitutions will be meaningless.

6. This Court ordered notice to respondent on 18.11.1993.

7. A counter affidavit was filed on behalf of respondents 2 and 4 stating, on the statement of Kumari Lili, F.I.R. No. 042/93 under Section read 376B read with 34, Indian Penal Code, was registered. Accused Dhir Singh was arrested and sent to judicial custody. The case report under Section 173 Cr. P.C. had been filed in the Court of Chief Judicial Magistrate, Aligarh on 13.8.1993 against the accused persons, namely Dhir Singh and Mikhail Heranj. The case is pending trial before, the District and Session Court, Aligarh.

8. It appears, apart from these two accused, others could not be identified. Two other accused, Pharsem Singh and B. Kajoor were discharged. Three other police personnel, namely Head Constable Ranjeet, Constable Naresh Singh and Constable Shiv Sarup Singh were arrested as they were on guard duty in the Muri Express Train at the time of incident and failed to provide necessary protection to tribal women/victims. The prosecution is in progress and it is stated that the case is likely to be committed.

9. At one stage of the case, the Court was informed that the victims could not be traced. This statement caused dismay in us. Therefore, a direction was issued to the State of Uttar Pradesh to trace the victims. This Court doubted whether the police were at all serious in this case. On our part, we could not tolerate this nonchalant attitude. Fortunately, the victims have been traced. As
such we think the prosecution will go on with due diligence and the law be allowed to take its course.

10. While the matter stands thus, as to the prayer of the petitioner that respondents 1 to 3 will have to engage themselves in framing an appropriate scheme to provide inter alia compensation and rehabilitation to the victims of such crimes of violence, the submissions are as under:

11. The National Commission for Women is rightly engaged in the evaluation and suggestion of changes in various legislations pertaining to women. Yet steps are to be taken as regards framing of scheme for compensation and rehabilitation to ensure justice to victims of such crimes of violence. Victims of such violence, by and large belong to weaker sections of the society. They are not in a position to secure justice through civil courts. No doubt, the Indian Penal Code and the Indian Evidence Act have been amended. In spite of it, victims of such violence are not able to get adequate remedy in securing justice. Therefore, the first respondent -National Commission for Women must be called upon to engage themselves in the exercise of drafting such a scheme and impress upon the Union of India to frame a scheme as early as possible.

12. This stand is opposed by the third respondent. It is stated that the National Commission for Women was constituted by the National Commission for Women Act, 1990 (hereinafter referred to as ‘the Act’). This Act came into force on 31.1.1992, as per Notification No. S.O. 99(E) dated 31.1.1992. The functions of the Commission are set out in Chapter III of the Act. The prayer that the Commission must engage themselves in framing appropriate schemes and measures is beyond the mandate given to the National Commission for Women.

13. We have given our careful consideration to the above. It is rather unfortunate that in recent times, there has been an increase of 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 cries 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.

14. We will only point out the defects of the existing system. 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 to suffer as a result of the rape itself. As stated in ‘Modern Legal Studies’, Rape and the Legal Process by Jennifer Temkin, 1987 Edition, page 7:

“It would appear that a radical change in the attitude of defence counsel and judges to sexual assault is also required. Continuing education programmes for judges should include re-education about sexual assault. Changes in the substantive law might also be helpful in producing new ways of thinking about this type of crime.”

Kelly writes:

“The most common cries were for more compensation and personal treatment from police officers. Victims remarked that, while they recognised officer had many cases to handle, they felt the officers did not seem sufficiently concerned with their particular case and trauma,” Shapland concludes:

“The changes in the criminal justice system necessary to approximate more closely to the present expectations of victims are not major or structural. They are primarily attitudinal. They involve training the professional participants in the criminal justice system that the victim is to be treated courteously, kept informed and consulted about all the stages of the process. They involve treating the victim as a more equal partner... This might include a shift in working practices of the professional participants that might initially appear to involve more work, more difficulty and more effort, but paradoxically may result in easier detection, a higher standard of prosecution evidence and fewer cases thrown out at court.”

15. O’Reilly stresses the attitudinal training thus:

“We are now victim-oriented and have taken an active role in getting the entire helping network—lawyers, doctors, nurses, social workers, rape crises centre workers—to talk and to interact together... We are then in a position to concentrate fully on the primary goal that unites us all—helping victims of sexual assault to get their lives back together.”

16. In this background, we think it 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 some one 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.

(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.

(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 victim must be maintained, as far as necessary.

(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.

(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 result of the rape.

17. On this aspect of the matter we can usefully refer to the following passage from ‘The Oxford handbook of Criminology’ (1994 Edn.) at pages 1237-38 as to the position in England:

“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.

The 1991 Criminal Justice Act contains a number of provisions which directly or indirectly encourage an even greater role for compensation.

18. Section 10 of the Act states that the National Commission for Women shall perform all or any of the following functions namely;

(a) investigate and examine all matters relating to the safeguard provided for women under the Constitution and other laws.

(b) call for special studies or investigations into specific problems or situations arising out of discrimination and atrocities against women and identify the constraints so as to recommend strategies for their removal.

19. Having regard to the above provisions, 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 take necessary steps for the implementation of the scheme at the earliest.

20. The writ petition is disposed of subject to above directions.
Appellants: State of Punjab  
Vs.  
Respondent: Gurmit Singh and Others  
Hon’ble Judges:  
A.S.Anand and Saghir Ahmad, JJ.  
Subject: Criminal

In the Supreme Court of India  
Criminal Appeal No. 616 of 1985  
Decided On: 16.01.1996

Acts/Rules/Orders  
Indian Penal Code, 1860 - Sections 363, 366, 368 and 376; Criminal Procedure Code, 1974 - Sections 154, 156, 313 and 327(2); Indian Evidence Act, 1872 - Sections 114 and 118; Criminal Law (Amendment) Act, 1983 - Sections 375 and 376

Cases Referred  

Case Note  
Criminal – rape – Section 376 of Indian Penal Code, 1860 and Sections 114 and 118 of Evidence Act, 1872 – prosecutrix of sex offence cannot be put at par with accomplice – Evidence Act does not require corroboration of her evidence in material particular – prosecutrix is competent witness under Section 118 – evidence of prosecutrix must receive same weight as attached to injured in case of physical violence – in case for some reason Court is hesitant to place implicit reliance on prosecutrix evidence it may look for corroboration – nature of corroboration must necessarily depend upon facts and circumstances of each case – conviction can be based upon evidence of adult and full understanding prosecutrix unless evidence shown to be infirm and not trustworthy.

Order  
Dr. Anand, J.

1. This appeal under Section 14 of the Terrorist Affected Areas (Special Courts) Act, 1984 is directed against the judgment and order of Additional Judge, Special Court, Ludhiana dated 1-6-1985 by which the respondents were acquitted of the charge of abduction and rape. For what follows, the judgment
impugned in this appeal, presents a rather disquieting and a disturbing feature.
It demonstrates lack of sensitivity on the part of the Court by casting unjustified
stigmas on a prosecutrix aged below 16 years in a rape case, by overlooking
human psychology and behavioral probabilities. An intrinsically wrong
approach while appreciating the testimonial potency of the evidence of the
prosecutrix has resulted in miscarriage of Justice. First a brief reference to the
prosecution case:

The prosecutrix (name withheld by us), a young girl below 16 years of age,
was studying in the 10th class at the relevant time in Government High School,
Pakhowal. The matriculation examinations were going on at the material time.
The examination centre of the prosecutrix was located in the Boys High School,
Pakhowal. On 30th March, 1984 at about 12.30 p.m. after taking her test in
Geography, the prosecutrix was going to the house of her maternal uncle,
Darshan Singh, and when she had covered a distance of about 100 karmas
from the school, a blue ambassador car being driven by a Sikh youth aged 20/
25 years came from behind. In that car Gurmit Singh, Jagjit Singh alias Bawa
and Ranjit Singh accused were sitting. The car stopped near her, Ranjit Singh
accused came out of the car and caught hold of the prosecutrix from her arm
and pushed her inside the car. Accused Jagjit Singh alias Bawa put his hand
on the mouth of the prosecutrix, while Gurmit Singh accused threatened the
prosecutrix, that in case she raised an alarm she would be done to death. Ad
the three accused (respondents herein) drove her to the tubewell of Ranjit
Singh accused. She was taken to the kotha of the Tubewell. The driver of the
car after leaving the prosecutrix and the three accused persons there went away
with the car. In the said kotha Gurmit Singh compelled the prosecutrix to take
liquor, misrepresenting to her that it was juice. Her refusal did not have any
effect and she reluctantly consumed liquor. Gurmit Singh then got removed
her salwar and also opened her shirt. She was made to lie on a cot in the kotha
while his companions guarded the kotha from outside. Gurmit Singh committed
rape upon her. She raised roula a.s she was suffering pain but Gurmit Singh
threatened to kill her if she persisted in raising alarm. Due to that threat, she
kept quiet. After Gurmit Singh had committed rape upon her, the other two
accused, who were earlier guarding the kotha from outside, came in one by
one, and committed rape upon her. Jagjit Singh alias Bawa committed rape on
her after Gurmit Singh and thereafter Ranjit Singh committed rape on her.
Each one of the accused committed sexual intercourse with the prosecutrix
forcibly and against her will. They all subjected her to sexual intercourse once
again during the night against her will. Next morning at about 6.00 a.m., the
same car arrived at the tubewell kotha of Ranjit Singh and the three accused
made her to sit in that car and left her near the Boys High School, Pakhowal
near about the place from where she had been abducted. The prosecutrix had
to take her examination in the subject of Hygiene on that date. She, after taking her examination in Hygiene, reached her village Nangal Kalan, at about noon time and narrated the entire story to her mother, Smt. Gurdev Kaur, PW7. Her father Trilok Singh PW6 was not present in the house at that time. He returned from his work late in the evening. The mother of the prosecutrix, Smt. Gurdev Kaur PW7, narrated the episode to her husband Tirlok Singh PW6 on his arrival. Her father straightaway contacted Sarpanch Joginder Singh of the village. A panchayat was convened. Matter was brought to the notice of the Sarpanch of village Pakhowal also. Both the Sarpanches, tried to affect compromise on 1-4-1984 but since the panchayat could not give any Justice or relief to the prosecutrix, she along with her father proceeded to the police station Raikot to lodge a report about the occurrence with the police. When they reached at the bus adda of village Pakhowal, the police met them and she made her statement, Ex. PD, before ASI Raghbir Chand PW who made an endorsement, F.x. PD/1 and sent the statement Ex. PD of the prosecutrix to the police station Raikot for registration of the case on the basis of which formal FIR Ex. PD/2 was registered by SI Malkiat Singh. ASI Raghbir Chand then took the prosecutrix and her mother to the primary health centre Pakhowal for medical examination of the prosecutrix. She was medically examined by lady doctor Dr. Sukhwinder Kaur, PW1 on 2-4-84, who found that the hymen of the prosecutrix was lacerated with fine radiate tears, swollen and painful. Her pubic hair were also found matted. According to PW1 intercourse with the prosecutrix could be one of the reasons for laceration which I found in her hymen. She went on to say that the possibility could not be ruled out that the prosecutrix was not habitual to intercourse earlier.”

2. During the course of investigation, the police took into possession a sealed parcel handed over by the lady doctor containing the salwar of the prosecutrix along with 5 slides of vaginal smears and one sealed phial containing pubic hair of the prosecutrix, vide memo Ex. PK. On the pointing out of the prosecutrix, the Investigating Officer prepared the rough site plan Ex. PF, of the place from where she had been abducted. The prosecutrix also led the Investigating Officer to the tubewell kotha of Ranjit Singh where she had been wrongfully confined and raped. The Investigating Officer prepared a rough site plan of the Kotha Ex. PM. A search was made for the accused on 2-4-1984 but they were not found. They were also not traceable on 3-4-1984, in spite of a raid being conducted at their houses by the ASI. On 5-4-1984 Jagjit Singh alias Bawa and Ranjit Singh were produced before the Investigating Officer by Gurbachan Singh PW8 and were placed under arrest. Both Ranjit Singh and Jagjit Singh on the same day were produced before Dr. B. L. Bansal PW3 for medical examination. The doctor opined that both the accused were fit to perform sexual intercourse. Gurmit Singh respondent was arrested on 9-
4-1984 by SI Malkiat Singh. He was also got medically examined on 9-4-1984 from Dr. B. L. Bansal PW-3 who opined that Gurmit Singh was also fit to perform sexual intercourse. The sealed parcels containing the slides of vaginal smears, the pubic hair and the salwar of the prosecutrix, were sent to the chemical examiner. The report of the chemical examiner revealed that semen was found on the slides of vaginal smear though no spermatozoa was found either on the pubic hair or the salwar of the prosecutrix. On completion of the investigation, respondents were challaned and were charged for offences under Sections 363, 366, 368, and 376 I.P.C.

3. With a view to connect the respondents with the crime the prosecution examined Dr. Sukhwinder Kaur, PW1; Prosecutrix, PW2; Dr. B. L. Bansal, PW3; Tirlok Singh, father of the prosecutrix, PW6; Gurdev Kaur, mother of the prosecutrix, PW7; Gurbachan Singh, PWS; Malkit Singh, PW9 and SI Raghbir Chand PW10, besides, some formal witnesses like the draftsman etc. The prosecution tendered in evidence affidavits of some of the constables, whose evidence was of a formal nature as also the report of the chemical examiner, Ex. PM. In their statements recorded under Section 313 Cr. P. C. the respondents denied the prosecution allegations against them. Jagjit Singh respondent stated that it was a false case foisted on him on account of his enmity with the Sarpanch of village Pakhowal. He stated that he had married a Canadian girl in the village Gurdwara, which was not liked by the sarpanch and therefore the sarpanch was hostile to him and had got him falsely implicated in this case. Gurmit Singh-respondent took the stand that he had been falsely implicated in the case on account of enmity between his father and Tirlok Singh. PW6, father of the prosecutrix. He stated that there was long standing litigation going on between his father and the father of the prosecutrix and their family members were not even on speaking terms with each other. He went on to add that on 1-4-1984 he was given beating by Tirlok Singh. PW6, on grounds of suspicion that he might have instigated some persons to abduct his daughter and in retaliation he and his elder brother on the next day had given beating to Tirlok Singh, PW6 and also abused him and on that account Tirlok Singh PW, in consultation with the police had got him falsely implicated in the case. Ranjit Singh respondent also alleged false implication but gave no reason for having been falsely implicated. Jagjit Singh alias Bawa produced DW-1 Kuldip Singh and DW2 MHC, Amarjit Singh in defence and tendered in evidence Ex. DC, a photostat copy of his passport and Ex. DD copy of his marriage certificate with the Canadian girl. He also tendered into evidence photographs marked ‘C’ and ‘D’, evidencing his marriage with the Canadian Girl. The other two accused however did not lead any defence evidence.

4. The trial Court first dealt with the prosecution case relating to the abduction of the prosecutrix by the respondents and observed:
‘The first point for appreciation before me would arise whether this part of the prosecution story stands fortified by any cogent or reliable evidence or not. There is a bald allegation only of (prosecutrix-name omitted) that she was forcibly abducted in a car. in the F.I.R. she stated that she was abducted in an Ambassador Car of blue colour. After going through me evidence, I am of the view that this thing has been introduced by the prosecutrix or by her father or by the thanedar just to give the gravity of offence. (Prosecutrix name omitted) was tested about the particulars of the car and she is so ignorant about the make etc. of the car that entire story that she was abducted in the car becomes doubtful. She stated in her cross-examination at page No. 8 that the make of the car was Master. She was pertinently asked whether the make of the car was Ambassador or Fiat. The witness replied that she cannot tell the make of the car. But when she was asked as to the difference between Fiat. Ambassador or Master car, she was unable to explain the difference amongst these vehicles. So, it appears that the allegations that she was abducted in a Fiat Car by all the three accused and the driver, is an imaginary story which has been given either by the thanedar or by the father of the prosecutrix.”

“If the three known accused are in the clutches of the police, it is not difficult for the I.O. to come to know about the car, the name of its driver etc., but strange enough, SI Raghbir Chand has shown pitiable negligence when he could not find out the car driver in spite of the fact that he directed the investigation on these lines. He had to admit that he made search for taking the car into possession allegedly used in the occurrence. He could not find out the name of the driver nor could he find out which car was used. In these circumstances, it looks to be improbable that any car was also used in the alleged abduction.” (Omission of name of the prosecutrix -ours)

The trial Court further commented:

“On 30th March, 1984 she was forcibly abducted by four desperate persons who were out and out to molest her honour. It has been admitted by the prosecutrix that she was taken through the bus adda of Pakhowal via metalled road. It has come in the evidence that it is a busy centre. In spite of that fact she has not raised any alarm, so as to attract persons that she was being forcibly taken. The height of her own unnatural conduct is that she was left by the accused at the same point on the next morning. The accused would be the last person to extend sympathy to the prosecutrix. Had it been so, the natural conduct of the prosecutrix was first to rush to the house of her maternal uncle to apprise him that she had been forcibly abducted on the previous day. The witness after her being left at the place of abduction lightly takes her examination. She does not complain to the lady teachers who were deployed to keep a watch on the girl students because these students are to appear in the centre of Boys School. She does not complain to anybody nor her friend that
she was raped during the previous night. She prefers her examination rather than to go to the house of her parents or relations. Thereafter, she goes to her village Mungal Kalan and informs for the first time her mother that she was raped on the previous night. This part of the prosecution story does not took to be probable.”

5. The trial Court, thus, disbelieved the version of the prosecutrix basically for the reasons; (i) “she is so ignorant about the make etc. of the car that entire story that she was abducted in the car becomes doubtful” particularly because she could not explain the difference between a Fiat car, Ambassador car or a Master Car; (ii) the Investigating Officer had “shown pitiable negligence” during the Investigation by not tracing out the car and the driver; (iii) that the prosecutrix did not raise any alarm while being abducted even though she had passed through the bus adda of village Pakhowal (iv) that the story of abduction” has been introduced by the prosecutrix or by her father or by the thanedar just to give me gravity of offence and (v) that no corroboration of the statement of the prosecutrix was available on the record and that the story that the accused had left her near the school next morning was not believable because the accused could have no “sympathy” for her.

6. The trial Court also disbelieved the version of the prosecutrix regarding rape. It found that the testimony of he prosecutrix did not inspire confidence for the reasons (i) that there had been delay in loding the FIR and as such the chances of false implication of the accused could not be ruled out. According to the trial Court Trilok Singh PW6 became certain on I -4-84 that there was no outcome of the meeting between the panchayats of Nangalkhurd and Pakhowal therefore there was no justification for him not to have lodged the report on I -4-84 itself and since Trilok Singh had entered into consultations with his wife as to whether to lodge the report or not, it rendered the matter doubtful.” (ii) that the medical evidence did not help the prosecu-librfcase. The trial Court observed that in her, cross-examination PW1 lady doctor had admitted that whereas inter-course with the prosecutrix could be one of the reasons for the laceration of the hymen “there could be other reasons also for that lacera-tion.” The trial Court noticed that the lady doctor had inserted a vaginal speculum for taking swabs from the posterior vaginal fornix of the prosecutrix for preparing slides and since the width of the speculum was about two fingers, the possibility that the prosecutrix was habituated to sexual inter-course could not be ruled out.” The trial Court observed that the prosecutrix was fighting her imagination in Order to rope in the accused persons and that implicit reliance could not be placed on the testimony of such a girl; (iii) there was no independent corroboration of her testimony and of iv) that the accused had been implicated on account of enmity as alleged by the accused in their statements recorded under Section 313 Cr.P.C.
7. The grounds on which the trial Court disbelieved the version of the 
prosecutrix are not at all sound. The findings recorded by the trial Court rebel 
against realism and low their sanctity and credibil-ity. The Court lost sight of 
the fact that the prosecutrix is a village girl. She was a student of Xth Class. It 
was wholly irrelevant and immaterial whether she was ignorant of the difference 
between a Fial, an Ambassador or a Master car. Again, the statement of the 
prosecutrix at the trial that she did not remember thecolour of the car, though 
she had given the colour of the car in the FIR was of no material effect on the 
reliability of her testimony. No fault could also be found with the prosecution 
version on the ground that the prosecutrix had not raised an alarm while being 
abducted. The prosecutrix in her statement categorically asserted that as soon 
as she was pushed inside the car she was threatened by the accused to keep 
quiet and not to raise any alarm otherwise she would be killed. Under these 
circumstances to discredit the prosecutrix for not raising an alarm while the 
car was passing through the Bus Adda is travesty of Justice. The Court 
overlooked the situation in which a poor helpless minor girl had found herself 
in the company of three desperated young men who were threatening her and 
preventing her from raising any alarm. Again, if the investigating Officer did 
not conduct the Investigation properly or was negligent in not being able to 
trace out the driver of the car, how can that become a ground to discredit the 
testimony of the prosecutrix? The prosecutrix had no control over the 
investigating agency and the negligence of an Investigating Officer could not 
aff ect the credibility of the statement of the prosecutrix. Trial Court fell in 
error for discrediting the testimony of the prosecutrix on that account. In our 
opinion, mere was no delay in the lodging of the FIR either and if at all there 
was some delay, the same has not only been properly explained by the 
prosecution but in the facts and circumstances of the case was also natural. 
The Courts cannot over-look the fact mat in sexual offences delay in the lodging 
of the FIR can be due to variety of reasons particularly the reluctance of the 
prosecutrix or her family members to go to the police and complain about the 
incident which concerns the reputation of the prosecutrix and the honour of 
her family. It is only after giving it a cool thought that a complaint of sexual 
offence is generally lodged. The prosecution has explained that as soon as 
Trilok Singh PW6, father of the prosecutrix came to know from his wife, 
PW7 about the incident he went to the village saronch and complained to 
him. The saronch of the village also got in touch with the saronch of village 
Pahowal, wherein the tube well kotha of Ranjit Singh rape was committed, 
and an effort was made by the panchayats of the two villages to sit together 
and settle the matter. It was only when the Panchayats failed to provide any 
relief or render any Justice to the prosecutrix, that she and her family decided 
to report the matter to the police and before doing that naturally the father and 
mother of the prosecutrix discussed whether or not to lodge a report with the
police in view of the repercussions it might have on the reputation and future prospects of the marriage etc. of their daughter. Trilok Singh PW6 truthfully admitted that he entered into consultation with his wife as to whether to lodge a report or not and the trial Court appears to have misunderstood the reasons and justification for the consultation between Trilok Singh and his wife when it found that the said circumstance had rendered the version of the prosecutrix doubtful. Her statement about the manner in which she was abducted and again left near the school in the early hours of next morning has a ring of truth. It appears that the trial Court searched for contradictions and variations in the statement of the prosecutrix microscopically, so as to disbelieve her version. The observations of the trial Court that the story of the prosecutrix that she was left near the examination centre next morning at about 6 a.m. was “not believable” as the accused would be the last person to extend sympathy to the prosecutrix are not at all intelligible. The accused were not showing any sympathy to the prosecutrix while driving her at 6.00 a.m. next morning to the place from where she had been abducted but on the other hand were removing her from the kotha of Ranjit Singh and leaving her near the examination centre so as to avoid being detected. The criticism by the trial Court of the evidence of the prosecutrix as to why she did not complain to the lady teachers or to other girl students when she appeared for the examination at the centre and waited till she went home and narrated the occurrence to her mother is unjustified. The conduct of the prosecutrix in this regard appears to us to be most natural. The trial Court over-looked that a girl, in a tradition bound non permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. Her not informing the teachers or her friends at the examination centre under the circumstances cannot detract from her reliability. In the normal course of human conduct this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others over-powered by a feeling of shame and her natural inclination would be to avoid talking about it to any one, lest the family name and honour is brought into controversy. Therefore her informing to her mother only on return to the parental house and no one else at the examination centre prior thereto is an accord with the natural human conduct of a female. The Courts must, while evaluating “evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless
the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over look. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person’s lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In State of Maharashtra v. Chandraprakash Kewalchand Jain MANU/SC/0122/1990 Ahmadi, J. (as the Lord chief Justice then was) speaking for the Bench summarised the position in the following words:

“A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is
undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. if the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence.”

8. We are in respectful agreement with the above exposition of law. In the instant case our careful analysis of the statement of the prosecutrix has created an impression on our minds that she is a reliable and truthful witness. Her testimony suffers from no infirmity or blemish whatsoever. We have no hesitation in acting upon her testimony alone without looking for any corroboration. However, in this case there is ample corroboration available on the record to lend further credence to the testimony of the prosecutrix.

9. The medical evidence has lent full corroboration to the testimony of the prosecutrix. According to PW1 Lady Doctor Sukhvinder Kaur she had examined the prosecutrix on 2-4-84 at about 7.45 p.m. at the Primary Health Centre, Pakhowal, and had found that “her hymen was lacertated with fine radiate tears, swollen and painful.” The pubic hair were also found mated. She opined that inter-course with the prosecutrix could be “one of the reason for the laceration of the hymen” of the prosecutrix. She also opined that the “possibility cannot be ruled out that (prosecutrix) was not habitual of intercourse earlier to her examination by heron 2.4.84.” During her cross-examination, the lady doctor admitted that she had not inserted her fingers inside the vagina of the prosecutrix during the medico-legal examination but that she had put a vagina! speculum for taking the swabs from the posterior vaginal fornix for preparing
the slides. She disclosed that the size of the speculum was about two fingers and agreed with the suggestion made to her during her cross-examination that “if the hymen of a girl admits two fingers easily, the possibility that such a girl was habitual to sexual inter-course cannot be ruled out.”. However, no direct and specific question was put by the defence to the lady doctor whether the prosecutrix in the present case could be said to be habituated to sexual intercourse and there was no challenge to her statement that the prosecutrix ‘may not have been subjected to sexual intercourse earlier’. No enquiry was made from the lady doctor about the tear of the hymen being old. Yet, the trial Court interpreted the statement of PW1 Dr. Sukliwinder Kaur to hold that the prosecutrix was habituated to sexual inter-course since the speculum could enter her vagina easily and as such she was “a girl of loose character”. There was no warrant for such a finding and the finding if we may say so with respect, is a wholly irresponsible finding. In the face of the evidence of PW 1, the trial Court wrongly concluded that the medical evidence had not supported the version of the prosecutrix.

10. The trial Court totally ignored the report of the Chemical Examiner Ex. PM, according to which semen had been found on the slides which had been prepared by the lady doctor from the vaginal secretions from the posterior of the vagina! fornix of the prosecutrix. The presence of semen on the slides lent authentic corroboration to the testimony of the prosecutrix. This vital evidence was foresaken by the trial Court and as a result wholly erroneous conclusions were arrived at. Thus, even though no corroboration is necessary to rely upon the testimony of the prosecutrix, yet sufficient corroboration from the medical evidence and the report of the chemical examiner is available on the record. Besides, her statement has been fully supported by the evidence of her father. Tirlok Singh, PW6 and her mother Gurdev Kaur, PW7, to whom she had narrated the occurrence soon after her arrival at her house. Moreover, the unchallenged fact that it was the prosecutrix who had led the Investigating Officer to the Kotha of the tubewell of Ranjit Singh, where she had been raped, lent a built-in assurance that the charge levied by her was “genuine” rather than “fabricated because it is no one’s case that she knew Ranjit Singh earlier or had even seen or visited the kotha at his tubewell. The trial Court completely overlooked this aspect. The trial Court did not disbelieve that the prosecutrix had been subjected to sexual intercourse but without any sound basis, observed that the prosecutrix might have spent the “night” in the company of some “persons” and concocted the story on being asked by her mother as to where she had spent the night after her maternal uncle, Darshan Singh, came to Nangal-Kalan to enquire about the prosecutrix. There is no basis for the finding that the prosecutrix had spent the night in the company of “some persons” and had indulged in sexual intercourse with them of her own free
will. The observations were made on surmises and conjectures—the prosecutrix was condemned unheard.

11. The trial Court was of the opinion that it was a ‘false’ case and that the accused had been implicated on account of enmity. In that connection it observed that since Trilok Singh PW6 had given beating to Gurmit Singh on 1-4-84 suspecting his hand in the abduction of his daughter and Gurmit Singh accused and his elder brother had abused Trilok Singh and given beating to Tirlok Singh PW-6 on 2-4-84, “it was very easy on the part of Trilok Singh to persuade his daughter to name Gurmit Singh so as to take revenge.” The trial Court also found that the relations between the family of Gurmit Singh and of the prosecutrix were strained on account of civil litigation pending between the parties for 7/8 years prior to the date of occurrence and that was also the ‘reason’ to falsely implicate Gurmit Singh. Indeed, Gurmit Singh accused in his statement under Section 313 Cr. P. C. did raise such a plea but that plea has remained unsubstantiated. Trilok Singh PW6 categorically denied that he had any litigation with the father of Gurmit Singh at all and went on to say that no litigation had ever taken place between him and Mukand Singh father of Gurmit Singh over a piece of land or otherwise. To the similar effect is the statement of Gurdev Kaur PW7 who also categorically stated that there had been no litigation between her husband and Mukand Singh father of Gurmit Singh. The trial Court ignored this evidence and found support for the plea of the accused from the statement of the prosecutrix in which during the first sentence of her cross-examination she admitted that litigation was going on between Mukund Singh father of Gurmit Singh and her father for the last 8/9 years over a piece of land. In what context the statement was made is not clear. Moreover, the positive evidence of PW6 and PW7 that there was no litigation pending between PW6 and the father of Gurmit Singh completely belied the plea of the accused. If there was any civil litigation pending between the parties as alleged by Gurmit Singh he could have produced some documentary proof in support thereof but none was produced. Even Mukand Singh, father of Gurmit Singh did not appear in the witness box to support the plea taken by Gurmit Singh. The allegation regarding any beating given to Gurmit Singh by PW6 and to PW6 by Gurmit Singh and his brother was denied by PW6 and no material was brought forth in support of that plea either and yet the trial Court for undisclosed reasons assumed that the story regarding the beating was correct. Some stray sentences in the statement of the prosecutrix appear to have been unnecessarily blown out of all proportion to hold that admittedly PW6 had been given beating by Gurmit Singh accused and that there was civil litigation pending between the father of the prosecutrix and the father of Gurmit Singh to show that the relations between the parties were chemical. There is no acceptable material on the record to hold that there was any such civil
litigation pending between the parties. Even if it be assumed for the sake of argument that there was some such litigation, it could hardly be a ground for a father to put forth his daughter to make a wild allegation of rape against the son of the opposite party, with a view to take revenge. It defies human probabilities. No father could stoop so low as to bring forth a false charge of rape on his unmarried minor daughter with a view to take revenge from the father of an accused on account of pending Civil litigation. Again, if the accused could be falsely involved on account of that enmity, it was equally possible that the accused could have sexually assaulted the prosecutrix to take revenge from her father, for after all, enmity is a double edged weapon, which may be used for false implication as well as to take revenge. In any case, there is no proof of the existence of such enmity between PW6 and the father of Gurmit Singh which could have prompted PW6 to put up his daughter to falsely implicate Gurmit Singh on a charge of rape. The trial Court was in error to hold that Gurmit Singh had been implicated on account of enmity between the two families and for the beating given by Gurmit Singh and his brother to PW6, in retaliation of the beating given by PW6 to Gurmit Singh on 1-4-1984. Similarly, so far as Jagjit Singh respondent is concerned, the trial Court opined that he could have been got implicated at the instance of the Sarpanch of village Pakhowal, who was hostile to Jagjit Singh. The ground of hostility as given by Jagjit Singh against the Sarpanch of village Pakhowal stems out of the fact that the sarpanch was annoyed with him for marrying a Canadian girl in the village Gurdwara. There is no evidence whatsoever on the record to show that the Sarpanch of village Pakhowal had any relationship or connection with the prosecutrix or her father or was in any way in a position to exert so much of influence on the prosecutrix or her family, that to settle his score Trilok Singh PW6 would put forward his daughter to make a false allegation of rape and thereby jeopardise her own honour and future prospects of her marriage etc. The plea of Jagjit Singh alias Bawa like that of Gurmit Singh did not merit acceptance and the trial Court erroneously accepted the same without any basis. The plea of the accused was a plea of despair not worthy of any credence. Ranjit Singh, apart from stating that he had been falsely implicated in the case did not offer any reasons for his false implication. It was at his lubewell kotha that rape had been committed on the prosecutrix. She had pointed out that kotha to the police during Investigation. No ostensible reason has been suggested as to why the prosecutrix would falsely involve Ranjit Singh for the commission of such a heinous crime and nomi-naie his kotha as the place where she had been subjected to sexual molestation by the respondents. The trial Court ignored that it is almost inconceivable that an unmarried girl and her parents would go to the extent of sinking their reputation and future in order to falsely set up a case of rape to settle petty scores as alleged by Jagjit Singh and Gurmit Singh respondents.
12. From the statement of the prosecutrix, it clearly emerges that she was abducted and forcibly subjected to sexual intercourse by the three respondents without her consent and against her will. In this factual situation the question of age of the prosecutrix would pale into insignificance. However, in the present case, there is evidence on the record to establish that on the date of the occurrence, the prosecutrix was below 16 years of age. The prosecutrix herself and her parents deposed at the trial that her age was less than 16 years on the date of the occurrence. Their evidence is supported by the birth certificate Ex. PJ. Both Triiok Singh PW6 and Gurdev Kaur PW7, the father and mother of the prosecutrix respectively, explained that initially they had named their daughter, the prosecutrix, as Mahinder Kaur but her name was changed to ... (name omitted), as according to The Holy Guru GranthSahib her name was required to start with the word “chhachha” and therefore in the school leaving certificate her name was correctly given. There was nothing to disbelieve the explanation given by Trilok Singh and Gurdev Kaur in that behalf. The trial-Court ignored the explanation given by the parents observing that “it could not be swallowed being a belated one.” The trial Court was in error. The first occasion for inquiring from Trilok Singh PW6 about the change of the name of the prosecutrix was only at the trial when he was asked about Ex. PJ and there had been no earlier occasion for him to have made any such statement. It was, therefore, not a belated explanation. That apart, even according to the lady doctor PW1, the clinical examination of the prosecutrix established that she was less than 16 years of age on the date of the occurrence. The birth certificate Ex. PJ was not only supported by the oral testimony of Trilok Singh PW6 and Gurdev Kaur PW7 but also by that of the school leaving certificate mark ‘B’. With a view to do complete justice, the trial Court could have summoned the concerned official from the school to prove various entries in the school leaving certificate. From the material on the record, we have come to an unhesitating conclusion that the prosecutrix was less than 16 years of age when she was made a victim of the lust of the respondent in the manner deposed to by her against her will and without her consent. The trial Court did not return any positive finding as to whether or not the prosecutrix was below 16 years of age on 30th March 1984 and instead went on to observe that even assuming for the sake of argument that the prosecutrix was below 16 years of age on 30th March 1984, it could still not help the case as she was not a reliable witness and was attempting to shield her own conduct by indulging in falsehood to implicate the respondents.’ The entire approach of the trial Court in appreciating the prosecution evidence and drawing inferences therefrom was erroneous.

13. 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”.

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14. What has shocked our judicial conscience all the more is the inference drawn by the Court, based on no evidence and not even on a denied suggestion, to the effect:

“The more probability is that (prosecutrix) was a girl of loose character, she wanted to dupe her parents that she resided for one night at the house of her maternal uncle, but for the reasons best known to her she does not do so and she preferred to give company to some persons.”

15. 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. Such like stigmas have the potential of not only discouraging an even otherwise reluctant victim of sexual assault to bring forth complaint for trial of criminals, thereby making the society to suffer by telling the criminal escape even a trial. The Courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole — where the victim of crime is discouraged — the, criminal encouraged and in turn crime gets reWARDED. Even in cases, unlike the present case, where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse, no such inference like the victim being a girl of “loose moral character” is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. No stigma, like the one as cast in the present case should be cast against such a witness, by the Courts for after all it is the accused and not the victim of sex crime who is on trial in the Court.

16. As a result of the aforesaid discussion, we find that the prosecutrix has made a truthful statement and the prosecution has established the case against the respondents beyond every reasonable doubt. The trial Court fell in error in acquitting them of the charges levelled against them. The appreciation of evidence by the trial Court is not only unreasonable but perverse. The conclusions arrived at by the trial Court are untenable and in the established facts and circumstances of the case, the view expressed by it is not a possible view. We, accordingly, set aside the judgment of the trial Court and convict all the three respondents for offences under Sections 363/366/368 and 3761.P.C. So far as the sentence is concerned, the Court has to strike a just balance. In this case the occurrence took place on 30-3-1984 (more than 11 years ago). The respondents were aged between 21-24 years of age at the time when the offence was committed. We are informed that the respondents have not been
involved in any other offence after they were acquitted by the trial Court on 1-6-85, more than a decade ago. All the respondents as well as the prosecutrix must have by now got married and settled down in life. These are some of the factors which we need to take into consideration while imposing an appropriate sentence on the respondents. We accordingly sentence the respondents for the offence under Section 376 I.P.C. to undergo five years R.I. each and to pay a fine of Rs. 5000/- each and in default of payment of fine to I year’s R.I. each. For the offence under Section 363 I.P.C. we sentence them to undergo three years R. I. each but impose no separate sentence for the offence under Section 366/368 I.P.C. the substantive sentences of imprisonment shall, however, run concurrently.

17. This Court, in Delhi Domestic Working Women’s Forum v. Union of India, MANU/SC/0519/1995, had suggested, on the formulation of a scheme, that at the time of conviction of a person found guilty of having committed the offence of rape, the Court shall award compensation.

18. In this case, we have, while convicting the respondents, imposed, for reasons already set out above, the sentence of 5 years R. I. with fine of Rs. 5000/- and in default of payment of fine further R. I. for one year on each of the respondents for the offence under Section 376 I.P.C. Therefore, we do not, in the instant case, for those very reasons, consider it desirable to award any compensation, in addition to the fine already imposed, particularly as no scheme also appears to have been drawn up as yet.

19. Before, parting with the case, there is one other aspect to which we would like to advert to.

20. 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 Court, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking
corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

21. 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 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.

22. The alarming frequency of crime against women led the Parliament to enact Criminal Law (Amendment) Act, 1983 (Act 43 of 1983) to make the law of rape more realistic. By the Amendment Act, Sections 375 and 376 were amended and certain more penal provisions were incorporated for punishing such custodians who molest a women under their custody or care. Section 114-A was also added in the Evidence Act for drawing a conclusive presumption as to the absence of consent in certain prosecutions for rape, involving such custodians. Section 327 of the Code of Criminal Procedure which deals with the right of an accused to an open trial was also amended by addition of sub-sections (2) and (3) after re-numbering the old Section as sub-section (1). Sub-section (2) and (3) of Section 327 Cr. P. C. provide as follows:

Section 327. Court to be open —

(2) Notwithstanding anything contained in subsection (1), the inquiry into and trial of rape or an offence under Section 376, Section 376-A,
Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code shall be conducted in camera:

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

(3) Where any proceedings are held under subsection (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."

23. These two provisions are in the nature of exception to the general rule of an open trial. In spite of the amendment, however, it is seen that the trial Courts either are not conscious of the amendment or do not realise its importance for hardly does one come across a case where the enquiry and trial of a rape case has been conducted by the Court in camera. The expression that the inquiry into and trial of rape “shall be conducted in camera” as occurring in sub-section (2) of Section 327 Cr. P. C. is not only significant but very important. It casts a duty on the Court to conduct the trial of rape cases etc. invariably “in camera”. The Courts are obliged to act in furtherance of the intention expressed by the Legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327 (2) and (3) Cr. P. C and hold the trial of rape cases in camera. 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 High Courts would therefore be well advised to draw the attention of the trial Courts to the amended provisions of Section 327 Cr. P. C. and to impress upon the Presiding Officers to invariably hold the trial of rape cases in camera, rather than in the open Court as envisaged by Section 327 (2) Cr. P. C. When trials are held in camera, it would not be lawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of the Court as envisaged by Section 327 (3) Cr. P. C. This would save any further embarrassment being caused to the victim of sex crime. Wherever possible it may also be worth considering whether it would not be more desirable that the cases of sexual assaults on the females are tried by lady Judges, wherever available, so that the prosecutrix can make her statement with greater ease and assist the Courts to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid
technicalities while appreciating evidence in such cases. 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 Section 327 (2) and (3) Cr. P. C. liberally. Trial of rape cases in camera should be the rule and an open trial in such cases an exception.

Appellants: Balwant Singh  
Vs.  
Respondent: State of Punjab  
And  
Appellants: Saudagar Singh  
Vs.  
Respondent: State of Punjab

In the Supreme court of India

Criminal Appeal Nos. 131 and 273 of 1978

Decided On: 10.02.1987

Hon’ble Judges
M.M. Dutt and G.L. Oza, JJ.

Acts/Rules/Orders
Criminal Procedure Code, 1973 - Sections 156, 157(1) and 169; Indian Penal Code, 1860 - Sections 366, 376 and 376(1)

Case Note
Criminal - rape - Sections 366 and 376 of Indian Penal Code, 1860 - appellants accused of offence of rape convicted under Section 366 - accused took complainant in car and raped her one after another - accused defended by saying they had been falsely implicated in case - medical report fully supported case of complainant - physical condition and injuries on body of complainant showed signs of her being raped - no reason to disbelieve evidence adduced by her - prosecution proved guilt of appellants beyond any reasonable doubt - Court dismissed appeals and affirmed conviction of appellants.

Judgment
M.M. Dutt, J.

1. These two appeals by special leave - one filed by Balwant Singh, Gurdish Singh and Nirmal Singh and the other by Saudagar Singh - are directed against the judgment of the High Court of Punjab & Haryana affirming with slight modification the order of convictions and sentences passed by the learned Additional Sessions Judge, Ludhiana. The learned Additional Sessions Judge convicted the appellants under Section 366 IPC and sentenced each of them to undergo rigorous imprisonment for four years and to pay a fine of Rs. 100. The appellants were also convicted under Section 376 IPC and sentenced to undergo rigorous imprisonment for 5 years and to pay a fine of Rs. 2000 each.
The High Court while affirming the said convictions and sentences directed that the sentences of imprisonment would run concurrently.

2. The prosecution case, in brief, is that on May 10, 1976 at 11.00 a.m., while Kumari Rajwant Kaur, aged about 19/20 years and a student of B.A. Part II of Gobind National College, Narangwal, was going to the college to collect her certificate of passing the Pre-University Examination the appellants, who are known to her and one Atma Singh (since acquitted), forcibly took her in a car to the canal bank and there in a grove of eucalyptus trees raped her one after another. When Atma Singh was committing rape on her, she lost consciousness.

3. The further case of the prosecution was that when Kumari Rajwant Kaur did not return home until 5.00 p.m., her father, Dalip Singh (PW 3), got anxious and started searching for her. About an hour after sunset in course of his search, Dalip Singh found his daughter, Rajwant Kaur, lying in an unconscious state under a banyan tree near the canal bridge. Nobody was near her at that time. Dalip Singh, his son and his wife brought her home. In spite of medical treatment, she did not regain consciousness till one hour before dawn next day. After regaining consciousness, she narrated to her father the entire incident.

4. Her father took her to the Police Station, Dehlon, where at 11.00 a.m. she lodged the first information report. At 4.30 p.m. on the same day, Dr. Gurbachan Kaur, Medical Officer, Civil Hospital, Ludhiana, examined her and found, amongst other, the following:

1. Vaginal examination was possible with one finger. Vagina and cervix were healthy.
2. Hymen was torn posteriorly. The edges of the tear were red and painful and bled on touch.
3. Two vaginal swabs were taken and sent to the Chemical Examiner through police for examination for semen and spermatozoa.
4. Red abrasion 1” x 1/8” on right breast medial side.
5. Reddish abrasion 1/6” x 1/8” on right breast 2” above injury No. 8.
6. She complained of pain in both legs and back of neck. No visible marks of violence were found.

5. As many as four police officers including the Superintendent of Police investigated the case at different stages. They, however, could not accept the truth of the version of Rajwant Kaur about the incident. It is said that on the instruction of the Superintendent of Police, the case was reported to be cancelled. Rajwant Kaur naturally felt dissatisfied with the conduct of the investigating agency of the police and herself filed a complaint in the court of
the Judicial Magistrate, Ludhiana. The learned magistrate committed the appellants and the said Atma Singh to the Court of Session for trial.

6. At the trial, the prosecutrix examined herself as PW 2. She also examined her father, Dalip Singh (PW 3) and Dr. Gurbachan Kaur (PW 1).

7. The defence of the appellants was that they had been falsely implicated in the case by Dalip Singh, the father of the prosecutrix, because he had an enmity against the appellants in connection with some litigations pending between them over the repayment of certain loans advanced by Dalip Singh to the appellants. The appellants also examined certain defence witnesses including the police officers who had investigated the case.

8. The learned Additional Sessions Judge, after considering the evidence adduced in the case, overruled the defence plea that the appellants were falsely implicated in the case at the instance of Dalip Singh because of his enmity against them. He found that the prosecution had proved the guilt of the appellants beyond any reasonable doubt and convicted them and sentenced them as mentioned above. Atma Singh was, however, acquitted.

9. On appeal by the appellants, a learned Single Judge of the High Court, as already stated, affirmed the convictions and sentences with slight modification, namely, that the substantive sentences would run concurrently. Hence these two appeals by special leave.

10. In this case, the appellants have been convicted on the evidence of the prosecutrix (PW 2), her father, Dalip Singh (PW 3), and of Dr. Gurbachan Kaur (PW 1). Mr. Kohli, learned counsel appearing on behalf of the appellants in both these appeals, has urged that in view of the fact that the investigating agency of the police could not accept the genuineness of the prosecution story, the High Court was not justified in affirming the conviction of the appellants solely on the uncorroborated evidence of the prosecutrix (PW 2). It is submitted that the High Court should have kept in its view the rule of prudence that the evidence of the prosecutrix without corroboration by any independent witness could not be made the basis of conviction of the appellants.

11. We are dissatisfied with the manner of investigation of the case by the police. It is curious that in spite of the statements of the girl and her father and the medical report, the police was not satisfied even prima facie as to the truth of the allegations against the appellants. The police officers including the Superintendent of Police, did not even consider it their duty to produce before the court the report of examination by the Chemical Examiner of the vaginal swabs of the prosecutrix as to the presence of semen and spermatoza. There is no explanation why such a very important and vital evidence has been withheld from the court. In the circumstances, no importance whatsoever should be
given to the fact that the police was not satisfied about the genuineness of the prosecution case.

12. Be that as it may, it is not correct to say that the evidence of PW 1 (sic PW 2) does not find any corroboration. The medical report, in our opinion, supports the case of the prosecutrix that she was raped. According to the medical report, the hymen was torn and the edges of the tear were red and painful and bled on touch. There were abrasions on the right breast. She complained of pain in both legs and back of neck. The High Court has rightly observed that these are the indications of first sexual intercourse of a female. According to the High Court, there was swelling on the internal walls of the vagina because of the forcible and violent intercourse by many persons. The prosecutrix (PW 2) was subjected to a lengthy cross-examination, but she did not break down under the pressure of such cross-examination. It is the evidence of her father, Dalip Singh (PW 3), that she was found in an unconscious state and she remained unconscious till one hour before dawn. This evidence also supports the evidence of the prosecutrix. It may be that Dalip Singh is the father of the prosecutrix, but there is no ground to discard his evidence. Both the learned Additional Sessions Judge and the High Court have believed the evidence of the prosecutrix and her father and, in our opinion, there is no reason why their evidence should not be believed.

13. It is next contended on behalf of the appellants that as it does not transpire from the medical report as to the number of persons who had committed rape on the prosecutrix, the conviction of the appellants is illegal and should be set aside. This contention, in our opinion, is without any substance whatsoever. We do not think that on medical examination it is possible to say about the number of persons committing rape on a girl and, accordingly, in her report Dr. Gurbachan Kaur has not expressed any opinion in that regard. The evidence of the prosecutrix that all the appellants had committed rape on her is not inconsistent with the medical report. In the circumstances, there is justification for the finding of the High Court that the medical examination and the evidence show the involvement of more than one person in the act of rape. The contention made on behalf of the appellants is rejected.

14. It is difficult for us to accept the contention of the appellants that because of enmity of the father of the prosecutrix against the appellants, they have been falsely implicated in the case. It may be that litigations are going on between Dalip Singh and the appellants, but it is absurd to suggest that because of the litigations or any enmity that he may have against the appellants, the father of the prosecutrix would falsely involve his daughter in a case of rape by the appellants. On the contrary, the High Court has rightly observed that the appellants, who are debtors, had a common interest to bring disrepute to Dalip Singh, their creditor, by committing rape on his daughter, Kumari
Rajwant Kaur (PW 2). There is, therefore, no substance in the contention of the appellants that they have been falsely implicated in the case on account of the enmity of Dalip Singh against them.

15. Lastly, it is submitted by the learned counsel for the appellants that the absence of any injury on the back of the prosecutrix or any part of her body falsifies the case of rape by the appellants on her. It is submitted that the prosecutrix was expected to offer resistance which would normally cause certain injury on her body and particularly on the back. As there was no such injury, it should be held that there was no such incident as alleged. This argument, in our opinion, is devoid of merit. It cannot be said that whenever resistance is offered there must be some injury on the body of the victim. The appellants were four in number and the prosecutrix being a girl of 19/20 years of age, she was not expected to offer such resistance as would cause injuries to her body. It is also not correct to say that there was no injury at all. It has been earlier noticed that as per the medical report she had red abrasions on her right breast. In the circumstances, the contention of the appellants is rejected. No other point has been urged on behalf of the appellants in these appeals.

16. For the reasons aforesaid, these appeals are dismissed.
Appellants: State of Andhra Pradesh
Vs.
Respondent: Gangula Satya Murthy

In the Supreme court of India
Criminal Appeal No. 455 of 1996
Decided On: 19.11.1996

Hon’ble Judges
Dr. A.S. Anand and K.T. Thomas, JJ.

Counsels
For Appellant/Petitioner/Plaintiff: Guntur Prabhakar, Adv.
For Respondents/Defendant: Vidya Sagar K. and
Ms. Asha Gopalan Nair, Advs.

Acts/Rules/Orders
Indian Penal Code, 1860 - Sections 300, 302, 375 and 376; Indian Evidence
Act, 1872 - Sections 25 and 26; Code of Criminal Procedure, 1973 -
Section 174

Case Referred
Para 20);

Case Note:
Criminal – error – Sections 302 and 376 of Indian Penal Code – respondent
convicted under Sections 302 and 376 and sentenced to imprisonment – on
appeal High Court expressed possibility of death of deceased due to
consumption of poison – High Court erred substantially in upsetting conviction
and sentence passed supported by sturdy reasons – decision of Trial Court
restored and appeal allowed.

Order
Thomas, J.

1. A girl of sixteen (Satya Vani) was raped and throttled to death. This was the
gravamen of the charge put against respondent Gangula Satya Murthy alias
Babu. Sessions Court convicted him under Sections 302 and 376 of the Indian
Penal Code and sentenced him to imprisonment for life and rigorous
imprisonment for 7 years respectively under the two counts. But on appeal, a
Division Bench of the High Court of Andhra Pradesh acquitted him. This
appeal by special leave has been filed by the State of Andhra Pradesh in
challenge of the said order of acquittal.
2. We shall state the facts of the case as put forth by the prosecution:

Satya Vani was a student of 10th Standard. She was residing with her parents in the village Talluru (East Godawari District). Respondent Babu, a married youngman, was residing with his mother in their house situated near the house of the deceased. Satya Vani used to visit respondent’s house to see television programmes as there was no television set available in her house. Respondent developed, in course of time, an infatuation for Satya Vani, but the overtures made by him were not favourably reciprocated by her.

3. On the evening of 26-11-1991, Satya Vani was sent by her parents to the house where her grand-parents lived with some errand. While returning from there she stepped into respondent’s house for seeing the telecast programmes. Respondent was all alone then in that house as his mother had gone to the town to see a cinema show. Taking advantage of the absence of anyone else in the house, respondent subjected Satya Vani to sexual intercourse by forcibly putting her on the col. When she threatened that she would complain it to her parents respondent caught hold of her neck and throttled her to death. A little later respondent went out of the house bolting it from outside.

4. As Satya Vani did not return home even after a long time her parents became panicky and they made hectic enquiries for her. When respondent’s mother reached home by about 10 P.M., she found Satya Vani’s dead body lying on the cot in her house, and she immediately conveyed the frightening news to her anxious parents.

5. Police was informed of the matter and an FIR under Section 174 of the Code of Criminal Procedure was prepared, and the inquest on the dead body was held by the Sub-Inspector of Police. During autopsy it was revealed that Satya Vani was subjected to sexual intercourse and her death was due to throttling.

6. On 2-12-1991, respondent was physically produced before the police by two residents of the locality (PW-6 and PW-7) on the premise that respondent had admitted his guilt to them. A letter which Satya Vani had addressed to the respondent was also delivered to the police. After completing the investigation, respondent was challaned.

7. Sessions Court found on evidence, which is entirely circumstantial, that respondent had raped the deceased girl and killed her by throttling. Accordingly the respondent was convicted and sentenced as aforesaid.

8. The following circumstances were found by the Sessions Court as established firmly by the prosecution: (1) Satya Vani was seen entering the house of the respondent by about 5.30 P.M.; (2) Afterwards time respondent was seen going
out of the house bolting the door from outside; (3) Death of Satya Vani took place inside the house of the respondent some time between 6 P.M. and 10 P.M.; (4) She was subjected to sexual intercourse before her death and she died due to throttling; (5) Respondent alone was present in the house during the relevant time besides the deceased; (6) Extra judicial confession was made by the respondent to PW-6 and PW-7.

9. The Division Bench of the High Court of Andhra Pradesh, however, expressed the view that possibility of deceased’s death due to consumption of poison could not be ruled out in this case. Learned Judges entertained the doubt that the injuries on the neck including the fracture of the hyoid bone could have been post-mortem injuries. Further, the extra judicial confession spoken to by PW-6 and PW-7 was not acted on by the High Court due to certain infirmities pointed out in the judgment. Resultantly, the High Court reversed the judgment of the Sessions Court and passed the order of acquittal.

10. Learned counsel, who argued for the State, seriously assailed the reasoning of the High Court for reaching the findings. When we perused the records in the light of the arguments addressed by both sides we are of the opinion that the High Court has manifestly erred in reversing the findings arrived at by the trial Court. We shall now advert to our reasons.

11. Dr. K. Trinadhara (PW-10) of the Government Hospital who conducted the post-mortem examination has recorded his observations in the certificate as follows:

“Injuries are ante-mortem in nature. Two finger pressure abrasions were present on the right as well as on the left side of the neck placed anteriorly, which continued up to the root level on the back of the neck, A fresh vaginal tear on the inner vaginal walls posterior to labia minora, fracture of the right hyoid bone and extravagation of blood on both sides of the neck were found. Both lungs were congested. Emphysemalas bullae were present on the surface of both the lungs.”

When the vaginal swabs collected from the deceased were examined under microscope, presence of dead non-motile spermatozoa were observed by the doctor.

12. The High Court has reached the conclusion that fracture of the hyoid bone was likely to be a post-mortem injury caused while the dead body was carried in a rickshaw. Learned Judges have advanced the following reasons for reaching the said conclusion: (1) Witnesses who were present at the inquest as well as the investigating officer did not notice any abrasion or other injury on the neck of the dead body; (2) Dr. Trinadharao (PW-10) admitted in cross-examination that “if pressure is applied by fingers, only contusions are possible
but not abrasions.” (3) P W-10 has further stated in his deposition that if the fracture on the hyoid bone was ante-mortem there would have been corresponding bleeding but no such bleeding was noted by the doctor during the autopsy. (4) The doctor witness has also slated that it is possible for causing fracture of the hyoid bone when a dead body is carried in auto-rickshaw.

13. We cannot resist expressing our distress that the High Court has chosen to advance fragile reasons to upset a well reasoned conclusion reached by the trial Court that the deceased was throttled to death. The mere fact that witnesses present at the inquest had escaped noticing the small abrasions on the neck of the dead body is too tenuous a ground for holding that such abrasions would have come into existence after the inquest was held overruling the definite opinion of the medical man (who saw the injuries) that they were ante-mortem injuries. It is totally incorrect to say that no abrasion would be caused if pressure is applied with fingers. It is only common sense that if such fingers have projecting nails, pressure application with such fingers would quite possibly cause abrasions as well. Similarly the observation of the High Court that no bleeding was noticed at the site of the fracture of the hyoid bone is not factually correct as PW-10 had noted in the post-mortem certificate that there was extravagation of blood on both sides of the neck.

14. The High Court has adverted to yet another reason for holding that death might not have been caused due to throttling. The vomited material found on the cot and mouth of the dead body was not sent for chemical examination, and hence the High Court concluded that “it is also possible that death might have been caused due to asphyxia by poisoning.” We are disturbed very much as the High Court has overlooked, if not ignored, the evidence of Dr. Trinadharao (PW-10) that viscera comprising of stomach contents, intestine, piece of lever and also a kidney had been forwarded to the chemical laboratory for analysis and PW-10 had reserved his final opinion till he got the result of such analysis. When he later received the chemical examination report he pronounced his final opinion that the death was due to asphyxia as no poison was detected in the viscera. The report of the chemical examiner is available in the records. Section 293 of the Code would enable the Court to use the said document in evidence. In spite of such unassailable materials the High Court has arrived at the finding that “in the facts and circumstances of the case it cannot be ruled out in its entirely that death was not caused due to poisoning.”

15. One of the circumstances relied on by the prosecution is that respondent had confessed the guilt to PW-6 and PW-7. In other words, prosecution relied on the extra judicial confession of the respondent spoken to by the said two witnesses. In their deposition they said that on 2-12-1991, they buttonholed
the respondent and confronted him with certain questions pertaining to the
depth of the deceased and then respondent had blurted out to them of what
happened. Witnesses further deposed that respondent took out a letter and
showed it to them. Witnesses thereupon took him to the police station where
that letter was also produced. PW-14 — Sub-Inspector of Police confirmed
that those two witnesses brought the respondent to the police station and
produced Ext. P-13 letter.

16. Truth of the evidence of PW-6 and PW-7 stands vouchsafed by Ext. P-13
letter as the same was proved to be a letter written by the deceased to the
respondent. PW-12 Assistant Director, Forensic Science Laboratory, who was
also a Handwritting Expert examined the handwriting on (he letter with the
admitted handwriting of the deceased found in some answer sheets (which
police collected from the Principal of the School where Satya Vani studied —
PW-13.) PW-12 gave cogent reasons for his conclusion that both were written
by the same person. A reading of the contents in thai leiter admits of no doubt
that it was addressed to the respondent in this case.

17. The aforesaid extra judicial confession was relied on by the trial Court but
the High Court did not act on it for two reasons. First is a seeming disparity
between the time of making the confession as spoken to by the witnesses and
the time mentioned by the police on the strength of station records. The second
reason is that the said extra judicial confession was reduced to writing as Ext.P-
7, inside the police station and hence it is hit by Section 26 of the Evidence
Act.

18. It is true that in the deposition PW-6 and PW-7 have said (hat it was at 7
A.M. that the respondent made the confession to them. But the Sub-Inspector
said that accused was produced in the police station at 7.30 P.M. We think that
much should noi have been made out of that disparity as there could be a
possibility of making an error in recording the time A.M. for P.M. We say this
because both PW-6 and PW-7 uniformly said that they took the respondent to
the police station situated about 3 kilometres away. As the police records
show that they produced him at 7.30 P.M. it is only inferential that respondent
would have made the confession on the evening and not during morning hours.
At any rate it is not proper to jettison an otherwise sturdy piece of evidence of
extra judicial confession on the ground of such a rickety premise.

19. The other reasoning based on Section 26 of the Evidence Act is also
fallacious. It is true any confession made to a police officer is inadmissible
under Section 25 of the Act and that ban is further stretched through Section
26 to the confession made to any other person also if the confessor was then in
police custody. Such “custody” need noi necessarily be post arrest custody.
The word “custody” used in Section 26 is to be understood in a pragmatic

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sense. If any accused is within the ken of surveillance of the police during which his movements are restricted then it can be regarded as custodial surveillance for the purpose of the Section. If he makes any confession during that period to any person be he not a police officer, such confession would also be hedged within the banned contours outlined in Section 26 of the Evidence Act.

20. But the confession made by the respondent to PW-6 and PW-7 was not made while he was anywhere near the precincts of the police station or during the surveillance of the police. Though Ext. P-7 would have been recorded inside the police station its contents were disclosed long before they were reduced to writing. We are only concerned with the inculpatory statement which respondent had made to PW-6 and PW-7 before they took him to the police station. So the mere fact that the confession spoken to those witnesses was later put in black and white is no reason to cover it with the wrapper of unadmissibility. We find that the High Court has wrongly sidelined the extra judicial confession.

21. The fact that body of (Satya Vani) was found on the cot inside the house of the respondent is a very telling circumstance against him. Respondent owed a duty to explain as to how a dead body which was resultant of a homicide happened to be in his house. In the absence of any such explanation from him the implication of the said circumstance is definitely adverse to the respondent.

22. High Court has extricated the appellant from the indictment of rape on the erroneous assumption that it would have been a consented copulation. Learned Judges have relied on two circumstances in support of the said assumption. One is that there was no nail mark on the breast or face or thigh or private parts of the deceased for indicating resistance offered by her. Second is that PW-10 doctor did not notice any hymen for the deceased. In that realm also the High Court committed serious error in skipping the contents of Ext. P-13 letter and also the injury on the right side of the posterior labia minora, (we have mentioned it supra). Of course that injury by itself is not conclusive proof of resistance but it cannot be ignored altogether. In Ext.P-13 letter, she cautioned the respondent not to have a leering on her. She deprecated in her letter the idea of a married man enjoying another lady by terming it an act of “grave sin”. Further, in his extra judicial confession made to PW-6 and PW-7, respondent had said that he took the girl by force and kept her on the cot as he was long nurturing the lust to enjoy her. The doctor had found fresh vaginal tear on the right side of the inner vaginal wall posterior. This injury is indicative of forcible sexual intercourse. According to the medical opinion also the presence of fresh vaginal tear showed that the deceased had been subjected to sexual intercourse prior to her death. The very fact that the sexual intercourse
was soon followed, if not contemporaneous with by the act of throttling is strongly suggestive of a vehement resistance offered by the female victim.

23. We have absolutely no doubt that the above circumstances are sufficient to reach the irresistible inference that she was ravished by the respondeni despite her refusal.

24. The High Court after considering the medical evidence while dealing with the question of rape opined:

“There is no direct evidence to show that the accused alone had sexual intercourse with her. The deceased was aged 16 years.”

25. We are rather distressed on this comment. By using the word “alone” the High Court almost cast a stigma on the prosecutrix as if, apart from the appellant, there were other persons also who had sexual intercourse with her. There is no basis at all for such an assumption. There was no warrant for recording such a finding and if we may say so, with respect, the finding is an irresponsible finding. We express our strong disapproval of the approach of the High Court and its casting a stigma on the character of the deceased prosecutrix. Even if the Court formed an opinion, from the absence of hymen that the victim had had sexual intercourse prior to the time when she was subjected to rape by the appellant she had every right to refuse to submit herself to sexual intercourse by the appellant, as she certainly was not a vulnerable object or prey for being sexually assaulted by anyone and this position becomes all the more clear from the contents of the letter Ex. P-13 as already noticed.

26. We, therefore, conclude that the High Court erred substantially in upsetting the conviction and sentence passed by the Sessions Judge supported by sound and sturdy reasons. We, therefore, allow this appeal and set aside the order of acquittal. We restore the conviction and sentence passed on the respondent/accused by the trial court. The bail bond shall stand cancelled. The respondent shall be taken into custody forthwith to undergo the remaining part of the sentence.

27. Before parting with the case we would like to point out that the Courts are expected to show great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the witnesses, which are not of a fatal nature to throw out allegations of rape. This is all the more important because of late crime against women in general - and rape in particular is on the increase. It is an irony that while we are celebrating woman’s rights in all spheres, we show little or no concern for her honour. It is a sad
reflection and we must emphasise that the Courts must deal with rape cases in particular with utmost sensitivity and appreciate the evidence in the totality of the background of the entire case and not in isolation. One of us (Dr. Anand J.) has observed in State of Punjab v. Gurmit Singh, MANU/SC/0366/1996 thus:

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

We think it is appropriate to reiterate those observations in this case.

Appellants: P. Rathinam
Vs.
Respondent: Union of India (UOI) and Ors

In The Supreme Court of India
Writ Petition (Criminal) No. 381 of 1988

Decided On: 28.10.1988

Hon’ble Judges
Ranganath Misra and M.N. Venkatachaliah, JJ.

Order
1. The State has filed an affidavit pursuant to the notice indicating therein that four of the police officers of the different grades said to be involved in the incident of rape have since been suspended from service, taken into custody and are being proceeded against. The matter is under investigation and learned counsel assures us that as soon as investigation is over if a prima facie case is found, charge-sheet shall be submitted without delay. We find that the accused persons are in custody, their bail having been cancelled by the High Court.

2. The victim Kalpana Sumathi in our view has become entitled to reasonable compensation. She has undergone treatment for a long period away from house and at a place out of the State; she has undergone a lot of suffering - physical and mental. An interim compensation of Rs. 20,000 is directed to be paid to her by the State within two weeks hence. Whether she would be entitled to any further sum of compensation is left open to be decided any leave is granted to the petitioner to apply to this Court after the criminal trial reaches finality at the trial stage. The payment of Kalpana shall be made by the District Magistrate of Dharmapura either personally or through a competent officer to ensure actual payment and a report of compliance shall be made to the Registry of this Court. Writ petition is disposed of accordingly.
Appellant: His Majesty’s Government on the F.I.R. of Chitra Maya Dhimal……. Petitioner

Versus

Respondents
Deepak Bhandari, a resident of the address as above and Others … Defendants

Supreme Court

Judge
The Hon’ble Justice Top Bahadur Singh
The Hon’ble Justice Dilip Kumar Poudyal

Division Bench
Criminal Appeal No. 2577 of the year 2057 (2000)

Date of Decision: Jyestha 27, 2059 (2002)

Verdict

1. Filed as an appeal following permission granted for revision of the case on a petition seeking its revision under Section 12 (1) (b) of the Judicial Administration Act, 2048 (1990), the facts and the decision of the present case are briefly described as follows:

2. The First Information Report (FIR) filed by the victim Chitra Maya stated that there was a dance and song programme of the Tharus in village Narwari on Bhadra 28, 2047 (1990). She had also gone there together with her minor sister. While returning home after the end of the programme at about 11/12 O’clock at night along with her two minor sisters and an elder sister Dukhani Dhimal, Deepak Bhandari, Subhas Katuwal, Pradeep Katuwal, Bhim Bhandari and Bhanu Rajbanshi intercepted her on the way and catching hold of the organ of her youth with a motive of sex started oppressing her. Her elder sister Dukhani managed to escape. When she started weeping and crying Deepak Bhandari took out his dagger and threatened to kill her if she did not allow them to have sexual intercourse. Following that all the five raped her by turn and after the discharge of semen inside her vagina, all five culprits fled the scene. Since the culprits had raped her with their semen falling inside the vagina and on the sari which she was wearing, she requested to prosecute and punish them under the provisions relating to Rape.

3. A report of Koshi Zonal Hospital on the examination of the vagina of Chitra Maya Dhimal dated Ashwin 5, 2047 was attached with the case file.
4. Defendant Bhanu Rajbanshi, in course of giving his statement before the police, stated that on Bhadra 28, 2047 (1990) Pradeep Katuwal, Deepak Bhandari, Bhim Bahadur Bhandari, Tek Bahadur Katuwal and he had gone to watch the dance and as it had started raining at night, four of them except Deepak Bhandari returned home. They came to know only the next day that Deepak Bhandari had collided with the informant while jumping at night. He alleged that Ganesh Chaudhary of their village had called all five of them to his place and had beaten them up, and in order to escape punishment it was he who had instigated the informant to file the complaint. Thus he denied to have committed the crime.

5. Defendant Pradeep Kumar Katuwal stated before the police that his elder brother Tek Bahadur, Bhanu and Bhim Bahadur had gone to watch the dance on Bhadra 28, 2047 (1990) and returned home at 10 P.M. He came to know only the next day about the incident of collision of Deepak with Chitra Maya on that day. He further alleged that in connection with that very incident Ganesh Chaudhary of the same village had assaulted them and due to that very animosity the informant had filed the false complaint.

6. Defendant Tek Bahadur Katuwal, in his statement given to the police, stated that after watching the dance at the night of Bhadra 28, 2047 (1990) they headed home as it had started raining. While they were sitting at a culvert near his home Shyam Rajbanshi had come there and asked why he had assaulted Chitra Kumari. It was only 4/5 days afterwards that Ganesh Chaudhary had made Bheem, Deepak, Pradeep, Bhanu Rajbanshi and him assemble at a place and had battered them, shouting why they had beaten up a female of the same village. He alleged that the informant had filed the false complaint at the instigation of Ganesh Chaudhary.

7. Defendant Bheem Bahadur Bhandari, in his statement before the police, stated that at the night of Bhadra 28, 2047 (1990) he, his brother Deepak, Subash, Pradeep and Bhanu watched the cultural programme and four of them had returned home except his brother, as it had started raining. He had heard that perhaps the informant had collided with Deepak. But he denied having raped the informant.

8. Defendant Deepak Bhandari, in his statement before the police, stated that on the night of Bhadra 28, 2047 (1990) he, along with his sisters Hom Kumari and Renuka had gone to watch the programme and headed towards the house of his uncle at about 9/10 O’clock at night, as it had started raining. At that very time Chitra Kumari and the other girls were also returning, and as there was deep darkness on the way, he happened to collide with the informant. It was due to that reason that the informant had started weeping. However, he denied to have committed rape on her. He further alleged that due to that very animosity the informant had implicated him in the FIR.
9. Dukhani Dhimal gave a written statement to the police describing that on Bhadra 28, 2047 (1990) she, Chitra Maya, her brother Jeet Bahadur and a minor sister of Chitra Maya had gone to watch dance, and during that night at 12 O’clock while returning home Bheem Bahadur from among the five defendants suddenly coming towards her to catch hold of her tried to seize her panty but she removed his hand and ran away from there. Since she had fled from the scene leaving behind Chitra Maya and others she did not know whether they committed rape.

10. Kalpana Dhimal, in her statement before the police, described that all the five accused surrounded Chitra Maya and threw her down on the ground and threatened her with a dagger to kill her if she did not let them have sexual intercourse with her. Following that Deepak, Bhim, Bhanu and thereafter the remaining two raped her one after another, and fled from there. Her elder sister Chitra Maya was still lying supine and quite after sometime she rose up, weeping incessantly, and they three including Veena Gurung followed behind their elder sister. Also, because dagger had been brandished, she and her elder sister could not protest and rather stood motionless.

11. Veena Gurung aged nine, in her statement before the police, described that while returning home along with Chitra Maya and her younger sister Kalpana, after watching the dance programme on Bhadra 28, 2047 (1990), Deepak, Bhim and other three persons of the same village tried to catch Dukhani who ran away from there. Then Deepak caught hold of Chitra Maya and thenafter the five accused made her fall down on the ground and Deepak, brandishing a dagger, threatened to kill her if she did not let all five of them to have to sexual intercourse with her. Then after first Deepak followed by Bhim and others raped Chitra Maya by turns and ran away from there.

12. The police chargesheet prosecuted the accused Deepak Bhandari, Pradeep Kumar Katuwal, Tek Bahadur Katuwal, Bhanu Rajbanshi and Bhim Bahadur Bhandari for punishment under Section 3 and for recovery of damage under Section 10 of the chapter On Rape on the ground that although the accused had not pleaded guilty the complaint about the rape of the informant had been substantiated by the statement of the two minor girls and the medical report certifying the fact of penetration inside the vagina and rupture of hymen. However, since the age of Deepak Bhandari was only 13 years and that of Pradeep Katuwal only 15 years it was also contended that action should be taken in respect of them as per Section 1 of the chapter On Punishment.

13. Defendant Pradeep Kumar Katuwal, pleading not guilty before the Court, stated that all the five arrested persons including him had gone to watch a dance on Bhadra 28, 2047 (1990) and returned from there at 11 O’clock at night. He further contended that he had not raped the complainant and they
had been falsely implicated only because they had enmity with Ganesh Chaudhary, a neighbour of the complainant.

14. Defendant Bhanu Rajbanshi, pleading not guilty before the Court, stated that as they, including Tek Bahadur and Pradeep had returned home at 11 O’clock at night after having watched the dance on Bhadra 28, 2047 (1990), they did not rape the complainant. Since Ganesh Chaudhary, a neighbor of the complainant, had beaten them up on the charge that they had damaged the harmonium taken to the dance programme, they had been falsely implicated due to that animosity.

15. Giving his statement before the Court defendant Deepak Bhandari stated that he had returned home at about 11 in the night of Bhadra 28, 2047 (1990) after having watched the dance and did not commit rape on the complainant. Since there had been a quarrel with Ganesh Chaudhary, a neighbor of the complainant, in connection with his allegation about the damage done to the harmonium, he had been falsely implicated due to that enmity.

16. Defendant Tek Bahadur Katuwal, giving his statement before the Court, stated that while returning home at 11 during the night of Bhadra 28, 2047 (1990) from the dance programme he was accompanied by Bheem, Pradeep, Deepak and Bhanu Rajbanshi and he did not rape the complainant that night. Since he had picked up a quarrel with Ganesh Chaudhary who was a neighbor of the complainant, she might have implicated him due to that reason, and the statement made before the police might have been given under threat or coercion.

17. In his statement before the District Court Bheem Bahadur Bhandari stated that on Bhadra 28, 2047 (1990) he along with Subhak, Najir, Thadi Rajbanshi and others had gone to the Tharu locality to watch dance and together they had returned from there, after watching the dance at about 10/11 O’clock. They did not come across the complainant on that night and they did not rape her. He further stated that they had taken the harmonium of the locality, which the locals had refused to take back that night unless it was repaired. Five days after their return the Tharus had called them on false pretext and beaten them up after locking them inside a room of the house of the complainant. He alleged that due to the enmity caused in connection with the harmonium the complainant was instigated to file a false complaint of rape against them in order to implicate them.

18. Morang District Court granted bail to all the five defendants pending the trial of the case as per Section 118 of the chapter on the Court Procedures on the ground that the complainant was of 19 years and the case file did not indicate that her hymen was ruptured due to the rape committed by those
defendants, and also as the organ of accused had not been even medically examined.


20. On behalf of His Majesty’s Government an appeal was filed in the Appellate Court of Biratnagar on Baishakh 27, 2051 (1993) challenging the acquittal verdict given by Morang District Court and praying for the conviction of the defendants in accordance with the prosecution charge sheet on the basis of the proofs present in the case file.

21. Expressing the opinion that as on account of the proofs like the FIR specifically mentioning the names of the accused followed by the testimony given by the informant which was congruous to the FIR, the testimonies of the minors Kalpana and Veena and the medical examination report given by Koshi Zonal Hospital certifying penetration inside the vagina and a rupture of the hymen, there was a likelihood of an alteration in the verdict of the Court of the first instance, the Appellate Court Biratnagar ordered to present the case file for consideration after summoning the defendants or after their default to appear before the court within the due date pursuant to Section 202 of the chapter on the Court Procedures and the Appellate Court Rules, 2048 (1991).

22. Dismissing the appeal filed by His Majesty’s Government and confirming the verdict of acquittal delivered by the District Court, Appellate Court Biratnagar opined that although the victim (the complainant) had stated in the FIR about the presence of stains of semen on the “sari”, it was not produced to substantiate the statement. The FIR was filed only on Ashwin 3, 2047 (1990) in respect of an incident of Bhadra 28, 2047 and the physical examination of the victim was done on Ashwin 5, 2047. The symptoms of rape, which should have been collected immediately in a rape case, were not found to have been collected. The doctor had opined that the medical examination of the victim could not find out symptoms of rape. The doctor had testified that penetration and rupture of hymen might have occurred also due to reasons other than rape. Victim Chitra Maya was said not to have made a hue and cry before or after the rape while going to the village, and the testimony given by Veena Gurung showed that she had gone home in their company. As Dukhani Dhimal, 22, was found to have given the testimony that she was behind Chitra Maya and did not see any incident occur, her testimony appeared to be factually contradictory. The defendants had pleaded not guilty both before the police as well as the Court. Even the defendants could not be examined immediately

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after the alleged offence. Hence, in such a situation the acquittal verdict given by the court of first instance was justified and, therefore, it was confirmed.

23. On behalf of His Majesty’s Government a petition was filed pursuant to Section 12 (1) (b) of the Judicial Administration Act, 2048 (1991) requesting for revision of the aforesaid case and reversal of the verdict of acquittal delivered by the Court of first instance which was subsequently confirmed by Appellate Court Biratnagar and for awarding punishment as demanded in the original charge sheet contending that those verdicts suffered from serious flaws because the FIR had made a specific mention of the names of the defendants as the rapists and the complainant, too, had reaffirmed the contents of her FIR during her testimony given before the Court. The eye-witnesses of the crime Kalpana Dhimal and Veena Gurung, had, in their statements before the police and in their subsequent testimony before the Court, reaffirmed their original statements and pointed out that the defendant Deepak and others had raped the complainant. As the medical examination report of Koshi Zonal Hospital dated Ashwin 4, 2047 (1990) also proved that the hymen of the complainant was ruptured and there had been vaginal penetration, the original complaint and the eye witness accounts were thus further substantiated. In addition to the above mentioned grounds and proofs, a precedent propounded by the apex court (Nepal Law Reporter, 2046 (1989) Vol 7, P. 727) also formed a ground for the serious flaws inherent in the impugned verdicts.

24. As the victim Chitra Maya Dhimal had specifically blamed the defendants in her FIR and had supported it with her testimony given before the Court, and as the statements of the eye witnesses, Kalpana Dhimal and Veena Gurung, made in course of investigation and their testimonies given before the Court showed that the defendants had raped the complainant Chitra Maya and as the medical report also established the act of sexual intercourse, and also as the acquittal verdict delivered by Appellate Court Biratnagar was also inconsistent with the principle propounded in the rape case (decision No. 3874) published in the Nepal Law Reporter, 2046 (1989) Page 727, the Supreme Court issued an order on Jyestha 4, 2057 (2000) granting permission for the revision of the case pursuant to Section 12 (1) (b) of the Judicial Administration Act, 2048 (1991) and asked for the case file to be presented before the bench in accordance with the Rules.

25. In the present case brought before the Bench for disposal, having been included in the weekly cause list and today’s daily cause list in accordance with the Rules, and after studying all the documents including the appeal enclosed in the case file and after hearing the arguments of the Government Deputy Attorney Mahendra Bahadur Karki, appearing on behalf of His Majesty’s Government, who pleaded for a reversal of the verdict of acquittal
delivered by the Court of first instance which was subsequently confirmed by the Appellate Court and also demanded conviction of the accused as claimed in the charge sheet, since those verdicts, which should have held the accused guilty on the basis of the specific FIR filed by the victim and her testimony in the court, the testimony of the eye witnesses given before the court and the medical examination report given by the doctor, had acquitted the defendants.

26. Disposing of the case, the apex court held that in the present case the FIR filed by Chitra Maya Dhimal, the victim, accused the defendants of raping her and the complainant also reiterated the charge mentioned in the FIR while testifying before the court. The minors, Veena Gurung aged nine and Kalpana Dhimal also aged nine, as well as her elder sister Dukhani Dhimal who were accompanying Chitra Maya, the victim, testified before the Court that first Deepak Bhandari and thereafter the other defendants had raped Chitra Maya, the victim, by turns forcing her to lie on the ground and threatening her with a dagger. Dr. Kasturi Malla, who had conducted the medical examination of the victim, had testified before the court that there were signs of penetration but no sperm could be detected and the other symptoms of injuries most likely to occur during the course of physical struggle were also not found. As it had been mentioned in the medical report that the vagina of the victim had been penetrated and her hymen was ruptured, it could not be said that there had been no rape. Now whether or not the defendants had committed that rape was the main issue for consideration. In this connection Kalpana Dhimal, Dukhani Dhimal and Veena Gurung who were accompanying Chitra Maya had clearly mentioned in their testimony before the court that the defendants had caught hold of the victim while she was returning home along with others after watching a Tharu dance programme at about 11 or 12 at the night and had raped her. The defendants could not show any such animosity which could provoke the victim to falsely implicate the defendants in a case of rape which was concerned with a matter like her own chastity and the evidence present in the case file also proved the presence of the defendants at the scene of occurrence. Even the testimony given by Dr. Kasturi Malla before the Court reaffirmed the medical report describing vaginal penetration and rupture of the victim’s hymen. The circumstances did not indicate so and neither was it so claimed that sexual intercourse had taken place with the consent of the victim. Only because Chitra Maya, the victim who had pointed out her age as 16 years in the testimony before the Court and 19 years in the FIR, did not struggle to protect her chastity against the gang of the five defendants, namely, Deepak Rajbhandari, Bhim Bahadur Bhandari, Tek Bahadur Katuwal, Bhanu Rajbanshi and Pradeep Kumar, it could not be assumed that she had given her consent to sex. The Morang District Court, which should have convicted all the five defendants as guilty of raping the complainant, had acquitted them of
the prosecution charge and that verdict had been subsequently confirmed by the Appellate Court, the defective verdicts were overturned by the apex court and the defendants were held guilty of the crime. As they were found guilty each of them was awarded, as per Section 3 of the chapter on Rape, a jail sentence of four years. However, since it was contended in the charge sheet that the provision of Section 1 of the chapter on Punishment ought to be applied to the case of Deepak Bhandari and Pradeep Katuwal, the two were awarded only half of the punishment which could have been applicable to an adult offender. That is to say, each of them was sentenced to two years of imprisonment. Also, the apex court further ruled that half of the partition share of the property of the defendants should be set aside for the sake of Chitra Maya, the victim.

(NB: the verdict was written by Hon’ble Justice Top Bahadur Singh with the concurrence of Hon’ble Justice Dilip Kumar Poudyal.)
Subject: Law inconsistent to the Constitution be declared invalid and ultra vires pursuant to Article 88(1) of the Constitution of the Kingdom of Nepal, 2047 (1990).

On behalf of the Forum for Women, Law and Development (FWLD), Thapathali, ward No. 11, Kathmandu Municipal Corporation and on her own, Advocate Sapana Pradhan Malla age of 35, a resident of the same ……………………………………………………………1

Writ Petitioner

Versus

His Majesty’s Government, Ministry of Law, Justice and Parliamentary Affairs, Singha Darbar, Kathmandu…………………………… 1
His Majesty’s Government, Cabinet Secretariat, Singh Darbar ……1
The House of Representatives, Singh Durbar, Kathmandu …….. 1
Respondents
The National Assembly, Singh Durbar, Kathmandu ……………1

The Supreme Court
Special Branch

Judge
The Hon’ble Justice Mr. Laxman Prasad Aryal
The Hon’ble Justice Mr. Kedar Nath Upadhyaya
The Hon’ble Justice Mr. Krishna Kumar Barma

Order
Writ No. 56 of the year 2058 B.S. (2001-2002)

Date of Judgment: Thursday, the 19th day of the months of Baishakh of the year 2059.

A brief description of the writ petition filed in this court under Article 88(1) of the Constitution of the Kingdom of Nepal, 2047 and the order issued on it are as follows:-

Whereas, according to Article 1(1) of the Constitution of the Kingdom of Nepal, 2047 the Constitution is the fundamental law of the land, and the laws inconsistent with the Constitution shall be void to the extent of such inconsistency. Right to Equality is the base and backbone of democracy and rule of law. The Constitution in its part 3 has guaranteed the right to equality and equal protection to all citizens. Likewise, Article 12(1) of the Constitution has provided the right to personal freedom and Article 20 has guaranteed the right against exploitation.

The Right to Equality, Right against Exploitation, Right to Live with Dignity, and Right to Self Determination are the rights which are conferred as a basic
human rights not only by our Constitution but also by various international human rights instruments, to which Nepal has become a state party. Nepal has ratified those international human right conventions without any reservation and consequently accepted the obligations created by those conventions. The Nepal Treaty Act, 2047 in its Article 9(1) has explicitly stated that in case any prevalent laws are inconsistent to the treaty ratified by Nepal, for the application of such treaty, the prevalent laws shall be void to the extent of such inconsistency and the provisions of the treaty shall prevail as national law. This has also been established as precedent by Supreme Court in various cases as well. Human rights are inherent and fundamental rights and it is the first duty of the Government to protect those rights. A prostitute, as she is a woman and human being also has the rights conferred by the above mentioned international conventions and the Constitution of the Kingdom of Nepal. No. 1 of the Chapter on Rape defines rape, and the punishment for rape has been provided in No.3 and 7 of the same Chapter. According to No. 7 of the Chapter, in case, any person commits rape in any manner with a prostitute without her consent and through the use of force he shall be punished with a fine not exceeding Rs. 500 or, with imprisonment not exceeding one year, and whereas, No 3 of the chapter has provided that if any person rapes a girl who is below 14 years of age, he shall be imprisoned for six to ten years and if it is a woman who is above 14 years of age, he shall be imprisoned for three to five years.

Thus, the Law itself has provided punishment differently to the culprit as per the status of women, where as culprits should not be punished differently on the basis of victims’ personal, professional, social or legal status. Moreover, the provision is inconsistent with the theme of criminal justice. State-enacted laws themselves have encouraged and motivated rape with these provisions. Consequently, in most cases, the accused may have the privilege of alleging that the victim is a prostitute. The provision denies a woman’s right to sexuality and encourages the sexual exploitation of women.

Whereas, Article 131 of the Constitution provides that the existing legal provisions inconsistent with the spirit of the Constitution shall, to the extent of such inconsistency, ipso facto cease to operate one year after the commencement of the Constitution. However, No. 7 of the Chapter on Rape is still prevailing. In this context, the said provision is invalid under section 9 of the Treaty Act and Article 11, 12(1) and 20 of the Constitution, CEDAW and other above mentioned International Human Rights Instruments. Therefore, the writ petitioner has requested that as No. 7 of the Chapter on Rape is inconsistent with the Constitution, the said provision, be declared *ultra vires* under Article 88(1) of the Constitution.
Whereas an order was issued by the Single Bench on 2058-4-17-4 (Aug. 1, 2001) in the name of respondents to submit their written statement as to why an order not be issued as contended by the petitioner.

Whereas, two separate written statements from two respondents, the House of Representatives and the National Assembly have been received contending that as the writ could not have shown and established any reason and connection as to why the House of Representatives and the National Assembly have been made respondents, thus, the petition is liable to be quashed.

Whereas, No. 1 of the Chapter on Rape, defining the term ‘Rape’ has provided different punishment on the basis of victims’ age in the same Chapter. No 7 of the Chapter has provided less punishment in the case of rape of a prostitute. The allegation that the said provision is discriminatory amongst women because the punishment is different for the same crime on the basis of victims’ character seems baseless. Most of the state parties to the various international instruments have expressed their positive commitment to changing situation, and Nepal has also endeavored to amend its discriminatory laws and enact new legislation in line with the changing situation. So, the said provision, which provides different punishments on the basis of victims’ age and character need not be amended or repealed instantly. Therefore, the respondent, Ministry of Law, Justice and Parliamentary Affairs has made the written statement contending that due to the fact that No. 7 of the Chapter on Rape is not inconsistent to the Right to Equality conferred by the Constitution, CEDAW and other International Human Rights Instruments, the writ petition is liable to be quashed.

Whereas, the Cabinet Secretariat has submitted the written statement contending that the allegation made in the writ petition as No. 7 of the Chapter on Rape which has provided less punishment in the case of rape to a prostitute than other cases is baseless. Moreover, the writ petitioner could not have established how and which of her rights have been curtailed by the activities of the cabinet secretariat. Thus, the writ petition is liable to be quashed.

Whereas, with respect to the writ petition duly presented before the bench as per rules, the writ petitioner, advocate, Ms. Sapana Pradhan-Malla herself and another advocate, Mr. Raju Pd. Chapagain, pleaded that a prostitute is also a woman and a human being, and has equal rights to enjoy the rights conferred by the Constitution and other International Human Rights Instruments. The law, which provides unequal punishment by clarifying the victims’ character for the same crime, is prima facie discriminatory. In a crime, mens rea and actus reas are the same, irrespective of the victims’ character. In this context, unequal punishment on the basis of victims’ character for the same crime represents a discriminatory principle of criminal justice. None of the prevailing Nepalese laws have ceased to consider prostitution as a crime. A woman who
is a prostitute should not be deprived of her rights, as the Constitution itself has guaranteed the right to practice any profession or to carry out any occupation as a fundamental right, except where prohibited by law. Therefore, the learned advocates pleaded that No. 7 of the Chapter on Rape should be declared *ultra vires*, since it is inconsistent with the right to equality conferred by the Constitution and contradicts the various international conventions to which Nepal is a state party.

Whereas, on behalf of the respondents His Majesty’s Government, Deputy Attorney General Mr. Narendra Kumar Shrestha and Joint Attorney General Mr. Narendra Kumar Pathak pleaded that Nepalese laws are based on the prevailing social values and customs for ages which is based on Hindu Religion and culture, and our society has itself considered prostitutes as low grade. To have sexual intercourse with a person other than her husband is inconsistent with our prevailing social values. A woman who has made sexual commercial work her profession, and the virtue of faithful woman should not be scrutinized with the same eyes. Generally, punishment is determined on the basis of crime and its nature. Taking this recognition into consideration, the legislature has provided lesser punishment to culprits in the case of the rape of a prostitute. Moreover, to provide the same punishment for all the crimes is incorrect either from the view of punishment theory or from social values. Further, they pleaded that as No. 7 and No 3 of the Chapter on Rape is different due to the nature of the crime, the writ petition is therefore, baseless and liable to be quashed.

Whereas, after having studied all the documents submitted in the file and considering the pleadings made by the learned lawyers from both sides, the court with respect needs to decide whether or not No. 7 of the Chapter on Rape is inconsistent with the Constitution and whether or not it should be declared void and invalid, as contended by the writ petitioner.

Whereas, having considered the decision, it appears that the main contention of the writ petition is that No. 7 of the Chapter on Rape is inconsistent with the Right to Equality conferred by Article 11 of the Constitution and other various International Human Right Conventions to which Nepal is a state party. No. 7 of the Chapter on Rape has provided that the punishment with a fine not exceeding Rs. 500 or with imprisonment not exceeding one year in case a person commits rape in any manner upon a prostitute without her consent and through the use of force. Whereas, No. 3 has provided imprisonment for six to ten years in case of rape of a girl who is below 14 years of age, and for three to five years in case of a woman who is above 14 years of age. It appears that the punishment has been provided differently on the basis of a victim’s character, even though the nature of the crime is the same.

Whereas, while considering whether the said provision, No. 7 of the Chapter on Rape, is inconsistent with the Constitution, it would be appropriate to
describe rape first. Rape is a crime against women’s human rights, which directly violates the right to self-determination and the personal liberty of an individual. It does not only affect the physical, mental and family life of a victim but also affects her dignity and existence. It is a crime not only against a victim of it but also against society. A murder ends the physical structure of a person, but rape is a crime, which destroys physically as well as psychologically. Thus, it is a heinous crime. Every country considers rape a serious crime and provides punishment for it, and Nepal has also provided such punishment and considers rape a grave crime.

According to our law, generally, rape is a crime against women and the physical and psychological torture that a victim woman has to face is the same, irrespective of women’s status, such as whether she is married or unmarried, whether she is underage, or whether she is a prostitute. A prostitute is also a woman and is entitled to enjoy all the rights granted to a human being. Universal Declaration of Human Rights 1948, in its Article 1 has declared that all human beings are born free and equal in dignity and rights. Similarly, it states that all are equal before the law and are entitled to equal protection under the law without any discrimination. Article 1 of the International Covenant on Civil and Political Rights (ICCPR) has explicitly stated that all people have the right to self-determination. Article 6 of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) has imposed an obligation to undertake the appropriate and sufficient measures to eliminate all forms of exploitation including trafficking and prostitution. Right to self-dignity, self-determination and independent existence are the rights, which even a woman prostitute, is entitled to enjoy as they are inseparably granted to all human beings. To compel a woman to use her body without her consent is to deny her of her right to live with dignity and her right to self-determination. Moreover, it is an insult to women’s human rights, irrespective of the status of women.

Whereas, Article 11(1) of the Constitution of the Kingdom of Nepal, 2047 has adopted the theory of non-discrimination so as not to deprive anyone of the equal protection of the law. Among equals, equality exists, but in the case of individuals, who are not equal for whatever reason, it is not necessary to treat them as equals. Sometimes classification can be made as per the situation, but it should be just and reasonable. Though according to article 11(3), positive discrimination can be made, this provision did not envision negative discrimination. Thus, in this context it cannot be said that our Constitution discriminates against prostitutes. Therefore, the law, which has discriminated against prostitutes by treating unequally, cannot be said to be just and reasonable, as the Constitution itself is not discriminatory. Besides, it is a state duty to abide by the obligation created by the Conventions, when Nepal is a signatory of these aforesaid International Human Rights Conventions, which
has guaranteed Human Rights to all. Whereas, section 9 of the Treaty Act, 2047 has also recognized that International Treaties, in which Nepal is a state party, are equal to National Laws.

The law does not define prostitution, hence, generally, our society accepts women as prostitutes, who carry out sexual intercourse with men for economic earnings. The Nepali Dictionary, published by Royal Nepal Academy, also defines the term 'Prostitute' as a woman who dances to the people and invites men for sexual intercourse with gestures and has sexual relations with them. Similarly, the term 'Prostitution' is defined as a profession of commercial sex work or a profession of earning money by sexual intercourse with men. In this way 'Prostitute' is defined as a woman who dances and keeps sexual relation for money and prostitution as a profession. Prostitution, in some countries is legalized. However, prostitution is a profession or occupation irrespective of whether or not it is legal. Article 12 (2)(e) has provided the right to freedom to practice any profession or to carry on any occupation, industry or trade until and unless it is prohibited by laws due to being contrary to public health or morality. The provision, which provides less punishment for rape to a prostitute, has discriminated against them without any reasonable grounds, construing them as lower class. The existence of such laws, which are discriminatory and unequal among citizens, does not comply with the spirit of the Constitution. It is not reasonable to think that the punishment for the crime should be different only on the basis of any profession or any individual’s character. If we keep in force such discriminatory legal provisions, it further encourages the rape of prostitutes. It is, therefore, not reasonable to keep in force such legal provisions that encourage grave crimes.

The main components for Rape are threat, intimidation and use of force. *Mens rea* and *actus reus* of the criminals exists in a same manner in a rape no matter if it is against any women. And the legal provision which punishes less and more for the same type of crime only on the basis of a victim’s character and profession becomes discriminatory according to the spirit of the Constitution and various International Conventions on Women and Human Rights and the recognized principles of the Justice as well. Now, therefore, as clause No. 7 of the Chapter on Rape of the Country Code is unequal and discriminatory even amongst the women, the court, hereby, issues an order to declare the said provision void and invalid according to Article 88(1), as it contradicts Article 1 of the Constitution of the Kingdom of Nepal, 2047. And the Court, further, issues order to pass the information of this order to the respondents through the offices of the Attorney General and hand over the case file as per rules.

Sd. Justice

We concur with the above opinion.

Sd. Justice          Sd. Justice
His Majesty’s Government on the
F.I.R. of Pratap Shahi ——————————- Plaintiff

Versus

Shree Prasad Upreti alias Shree Upreti, a resident of Garamuni VDC
Ward no 3 of Jhapa District, currently living at Sundhara of
Kathmandu Metropolitan City ——————————————– Defendant

Kathmandu District Court

Judge
Dr. Ananda Mohan Bhattarai

S.W.F No 376/755 of the year 2058/59

Date of Judgment: Wednesday, first of Jestha of the year 2059 of the Vikram Calendar (corresponding to May 15, 2002)

Brief facts of the Case

The first information report (FIR) prayed for action against Shree Prasad Upreti alias Shree Upreti the principal of the said school. The informant inter alia mentioned that his niece, [the name of the victim is blocked as per the order of the court and henceforth will be mentioned as victim], aged 9 years, who was studying at the said school, was raped by the said principal in the room of the hostel where she was sleeping.

In a separate petition, Mr Pratap Shahi requested for health examination of his niece [the victim], who was raped by Shree Prasad Upreti, the principal of Basundhara School. He also prayed for action against the said accused.

The letter received from the Maternity Hospital, which is enclosed with the examination report, inter alia mentioned that lacerations, contusion and signs of struggle were found on and around vagina and that hymen was ruptured. Based on this it opined that the victim was raped.

Ms Shrijana Shahi, the one inquired by the Police, giving the account of the incident mentioned inter alia that her niece, [the victim] did not like to return to school. Upon inquiry she complained that the said accused Shree Prasad Upreti, the principal of Basundhara Boarding School, where the victim was studying, used to rape her.

The statement of the victim was also separately recorded which was attached with the file.

The said accused Shree Prasad Upreti, in his statement before the investigating officer, confessed that the victim was studying at Basundhara Boarding School,
run by the accused and was living in the hostel of the school. On the night of Aug 12, 2000, when she was sleeping he went to her hostel, woke her up and threatened to kill her if she cried. Then he again dragged her to her bed and raped her despite her resistance. Thereafter, he also had sex with her time and again without her consent.

In the test identification parade, the victim identified the accused and also stated that the identified person, Shree Prasad Upreti threatened to injure and kill her, dragged her and had sex with her several times.

The Scene of Crime Report revealed that the place of incident was the hostel room of the victim, where she used to live, and also the cot of a teacher named Dharani, belonging to Basundhara Public Boarding School, situated at Basundhara of Ward no 23 of Kathmandu Metropolitan City.

A few people interrogated by the investigating authorities, namely Dambar Bahadur Shahi, Tikaram Adhikari, Nanda Bahadur Singh, Prem Prasad Adhikari, Shayam Sundar Malla, Bhim Prasad Adhikari, Dil Vijaya Upreti, Dharani Sharma, Narayan Prasad Upreti, Khadka Bahadur Chand through their separate statements mentioned that Shree Prasad Upreti, the Principal of Basundhara Public Boarding School raped the victim on October 12, 2000.

The letter of the Basundhara School mentioned that the victim stayed in the hostel of the school and that her date of birth is January 17, 1990.

The charge sheet filed by the investigating authorities to the court dated November 10, 2000 recounted a few facts. For instance the F.I.R claimed that the victim, aged 9 years, who was the niece of the F.I.R. informant, was raped by Shree Prasad Upreti, the principal of her own school; the letter of the Maternity Hospital where it was mentioned that lacerations, contusion and redness were found on and around vagina and up to anal part of the victim and that her hymen was ruptured; the statement of the victim where she claimed that the accused Shree Prasad Upreti, who was principal of her school coerced her to have sex on several occasions by frightening and threatening her with physical harm; the report of the victim where she identified the accused; statement of the accused where he confessed that he had raped the victim upon threat and coercion; statement of a few people interrogated by the investigation authorities namely Dambar Bahadur Shahi, Tikaram Adhikari, Nanda Bahadur Singh, Prem Prasad Adhikari, Shayam Sundar Malla, Bhim Prasad Adhikari, Dil Vijaya Upreti, Dharani Sharma, Narayan Prasad Upreti, Khadka Bahadur Chand where they believed that the accused had raped the victim. On the basis of this, as was mentioned in the Charge Sheet, it was established that the accused raped the victim, aged 9 years, who was his own student, by threatening her of physical harm, that his action was in violation of Section 1 of the Chapter “On Rape” of the Muluki Ain (National Code).

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Accordingly, it was submitted that the accused be punished under Section 3 of said Chapter of the said law and that the victim be compensated with half of the parental property that the accused gets upon partition from his family under Section 10 of the said Chapter of the said Act.

The defendant, Shree Prasad Upreti made a statement in the court where he *inter alia* said, “The charge against him is false. I have not raped the minor girl. The statement given by the victim at the police is concocted. It has been made as her uncle and aunt, who submitted the F.I.R., taught her. The statement given by me to the investigating authorities is fake and false. They beat me several times and forced me to change my statement. From the time the child got enrolled at my place, the F.I.R. informant began to get jealous of me. He used to say that despite such hard work I am finding it very difficult to maintain life, but you have made such a progress in two or three years’ time. The F.I.R. informant is yet to pay the school fee of the victim and he made this false allegation with malicious conspiracy to trap me into the false charge and for avoiding the payment of the fee.”

The remand order dated Nov 12, 2000 said; “Based on the facts as can be found in the case file such as a very concrete allegation against the defendant in the F.I.R., the statement of the victim, the identification report, and medical examination report, the confession made by the defendant to the doctors conducting medical examination and the age of the victim who is 10 years, it cannot be said at this stage that the defendant is innocent and therefore, subject to final decision to be made later on the basis of evidence to be evaluated, for now, as the grounds mentioned clause (2) of Section 118 “Of the Court Procedure”[of the Muluki Ain] exist let the defendant be remanded to jail and where he would get the basic facilities as provided by law for detainees. As the defendant is present in the case let case be submitted for hearing as per the Court Rules after recording the statement of the F.I.R informant, victim, the doctor conducting medical examination, those people giving statement to the police, the people sitting as witnesses in the crime scene report be called through the District Government Attorney’s Office and also after the statement of the witnesses of the defendant is recorded.”

Mr Purna Singh Khatri, the witness of the defendant, who made the statement to this court *inter alia* said that the defendant, Shree Prasad Upreti, was running a boarding school at Basuldhara and as his boarding school was doing a good business the F.I.R. is given with a motive to create obstacle in his business by trapping him in a case. From December 1999 to 6th March 2000 the said Mr Upreti was in Jhapa thus, the allegation of rape against a person who was in Jhapa is false. The victim used to live, play and sleep in the hostel with her group. It is baseless to say that rape was committed in the crowd of people. As the said defendant was innocent he should be acquitted.
Mr Baburam Neupane, another witness of the defendant, *inter alia* said that the said victim and her brother used to study in the boarding school run by Shree Prasad Upreti. He was playing the role of a guardian for these and other children treating them like their own kids. [Therefore] no question arises of an educated person living with his family committing such a crime. During the time when the incident is said to have occurred the said accused Mr Upreti had gone to Jhapa with his family. As his boarding school was doing a good business, a false F.I.R. must have been lodged to lower the popularity, prestige and dignity of the defendant and ruin his business.

An order was issued by the court on February 9, 2001 where it said; “whereas the statement of the witnesses of the defendant has been recorded as per the order of this court dated Nov 12, 2000 the statement of the witnesses of the plaintiff including the doctors examining the victim is yet to be recorded. And hence pursuant to Rule 15 of the State Cases Rules let the case be brought to the bench after asking the District Attorneys Office to present the witnesses of the plaintiff and the experts for examination.”

Mrs. Dil Vahaya Upreti,[wife of the accused] who had recorded her statement in the police *inter alia* said; “In Paus of 2056 (corresponding to December 1999 and January 15 of 2000) when the incident of rape is said to have been committed for the first time, we were in Jhapa from Mangshir (i.e. from November 15). As I was always with my husband, had the incident of rape occurred against such a minor, it would have come to my notice in some ways or the other. As other members of our family, other teachers, the victim, her brother and other students live in the hostel, and since there is no isolated place such an offence cannot take place. And there was no any such symptom seen in the child. Some 10 -15 days prior to the girl was taken to her uncle’s place, her own parents had also come to see her at the school. The girl would have told her parent [had such an incident taken place]. This did not happen. Further, had she been raped time and again she would have complained when it had occurred for the first time. As no such thing happened the complaint made in the F.I.R is false.”

The F.I.R informant, Mr Pratap Shahi, in his statement made in the court on March 6, 2001 *inter alia* said; “The F.I.R submitted on Aug 15, 2000 to the District Police Office and the content of the same and the signature affixed therein is correct. I submitted the F.I.R out of my free will. The victim, who is my niece, is now nine years old. I had enrolled her to Basundhara School in 1997. As Aug 14 and 15 were holidays, I brought her to my residence on Aug 14, 2000 from her school. On the evening of Aug 17, when the victim was supposed to go back to the hostel, she told to my wife that that she would rather die but would not go to the school. When my wife asked for the reason the victim narrated that the principal of the school frequently raped her by...
threatening her of physical harm. When I came to know about this through my wife, I also asked the victim and she told me every detail of the incident. Thereafter I made a complaint to the Police Office at Maharahgunj. Following this, the accused was arrested and the victim was sent to Maternity Hospital for medical examination”.

Khadka Bahadur Chand, the person making statement during the investigation [witness of the plaintiff] *inter alia* said in the bench; “The statement made by me on Aug 29, 2000 was done with my free will. The content of the document and the signature affixed therein are mine. The victim who was studying at the school run by the defendant had told everything about the rape to her aunt and thereupon when the aunt told me this I came to know about the incident. As the crime was committed by a teacher who is supposed to contribute to enlighten children, the said defendant should be given the severest punishment.”

Mr Narayan Upreti, the person making statement during the investigation *inter alia* said in the bench; “The statement made by me on Aug 29, 2000 was done with my free will. The contents of the document and the signature affixed therein are mine. But what I wanted to say is not inscribed in the document properly. The document was prepared by them[ the police] and I was asked to sign. In the school not only the said Shree Prasad, but all his family members are staying. I had told to the police that the said Mr Upreti was in his home at Jhapa from Dec 5, 1999 to March 6, 2000. But the police asked me to tell this to the court. As I read about the incident, I do not think that Mr. Shree Prasad Upreti can commit such an immoral offense.”

The victim in her deposition to the bench *inter alia* said; “The statement recorded by the District Police Office on Aug 17, 2000 was made out of my free will. The content of the same is correct and the signature affixed therein is mine. I used to study at Basundhara Public School and used to stay in the hostel. At that school, Principal, Mr Shree Prasad Upreti raped me once in the day time and three times in the night and last time he committed rape on the night of Aug 11, 2000. There used to be people in the room of the hostel where I used to live but they did not know about the incident. He threatened and raped me. I had confided this with Sabina who was staying on rent and Pinki who used to work [at the hostel]. They had told this to the aunt [wife of Mr Upreti], but I could not tell her due to fear. I had also cried when he raped me; I felt pain when he did this to me. Last time he raped me on Aug 11, 2000.”

Dharani Sharma, the person making statement during the investigation, in his deposition before the bench *inter alia* said; “The statement made by me on Aug 29, 2000 was done with my free will. The content of the document and
the signature affixed therein are mine. Mr Shree Prasad Upreti had gone to his home in Paus [i.e. December 1999] Before Janaipurnima. In other words, before the children went home there were guests in the room [of the hostel]. As to what happened in between is a matter of doubt.”

Mr Shyam Shundar Malla, the person making statement during the investigation inter alia said to the bench; “The statement made by me on Aug 29, 2000 was done with my free will. The content of the document and the signature affixed therein are mine. I believe that the said defendant Mr. Shree Prasad Upreti has committed rape.”

Tikaram Adhikari, Prem Prasad Adhikari and Dambar Bahadur Shahi, persons making statement during the investigation, while making separate depositions to the bench said to the effect that the statements made by them on Aug 29, 2000 were done with their free will and that the content of the documents and the signature affixed therein were theirs.

Bhim Prasad Adhikari, the person making statement during the investigation inter alia said to the bench; “The statement made by me on Aug 29, 2000 was done with my free will. The content of the document and the signature affixed therein are mine. Since Shree Prasad Upreti, who is working in a sensitive field such as education has committed such an immoral offense he should be granted with the highest punishment.

Dr. Sudha Sharma, medical doctor who had examined the victim, in her deposition before the bench inter alia said; “I had examined the victim child on Aug 17, 2000 and have already given a detailed report by letter no 40/13/1698. In the lab report attached to that report no spermatozoa was found. Because of the rape a child victim gets affected both physically and mentally. I have described the physical effects in my report. The redness extended up to anal part, which in my opinion might have been caused due to struggle and infection. I have expressed my opinion in that report on the basis of medical examination and there are no other grounds for this.”

Ms Shrijana Shahi, the aunt of the victim in her deposition before the bench inter alia said; “As it was a holiday during the Janai purnima and Gai jatra my niece [the victim] was brought to our residence by her uncle [my husband]. At the residence she cried for an hour. Seeing this when I asked for the reason she said that she does not want to go back to that boarding [school]. She then said it is better to die than to go to the school. I then took her to a private room and when further inquired then sobbingly she said that her principal Shree Prasad Upreti came to her room and raped her after putting off her panties. She also told that the Principal used to do this frequently to her. When she tried to cry the he used to shut up her mouth and threatened to shackle and beat her if she told anyone. Therefore, I could not tell you before, she said.
Last time when she was sleeping the principal opened the door and put on the light. When she opened up her eyes it was the Principal, then she shut up her eyes in fear. The Principal then came in, threw away the quilt which she was covering herself with, dragged her to Dharani sir’s bed, took off her panties and raped her, she told.

The bench on Nov 6, 2001 issued an order where it said; “as the doctor at the Bir hospital, who conducted physical examination of the principal Shree Prasad Upreti, recorded in the report that the said Upreti had ‘confessed of committing rape’, let the doctor at the Bir Hospital who conducted medical examination of the accused on Aug 18 be identified through correspondence to the said hospital, and for this let a photocopy of the examination report be sent to the hospital. As it is very necessary to take the deposition of the said doctor, let the doctor be called for the same. And once he comes let the case be submitted to the bench.

Dr. Ajit Nepal, the doctor at the Bir Hospital who had conducted physical examination of Shree Prasad Upreti in his deposition before the bench said; “on Aug 16, 2000 I had conducted physical examination of Shree Prasad Upreti and gave the report. The said defendant had confessed that he had raped the victim several times in a period of one month and had also confessed that last time he had raped her eight days before he was brought for examination. This was recorded on the upper end of the prescription. There was no sign of intercourse on and around his private parts at the time of examination.”

The decision of the court

This case which falls under the jurisdiction of this court pursuant to the Judicial Administration Act 1991 and Section 29 “Of Court Procedure” of the Muluki Ain has come to this bench for hearing after being listed in the weekly and daily cause list. After going through the case file we heard the oral submissions made on behalf of His Majesty’s Government by learned District Government Attorney Mr Dilli Raman Acharya. Learned advocates Shiva Raj Adhikari, Ms Chandeshwari Tandekur, Ms Indu Tuladhar, Ms Sharita Sharma made submissions on behalf of the informant of the F.I.R. and learned Advocates Mr Khagendra Adhikari and Mr Krishna Prasad Sapkota on behalf of the defendants.

As I move on for decision I find that the investigation in this case commenced once the F.I.R was filed [to the police] on Aug 15, 2000 in which it was alleged that the niece of the informant, [the victim] aged 9 years, who was studying at the Basundhara Public School in standard two, was raped by the accused Shree Prasad Upreti alias Shree Upreti, the Principal of the school and action was sought against him. We also find that in the charge sheet [submitted to this court] it is claimed that the defendant Mr Shree Prasad
Upreti alias Shree Upreti, violated Section 1 of the Chapter “Of Rape” of the Muluki Ain and therefore, a prayer has been made for punishing him under Section 3 and 10 of the same chapter and for payment of half of the property that the defendant gets through partition to the victim [by way of compensation].

On the basis of the claim made in the F.I.R., the statement and deposition of the victim, the statement of the accused, and the depositions of other persons who gave statement to the Investigation Officer and other evidence found in the case the following main questions needed to be addressed:

a. Whether or not the offence of rape can be established?
b. If yes, what punishment should be given to the defendant?

While the first question pertains to the analysis of facts and relevant laws the second question, in addition to the analysis of facts and the law also relates to a few issues such as how the court should view the offence of rape; while fixing appropriate sentence what are the considerations [that the court should keep in view] and how should the court use judicial discretions.

As to whether or not the case under dispute is a case of rape and as to whether or not the offence of rape can be established, there are differences between the plaintiff and the defendant. These things are clearly stated by learned counsels from both sides, a mention of which will be made in appropriate places. But before entering to these issues there is a need to highlight a few facts on which there is no disagreement.

The victim is a student of Basundhara Public School of which the defendant is the Principal. She was admitted to this school in 1997 and since then was staying there as a bordered student. While in the F.I.R and the statement of the accused the age of the victim is mentioned as 9 years, in the letter of the Basundhara School, which is attached in the case file, her date of birth is mentioned as Jan 27, 1990. In other words, in both the cases the victim falls in the age group protected by law. There are a few other relevant facts on which there is no disagreement such as the father of the victim [name blocked as per the court order] is a resident of Dailekh district. He is employed in the Indian Army while the mother [of the victim] was living in the village [in their native place], and therefore the victim is enrolled in the school of the defendant under the guardianship of the F.I.R. informant who are her uncle and aunt. These people used to visit the victim occasionally and take care of her as local guardian. The informant has stated, that as Aug 14th and 15th were holidays the victim was brought to his residence and only then he came to know about the incident. Mrs. Dil Vahaya Upreti, who is the wife of Shree Upreti and also a teacher of the school (who is also called head miss) while recording her
statement before the Investigation Officer has admitted that the F.I.R. informant had checked out the child on Aug 14th. On the basis of the facts that exist in the case, it is clearly seen that the child who came from a simple family of the hilly district of mid-western district, was pursuing studies at the direct control, supervision and guidance of the defendant Mr Shree Prasad Upreti. Having said this, about the facts on which there is no disagreement, let us see whether or not the charge of rape comes to be established in this case.

In the F.I.R. lodged on Aug 15th 2000 it is mentioned that the victim was brought to the residence of the informant, that on the evening of Aug 15th when his wife tried to send back the victim to the school she began to cry and when the wife tried to know the reason the victim said that she would rather die than go back to the school. It was also mentioned that when the victim was asked privately she disclosed that the principal used to rape her time and again. After that, during the course of investigation when the statement of the victim was recorded, she gave a graphically detailed account of the last incident and other incidents, which had taken place prior to this. In the last incident after which the present F.I.R is filed, the statement of the victim is as follows:

“… last Saturday night when the head miss had already fallen asleep, the head master Shree Upreti entered into my room and switched on the light, when I opened up my eyes to find out who had switched on the light I saw Shree Upreti…I closed my eyes. During that time of the night everyone was already asleep. The bed of teacher Dharani was in my room. Teacher, Dharani had gone to Jhapa. He dragged me to Dharani’s bed. Despite my refusal Shree Upreti opened my underwear and made me lie on Dharani’s bed. He climbed over me and raped me …after that he told me not to disclose this to any one otherwise he will shackle and beat me; then he sent me back to my bed. Head sir always.. even though I refused and cried a lot .. used to have sex with me by threatening me”…

[As indicated already], the statement of the victim is not limited to this incident alone. She has also recounted each and every incidents committed by the defendant prior to this, according to which the series of incident first began some 8 months before, and she says that it continued. By the way it is necessary to mention this also here. She recounts the first incident thus:

“ …[that time ] the head miss had gone to Narayanghat, the Principal called me to his room in the night, there was nobody in the room, I don’t remember the date and day, he asked me to lie on the cot and told me that he is going to have sex with me. After threatening me that if I told this to anyone or your uncle he would shackle me and beat me. Then he despite me crying ..he raped me…”

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According to the victim there after also [the Principal] took her to his room and raped her two more times when there was nobody around. While making the statement in this court the defendant Shree Prasad Upreti alias Shree Upreti has denied the offence.

While giving the statement he has declined that he committed the offence on Aug 12, 2000 and as to other incidents he has taken a plea of alibi. In the statement he has also maintained that had he committed any such offence the child would have complained to her mother when the latter had come over to Kathmandu for medical treatment. Later also she would have complained [to the guardian] when she went on holidays on several occasions. He has also argued that as the school had made progress, the complaint was filed out of jealousy. But it is found that the accused while making statement to the Investigation Officer has confessed the last incident about which the F.I.R is lodged and other incidents as well. While making the statement before the Investigation Officer the accused has admitted that three years back he had enrolled the victim as a bordered student at the request of the uncle of the victim[ the F.I.R. informant]. In December 2000 when his wife had gone to Narayanghat and when there was no one in the school, he had called the victim to his room, and despite her refusal had had sex with her by threatening her. After that also as the desire to have sex with her [the victim] further grew in him he frequently used to have sex with her despite her refusal. He also lost interest to have sex with his wife and by this he has corroborated the statement of the victim. The last incident against which this case has been filed, the accused says this:

“… last Saturday on Aug 12, 2000, I felt like having sex with [the victim], she was sleeping in the hostel, teacher Dharani also used to live in the hostel; he had gone to Jhapa. I knew that [the victim] was alone in the hostel. After my wife went to sleep, I entered into her room quietly and found victim sleeping after switching off the light. When I switched on the light, the victim opened up her eyes and then closed. When I asked the victim to wake up she did not comply due to fear. I threatened her, if you cry I will shackle and beat you; she did not react. After dragging her from her bed to the cot of Dharani, I asked her to allow me to have sex, she did not agree, and therefore I made her lie down on Dharani’s bed, opened her underwear and …climbed over her and had sex with her as long as I wished to... then I sent her to sleep in her bed and also threatened her that I will beat her up if disclosed this to anyone, she then kept quiet.”

Apart from the statement of the accused, the report of medical examination done at Indra Rajya Lami Maternity Hospital is also enclosed to the case file. The said report dated Sept 16, 2000 states “redness and marks of struggle are seen around the vagina and up to the anal part of the victim, hymen has been
ruptured”. The report opines; “based on these evidences mentioned above it is understood that [the victim] is raped”. Dr Sudha Sharma, the person who wrote the report, in her deposition made in this court has supported her opinion. This apart, the deposition of the victim is also in the file. In her deposition, the victim while supporting the statement made to the Investigation Officer, has categorically alleged that the accused had raped her. Besides, various persons including the F.I.R. informant, Mr Pratap Shahi, his wife and the aunt of the victim Ms. Shrijana Shahi in their deposition to this court have also authenticated their statement made to the Investigating Officer. It is found from all these evidences the charge against the accused has been substantiated.

Even though the Chapter “Of Rape” of the Muluki Ain, unlike section 375 of the Indian Penal Code, has not clearly defined rape, it has broadly included necessary ingredients of the same in it. For instance, as we examine in the context of this case, section 1 of “Rape” considers any sexual act with a person below 16 years of age with or without consent as rape. [This, in other words, means] that in case of persons below the age of 16, due to the inclusion of the concept of statutory rape in our law [issues such as] whether or not the victim had consented, whether or not force was used, or whether or not threat, fear, coercion or intimidation was used, are irrelevant. While this is so in case of the people statutorily protected, in the case of adults also, the use of expression such as “without consent in whatever way, by using threat or undue influence” the law has tried to proscribe all sorts of non-consensual sexual intercourses. There is no doubt that the victim in this case is a person statutorily protected. Therefore, it is not necessary to examine issues such as whether or not the victim protested, whether or not the victim disclosed the incident to anyone. Here, rather than what the victim said, it is important to analyze what the documents in the file conclusively depict.

As mentioned before, the victim has categorically alleged that the accused has raped her and in the deposition that she gave in this court also she has authenticated the statement she had given to the Investigation Officer. Regarding this the learned defense counsels have inter alia argued that the child does not even know what the term “Balatkar (i.e. rape)” means, and as there are other children in the hostel, that in such a situation the incident of rape cannot take place, and hence her statement cannot be relied upon. But if one goes through the statement made by the victim to the Investigation Officer and in the Court, one finds that she has categorically alleged that the accused had raped her. She does not seem to be a person who does not know the nature of action against her. Therefore, the fact that she could not explain the Hindi expression “balatkar” does not make her statement weak. In the last incident against which this case has been filed, she has categorically stated that it took
place in the bed of Dharani when he was not there. This is corroborated by the statement of the accused made to the Investigation Officers which is mentioned above. All the incidents that the victim has mentioned, are of such nature that they can be committed by the Principal only by deceiving others or behind their eyes. Right from the case of Bachhi Bista [N.K.P. 2024 decision no 1052, p 142] the Supreme Court has consistently made similar observations. Whereas the criminals commit crimes by eluding others even in situations where simple folks do not see it possible, here the victim has clearly stated that the accused committed the crime during the night, stealing an opportunity when there were no one [in the hostel]. Therefore, there is no reason why the court should not believe her story.

The learned defense counsels have disputed the opinion of the [medical] expert on two grounds: a) that the term “understood” is used [in the report]; and b) that the report of the laboratory enclosed with the opinion has mentioned that “smear is negative for spermatozoa”. So far as the first contention is concerned rather than what opinion did the expert give, the court should examine and analyze what facts s/he put before it. It is the responsibility of the accused to explain to this court as to how did the girl, who was in his direct custody, sustain the above mentioned marks in her body. Nothing so far has been said about this from the side of the accused. While this is the situation in this case, the expert who gave the opinion has also made a deposition in the court explaining and supporting the statement. Therefore, it should be construed that the marks found in the body of the victim, which is mentioned above naturally, substantiate the opinion [of the expert] expressed therein. From this point of view this court should not be bothered with the word “understood” used by the expert.

As to the question that no spermatozoa are seen in the lab test report, in the crime of rape it cannot be construed from the non-presence of spermatozoa during the medical examination of the vagina of the woman that no crime of rape was committed. While the presence of spermatozoa proves the fact of the fall of sperm along with rape but on the ground that no sperm was found it cannot be construed that no sexual intercourse was committed. The court should not overlook the fact that many intervening factors can affect this. It is worth noting here that the decision of the Supreme Court in Madhukar Rajbhandari v HMG (SC Bulletin Vol 9 No 11, 2057 p 6) provides guidance in this matter.

While trying to dispute the story of the victim the learned advocate of the defense Mr Krishna Prasad Sapkota read a few excerpts from medical jurisprudence and argued that the effect of rape is so serious on minor children that in several instances the victim may also die. For substantiating his argument he presented a few excerpts from Medical Jurisprudence and Toxicology by
H.W.V. Cox (6th ed. 1997) p 433 and Medical Jurisprudence by Dr. K.S. Narayan Reddy (1st ed 2000) p 439 which read as follows:

“In the case of small children, the genital injuries found are either absolutely minimal or of such magnitude that one is unable to perform the examination without general anesthesia … if, however, insertion of the penis goes beyond the vulva, the tearing and damage of the tissues are so extreme that frequently a real danger to life exists and in fact a proportion of these cases have a fatal outcome” (Cox at p 433)

“…younger the child the more widespread are the injuries…as the age and size of infant increases, the pattern of injury will become less marked…” (Reddy at p 438)

The bench would like to thank the learned counsel for highlighting the technical aspects of rape. There is no need to dispute much here on what the learned authors have written. But in both the excerpts and the related writings also nothing specific is mentioned by separating different age groups and mentioning what body parts get developed at what age group and what evidence of rape are found in the victim of what age group. On the basis of the expressions such as “small children” or “young children” are used [in the excerpts] it cannot be construed that the terms refer to the girls of all age groups. Factors such as individual circumstances of each case, the circumstance of the actus reus, the age of the victim and the accused, the time gap between the incident and the medical examination determine what evidence are found [in a particular case]. In fact, in order to establish a crime of rape it is not necessary to find the fall of semen or vital injury in the genitals. A mere penetration is sufficient for establishing the incident of rape. In several circumstances where the victim is in long custody of the accused, where a situation is created under which she cannot defend herself, the marks of defense may not be found. While reaching the conclusion in a case of rape the court should holistically examine and analyze all these facts. Because there is a principle, which should never be forgotten in criminal cases. It says; “the criminal should not go off scot-free because the constable blundered”. This means to say that if after a holistic evaluation of evidence the accused is found guilty the court should not over blow minor contradictions to reach such a conclusion whereby the criminal gets acquitted. If a situation is created where by a criminal gets acquitted due to the facts that could be ignored while deciding a case, this is damaging to the whole system of criminal justice, which ultimately destroys the basic foundation of a civilized state.

In this case there is yet another aspect in the story of the child which should be analyzed. Why did the child, who is under the custody and guidance of the defendant for the last three years, who has dreamt to carve out a bright future
by getting educated at the school run by the defendant, made such a serious
allegation against the defendant? Why did the guardians, who entrusted the
child to the defendant, all of a sudden pored down so heavily on the defendant
and leveled the charge of rape against him? While pleading not guilty before
this court the defendant has said that the complaint was made “out of jealousy”
against him and “the progress made by his school”. These contentions do not
seem believable because the progress of the school where one studies cannot
be a matter of envy for a student or the parent. It goes against all logic that an
innocent child of 9 or 10 years, disregarding the possible stigma against her
self, would level the charge of rape [against her own principal] or a guardian
would use his own niece for such a thing “out of jealousy”. Therefore, the
contention of the defendant about the [statement of the child] does appear
unfounded.

Hence, in a nutshell after evaluation of the evidence such as a categorical
F.I.R., the statement of the victim to the Investigation Officer and her deposition
in this court, the opinion of the expert and her deposition in the court, deposition
of witnesses of the plaintiff, Pratap Shahi, Anjana Shahi etc. I have reached
the conclusion that this defendant, Shree Upreti alias Shree Prasad Upreti has
committed the crime of rape.

Now coming to the second question raised in the beginning, [I find] that section
3 “Of Rape” [of National Code] provides for a sentence of imprisonment
from 6 to 10 years to person who rapes a woman below the age of 14 years.
The gravity of offence is an important factor in the use of judicial discretion
while determining what sentence should be imparted to the accused. In this
connection, the court should give appropriate consideration to factors such as
the relation between the accused and the victim, the nature of business of the
accused, [his/her] social responsibilities, human rights of the victim, the need
to support her and the responsibility to prevent crime in society. Whereas in
the determination whether or not the offence is established the principles of
criminal law do work as standards and on the basis of these standards the
court should reach to the conclusion about the crime, while imparting
punishment and providing support to the victim, the court should make
reference to the human rights law as well.

For a long time the courts have looked upon the issue of rape from the traditional
criminal law approach. But now one witnesses a change in this. Now, rape is
not only looked upon as a physical attack on women, it is also seen as a matter
linked with their right to life of dignity and right to privacy. A holistic
examination of international human rights instruments and especially the
Articles 1, 2, and 4 of the Convention on Elimination of All forms of
Discrimination against Women- (CEDAW) and Art 1, 2 and 3 of Declaration
Sexual Assault and Rape

on Elimination of Violence Against Women- DEVAW enables one to consider it as a violence against woman and a matter inextricably linked with the prestige and dignity of woman. Similarly, the Treaty of Rome 1998 which establishes the International Criminal Court also considers the crimes of rape which occur in mass scale as crimes against humanity. Similarly Article 16 and 34 of the Convention on the Right of the Child –CRC is also relevant in the context of this case. This has, beside other things, called upon member states to take appropriate measures for protecting children from sexual exploitation. All these things are relevant in the context of this case.

The development of the human rights law has begun to impact the national law and the judicial decisions. This is seen from the decision of the Supreme Court in Madhukar Rajbhandari’s case mentioned above where the honorable Supreme Court has not only looked upon rape as a physical attack [upon the female] but has also taken into account the “suffering that the victim female has to bear with for life due to the heinous physical and mental attack and the bad name and contempt that the family should bear” as important considerations. A new thinking and new approach of similar kind is seen to have developed in neighboring jurisdictions. For instance, in State of Karnataka v Krishnappa (2000) 4 SCC 75 at p 77 the Indian Supreme Court has observed:

“…Sexual violence apart from being a dehumanizing act, is an intrusion on the right to privacy and sanctity of a female. It is a serious blow to her supreme honor and offends her self-esteem and dignity. It degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind her a traumatic experience”.

Other decisions of the Indian Supreme Court also speak about the human rights aspects. Among them some examples are as follows:

“Rape is an experience which shakes the foundation of the lives of the victim. For many its effect is a long term one, impairing their capacity for personal relationship altering their behavior and values and generating endless fear” [Delhi Domestic Working Women’s Forums v Union of India and Others (1995) 1 SCC 14]

“Rape is thus not only a crime against person of a woman (the victim), it is a crime against entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by 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 a violation of the victims most cherished fundamental rights, namely the right to life contained in Article 21” [Bodhisattwa Gautam v Subhra Chakrabarty (1996) 1 SCC 490].
“It is an irony that while we are celebrating women’s rights in all spheres, we show little or no concern for her honor. 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. A rapist not only violates the victim’s privacy in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of victim. A murderer destroys the physical body of the victims, a rapist degrades the very soul of the helpless female” [State of Punjab v Gurmit Singh and Others (1992) 2 SCC 384].

It is imperative for us now to study, analyze and embrace the above-mentioned developments in the context of justice dispensation [in our country]. It is my view that against the backdrop the provision of the Constitution, Section 9 of the Treaty Act and the commitment of the state for the protection of human rights, it is not appropriate for us to stick to traditional approach and remain oblivious of emerging dimensions in the domestic, comparative and international law enumerated above. Having said these things in the beginning about the considerations that need to be taken while fixing the punishment, when I look into this case, it is seen that the accused has committed a crime against an innocent girl who was in his custody and control. The principle of criminal law recognizes that any crime committed against a person who is under one’s custody and control or against a helpless child aggravates the seriousness of the crime. If we accept that our criminal law is not an anthology of unprincipled provisions, we need to accept that these things are engrained in our criminal law. One finds treachery and betrayal ingrained in the action of the accused, who has established a noble institution like the school but has committed a crime against the child entrusted to him. That being the case, this crime is naturally more serious and different than other crimes. Therefore, it is necessary in the interest of justice to fix the sentence in this case taking into view all these considerations.

Equally important to fixing of appropriate sentence is the protection, support, compensation and rehabilitation of the victim in society. In this case also as to how the victim should be protected, at least two things seem very important:
1. protection of victim from unnecessary publicity of the incident of crime and entry or presence of unnecessary parties; and
2. payment of compensation to the victim.

Generally, the hearing of a case in an open court is linked with judicial impartiality. This is also a basic principle of democracy and natural justice. But where the accused and the victim are given equal opportunity to present their witnesses and cross-examine the opponent and where equality of the parties before the court is ensured, it is not necessary to make the court a public theatre for unconcerned parties. This is also not in the interest of justice.
about which a lot of literature has developed in recent times. For instance Article 14(1) of the ICCPR, of which Nepal is a party, provides that where the interest of justice is affected, where it is necessary to protect private life of the parties of the case, the court is empowered to proscribe unnecessary publicity. It reads:

“The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society or when the interest of the private lives of the parties so requires; or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.”

Similarly it is worth mentioning the provision of the UN Standard Minimum Rule for Administration of Juvenile Justice (Beijing Rule Gen Res 40/93, 29 Nov. 1985) which states; “Juvenile’s right to privacy should be respected at all stages of the proceedings…” Section 49(2) of our Children Act 1991 also empowers the court to prevent the publication of case and the facts relating to the case by reporters and photo journalists also without the permission of the authority hearing such case. In this case in view of the age of the victim it is in the interest of justice to prevent the publicity of identity of the victim. With regard to the compensation, as it has been claimed that a half of the property that accrues to the accused through partition be paid to the victim, I hold that if that property is effectively given to the victim that will form an appropriate compensation.

Now therefore, it is held on the grounds mentioned heretofore, that Shree Prasad Upreti alias Shree Upreti by raping the victim, a minor girl of nine years, has violated Section 1 of the Chapter “of Rape” of the Muluki Ain. Pursuant to Section 3 of the same chapter he is imposed with the punishment of eight years of imprisonment. Pursuant to Section 10 of the same chapter the victim is entitled to be compensated with half of the property that accrues to the accused through partition. Further, as the victim is a minor, in view of the fact that publication of the fact and the decision of a serious case like rape may have adverse mental effect on the victim, pursuant to Section 49(2) of the Children Act 1991 we hereby restrict the publication of the fact of the case which reveals the identity of the victim. Rest of the things will be done as mentioned in details below and I have given this judgment pursuant to Section 186 of chapter on “Of Court Procedure” of the Muluki Ain.

Details

1. In case of the defendant Shree Prasad Upreti alias Shree Upreti, as mentioned in the decision section heretofore, for the violation of Section 1 of the Chapter “Of Rape” of the Muluki Ain it is held pursuant to section 3 of the same chapter that he be punished with eight years imprisonment and that pursuant
section 10 of the same chapter the victim is entitled to take half of his property. As he is under detention since Aug 17, 2000 and is on bail by the order of the court dated Nov 12, 2000, and is now in the jail at Dillibazar let the concerned execution section be intimated to the effect that his jail term be counted from the date of his detention, and he be given the detention letter pursuant to Section 120 of the Chapter “of Court Procedure” of Muluki Ain.

2. As the victim is entitled to claim half of the property that accrues to Shree Prasad alias Shree Upreti through partition, let the concerned section be intimated to the effect that half of the property of the defendant be frozen and after collecting necessary particulars once the case is finally decided let that property be given to the victim.

3. As the victim is a minor pursuant to Section 49(2) of the Children Act 1991 let the facts of the case that disclose the identity of the victim not be published.

4. Let the defendant be informed to the effect that he may file an appeal with the Appellate Court Patan within 70 days of this decision.

5. Let the District Government Office be informed of the decision.

6. If concerned parties ask for the copy of the decision let it be given after collecting the necessary fee pursuant to the rules.

7. Let the registration number of the case be struck down and the file be sent to the record section.

Sd
( Dr Ananda Mohan Bhattarai)
Madhukar Rajbhandari, a resident of Samakhushi, Ward no 26 of Kathmandu Metropolitan City ————
Appellant/Defendant

Vs

His Majesty’s Government on the F.I.R of Bhawana Pyakurel – Respondent

Criminal Appeal No 1480 of the year 2054

Decision No 6949 N.K.P. 2057 No 10/11 p. 750

Supreme Court

Division Bench

Judge

Hon. Justice Kedarnath Upadhayay
Hon. Justice Krishna Kumar Verma

Date of Judgment: Monday, 2rd of Jestha of the year 2057 ob Bikram Calendar (corresponding to May 16, 2000)

Kedarnath Upadhyaya J.: This case has been submitted for hearing after permission was granted for revision pursuant to Clause (a) and (b) of section 12(1) of the Judicial Administration Act 1991, on the petition against the decision of the Court of Appeal Patan. The facts and the decisions are briefly as follows:

Indira Bhandari, Indu Adhikari, and Bhawana Pyakurel in their joint First Information Report (F.I.R.) inter alia stated; “On the night of Oct 23, 1992 at around 11 PM we the petitioners, Indira Rajbhandari, Indu Adhikari and Bhawana Pyakurel were staying in our common room. Meanwhile a few women came to play Bhailo (a cultural program during Dipawali festival) program and we came out to the main door to watch the same. A sister who used to stay on rent in that house was also watching the program. After the Bhailo program was over that sister went back to her room. As a few guys were still singing and dancing we were watching the program. There we were chatting with a boy called Loke. After he went to the industry, two people whose name we came to know later namely Madhukar Rajbhandari, and Rejesh Shrestha came to our room and caught hold of Bhawana’s hair and made her wake up, and began to ask about our identity. When we were telling them our identity two other people, namely Budhiratna and Dhirendra also barged into the room. Then among them Madhukar Bhandari caught hold of me Indira Bhandari, Dhirandra Pyakurel caught hold of me Bhawana Pyakurel, Laxman Adhikari caught hold of me Indu Adhikari, made us lie on the cot, took off the clothes and opened up their trousers and raped us. After Madhukar and Dhirendra
were done and went out two others Rajesh and Buddh Ratna came in and raped with me Indira Bhandari and Bawana Pyakurel though we exactly do not remember who raped whom. Once they left us and went out we cried for help. Then as people who heard our cry came to us we told everything to them. As we are meted with grave injustice we have come to lodge this F.I.R. We pray for the arrest of these people and demand action against them.”

Dhirendra Pyakurel, in his statement to the police inter alia said; “ Me and other four of my own Tol (closely knit residential area -block); namely Madhukar Bhandari, Rajesh Shrestha, Buddhira Shakya and Laxman Adhikari, made a plan to have sexual intercourse with the F.I.R. informants. [As per the plan] went to their room, threatened them, and I caught hold of Bhawana, Madhukar caught hold of Indira and had sexual intercourse with them. After we came out Buddhira and Rejesh also went to their room. I can not tell with whom they had sexual intercourse. ”

In the public reconnaissance, people stated that they did not think that the people shown by investigating officials namely Dhirenda Pyakurel and those at large namely Buddhira, Madhukar, Rajesh Shrestha raped these girls. Even if they had sexual intercourse it must be consensual.

In the charge sheet filed to the court it was claimed that the defendants namely Dhirendra Pyakurel, Madhukar Rajbhandari, Rejesh Shrestha, Buddhira Shakya, and Laxman Adhikari by raping the girls had violated section 1 of the chapter on “Rape” of National Code and hence should be punished under section 3 of the same chapter. It also claimed that pursuant to section 10 of the same chapter half of the property that accrues to these defendants should be given to the victim. It prayed to the court for the issue of warrant against those absconding.

Dhirendra Pyakurel in his statement in the court inter alia said; “I know the F.I.R informant. I have not raped anyone on Oct 23, 1992. The police forced me to sign a paper by beating me. The statement given by me to the police was not made out of my free will.”

Madhukar Rajbhandari in his statement in the court inter alia said; “I do not know the F.I.R informant. On Oct 20, 1992 I and my friend Buddhira went to Calcutta to purchase goods and came back to Kathmandu only around 13th or 14th of November 1992. And when my brother told me that there was a warrant against me I came to know about the case. I do not reside in Samakhushi at all. I know Dhirendra Pyakurel. I met him only during Dashain. I do not know why the Police filed a case against me. I should be acquitted of the charge.”

Buddhira, in his statement in the court inter alia said; “ I had gone to Calcutta with Madhukar Rajbhandari on Oct 20, 1992 to purchase goods and came back only on 13th or 14th of November 1992. I do not know the F.I.R. informant.
As Dhirendra is of the same place I do know him. I do not know why Dhirendra complained against me. I am innocent and so need to be cleared of the charges.”

Rajesh Shrestha in his statement in the court inter alia said; “I do not know the F.I.R informant. On Oct 22, 1992 I had gone to Narayangarh with my mother, her brother, and my aunt to celebrate Tihar (Dipawali festival). As I became unwell I stayed there for treatment. I am innocent and hence should be cleared of the charges.”

Bhawana Pyakurel, the victim, in her deposition in the court inter alia said; “I used to work at Birendra Thapalia’s industry. We were living in the house rented by him. We, the victims, Indira Bhandari, Indu Adhikari, Bhawana Pyakurel and I were living in the same house. As Oct 23, 1992 was “a Laxmi Puja” [a day when Laxmi, the goddess of wealth is worshipped] day, people had come to play Bhailo. While I was lying down in my room a man entered into the room along with Indira. He came to me, removed the quilt, caught hold of my hairs and made me get up. When Indu Adhikari came, five other men entered into the room. Then Dhirendra inquired about our identity and said you girls have a bad record. I am the head constable of Swahrakhutte Police Post. He said that we were to be put in jail for six month, and then Rajesh and Buddhiratna went out. Madhukar, Laxman and Dhirendra raped Indira, Indu and I respectively.”

Dr Bimala Lakhe who conducted the medical examination also gave deposition in the court supporting what she wrote in the report.

Kathmandu District Court while handing down its decision on Sept 8, 1993 inter alia observed; “the F.I.R informant in her F.I.R has said that she was raped when her attempt to protest failed due to the threat and intimidation, and when she was tired her clothes were removed and she was raped. If she had had a consensual sexual intercourse there is no reason to complain about it later. Hence, the defendant [Dhirendra] is found guilty of raping the girl. He is hereby imposed with three year’s imprisonment and is also liable pursuant to section 10 [of the Chapter on Rape]. In case of defendants other than Dhirendra, as the charge is not substantiated they are not found guilty. Among the defendants even though Madhukar was not himself involved in the rape he assisted in committing rape. Therefore, he is punished with one month’s imprisonment. As it is not found that other defendants namely Rajesh Shrestha and Buddhiratna Shrestha had raped or assisted in committing rape, they are hereby cleared of the charge.”

In his appeal filed on Oct 9, 1993 against the decision of the Kathmandu District Court defendant Dhirendra Pyakurel, inter alia argued; “The Kathmandu District Court in its decision has relied on the deposition of the F.I.R. informant. But the fact is that the complaint cannot be relied upon for
leveling charge against me, nor can it be taken as evidence. The decision is based on subjective and emotional ground and because of this my right to freedom has been violated. I pray that the decision be reversed.”

Similarly, in his appeal against the decision of the Kathmandu District court filed on Dec 21, 1993, defendant Madhukar Rajbhandari inter alia argued; “In order to make me an associate in the offence of rape, first, the incident of rape should be substantiated and secondly, it should be established that I had been intentionally involved in committing the offence. These things cannot be established in this case. There is no proof to establish my presence and involvement in the offence. Therefore, the decision of the Katmandu District Court should be set aside”

It was argued in the appeal filed on behalf of His Majesty’s Government that the involvement of the defendant is established by various evidence. In this situation the decision of the Kathmandu District Court to convict some and acquit others is not correct. As all the defendants stand on the same footing they should be liable to the same punishment. Therefore, the defendant should be punished as claimed by the plaintiff.

The Court of Appeal, Patan in its judgment dated Nov 12, 1995 inter alia observed; “On the basis of the facts such as the confession by Dhirendra Pyakurel to the Investigation Officer, medical examination of vagina of Bhawana Adhikari, the categorical statement of the F.I.R. informant and the deposition made by her in support of F.I.R and the involvement of Madhukar Rajbhandari in the incident, the decision of the Kathmandu District Court to impose three year’s imprisonment to Dhirendra Pyakurel and also the imposition of liability pursuant to section 10 stands correct. In case of Madhukar Rajbhandari the decision to impose one month’s imprisonment stands correct. Similarly, the acquittal of defendants Buddhiratna Shakya and Rajesh Shrestha also stands conformed.”

Against the decision of the Court of Appeal, Patan Madhukar Rajbhandari filed a petition in this court for revision where he inter alia argued; “The decision of the Court of Appeal which confirmed the decision of the District Court is defective. It is against law to impose punishment on a person like me who was not present on the incident site. All three of the so called victims have not been present to the court to establish the fact. Only Bhawana Pyakurel has been present in the court. As the charge against me is not established, I should not have been punished. On the basis of the public inquiry report and the medical examination report, as the court has reached to the right conclusion that I was not involved in the rape, it is wrong to punish me as an associate on the basis of the statement of Bhawana Pyakurel that I latched the door from inside. Bhawana Pyakurel has deliberately taken my name in her deposition
Sexual Assault and Rape

to establish the incident, but this is not established by other evidence. From the fact that, Indira Bhandari, who put an allegation of rape against me has not been present in the court, it is established that I was not involved in the crime. I have submitted the proof that I was not present in that place when the incident is said to have taken place and it is corroborated by the deposition of my witnesses, in this situation I cannot be declared guilty. The court has not also evaluated the statement of Birendra Thapalia, the owner of the house who said that he did not know about the incident. Therefore, the decision is against Section 184 “Of Court Procedure” and precedent established in N.K.P. 2043 p 31, decision no 2594. Hence it should be reversed and I should be cleared of the charges.”

This court through its order dated Dec 25, 1996 called for the files.

Similarly, this court through its order dated Aug 8, 1997 granted permission for revision pursuant to section 12(1) (a) and (b) of the Judicial Administration Act, 1991. The court inter alia observed; “In the absence of the fact that the accused went to the scene of the crime knowingly and deliberately assisted in the committing of the offence, the decision of the Court of Appeal Patan dated Nov 12, 1995 which convicted Madhukar Rajbhandari on the ground that he assisted in the committing of the crime is in conflict with the principle that no one should be punished in the absence of solid and direct evidence as enunciated in N.K.P. 2043 Number 2, Decision no 2636.”

The Decision

This case is submitted for hearing as per the rules and being listed in the daily cause list. Making oral submission on behalf of the defendant Madhukar Rajbhandari, learned advocates Mr Shiva Prasad Rijal, Mr Milan Rai and Mr Hari Phuyal argued that the court itself has accepted that the charge against their client Madhukar Rajbhandari is not established. So it is a mistake in law to punish him for complicity in the crime. Madhukar Rajbhandari was not present in the incident site, and his defense of alibi has been proved by documentary evidence and deposition of witnesses. In such a situation he cannot be punished for complicity. Even though their client had been charged of raping Indira Bhandari, the said woman has not come over to the court for deposition to authenticate her statement and the court itself had accepted in its decision that there was no other evidence against him he cannot be punished for colluding in committing other rape offence. Only because that victim Bhawana Pyakural had alleged that Madhukar had latched the door from inside, he cannot be called guilty. Her statement is not corroborated by other evidence, and so cannot be used as evidence against their client. Therefore, the decision of the Court of Appeal should be reversed and Madhukar Rajbhandari should be freed of charges. On behalf of His Majesty’s Government, learned Joint
Government Attorney Mr Nanda Bahadur Subedi argued that from the deposition of Bhawana Pyakurel in the court the offence of rape has been established and from her deposition it is established that the defendant Madhukar Rajbhandari had assisted in rape by latching the door from inside. In this situation the decision of the Court of Appeal should be confirmed.

As we move on to examine the case for decision and see whether or not the decision of the Court of Appeal, Patan which confirmed the decision of the original court is correct and whether or not the arguments raised by the appellant can be established, we find that this case has been filed against the defendants on a categorical charge that these people entered into the room of the F.I.R. informants, five young girls of around 17 or 18 years at around 11.00 P.M. in the night and raped them. Among the F.I.R. informant, Bhavana Pyakurel in her deposition in the court has alleged that Madhukar Rajbhandari, one among the defendant, put off the light, latched the door from inside and raped Indira Bhandari. On the ground that when the private parts of F.I.R informant, Indira Bhandari aged 17 years, was examined no sperm was found in the vaginal swab, the original and appellate court have cleared him of charge against Section 3 of the Chapter on “Rape” and against this no petition for revision has been filed on behalf of His Majesty’s Government. Nevertheless, only due to the fact that no petition for revision was filed or no appeal was filed, a condition should not arise whereby lower courts follow a wrong precedent or a decision based on disingenuous foundation. The fact that no spermatozoa was found during the medical examination of the vagina, does not establish that the crime of rape was not committed. The presence of spermatozoa only proves the occurrence of rape as well as the fall of semen. But where no semen has fallen no spermatozoa will be found. In such a case one cannot discard other evidence and reach the conclusion that no rape was committed. Moreover the presence of spermatozoa or the lack of it depends on which time the examination was done.

In this case, the lower court by taking the stand that in case of rupture of hymen where medical examination is conducted the vaginal swab should contain spermatozoa, has not tried to understand the nature of the crime of rape in a proper perspective. In this type of case, factors such as the age of the victim (which seems to be 17, or 18 years), the physical and mental trauma that the victim has to bear with, and the social derision that the victim and her family have to face, the monstrous nature of the offender are important considerations. The kind of fearful situation that the defendant, Mudhakar Rajbhandari has created in the mind of young girls such as the victim, in such a situation the presence of the sign of struggle or the lack of it cannot be said to be very important. This defendant has absconded following the incident and afterwards when he appeared he took the plea of alibi, but the plea and the
corroboration by his witnesses does not seem actually reliable.

Hence, when one examines the deposition of the victim Bhabana Pyakurel in the court, who is a young girl, and the fact that it is corroborated by medical examination one does not need to think otherwise about the crime committed against her and the involvement and collusion of defendant Madhukar Rajbhandari in that crime. [Hence] the decision of the Court of Appeal need not be changed. The decision of the Court of Appeal Patan dated Nov 12, 1995 holds good. The petition of the defendant is rejected.. Let the registration of the case be cancelled and the case file be transferred as per the rule.

Sd
Kedar Nath Upadhyaya
Justice
I concur
Krishna Kumar Verma
His Majesty’s Government on the F.I.R. of
Ratna Devi Shrestha – Plaintiff
Vs.
Kumar Dongol, a resident of ward no 9 of Saraswati V.D.C. of Kathmandu District ————- 1
Buddhi Dongol, a resident of the same place ———— 1 Defendants
Krishna Kumar Bhujel, a resident of ward no 9 of Sirchaur V.D.C., Okhaldhunga District currently residing at ward no 9 of Saraswati V.D.C. of Kathmandu District ————- 1

Kathmandu District Court
Judge
Hon. Additional Judge, Hari Kumar Pokherel

Govt. Cr. No. 320/807 of the year 2059/60 B.S.

Date of Judgment: Thursday on Falgun 15 of the year 2059 of the Bikram calendar (corresponding to Feb 29, 2003)

The brief description of this case which under jurisdiction of this court pursuant Section 7 of the Judicial Administration Act 1991 and Section 29 of the chapter “Of Court Procedure” is as follows:

Ratna Devi Shrestha, in her first information report inter alia stated; “On Jan 6, 2002, I was coming back home after a days work at my sister Mohan Maya Shrestha’s place, who was constructing a new house by demolishing the old one at Ward no 1 of Tokha Saraswati V.D.C. in Kahmandu District. It was around 19.30 o’clock in the evening and after taking dinner at my sister’s place when I was coming to a place called Bishigal, the culprits, Kumar Dongol, Buddhi Dongol and Krishna Kumar Bhujel who were waiting for me suddenly surrounded me, caught hold of me and forcefully took me to the wheat field. They made me lie down and when I tried to flee, they beat me with fist and wooden stick on my head, stomach and eye, raped me and left me helpless and defenseless to the point of unconsciousness. After I came back to my sense, when I cried for help my friend Sanumaya Dangol arrived and she took me to my sister’s house. Immediately after that we went to complain to the Area Police Post and had my medical check up at the Maternity Hospital at Thapathali. In the incident I also lost my golden ring weighing half a tola (around 5.5 grams). I pray for legal action against the culprits Kumar Dangol, Buddhi Dongol and Krishna Kumar Bhujel under the chapter on “ Rape’ of the National Code.”
In the identification parade where 10 people were asked to stand on line, the victim Ratna Devi identified Krishna Bhujel, Buddhi Dongol and Kumar Dongol as the person standing on the first, fifth and tenth position and demanded that as those were the people who had beaten and raped her, action should be taken against them.

The accused Kumar Dongol and Bhddhi Dongol through their separate statement to the Investigation Officer confessed the crime. They said to the effect that among them Krishna Kumar had the knowledge that the F.I.R. informant Ratna Devi Shrestha had gone to her sister’s place to work and would come back in the evening. When this was told to Kumar Dongol and Buddhi Dongol, all the three conspired to have sexual intercourse with her when she would come back. That evening (i.e. on the evening of Jan 6, 2002) at around 7.30 o’clock they stalked her at a place called Bishigal. When they saw that Ratna Devi was coming towards them Kumar Dongol caught hold of her, covered her face. As he tried to take her to the wheat field she cried. Then all three of them beat her on her head, stomach and eye, put down her trouser and among them first Krishna Kumar Bhujel, then Buddhi Dongol and then Kumar Dongol raped her. But they did not know what happened to the jewelry she had put on.

Krishna Kumar Bhujel, in his statement to the Investigation Officer inter alia said; “As we knew that on Jan 6, 2002 the F.I.R informant had gone to her sister’s place, I, Kumar Dangol and Bhddhi Dangol conspired to have sex with her when she would come back in the evening. We were waiting for her and when she came on her way back to her home, we stopped her, caught hold of her and beat and made her lie down. Then I raped her first, followed by Bhddhi Dangol and Kumar Dangol respectively. But we have not taken the jewellery.”

The letter of the Shree Indra Rajya Laxmi Maternity Hospital Development Committee dated Jan 8, 2002 stated; “The medical examination of the victim Ratnamaya Shrestha was done on Jan 7. It was found that there was bruise in the lower part of her left eye, there was swelling in the first finger of the left hand. Her hymen had been ruptured long back. It cannot be said whether or not she was raped”.

Sanumaya Dongol in her statement inter alia said; “In the evening of Jan 6, 2002 when the F.I. R. informant Ratna Devi Shereshta was coming back on her way home, the defendants namely Krishna Kumar Bhujel, Kumar Dongol and Buddhi Dongol, who are now arrested caught hold of her and raped her. After raping her they went little ahead and were sitting there. When I heard the cry of the F.I.R informant and I went to the site, she told me that the three defendants had beaten and raped her. As she told me that she was having pain
in her vagina and it was bleeding I came to be certain that she was raped. After that I reached her to her sister’s place and then she was taken to the Maternity Hospital for medical examination.”

The District Police Office by a letter dated Jan 10, 2002 sent Ratna Devi’s trouser, Krishna Bhujel’s trouser, underwear of other two defendants for examination.

Sanukaji Shrestha in his statement *inter alia* said; “On Jan 6, 2002 Ratna Devi had come to my house for demolition of the house. After taking dinner at my house she went back. Later I came to know that on her way home the defendants, Krishna Kumar Bhujel, Krishna Dongol and Buddhi Dongol caught her, raped her and left her in an unconscious state. I fully believe that the said victim had been raped.”

The incident of crime report identified the place where the defendants Krishna Kumar Bhujel, Kumar Dongol and Buddhi Dongol had raped the F.I.R. informant.

Haridas Shrestha in his statement *inter alia* said; “In the night of Jan 6, 2002 the F.I.R informant and one Sanumaya Dangol had come to my house. I saw injuries in the first finger of the left hand of the F.I.R informant, and when I asked she told me that the defendants Krishna Kumar Bhujel, Kumar Dongol and Buddhi Dongol had beaten her and after making her unconscious raped her. Then I immediately reported to the police.”

His Majesty’s Government in its charge sheet claimed that the defendant Krishna Kumar Bhujel, Kumar Dongol and Buddhi Dondol had by raping the victim violated Section 1 of the chapter on “Rape” of National Code. Therefore, it claimed that the defendants must be punished under section 3 of the same chapter and half of the property of the defendants must be given to the victim pursuant to section 10 of the same chapter.

Kumar Dongol in his statement in the court said that he did not rape the F.I.R informant and other co-accused also have not raped the girl. Therefore, he should not be punished as claimed in the charge sheet.

Buddhi Dongol in his statement in this court *inter alia* said; “As we saw Haridas Shrestha having sexual intercourse with Ratna Devi Sharetha, such a charge is leveled against us to save himself. We all are innocent. As I have not raped Ratna Devi I should not be punished as claimed in the charge sheet.

Krishna Kumar Bhujel in his statement in the court *inter alia* said; “Haridas Shrestha has had sexual intercourse with Ratna Devi. We, Kumar Dangol, Buddhi Dongol and I have not raped her. If we had committed the crime we should have been punished. But since we have not committed the crime we should not be punished as claimed in the charge sheet.
The court on Feb 7, 2002 remanded the defendants to custody pursuant to Section 118 (2) of the Court Procedure of the National Code as up to that point, it did not find any proof in the case file that they had not committed the offence.

Ratna Devi Shrestha in her deposition to the court *inter alia* said; “I was beaten and raped by defendants Kumar Dongol, Buddhi Dongol and Krishna Kumar Bhujel. I had given the F.I.R. report on Jan 7, 2002 and the signature fixed therein is mine. The defendants should be punished.”

Rastraman Shrestha, the witness of Krishna Kumar Bhujel and Buddhi Dongol, in his deposition to the court, said that when he asked Ratnamaya she told him that Buddhi Dongol has not even touched her. Kumar Dongol had given her a slap over the eye. She told him that nothing other than that had happened.

Hari Shrestha in his deposition in the court said that the statement made by him to the Police and the contents are correct as was his signature affixed therein.

Expert Mr Rahesh Kumar Lal Karna in his deposition in the court said that he, along with others, had examined the victim and written the report.

Expert Rakesh Kumar Singh in his deposition to the court said that the examination on Feb. 20 was done by them and the signature fixed therein is his.

Sanu Maya Dangol in her deposition in the court said that the paper made in the Police was not her statement. As she was asked to be a witness, she has just signed. The defendants have not committed the rape.

The medical examination of Ratna Devi Shrestha on Jan 8 was done by me. The signature fixed therein is mine said Dr. Indira Satyal in her deposition in the court.

Sanukaji Shrestha in his deposition in the court authenticated his statement and signature fixed in the document created on Jan 20, 2002.

Similarly Kashinarayan Dangol in his deposition in the court authenticated his signature fixed in the crime scene report.

**Decision of the Court**

This case has been submitted to this bench for decision pursuant to the rules. After studying the case file we heard the oral submissions made by learned counsels namely, District Attorney Suryanath Prasad Adhikari on behalf of His Majesty’s Government; Advocate Indu Tuladhar on behalf of the F.I.R informant; and Advocate Mr Purnachandra Paudel on behalf of the three defendants. In this case in which the charge sheet has been filed against these
defendants alleging that they raped the F.I.R informant, Ratna Devi Shrestha, in violation of Section 1 of the Chapter on “Rape” of the National Code. A claim is made for imposition of punishment against the defendants under section 3 of the same chapter and for payment of half of the property that accrues to the defendants to the victim pursuant to section 10 of the same chapter. We have to decide whether or not the defendants have committed the offence and whether or not they should be punished as claimed in the charge sheet.

When we move on to decide this case we find a categorical mention in the F.I.R that the defendants have raped [the victim]. The F.I.R informant has in her deposition in this court has supported her statement. The defendants have claimed in the court that it is not they but the brother-in-law of the F.I.R informant who had sexual relation with her. They had seen them having sexual intercourse and for the fear of spreading of rumors in the village, the F.I.R. was filed in which a categorical allegation was made against them for trapping them in the charge. In the medical examination report prepared at the Her Majesty Indra Rajyalaxmi Devi Maternity Hospital Development Committee which has been sent to this court, a doubt has been expressed as to whether or not a rape has been committed. The trousers of the victim were sent for laboratory examination at the Central Police Scientific Laboratory. A report has been sent to us where it is stated; “semen and blood could not be detected on exhibit 1, 2, 3, and 4. Hence we need to examine the preliminary question whether or not a rape has been committed against the F.I.R. informant.

In the book titled “Medical Jurisprudence and Toxicology” written by Modi it is mentioned; …” to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora on the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law…”

When we examine the case in the light of the excerpt mentioned above, even though the report of the Maternity Hospital or the Central Police Scientific Laboratory does not show any blood or semen, an offence of rape can be established even in the absence of such things. Further more, when we examine the deposition made by the expert who examined the victim Ratna Devi Shrestha, he did not ask questions or record the reply as to whether or not the victim had taken bath, whether or not she had changed the clothes. Hence only on the ground that no blood or semen was found in the garments of the victim or the accused, no conclusion can be made as to whether or not rape took place.

Now, as to whether or not the defendants have committed rape, we find that the F.I.R. informant has made a categorical allegation against all the three
defendants. No pre-existing enmity is seen from the file between the F.I.R. informant and the defendants. The incident has taken place on Jan 6, 2002 at around 19.30 in the evening and as because the F.I.R. has been lodged the very next day, in view of the time factor that has been taken here it cannot be said that the F.I.R was influenced by after thoughts. On the one hand it does not apparently seem possible to file such a F.I.R. by disregarding the impending social, economic and psychological impact on one’s own life, and in view of the statement of the defendant Buddhi Dangol, in which he told the court that they did not have any enmity, one cannot doubt and say otherwise to the genuineness of the F.I.R.

While the F.I.R informant in her deposition in the court has said that she also scratched one of the assailant during the incident in the medical report of Kumar Dangol done at the Bir Hospital “blood stain on the both nostril” has been found. This proves the statement of the F.I.R informant. All the three defendants have admitted that they were present on the site at the time of the incident and their statement also shows that they were at a close distance from the victim. As to the contention of the defendants that they had seen the sexual bout taking place between the F.I.R. Informant and her brother-in-law, as it is not generally necessary for parties who have consensual sexual intercourse to choose a place like the wheat field as they can always find a better place, the contention of the defendant does not seem reliable.

When we examine the crime scene report enclosed in the file we find that the wheat plants have been brought down in the middle of the field the contention of the victim that she was raped in the wheat field is supported. In fact, the eye witness in this case seems to be the victim herself, when her F.I.R. and her deposition, where she has been cross examined, unless seen fake should be accepted as evidence.

Hence, as analyzed in paragraphs above, even though the defendants have declined the offence in the court as the allegation against the defendants made in the F.I.R. has been supported by deposition [of the victim] in the court, as the defendants have confessed the offence to the Investigation Officer entrusted with the power to investigate, as the defendants and the F.I.R. informant know each other and there existed no pre-existing enmity between them, as it is unlikely for the victim to make a false allegation and support it in the deposition which may raise a negative question against her in future, it is held that the defendants have committed the offence. Hence, defendants Kumar Dangol, Buddhi Dangol and Krishna Kumar Bhujel each are hereby imposed with four year’s imprisonment pursuant to section 3 of the Chapter on “Rape” of National Code and pursuant to section 10 of the same chapter it is also decided that half of the property that accrues to these defendant be paid to the victim.
Having so decided, as rest of the things that are mentioned in the details below will be as mentioned therein, we hand down this judgment as per section 186 of the “Court Procedure”.

Details

1. As mentioned in the decision section above, as the defendants namely Kumar Dongol, Buddhi Dongol and Krishna Kumar Bhujel each have been imposed with four years imprisonment under section 3 of the Chapter on “Rape” and as they have been in detention from Jan 7, 1992 in Central Jail Branch at Jagannath Deval, let the record be created for execution of the remaining portion of their jail term.

2. As mentioned in the decision section above, as the victim Ratna Devi Shrestha is entitled to half of the property that accrues to the defendants through partition Kumar Dangol, Buddhi Dangol and Krishna Kumar Bhujel pursuant to section 10 of chapter on “Rape” if the victim after the completion of the time for appeal files a petition claiming the property, let description of the property that accrues to the defendants be taken, and let half of that property be transferred in the name of the victim and let the title record be created in her name, let the record be created for that purpose and let the Land Revenue Office be informed for that purpose.

3. Let the defendants be informed that if they do not agree to the decision they may file an appeal within 70 days to the Court of Appeal, Patan, and let the record of such information be kept in the file.

4. Let the District Government Office be informed of the decision and let the copy of the decision be sent to them.

5. If concerned parties apply, let the copy of the decision be given by fulfilling legal procedures.

6. Let the file be transferred to the record section as per the law.

Sd
(Judge Hari Kumar Pokherel)
Sexual Assault and Rape

Piyasena and Two Others
Vs.
The Attorney-General

Court of Appeal
Abeywardane, J., Jayalath, J.; and Wijetunga, J.

C.A. 34-36/84.

H.C. Ratnapura 62/80
M.C. Embilipitiya 19122.

July 09 and 10, 1986


The prosecution case was that the prosecutrix was raped by the three accused persons – each three times once in the prosecutrix’s own house in the presence of her mother and twice elsewhere where there were no witnesses. Each of the accused was indicted on a single charge of rape and after trial the jury found each of the accused guilty of rape. It was contended that the charge was bad, the corroborative material did not cover all three acts of rape and the accused being at a loss to know of which act of rape they were convicted, were prejudiced in their defence and the identification parade having being held the evidence on the identity of the accused should not have been accepted.

Held

(1) Although each accused had committed three distinct acts of rape these acts constituted a series of acts in one continuing transaction. It was one activity although the activity involved more than one act. Hence, it is legitimate to indict each accused in a single charge of rape. It was not necessary to have a separate count for each act of rape. Sufficient particulars had been given in the charges and the charge was not bad for duplicity.

(2) The Judge in his summing up had sufficiently explained the law relating to corroboration including the circumstances under which a jury can convict in spite of the absence of corroboration of the victim’s evidence.

(3) The identification of the accused by the prosecutrix was acceptable and the verdict of the jury was reasonable.

Cases referred to:

(1) Director of Public prosecutions V.Merriman – (1973) 56 Cr. Appeal Reprots, 756, 775, 776.

266 Sexual Assault and Rape

APPEAL from conviction in the High Court of Ratnapura.
Ranjith Abeysuriya with Athula Pathinayake for accused-appellants.
September 5, 1986.

JAYALATH, J.
The three accused-appellants N.T. Piyasena, K.T. Bandupala and P.P. Gunapala were charged on four counts as follows: -

(1) That they did on or about the 24th October 1977 at Mahagama within the jurisdiction of this court abduct Goowandarage Karunawathie in order to have unlawful sexual intercourse and thereby commit an offence punishable under section 357 of the Penal Code.

(2) That at the time and place aforesaid and in the course of the same transaction you the first accused above named did commit rape on Goowandarage Karunawathie an offence punishable under Section 364 of the Penal Code.

(3) That at the time and place of aforesaid and in the course of the same transaction you the second accused above named did commit rape of Goowandarage Karunawathie an offence punishable under Section 364 of the Penal Code.

(4) That at the time and place of aforesaid and in the course of the same transaction you the third accused above named did commit rape on Goowandarage Karunawathie an offence punishable under Section 364 of the Penal Code.

Thus each of the accused –appellants were charges on two counts punishable under Section 357 and 364 of the Penal Code.

After trial the jury returned a unanimous verdict of guilty on each of the counts against all the accused-appellants.

Each accused-appellant was sentenced to 5 years’ rigorous imprisonment on count one and (the 1st, 2nd and 3rd accused-appellants were sentenced) to 15 years’ rigorous imprisonment on counts two, three and four respectively, by the learned trial judge. The sentences against each accused-appellant were to run consecutively, so that each accused-appellant would have to serve a period of 20 years’ rigorous imprisonment.
Before considering the submissions made by the learned Counsel for the accused-appellants it would be necessary to state the facts of this case as briefly as possible.

Goowandarage Karunwathie stated at the trial that she was 18 years of age at the time of the incident and living with her mother and father at Mahagama, Embilipitiya. With them lived another boy by the name of Piyasena, who was a distant relation. The four of them had gone to sleep at about 7 p.m. after their dinner on the 24th October, 1977. They lived in a small house which contained a small verandah, a hall and a kitchen. There was a door in front of the house and there was also a door in the rear of the house.

On that day she and her mother slept near each other near the kitchen. Piyasena slept in the kitchen. Karunwathie said that she had not fallen asleep. She said that some time later she heard someone knocking on the front door, and wanted the door to be opened. Her mother replied saying that she cannot open the door. The person who knocked at the door then said that the door would be forced open if she did not open it.

She said that the door was then opened and three persons entered the house. Karunawathie said that Bandupala the 2nd accused-appellant entered the house first, followed by the 1st and 3rd accused-appellants. She said that they were armed with clubs. There was a bottle lamp on a table alight, which she said one of the persons hit with a club and broke into pieces.

The 1st accused-appellant who had a club in his hand went towards her father and took the pickaxe, which was with her father. These persons then tried to pull her out. She said that the inmates of her house on seeing what was happening raised cries. Her mother and father were then assaulted by the 1st and the 2nd accused-appellants with clubs and pushed towards the kitchen, and threatened with death. Piyasena was assaulted by them with clubs and chased out of the house.

Karunawathie said that she was first put on the floor by the second accused-appellant, whom she identified as Bandupala, and thereafter lifted on to a bed which lay beside her. The 2nd accused-appellant then attempted to rape her; but she said that he could not do so as she resisted. The 2nd accused-appellant then called the 1st accused-appellant and having cast a remark told him that she was resisting and was not yielding to his demands. Karunawathie said that she had struggled with the 2nd accused-appellant when he attempted to rape her. The 1st accused-appellant then threatened her and raised her gown and raped her.

Karunawathie stated that after about 15 minutes the 1st accused-appellant released her and the 2nd accused-appellant came and having raised her gown
and raped her. After about 10 minutes the 2nd accused-appellant released her and the 3rd accused-appellant came and raped her in the same manner. The 2nd accused-appellant threatened her father and mother and warned them that if they made a complaint to the police about this incident they would kill both of them. The 1st and the 3rd accused-appellants then went out of the house at the request of the 2nd accused-appellant.

Karunawathie said that the 2nd accused-appellant then dragged her out of the house, having threatened her father. Before doing so he collected a gown and an underskirt from a line and asked Karunawathie to wear it. She said that when she was taken out of the house she saw the 1st and 3rd accused-appellants waiting outside.

When Karunawathie was being dragged out of the house she said that her mother followed her right up to the spill, which was a little distance away. The 2nd accused-appellant then put her on to a boat, and with the 1st and 3rd accused-appellants rowed the boat towards the house of the 1st accused-appellant. This house was situated in the midst of a jungle. Karunawathie said that she was led into the house and the doors were locked. It was about 12 midnight when they reached the 1st accused-appellant’s house. There was no one else there.

Karunawathie said that the 2nd accused-appellant then put her on a mattress which lay in the house and raped her. The 1st accused-appellant then raped her, followed by the 3rd accused-appellant. After that the 2nd accused-appellant told her to sleep, but she could not sleep. She said that again at about 5 a.m. the 2nd Accused-appellant raped her forcibly in spite of her protests. He then left saying that he was going to the pola. Then 1st accused-appellant again raped her after the 2nd accused-appellant left. The 3rd accused-appellant followed the 1st accused-appellant and raped her again for the third time. Karunawathie said that the three of them raped her in spite of her resisting them and raising protests.

The 1st accused-appellant then went away saying he was going to the pola. Karunawathie said that he tried to lock her inside his house before leaving for the pola, but she pushed the door and got out to the front of the house and sat on the doorstep. The 1st and 2nd accused-appellants had left for the pola whilst the 3rd accused-appellant waited near her. The 1st accused-appellant then returned and took her towards the main road, and then to a boutique where he got her some tea. On their return from the boutique at about 7 a.m. they met the 2nd accused-appellant, who asked Karunawathie to accompany him to the house, Karunawathie said that she refused to go. He threatened Karunawathie that he would take her to Mau Ara, and there kill her.
Karunawathie replied that she felt dizzy and she could not go anywhere. He then took her along a sandy road and again asked to come with him to Mau Ara, but she refused. She said that whilst she was being threatened she saw a jeep approaching towards them. The 2nd accused-appellant tried to drag her by the hand, but she resisted and got away, and ran towards the jeep. The 2nd accused-appellant ran towards the jungle which was on the right side and fled when the jeep came near them. Karunawathie said that she walked towards the jeep and she got into the jeep and waited with two police officers whilst two others searched the area for the 2nd accused-appellant. The police officers however could not apprehend the 2nd accused-appellant who had escaped.

Karunawathie stated that she was then taken to the 1st accused-appellant’s house by the police officers. Thereafter she was taken to her house at Mahagama where her statement was recorded by the police. She said she was later examined by a doctor at the Pallebedda Hospital.

Mr. Jayasekera, Judicial Medical Officer of the Pallebedda Hospital who examined her on 25.10.77 found four external injuries on her which were as follows:

- Injury No. 1 was an abrasion behind the back of the chest. It was 3½” wide.
- Injury No. 2 was an abrasion on the left thigh 3 inches long.
- Injury No. 3 was an abrasion on the left thigh. He could not describe the size of this injury.
- Injury No. 4 was a scratch by a finger nail, 1 inch long.

The doctor stated that injuries 1, 2 and 3 could have been inflicted by a club. Injury no. 4 could have been inflicted by a finger nail.

The doctor also stated that there was a complete tear in the hymen. The tear was a recent one and consistent with Karunawathie’s story that she had been raped with force. He said that Karunawathie had lost her virginity as a result of this injury.

Podi Menika, Karunawathie’s mother in her evidence corroborated Karunawathie’s evidence that the 1st, 2nd and 3rd accused-appellants entered their house on the 24th October, 1977 and raped Karunawathie in spite of the father, Karunawathie and herself raising cries and pleading with them not to harm Karunawathie. These incidents occurred in their house, and in their presence. She saw her daughter being raped by the three accused-appellants from the kitchen in which she and her husband were kept confined.

Podi Menika also said that the three persons entered their house by forcing open the rear door. She said that she had refused to open the front door when
they knocked on it. She said she followed the three persons who were dragging her daughter towards the spill after they had raped her in their house. On reaching the spill they got on to a boat and rowed away in spite of her protests. Podi Menika said that she made a complaint to the Embilipitiya police at about 7 a.m. (in the morning). She said she was in a dazed condition at the time she made a complaint to the police.

Sub-inspector Wimaladasa said that on receipt of the complaint on 25.10.77, he left with two other police officers and the complainant at about 8.15 a.m. They went by jeep towards the complainant’s house. He made his observations at the house. The house consisted of a small verandah, a hall and a kitchen. There was a bed on the left side of the hall which could be seen when one enters the hall from the verandah. The bed could also be seen from the kitchen. This bed was shown to him as the one on which Karunawathie had been raped. He said the front door had been intact but the zinc sheet in the rear door had been bent and dented. He said there was a bottle lamp near the bed, which had been broken to pieces.

S.I. Wimaladasa said that after he made his observations he and the other police officers went in search of the accused-appellants. They went to the 2nd accused-appellant’s house, which is about 150 yards from Podi Menika’s house, but there was no one there. They then left towards the Young Farmers Colony on receipt of some information and when proceedings along the road Karunawathie came towards the jeep and told them what had happened. Karunawathie was wearing a black gown with red spots on it. She also had a parcel in her hand, which had an underskirt in it. These articles and another gown which she had worn in the house were produced by him as P1, P3 and P4. S.I. Wimaladasa said that when proceeding along the road as they saw Karunawathie come towards them they saw someone, whom they later came to know was the 2nd accused-appellant. He ran away into the jungle. S.I. Wimaladasa and another officer searched for him, but failed to apprehend him as he had escaped.

He then went to the 1st accused’s house where Karunawathie had been taken to and raped once again. He said that the door of the house had been left open but nobody was there. Karunawathie showed him a mattress lying on the floor. Karunawathie had told him that this was the mattress on which the accused-appellants had committed rape on her the second time. Wimaladasa stated that after Karunawathie’s statement was recorded in her house she was produced before the Judicial Medical Officer and examined by him. The productions were duly sealed and sent to the Government Analyst and his report was produced as P5. In his report the Government Analyst has stated that he traced human blood and semen on one of the gowns and underskirt worn by
Karunawathie; and there was also semen found in the other gown worn by Karunawathie.

After the evidence of the police officers the case for the prosecution was closed. None of the accused gave evidence or called any witnesses to give evidence on their behalf.

In the course of the cross-examination on behalf of the 2nd accused-appellant it was suggested that Karunawathie had known the 2nd accused-appellant prior to this incident, and that she had consented to have sexual intercourse with him, which she denied. Karunawathie was cross-examined in great detail by the defence, and throughout she maintained that she indentified the 2nd accused-appellant Bandupala, whom she had seen before. She said that she came to know the 1st and 3rd accused-appellants and their names in the course of the incident as they were called by each other by their names. She said that she came to know and identify them by their faces and their names. There was some contradictions marked by the defence in cross-examination of Karunawathie.

The main submissions of the learned counsel for the accused-appellants were:-

(1) that upon the facts disclosed by the evidence there were separate acts of rape alleged by the prosecution, first in Karunawathie's house, and thereafter at the 1st accused-appellant's house. He contended that there should have been separate counts for each act of rape which he said was a distinct offence.

(2) He further submitted that the question of corroboration would arise with regard to each distinct offence of rape alleged. He stated that particularly in regard to the rape alleged in first accused-appellant's house there was no corroboration. Considering the facts of this case, he said it is difficult to discern of which act of rape the accused-appellants were found guilty by the jury. Karunawathie had stated in her evidence that there were nine acts of rape committed on her by the accused-appellants.

(3) The learned counsel for the accused-appellants further submitted that there had been no identification parade. He also submitted that the mother had not identified the 1st and 3rd accused-appellants and did not give their names correctly.

In considering the first submission made by the learned counsel for the accused-appellants that there should have been separate counts in respect of each act of rape it is necessary to advert to the facts again. The three accused-appellants were alleged to have raped Karunawathie at her house from 10 a.m. on the night of the 24th October 1977 and then taken her away by force immediately after these acts were committed. She was again raped by them in the 1st accused-appellants house. The rape in Karunawathie's house, the abduction and again
the rape in the 1st accused-appellant’s house are in my view all a series of acts in one continuing transaction and the prosecution is entitled to charge the accused-appellants on separate counts for each act of rape, or in one count as one continuing act of rape. Lord Morris of Borth-y-Gest in the case of Director of Public Prosecution v. Merriman (1) supports this view, and states in his judgment as follows:

“It is furthermore a general rule that not more than one offence is to be charged in a count in an indictment. By Rule 4 of Schedule 1 to the Indictments Act 1915 (now repealed) it is provided as follows:

‘A description of the offence charged in an indictment or where more than one offence is charged in an indictment, of each offence so charged shall be set out in the indictment in a separate paragraph called a count’. The question arises- what is an offence? If ‘A’ attacks ‘B’, and in doing so stabs ‘B’ five times with a knife, has ‘A’ committed one offence or five? If ‘A’ in a dwelling house of ‘B’ steals ten different chattels, some perhaps from one room and some from others, has he committed one offence or several? In many different situations comparable questions could be asked. In my view, such questions when they arise are best answered by applying common sense and by deciding what is fair in the circumstances. No precise formula can usefully be laid down but I consider that clear and helpful guidance was given by Lord Widgery, C.J. in a case where it was being considered bad for duplicity. (See Jamieson v. Priddle (2)). I agree respectfully with Lord Widgery that it will be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act. It must of course depend on the circumstances. In the present case it was not at any time suggested, and in my view could not reasonably have been suggested, that count one was open to objection because evidence was tendered that the respondent stabbed Mr. Parry more than once.”

I am of the view that sufficient particulars of the offence have been given in the charges framed and he could not have been prejudiced in the formulation of his defence in this case.

In this case as submitted by the learned Senior State Counsel there were several acts of penetration by each of the accused-appellants in committing the offence of rape in the course of the same transaction. It may also be stated that no objection was made by the defence at the trial that the indictment was bad for duplicity, and in my view the submission that the charge is bad for duplicity must necessarily fail for these reasons.

The Second submission made by the learned counsel for the accused-appellants was that there is no corroborative evidence in respect of every act of rape alleged against each of the accused-appellants.
A perusal of the summing up in this case clearly indicates that the learned trial judge has taken great pains to explain to the jury the law on the requirement of corroboration in an offence of rape and the circumstances in which a jury can convict in spite of the absence of corroboration of the victim’s evidence. The learned trial judge has warned the jury adequately of the danger of convicting an accused on the uncorroborated testimony of the virtual complainant in a case of rape. In my view the jury has been adequately directed by the learned trial judge on the law regarding corroboration of the complainant’s testimony.

Another contention of the appellants was that no identification parade was held. It was submitted that Podi Menika had not identified the 1st and 3rd accused-appellants by their names, as the names she gave were incorrect. But as stated earlier Karuawathie who had been altogether nine hours with the three accused-appellants from about 10 a.m. on the night of the 24th October till about 7.30 a.m. on the morning of the 25th October said that she did identify them by their faces and their names the accused-appellants had called each other. Both Karunawathie and Podi Menika said that they identified ‘Bandu’ the 2nd accused-appellant whom they had seen before and who lived 150 yards away from their house. These are all questions of fact which were left to the jury to decide.

After due consideration of all the submissions of the learned counsel for the accused-appellants and the Senior State Counsel and the totality of the evidence led in this case, I do not think that this is a case in which it could be said that the verdict of the jury is unreasonable.

For the above reasons I affirm the conviction of each of the accused-appellants.

There is no doubt that the crime committed by the accused-appellants is a heinous crime which requires deterrent punishment. However considering the age of the accused-appellants and the fact that they have not had a previous record of crime and the fact that they have served a period of 3 years and 7 months in remand custody after their convictions I am of the view that the ends of justice will be met if each of the accused-appellants are sentenced to 5 years rigorous imprisonment on count 1; the 1st accused-appellant to 10 years’ rigorous imprisonment on count 3, and the 3rd accused-appellant to 10 years’ rigorous imprisonment on count 3. The sentence against each accused-appellant to run concurrently.
Rajapakse
Vs.
The State

Subject to this variation in the sentence the appeal is dismissed.
Abeywardena, J.-I agree
Wijetunga, J.-I agree

Court of Appeal
Yapa J (P/CA)
Kulatilaka J

C.A.No. 80/98
H.C. Anuradhapura 22/98

October 24, 30, 2000

Appeal dismissed Sentence Varied

The accused appellant was indicted on two grounds, one under S. 357 – and on the second count that in the course of the same transaction the accused appellant abetted a person unknown to the prosecution in the commission of rape.

The High Court Judge trying the case in absentia found the accused appellant guilty on both counts on 22.7.1998. Later the accused appellant was arrested and on 2.9.99, the trial judge read out to the accused appellant the sentence imposed on him. The accused appellant on 17.9.99 lodged an appeal against his conviction and sentence.

In appeal it was contended that there was no evidence of absconding to commence and proceed with the trial in absentia, and that the trial judge failed to act under S. 241 (3) of the Criminal Procedure Code and that there was no proper judgment in terms of S. 283.

The State urged that the petition of appeal was out of time and facts and circumstances would not warrant the accused to invite court to exercise its revisionary jurisdiction.

Held:
(i) The journal entries indicate that the accused – appellant did not give any reasons for his absence from court and it was only then that the trial judge had
proceeded to enforce the sentence imposed on him on 22.7.98 to be operative from 2.9.99. In terms of S. 241 (3) the accused person if he appears before Court and satisfies court that his absence at the trial was bonafide, the Court shall set aside the conviction/sentence/order and the trial then would be fixed de-novo.

(ii) The essence of a judgment consist in the reason for conviction of acquittal of an accused person. The Judgment in this case is a well reasoned out judgment.

(iii) The period of time within which an appeal should be preferred must be calculated from the date on which the reasons are given. The conviction/sentence was given on 22.7.98. The petition of appeal was lodged on 17.9.1999. The appeal is therefore, out of time.

(iv) An application in Revision shall not be entertained save in exception circumstances. When considering issue court must necessarily have regard to the contumacious conduct of the accused in jumping bail and thereafter his conduct in a manner to circumvent and subvert the process of the law and judicial institutions. In addition, the party should come before Court without unreasonable delay.

Appeal from the judgment of the High Court of Anuradhapura.

Cases referred to:
1. Thilakaratne V Attorney General – 1989 2 SLR 191
4. Solicitor General V. Nadaraja Muturajah – 79 NLR 63
5. Attorney General v. Podi Singho – 51 NLR 385
6. Camillus Ignatious V OIC of Uhana Police Station (Rev) CA 907/89 M.C. Ampara 2587.
7. Sudarman de Silva and Another V. Attorney General 1986 I SLR 11

Dr. Ranjith Fernando with Anoja Jayaratne and Sandamalt Munasinghe for the accused - Appellant.

Kumudini Wikramsinghe Senior State Counsel, for the Attorney – General.

January 19, 2001
Kulatilaka, J.
In this prosecution before the High Court of Anuradhapura the accused-appellant stood trial on a plea of “not guilty” to two counts in the indictment. In the first count it was alleged that on 23.2.95 the accused-appellant along with persons unknown to the prosecution abducted Gunasekerage Lasadawathie in order to force or induce her to illicit intercourse without her consent, an offence punishable under Section 357 of the Penal Code and the second count alleged that in the course of the same transaction the accused-appellant abetted a person unknown to the prosecution in the commission of rape on the said Lasadawathie.

At the trial the High Court Judge sitting without a jury commenced and proceeded with the trial in the absence of the accused-appellant and pronounced his judgment on 22.7.98 whereby he found the accused-appellant guilty on both counts and sentenced him to a term of five years rigorous imprisonment and to a fine of Rs. 2000/- with a default term of six months rigorous imprisonment on the first count and to a term of fifteen years rigorous imprisonment and to pay a sum of Rs. 10,000/- as compensation with a default term of two years rigorous imprisonment on the second count. Both sentences were to run concurrently. Further he ordered that in the event of accused-appellant failing to pay the fine and compensation imposed on him the sentences on both counts to run consecutively. Thereafter the learned trial judge had issued an open warrant against the accused-appellant.

Consequent upon the issuance of the warrant the army had arrested the accused-appellant and had handed him to the custody of the Medawatthy police who is turn had produced him before the High Court on 2.9.99.

The Learned High Court Judge had read out to the (accused-appellant) the sentences imposed on him by the learned trial Judge. On 17.9.99 the accused-appellant had filed a petition of appeal against his conviction and sentence.

At the hearing of the appeal the learned counsel who appeared for the accused-appellant urged the following grounds:

1. that there was no evidence of absconding for the trial Judge to make his order dated 20.5.98 to commence and proceed with the trial in absentia in terms of Section 241(1) of the Code of Criminal Procedure Act No. 15 of 1979 and as such there was no proper trial.

2. that the trial Judge has failed to act in terms of Section 241 (3)(a) of the said Act.

3. that there was no proper judgement in terms of Section 283 of the Code of Criminal Procedure Act.

On the other hand the learned Senior State Counsel urged the following grounds:

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(1) that the petition of appeal is out of time.

(2) that the facts and circumstances of this case would not warrant the accused to invite the Court of Appeal to exercise its revisionary jurisdiction in the event this Court were to hold that the appeal is out of time.

Before giving our mind to the above matters it is pertinent to refer briefly to the facts of this case. The prosecution has adduced the evidence of the prosecutrix Lasadawathie, her sister Chandrawathie, medical expert Dr. Upul Ajit Kumara Tennekoon and the investigations carried out by the police.

The prosecutrix Lasadawathie testified that in the year 1995 she used to sleep in the house of her uncle Buddadasa because of threats to harm her coming from the accused-appellant Gamini Rajapakse who was her nephew. The accused-appellant was married to Lasadawathie’s sister’s (Chandrawathie’s) daughter. He had threatened to shoot her or rape her. When she went to her uncle’s place to sleep her mother used to chaperon her. On 23.2.95 she left home alone around 7 p.m. for her mother was sick. Whilst she was on her way to her uncle’s place the accused-appellant had come with three others on two bicycles, held her and carried her by force to a lonely place. Thereafter two persons had raped her, one after the other whilst on both occasions the accused-appellant Gamini Rajapakse was holding her. They left her there naked and unconscious. When she gained consciousness it was dawn and she was feeling lifeless. The abductors and rapists had inserted two sticks into her private parts. These sticks were marked P1 and P2. The abductors had gagged her mouth with her own brassiere. It was a dastardly act, a gruesome crime. Early morning Chandrawathie had gone in search of her sister Lasadawathie accompanied by the police. She found her sister Lasadawathie lying naked at a lonely spot. Her mouth was gagged with a brassiere. She was very weak and on being questioned by Chandrawathie she had said “it was Gamini Rajapakse who is married to your daughter who is responsible.”

The medical evidence was adduced by the medical expert Dr. U.A.K. Tennakoon who had examined the prosecutrix on 24.2.95 at the Anuradhapura Hospital. She had been transferred to Anuradhapura from Medawachiya on the same day. He had observed two injuries on the prosecutrix namely.

(1) swollen buccal mucosa of upper pallet.

(2) 1/2” long linear abrasion on the buttocks area. Further he observed “two plant sticks (1/4” in diameter, 4 1/2” long, and 0.1” in diameter, 7 1/2” long) found in the vagina in situ.” The patient had given a history of rape. His report has been produced marked P6. Further in her short history to the Doctor she had implicated the accused-appellant. Thus the testimony of the prosecutrix has been amply corroborated by the medical evidence to the effect that she had been ravished.
The Inspector of Police Keerthi Bandara testified to the investigations carried out by him at the crime scene. He had personally accompanied the complainant Chandrawathie in search of the prosecutrix and found her lying naked at a lonely spot on Maligawa Road 3 miles away from Lindawewa junction. He found her mouth gagged with a brassiere. This brassiere had been produced marked P1. After dispatching the prosecutrix to the hospital he went in search of the accused-appellant to his house. He found that the accused-appellant had run away, but he was able to arrest him at Medirigiriya on 28.2.95.

We now consider the arguments advanced by the learned counsel for the accused-appellant in support of his contentions.

According to Section 241(3) of the Code of Criminal Procedure Act, No. 15 of 1979 after the conclusion of the trial of an accused person in his absence if he appears before Court and satisfies the Court that his absence at the trial was bonafide the Court shall set aside the conviction and sentence and order that the accused be tried de novo.

The learned Counsel at the commencement of the argument made submissions to the effect that when the accused-appellant was produced before the High Court on 2.9.99 by the police the learned High Court Judge had merely read over to the accused-appellant the sentence imposed on him by the trial Judge in his judgement dated 22.7.98 albeit, the learned Judge failed to comply with the provisions of Section 241 (3) of the Act. However, when he was confronted with the journal entry of 2.9.99 he chose to abandon that contention. The journal entry indicates that the accused-appellant did not give any reasons for his absence from Court and it was only then that the learned High Court Judge had proceeded to enforce the sentence imposed on him by the learned trial Judge on 22.7.98 to be operative from 2.9.99. Nevertheless the learned counsel persisted with his contention that the High Court did not have sufficient evidence of absconding for him to justify the order he made on 20.5.1998 in terms of Section 241 (1) of the Code of Criminal Procedure Act for a trial in absentia.

According to the proceedings in the Magistrate’s Court the accused-appellant had been enlarged on bail on 13.3.96 after signing a bail bond and a recognizance whereby he bound himself to continue to appear in Court. In
that bail bond he had given his name and address. The journal entry of 9.3.98 indicates that the Court had noticed the accused-appellant to appear on 25.3.98 to serve his indictment. According to the journal entry of 25.3.98 when the case was called on that date to serve the indictment the accused was absent. It was reported to Court that the accused had been missing for a period of about two years. Thus the accused-appellant had flouted and violated the conditions and assurances in the bail bond solemnly signed by him.

The surety had been presented. He had been released on personal bail with the assurance given by him that he would produce the accused-appellant in Court.

It is on record that on 18.5.98 when the case was called Attorney-at-Law Hatangala had made submissions on behalf of the surety to the effect that the accused-appellant whilst he was on bail in connection with the instant case he had robbed a gun and cartridges from a Grama Arakshaka and thereafter had proceeded to murder his own wife. Subsequently he was involved in a robbery as well. Thereafter he had disappeared from the village. Apart from these concrete facts which are on record, the learned High Court Judge had before him the evidence of the Grama Sevaka of the area where the accused had been living. He had testified to the effect that he had never seen the accused-appellant in his area. The father of the accused Suddahamy testified that the did not see his son since April 1996 and he did not know his whereabouts. Thus we are of the view that there was concrete and cogent evidence before the learned trial Judge to justify the order he made on 20.5.1998 to commence the trial and proceed in the absence of the accused-appellant. In this regard vide the judgment of Wijeyaratne, J in Thilakaratne vs. The Attorney-General.

Another point urged by the learned counsel for the accused-appellant was that the judgment of the learned trial Judge dated 22.7.98 was not a proper judgment in terms of Section 283 of the Code of Criminal Procedure Act. Our Courts have stressed now and then that the essence of a judgment consists in the reasons for conviction or acquittal of an accused person. Vide Thlagarajah vs. Annaikoddal Police, Haramanis Appuhamy vs. Inspector of Police Bandaragama. The learned trial Judge has given his mind to the vivid description of events testified to by the prosecutrix, corroborative evidence adduced by any independent source namely Chandrawathie relating to the utterances made by the prosecutrix to Chandrawathie soon after Chandrawathie and the police found her, to the effect that it was Chandrawathie’s son-in-law Gaminin Rajapakse who was responsible for the gruesome act to which she was subjected to and the fact that the prosecutrix was lying naked with a gagged mouth. The learned trial Judge has considered the relevance of medical evidence as well before he arrived at the conclusion that the accused-appellant was guilty on both counts in the indictment. The judgment in this case is a
The learned Senior State Counsel took up a preliminary objection that the appeal was out of time. She referred us to Section 203 of the Code of Criminal Procedure Act which read as follows:

“When the cases for the prosecution and defence are concluded the Judge shall forthwith or within ten days of the conclusion of the trial record a verdict of acquittal or conviction giving his reasons therefore and if the verdict is one of conviction pass sentence on the accused according to law”.

She submitted that in all cases irrespective of whether the accused was presented or tried in absentia the trial Judge has to comply with Section 203 of the Code of Criminal Procedure Act and in terms of Section 331 of the Code the petition of appeal has to be lodged with the Registrar of the High Court within 14 days from the date when the conviction, sentence or order sought to be appealed against was pronounced. This position has been looked into by Sri Rajah, J in Haramanis Appahamy vs. Inspector of Police Bandaragama (Supra) and Pathirana, J in Solicitor-General vs. Nadarajah Muthurajah where it was held that the period of time within which an appeal should be preferred must be calculated from the date on which the reasons for the decision are given.

In the instant case the reasons for the conviction and the sentence were given on 22.7.98. The petition of appeal had been lodged in the High Court on 17.9.1999. Therefore the submission made by the learned Senior State Counsel to the effect that the appeal is out of time should succeed.

The learned counsel for the accused-appellant also submitted that if this Court were to hold that the petition of appeal is out time it would not preclude him from inviting this Court to exercise the revisionary powers in terms of Section 364 of the Code of Criminal Procedure Act. We agree that the powers of revision of the Court of Appeal are wide enough to embrace a case where an appeal lay was not taken. However an application in revision should not be entertained save in exceptional circumstances. Vide the judgment of Dias, SPJ in Attorney-General vs. Podisinghoe. When considering this issue this Court must necessarily have regard to the contumacious conduct of the accused in jumping bail and thereafter conducted himself in such a manner to circumvent and subvert the process of the law and judicial institutions. In addition if this Court were to act in revision the party must come before Court without unreasonable delay. In the instant case there is a delay of 13 months. In this regard vide Justice Ismail’s judgment in Camillus Ignatious vs. OIC of Uhana Police Station (Application in revision) where His Lordship was of the view that a mere delay of 4 months in filing revisions application was fatal to the
prosecution of the revision application before the Court of Appeal. Accused’s contumacious conduct and unreasonable delay would necessarily preclude him from inviting this Court to act in revision in terms of Section 364 of the Code of Criminal Procedure Act.

In *Sudarman de Silva & Another vs. Attorney General* 7 at 14 and 15 Sharvananda, J observed that the contumacious conduct on the part of an applicant is a relevant consideration in an application in revision. In this regard vide the judgment of F.N.D. Jayasuriya, J in *Opatha MudiyanseLage Nimal Perera vs. Attorney-General* 8. In that case too the trial against the accused was held in absentia and he had filed an application in revision 23/4 years since the pronouncement of the judgment and the sentence. His Lordship remarked:

“These matters must be considered in limine before the Court decides to hear the accused-petitioner on the merits of his application. Before he could pass the gateway to relief his aforesaid contumacious conduct and his unreasonable and undue delay in filing the application must be considered and determination made upon those matters before he is heard on the merits of the application.”

In these circumstances we are not disposed to exercise our revisionary powers of this Court and interfere with the judgment of the learned High Court Judge made on 22.7.98. Besides, on the facts of this case there is no merit.

We observed that the learned Judge has ordered the sentences to run consecutively, in the event the accused-appellant failed to comply with the terms in respect of the fine and compensation imposed on him one counts one and two respectively. We order that this portion of his sentence to be struck off since there is no legal basis to make such an order. Subject to this variation, we proceed to dismiss the appeal and also the application for revision made to this Court in terms of Section 364 of the Code of Criminal Procedure Act.

HECTOR YAPA, J. (P/CA) - I agree.
Appeal dismissed.
Application in revision refused.
Accused-appellants
Vs.
Hon. The Attorney General
Respondent

In The Supreme Court of the Democratic Socialist Republic of Sri Lanka
In the matter of an Appeal under Section 451 (3) of the Code of Civil Procedure
Act, No. 15 of 1979 as amended by Act No. 21 of 1988
S.C. Appeal No. 2/ 2002 (TAB)
H.C. Colombo No. 8778/97
Rajapakse Devage Somaratne Rajapakse,
J.M. Jayasinghe,
G.P. Priyadharsana,
A.S. Priyashantha Perera,
D.M. Jayatillake,

Before
Shirani A. Bandaranayake, J., P. Edussuriya, J.,
H.S. Yapa, J, J.A.N. de Silva, J & Nihal Jayasinghe, J.

Counsel
Ranjith Abeysuriya, PC, with Thanunja Rodrigo for the
1st Accused-Appellant.
Dr. Ranjith Fernando with hashini Gunawardane and
Himalee Kularatne for the for the 2nd, 3rd, 4th and 5th Accused-Appellants.
C.R. de Silva, Solicitor General, President’s Counsel, with Sarath Jayamanne,
Senior State Counsel for the Attorney-General.

Written Submissions
Tendered on : 19.12.2003
Decided on : 03.02.2004

Shirani A. Bandaranayake, J.
This is an appeal filed in terms of section 451 (3) of the Code of Civil Procedure
Act, as amended by Act No. 21 of 1988 against the conviction and sentences
imposed by the judgment of the Trial at Bar on the accused-appellants
(hereinafter referred to as appellants).

Originally nine accused were indicted on 18 Counts. Of the 18 Counts in the
indictment 1st to 7th Counts were unlawful assembly counts for committing
abduction, rape and murder and all the accused-appellants were acquitted on those Counts. Therefore, the Counts that would be material for the purpose of this appeal are the Counts numbers 8 to 18. They are as follows: -

Count No. 8 - The accused-appellants abducted Krishanthi Kumaraswamy, an offence punishable under Section 357 read with Section 32 of the Penal Code.

Count No. 9 - That the 1st accused-appellant committed rape on Krishanthi Kumaraswamy, an offence punishable under Section 364 of the Penal Code.

Count No. 10 - That the 2nd accused-appellant committed rape on Krishanthi Kumaraswamy, an offence punishable under Section 364 of the Penal Code.

Count No. 11 - That the 3rd accused-appellant committed rape on Krishanthi Kumaraswamy, an offence punishable under Section 364 of the Penal Code.

Count No. 12 - That 4th accused-appellant committed rape on Krishanthi Kumaraswamy, an offence punishable under Section 364 of the Penal Code.

Count No. 13 - That 7th accused-appellant (the 5th appellant in this appeal) committed rape on Krishanthi Kumaraswamy, an offence punishable under Section 364 of the Penal Code.

Count No. 14 - That 8th accused-appellant committed rape on Krishanthi Kumaraswamy, an offence punishable under Section 364 read with Section 490 of the Penal Code.

Count No. 15 - That they caused the death of Krishanthi Kumaraswamy, an offence punishable under Section 296 read with Section 32 of the Penal Code.

Count No. 16 - That they caused the death of Rasamma Kumaraswamy, an offence punishable under Section 296 read with Section 32 of the Penal Code.

Count No. 17 - That they caused the death of Pranavan Kumaraswamy, an offence punishable under Section 296 read with Section 32 of the Penal Code.

Count No. 18 - That they cause the death of the Kirubamoorthi, an offence punishable under Section 296 read with Section 32 of the Penal Code.
One accused, namely, W.S.V. Alwis died during the course of the trial, accused D.G. Muthubanda was acquitted at the end of the prosecution case and accused A.P. Nishantha was acquitted at the end of the trial. The 8th accused, namely, one D.V. Indrajith Kumara was absconding during the course of the trial and therefore the trial against him proceeded in absentia, in terms of Section 241 of the Code of Civil Procedure Act, No. 15 of 1979. The 18 counts on which the accused were indicted related to charges of unlawful assembly and common intention in respect of the offences of abduction, rape and murder. These charges related to the abduction, rape and murder of Krishanthi Kumaraswamy, murder of Rasamma Kumaraswamy, murder of Pranavan Kumaraswamy and murder of Kirubamoorthi. Rasamma Kumaraswamy and Pranavan Kumaraswamy were the mother and the brother respectively of Krishanthi Kumaraswamy and Kirubamoorthi was a neighbour as well as a friend, of Kumaraswamy family.

At the conclusion of the Trial at Bar, the 1st appellant was found guilty of charges relating to abduction (Krishanthi), rape (Krishanthi) and murder (Krishanthi, Rasamma, Pranavan and Kirubamoorthi) and was sentenced to 10 years rigorous imprisonment on the abduction charge and a fine of Rs. 50,000/- with a default term of 2 years rigorous imprisonment (Count 8), 20 years rigorous imprisonment on the rape charge (Count 9) and the death sentence on the murder charges (Counts 15, 16, 17 and 18).

The 2nd appellant was found guilty of charges relating to rape (Krishanthi) and murder (Krishanthi, Pranavan and Kirubamoorthi) and was sentenced to 20 years rigorous imprisonment on the rape charge (Count 10) and the death sentence on the murder charges (Counts 15, 17 and 18).

The 3rd appellant was found guilty of charges relating to abduction (Krishanthi), rape (Krishanthi) and murder (Krishanthi) and was sentenced to 10 years rigorous imprisonment on the abduction charge and a fine of Rs. 50,000/- with a default term of 2 years rigorous imprisonment (Count 8), 20 years rigorous imprisonment on the rape charge (Count 11) and the death sentence on the murder charge (Count 15).

The 4th appellant was found guilty of charges relating to abduction (Krishanthi) rape (Krishanthi) and murder (Pranavan and Kirubamoorthi) and was sentenced to 10 years rigorous imprisonment on the abduction charge and a fine of Rs. 50,000/- with a default term of 2 years rigorous imprisonment (Count 8), 20 years rigorous imprisonment on the rape charge (Count 12) and the death sentence on the murder charges (Counts 17 and 18).

The 5th appellant was found guilty of charges relating to rape (Krishanthi) and murder (Rasamma, Pranavan and Kirubamoorthi) and was sentenced to
20 years rigorous imprisonment on the rape charge (Count 13) and the death sentence on the murder charges (Counts 16, 17 and 18).

The 1st appellant was a Lance Corporal attached to the Sri Lanka Army serving in Jaffna. On the day of the incident, viz, 07.09.1996, he was assigned to the Chemmuni Security Check Point. The 2nd and 4th appellants were soldiers of the Sri Lanka Army who had been assigned duties at the Chemmuni Security Check Point whereas the 3rd appellant was a Reserve Constable who had been assigned duties at the said check point. The 5th appellant was a Corporal of the Sri Lanka Army who had been assigned to the Forward Defence Line which was situated about 50 meters away from the Chemmuni Security Check Point.

The time or the incident which took place in 1996 Krishanthi Kumaraswamy was eighteen years old and was sitting her General Certificate of Education (Advanced Level) Examination from Chundikuli College, Jaffna. She had lost her father in 1984 and lived with her mother Rasamma and younger brother Pranavan in Kalthadi South. Her elder sister, Prashanthi, was resident in Colombo. Krishanthi had been described as an intelligent student who had obtained seven Distinctions and one Credit Pass at the General Certificate of Education (Ordinary Level) Examination.

Rasamma Kumaraswamy was 59 years of age at the time of her death. She was a Graduate and a former Principal of Kaithadi Muthukumaraswamy Maha Vidyalaya and was teaching at Kaithadi Maha Vidyalaya at the time of her death.

At the time this incident took place, Pranavan was a bright student aged sixteen years and studying at St. John’s College, Jaffna.

Siddambaram Kirubamoorthi was a close friend of the Kumaraswamy family who had assisted them and was working at the Co-operative Stores.

(A) The case for the prosecution

On the day of the incident, viz, 7th September 1996, Krishanthi left home on her bicycle to sit for her Chemistry Multiple Choice question paper at Chundikuli College. She was dressed in her white school uniform, red tie with socks and shoes. After handing over her answer script to the Supervisor sometime after 11:30 a.m., she had left the Examination Hall. Thereafter Krishanthi, with her classmate and friend Sundaram Gautami, went on their bicycles to the house of a deceased colleague to pay their last respects. These two girls had left the said funeral house around 12:30 p.m. and had parted company at a junction. Krishanthi was last seen cycling towards Kaithadi along the road where she had to pass the Chemmuni Check Point. When Krishanthi was cycling past the Chemmuni Security Check Point, she was
ordered by the 1st appellant to stop on the pretext of wanting to question her. On obeying his orders, she alighted from her bicycle and then Krishanthi was taken inside a bunker, and a piece of cloth was tied around her mouth.

Due to the delay in her daughter’s return after the examination, her mother Rasamma left home around 2:30 p.m. in search of her, after making inquiries from the neighbours. Pranavan and Kirubamoorthi accompanied her. They had left on two bicycles, one being Pranavan’s black bicycle, which had a chain case with a special badge commonly known as ‘the Honda badge’. They had arrived at the Chemmuni Security Check Point and inquired from the military personnel about Krishanthi. However, the 1st appellant had denied any knowledge of Krishanthi’s whereabouts.

At that time Rasamma, Pranavan and Kirubamoorthi insisted on finding Krishanthi. The 1st appellant who did not want the matter being reported to higher authorities had taken the three of them inside a bunker and detained them forcibly. In the night, the appellants had strangled the two men (Pranavan and Kirubamoorthry) with a rope and buried the two bodies behind the security check point. Their clothes were buried in a separate pit. Rasamma was also murdered and buried in the same manner. Krishanthi was raped continuously by the appellants and murdered in the same way as was done with the other three. Her body was put in a pit behind the Security Check Point.

Sometime later the Army Authorities had received an anonymous petition regarding four missing civilians. Thereafter an inquiry commenced and the persons who were assigned to Chemmuni Security Check Point were interrogated and consequently four decomposed bodies together with items of clothing were exhumed from a point close to the said Chemmuni Security Check Point.

The 1st, 2nd, 3rd, 4th and 5th appellants and made confesses to the Military Police accepting their culpability to the offense in question. In addition the appellants did not offer any explanation as to how they came to know independently of one another the exact location of where the bodies of those four persons and their clothing were buried.

At the hearing of this appeal, seven grounds of appeal were taken on behalf of the appellants. They are as follows:

1. Three Judges of the Trial at Bar gave three separate judgments independent of each other without any indication on record that there was concurrence or agreement and therefore there was no valid judgment of the Trial at Bar.
2. Trial at Bar erred in law by admitting the confessions made by the appellants to the Officers of the Military Police when in fact they were obnoxious to Section 25 of the Evidence Ordinance.
3. The Trial at Bar erred in law by effectively inferring guilt of the appellants from recoveries made in terms of Section 27 of the Evidence Ordinance.

4. The Trial at Bar erred in law by placing reliance on photographic evidence to establish identity of the victims.

5. The Trial at Bar erred in law by failing to judicially evaluate the items of circumstantial evidence.

6. The Trial at Bar erred in law by rejecting the Dock Statements made by the appellants on the basis of a consideration of the contents of the confessions admitted in evidence.

7. The Trial at Bar erred in law by the addition of a charge of rape following an amendment to the indictment which was illegal and therefore vitiated the entire proceedings.

It was contended that if the appellants were successful on the first ground, of appeal, the trial would stand vitiated and the trial would have to be taken de novo. In respect of the other grounds, it was contended that if the appellants were successful, the convictions and sentences against the appellants should be set aside and they be acquitted.

Ground 1

*Three Judges of the Trial at Bar gave three separate judgments independent of each other without any indication on record that there was concurrence or agreement and therefore there was no valid judgment of the Trial at Bar.*

The appellants contended that they expected the three Judges of the Trial at Bar sitting together ‘to jointly hear, consider and evaluate the evidence led’, and to come to a finding jointly. It was submitted that in this case the three Judges of the Trial at bar have written three separate judgments totally independent of one another and had signed separately even making reference to their respective High Court stations in their judgments. Learned Counsel for the appellants further submitted that although the final findings in respect of the guilt of the appellants are the same in each judgment, on an interpretation of strict legal principles, it is not a valid and proper judgment of the Trial at Bar in respect of the appellants and therefore this case should be sent back for a trial de novo.

Halsbury’s Laws of England (Vol. 26 – 4th Edition, pg. 237) defines the meaning of a judgment as ‘any decision given by a Court on a question or questions at issue between the parties to a proceeding properly before the Court’. In *R v Ireland* ([1970] 44 A.L.J.R. 263) it was stated that,
“In a proper use of terms the only judgment given by a Court is the order it makes. The reasons for judgment are not themselves judgments though they may furnish the Courts reason for decision and thus form a precedent.”

Discussing the reserved judgments in the House of Lords, Michael Zander (The Law making Process, 4th Edition, Butterworths, pg. 283) points out that there could be a single judgment where there are disagreements. However, he has clearly pointed out that even when the Judges wholly or mainly agree with both the result and reasons still they write their own separate judgments.

The decision in Lake v Lake ([1955] 1 All E.R., pg. 538) again referred to the judgment or order as one which means the final judgment or order which is drawn up and not the reasons given by the judge for the conclusion at which he arrives. Stroud’s Judicial Dictionary of words and phrases described a ‘judgment’ as the sentence of the law pronounced by the Court upon the matter contained in the record. (5th Edition, Volume III, pg. 1374).

In this case three Judges of the Trial at Bar had arrived at the same conclusion for different reasons. It would appear that they had individual and different approaches when they considered the evidence individually and had evaluated various issues that arose in the course of the trial. Although there were three separate judgments written by the three Judges, all of them have come to the same conclusion, after considering the material individually and collectively. Therefore on a close examination of the three judgments it would not be a fair assessment to say that the three Judges have given three judgments in isolation without any indication on record that there was concurrence and agreement.

Further considering the legality of a judgment based on the aforementioned authorities it cannot be accepted that there was no valid judgment merely because the Trial at Bar had delivered three separate judgments.

**Ground 2**

*Trial at Bar erred in law by admitting the confessions made by the appellants to the Officers of the Military Police when in fact they were obnoxious to Section 25 of the Evidence Ordinance.*

The contention of the learned Counsel for the appellants is that certain statements made by the appellants to the personnel of the Military Police have been admitted in evidence and acted upon by the Trial at Bar, holding that a Military Police Officer would not come within the scope of the definition of a Police Officer in terms of Section 25 of the Evidence Ordinance.

It is not disputed that the confessionary statements of the appellants were recorded in the presence of Military Police Officers under the supervision of Major Podiralahamy and Lt. Col. Kalinga Gunaratne.
Section 25 of the Evidence Ordinance is in the following terms:

“No confession made to a Police Officer shall be proved as against a person accused of any offence.”

It is to be noted that the Evidence Ordinance does not define the term Police Officer. The Police Ordinance defines the term to mean a member of the regular Police Force and includes all persons enlisted under that Ordinance. On the other hand the Code of Civil Procedure Act, No. 15 of 1979 refers to a Police Officer to mean a member of an establish Police Force and includes Police Reservists. Learned Solicitor General for the Attorney General contended that a public Officer empowered with certain police powers does not, by that fact alone, become a police Officer within the leaning of Section 25 of the Evidence Ordinance. He relied on the decision in Rose v Fernando ([1927] 29 NLR 45) Learned Solicitor General also drew our attention to the provisions of the Army Act and submitted that a military Police Officer, who for the purpose of the Army Act, is an Officer who enjoys no more powers than those enjoyed by excise and customs officers. The contention of the learned Solicitor General was that the Military Police is a unit in the Army established for the purpose of performing certain administrative and disciplinary functions within the Army. His position was that under the Army Act there is no distinction between Military Police Officers and other Army Officers, as all the powers enjoyed by the Officers of the Military Police are the powers that have been conferred in general on all Army personnel. Learned Solicitor General cited an example where in terms of the Army Act and Regulations made under that Act, a Military Officer arresting a person subjected to the Army Act would do so on the general powers that have been conferred on the Army personnel. He also submitted that a Military Police Officer does not have the authority that an ordinary Police Officer would exercise in a criminal investigation.

It was also contended by learned Solicitor General that if the legislature intended to expand the meaning of ‘Police Officer’ in terms of Section 25 of the Evidence Ordinance to include Public Officers conferred with limited powers with regard to arrest, detention and search, that could have been done under Section 25 (2) of the Evidence Ordinance in the same manner where confessions made to Excise Officers and Forest Officers become inadmissible. Therefore, he submitted that the Courts should be mindful of the manifest intention on the part of the Legislature to restrict the unqualified expansion of the term Police Officer and therefore, the Court must give a narrow interpretation to this term. In support of this contention learned Solicitor General cited several Indian Authorities [Raj Ram Jaiswal v State of Bihar (AIR 1964 SC 828), Jothi Savant v State of Mysore (AIR 1976 SC 1746),
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It was also the submission of learned Solicitor General that the Army Act was enacted after the decision in Rose v Fernando and that the amendment to Section 25 of the Evidence Ordinance does not provide for the exclusion of the confessions made to an officer of the Military Police or any other Army Officer exercising authority over a person making a confession. He drew our attention to Part XI of the Army Act, which deals with the rules of evidence applicable to a Court Marshal. His position is that this part does not directly or indirectly equate a Military Police Officer or any other Army Officer for the purpose of Section 25 of the Evidence ordinance. The contention of the learned Solicitor General is that at the time the army Act was enacted in 1949, if the legislature intended to exclude confessions made to Military Police Officers and other Army Officers in authority, the legislature would have included an exclusionary provision in Part XI of the Army Act. Therefore such a deliberate omission clearly demonstrates the intention of the legislature to permit the admissibility of confessions made to Military Police Officers at a Court Marshal.

On the other hand, learned Counsel for the appellants contended that the legislature did not define the term ‘Police Officer’ in the Evidence Ordinance advisedly to enable the Courts to give broader interpretations with a view to enhancing the liberty of a suspect. Several decisions of the Supreme Court were cited where this rationale was accepted. In Nuge Kanny v Pables Perera ([1908] 1 Tambiah Raports 25) and in Vidane Arachchi of Kalupe v Appu Sinno ([1921] 22 NLR 412) it was held that a confession to a Mudaliyar, who held an inquiry, was a Police Officer. It is of interest to note that in Nuge Kanny v Pables Perera (Supra) the Mudaliyar had held the departmental inquiry against a Police Vidane. In this case, in the course of the judgment, Wood Rention, J. stated that,

“It is of great moment that both the spirit and the letter of that section should be maintained, and I think it applies to headmen of all grades as well as Police Officers within the strict meaning of the term”.

In Rose v Fernando (Supra) although it was held that a confession made to an Excise Officer was inadmissible, Schneider, J. was categorical that the expression ‘Police Officer’ in the Evidence Ordinance should be construed not in any technical sense, but giving it a more comprehensive significance. A similar view was expressed by Gavin, J. in Rose v Fernando where he stated that,

“The term ‘Police Officer’ ordinarily means a member of an established Police Force; as used in Section 25 of the Evidence Act it may legitimately be applied...
to officers of government who are authorized generally to act as Police officers and are charged with performance of the duties and armed with the powers of a Police Officer. In short, who are, as my Lord has said in his Judgment, Police Officers in every thing but name.”

A similar view has been taken by the Indian Courts, with regard to Section 25 of the Indian Evidence Ordinance which was the model Ordinance for our Evidence Ordinance enacted in 1985. For instance, in Raj Ram Jaiswal v State of Bihar (Supra), Mudholker, J. was of the view that, the test for determining whether a person is a public officer in terms of Section 25 of the Evidence Ordinance would be whether the power of a Police Officer is conferred on him or whether he is in a position to exercise such power. In Raj Ram’s case he went on to state that,

“In other words, the test would be whether the powers are such as would tend to facilitate the obtaining by him confession from a suspect or a delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys. These questions may perhaps be relevant for consideration where the powers of a Police Officer conferred upon him are of a very limited character and are not be themselves sufficient to facilitate the obtaining by him of a confession.”

A close analysis of the Sri Lanka cases including Rose v Fernando would show that the line of thinking of the contents of Section 25 of the Sri Lanka Evidence Ordinance does not differ much from the test propounded by Mudholker, J. in Raj Ram Jaiswal v State of Bihar (Supra).

In the light of the above it would now be appropriate to consider the rationale for excluding statements made to Police Officers. This has been clearly explained and set out in our case law.

In Queen v Rev. H. Gnanaseeha Thero and 21 others ([1968] 73 NLR 154) the court considered the evidence in regard to the circumstances under which the accused made their statements to the Police. The decision of Frankfurtur, J. in Colombe v State of Connecticut (367 US 568) was cited with approval in that case where it was stated that,

“The prisoner knows this – know that no friendly or disinterested witness is present – and the knowledge may itself induce fear. But, in any case, the risk is great that the Police will accomplish behind their closed door precisely what the demands of our legal order forbid: make a suspect the unwilling collaborator in establishing his guilt. This they may accomplish not only by relay questioning persistently, insistently subjugating a tired mind, but by subtler devices.
In the Police Station a prisoner is surrounded by known hostile forces. He is disoriented from the world he knows and in which he finds support. He is subject to coercing impingements, undermining even if not obvious pressures – of every variety. In such an atmosphere, questioning that is long continued – even if it is only repeated at intervals, never protracted to the point of physical exhaustion – inevitably suggests that the questioner has a right to, and expects, an answer. This is so, certainly, when the prisoner has never been told that he need not answer and when, because his commitment to custody seems to be at the will of this questioners, he has every reason to believe that he will be held and interrogated until he speaks.”

In Murugan Ramaswamy ([1964] 68 NLR 265) Viscount Radcliffe delivering the opinion of the Judicial Committee of the Privy Council referred to the policy to excluding in evidence confessions made to Police Officers. He observed that,

“There can be no doubt as to what is the general purpose of Section 25 and 26. It is to recognize the dangers of giving credence to self – incriminating statements made to policemen or made while in police custody, not necessarily because of suspicion that improper pressure may have been brought to bear for the purpose of securing convictions. Police authority itself, however carefully controlled, carried a menace to those brought suddenly under its shadow; and these two Sections recognize and provide against the danger of such persons making incriminating confessions with the intention of placating authority and without regard to the truth of what they are saying.”

The appellants, as pointed out earlier had made certain statements which were confessions by their nature to the Military Police officers in the Army were admitted in evidence in the Trial at Bar. Learned Counsel for the appellants had raised objections regarding the admissibility of the confessions made to Military Officials on the ground that they cannot be admitted as evidence in violation of Section 25 of the Evidence Ordinance. The Trial at Bar made order that those statements made to the Military Police Officers were admissible if they were made ‘freely and voluntarily’ in terms of Section 24 of the Evidence ordinance. Consequently a voir – dire inquiry was held in view of the objections taken by the appellants regarding the admissibility of the confessions made by the appellants. The Trial at Bar held that the confessions made to the Military Police officer are admissible as the Military Police Officer would not come within the definition of a Police Officer in terms of Section 25 of the Evidence Ordinance.

The Army Act in Part VII defines persons subject to Military law and Section 34 states that,
“For the purpose of this Act, ‘person subject to Military Law’ means a person who belongs to any of the following classes of persons: -

(a) all officers and soldiers of the Regular Force;

(b) all such officers and soldiers of the Regular Reserve, Volunteer Force, or volunteer Reserve, as are deemed to be officers and soldiers of the Regular Force under subsection (3) of Section 3.”

Section 35 of the Army Act refers to custody of the persons who are subject to Military Law and the description of the custodians are given in Section 37. According to Section 35 of the Army Act, if a person subject to Military Law has committed any military or civil offence he may be taken into military custody. It is to be noted that the Code of Civil Procedure Act, which deals with the procedure regarding arrest has provided for more restricted powers in arresting a person by defining the offence into cognizable and non-cognizable offences. Provision has also being made that in order to arrest a person in certain circumstances, it is necessary to obtain a warrant from a Judicial Officer thereby necessitating the intervention of the judiciary. An examination of the provisions of the Army Act reveals that on a comparison with the provisions of the Code of Civil Procedure Act, there are no such restrictions with regard to the power of Military Police Officers to arrest persons. Accordingly it appears that the Military Police have more power over arrests than the regular police officers.

Moreover, it is also to be noted that when a Military Police Officer has arrested a person subject to the Military law the commanding officer of that Military Police Officers shall without unnecessary delay investigate the charge on which the person is in such custody. According to Section 39 of the Army Act, the Military Police could keep a person under the Military law in detention up to a period of seven days, whereas a Police officer could only keep a suspect in custody for a maximum period of 24 hours prior to producing him before the nearest Magistrate.

The effect of all these provisions under the Army Act is that the Military Police Officers have far greater powers in respect of the persons arrested under the Military Law than the powers vested in Police Officers with regard to persons kept in their custody.

It was disclosed that the confessionary statements of the appellants were recorded in the presence of military Police Officers in the charge and under the supervision of major Podiralahamy and Lt. Col. Kalinga Gunaratne. An examination of the evidence reveals that the appellants had been questioned for an hour and at the time when the appellants were interrogated, they were ordered to remove their caps and belts. Learned Counsel for the appellants
regarded this as the usual practice of a ‘symbolic stripping of power and authority of the person before interrogation’.

Section 25 of the evidence Ordinance in my view is a broadly worded section and it absolutely excludes from evidence a confession made by an accused to a Police officer while in his custody. The circumstances in which such a confession was made is irrelevant for this purpose. Mohmood, J. in R v Babu Lal (ILR 6A 509, 523) stated that,

“The legislature had in view the mal-practices of Police Officers in extorting confessions from accused persons in order to gain credit by securing convictions and those mal-practices went to the length of positive torture.”

These observations as well as the observations made by Frankfurter, J. in Colombe v State of Connecticut (Supra) highlights the desirability in excluding statements made to Police Officers or Officers who have certain powers and authority over accused persons in their custody. Considering the powers and the authority the Military Police Officers have over the persons in their custody, combined with the gravity of the charges, the detention incommunicado, and the inaccessibility to lawyers to practice the rights of such persons in their custody would be a paramount necessity to include a Military Police officer also into the definition of ‘Police Officer’ in terms of Section 25 of the Evidence Ordinance.

Accordingly the confessions made to Military Police officers by the appellants in this case are inadmissible and therefore cannot be used against the appellants.

**Ground 3**

The Trial at Bar erred in law by effectively inferring guilt of the appellants from recoveries made in terms of Section 27 of the Evidence Ordinance.

Learned Counsel for the appellants contended that there was inadequate application of the principles of law relating to the concept of admissibility of a statement made in terms of Section 27 of the Evidence Ordinance by the Trial at Bar. According to the learned Counsel it is necessary to observe certain basic criteria before there is an admission of a statement under Section 27 of the Evidence Ordinance. One such criteria would be that, a recovery or a discovery is not a relevant fact and would not be admissible under Section 27 of the Evidence Ordinance, if such recovery or discovery had been shown by another person on a previous occasion and therefore the place in question was known to the Police previously. It was also contended that in the Judgment (Vol. I), President of the Trial at Bar had correctly stated that the only interference that could be drawn from the Section 27 statements to where the bodies were buried is the ‘knowledge’ of the whereabouts of the deceased.

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Later the President of the Trial at Bar, according to the learned Counsel for the appellant, had gone on to say that recoveries based on Section 27 statement is an important factor in dealing with the guilt or the innocence of the accused and the murderous intent of the accused is clearly established by the recoveries made in terms of Section 27.

Learned Counsel for the appellants also strenuously argued that when one of the appellants were taken to the place in question to show where the bodies were buried, the same place had already been shown earlier by another appellant.

Section 27 of the Evidence Ordinance, which comes under the caption admissions and confessions deals with how much of such information received from accused may be proved against them and is in the following terms:

“27 (1) Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.”

The rationale underlying the proviso contained in Section 27 of the Evidence Ordinance was analysed in Thurtell v Hunt ([1825] Notable British Trials, pg. 145) by Baron Parke where he made the following observation:

“A confession obtained by saying to the party, ‘you had better confess or it will be the worse for you is not legal evidence. But, though such a confession is not legal evidence, it is everyday practice that if, in the course of such confession, that party states where stolen goods or a body may be found and they are found accordingly, this is evidence, because the fact of the finding proves the truth of the allegation, and his evidence in this respect is not vitiated by the hopes or threats that may have been held out to him.”

A discovery made in terms of Section 27 of the Evidence Ordinance discloses that the information given was true and that the accused had the knowledge of the existence and the whereabouts of the actual discovery. Therefore as has been adopted by T.S. Fernando, J. in Piyadasa v The Queen ([1967] 72 NLR 434) following the Indian decision in Kottava v Emperor ([1947] AIR [PC] 70) that ‘if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true’. It was therefore held that such information could be ‘safely allowed to be given in evidence’.

A ‘fact’ has been defined in Section 3 of the Evidence Ordinance to mean and includes’
(a) anything, state of things or relation of things capable of being perceived by the senses; and
(b) any mental condition of which any person is conscious.

This indicates that the definition given to the term fact is of extensive scope and would embrace both material and psychological facts.

Considering the evidence that was admitted by the Judges of the Trial at Bar, it is clear that there had been no such misdirection in dealing with the evidence pertaining to the discovery in terms of Section 27 of the Evidence Ordinance.

The President of the Trial at Bar had identified as item No. 5 the recovery of bodies and the clothes of the deceased persons which were recovered on the basis of the statements made by the 1st, 2nd, 3rd and 4th appellants. He has very correctly pointed out that the statements of the appellants can be used only for the purpose of showing that the appellants had only the knowledge of the existence and whereabouts of such items. The Presidents of the Trial at Bar had categorically stated that the relevant statements cannot be used for any other purpose. The other Judges too refer to the statements made by the appellants leading to the discovery of the bodies of the four persons and stated that the appellants had only the knowledge as to where the four bodies were buried.

A vital limitation on the scope of Section 27 of the Evidence Ordinance is that only the facts which are distinctly related to what has been discovered would be permitted on evidence. It is well settled law that there should be a clear nexus between the information given by the accused and the subsequent discovery of a relevant fact. Also it would be necessary to select the portion of the statement which is distinctly related to the discovery of a relevant fact. Discussing these distinct issues Prof. G.L. Peiris has stated that, (Law of Evidence, pg. 179).

“The issue of admissibility necessitates selection of that portion of the statement which is distinctly related to the discovery of a relevant fact, and the deletion of all other parts of the statement made by the accused. This was the problem with which the Court was confronted in a case like Justin Perera and Albert, where the accused states, for example, that he raped a girl and threw the sarong containing blood and seminal strings into a ditch where the item of clouding was subsequently discovered only the portion of the statement dealing with the throwing of the sarong into the ditch, and not the first half of the statement which contains a confession that the accused committed rape, may be admitted against him in terms of Section 27.”

The three Judges of the Trial at Bar, it should be noted, had quite correctly selected the portion of the statement which is distinctly related to the discovery
of the bodies of the four persons and their clothing. Moreover, the judgments are clear on the fact that they have deleted the other parts of the statements made by the appellants and considered only the relevant portion. In such circumstances it would not be correct to say that Trial at Bar erred in dealing with the evidence pertaining to discovery made under Section 27 of the Evidence Ordinance.

**Ground 4**

The Trial at Bar erred in law by placing reliance on photographic evidence to establish identity of the victims.

At the outset learned counsel for the appellants raised this point as one of the grounds on which he was challenging the decision of the Trial at Bar. However, subsequently he informed Court that he is not pursuing this objection. In the circumstances, I am of the view that it is unnecessary to examine this ground of appeal any further.

**Ground 5**

The Trial at Bar erred in law by failing to judicially evaluate the items of circumstantial evidence.

Learned Counsel for the appellants contended that the Trial at bar has not indulged in the necessary exercise of a judicial evaluation of the items of circumstantial evidence independent of the confessions to ascertain whether such items of circumstantial evidence would be sufficient to establish the culpability or the guilt of the appellants beyond reasonable doubt. His position is that the Judges had evaluated the items of circumstantial evidence in relation to the confessions made to the Military Police. Learned counsel for the appellants therefore contended that the Trial at Bar erred thereby and the resulting position being if the confessions are ruled inadmissible, there is no judicial evaluation of any other evidence available and hence there cannot be a conviction of the appellants.

Circumstantial evidence of facts where the principal or the disputed fact, or *factum probandum* could be inferred. In Chakuna Orang v State of Assam (1981 Cri. L.J. 1661) describing circumstantial evidence it was stated that,

“Evidence which proves or tends to prove the factum probandum indirectly by means of certain inferences of deduction to be drawn from its existence or its connection with other ‘facts probantia’ it is called circumstantial evidence.”

On a consideration of the judgments of the Trial at Bar, it is not correct for the learned Counsel for the appellants to have submitted that the circumstantial evidence has not been judicially analysed and evaluated by the Trial at bar.
The President of the Trial at Bar, in his judgment from pg. 17 to pg. 25 has considered the items of circumstantial evidence. Similarly the other two members of the Court have evaluated the circumstantial evidence in their separate judgments (Judgment No. II pg. 26-49 and 52-77, Judgment No. III pg. 131-157). Consequently, independently the confessions of the appellants made to the Military Police, the following items were considered as circumstantial evidence.

Witness Samarawickrama (RPC 34102), was on duty at Chemmuni Security Point No. 2 which was about half a kilometer away from the Chemmuni Security Check Point where the 1st, 2nd, 3rd and 4th appellants were assigned for duty on 07.09.1996. Samarawickrama was conversant in Tamil. Around 2:00 p.m. on the day in question, the 1st appellant had sent a message informing him that it was necessary to question a LTTE suspect who spoke in Tamil. Therefore when he visited the Chemmuni Security Point a girl in school uniform was seated on a chair. Her hands, legs and mouth were tied. The 1st and 4th appellants were also present at the check point at that time. On being questioned, the girl identified herself as Krishanthi Kumaraswamy studying at Chundukuli College. On the instructions of the 1st appellant, when she was asked as to whether she has any connections with the LTTE, she had stated that she obtained seven Distinctions at her Ordinary Level Examination and had queried, as follows: -

"Why are you treating me like this? We came here trusting you all".

Thereafter the girl had started shouting and the 1st appellant had informed Samarawickrama to leave. A photograph of the deceased was shown to the witness Samarawickrama which he identified as the person with whom he had spoken to on 07.09.1996 at the Chemmuni Check Point. Around 3:00 p.m. on the same day a middle aged woman with two men had come to check point No. 2 in search of a girl. The woman had told Samarawickrama that her daughter who went to school had not returned and inquired whether a school girl had been arrested at the check point. When Samarawickrama denied such an arrest she thanked him and left the place with the other two persons. Samarawickrama had identified the photographs marked as P2, P3 and P4 which were the photographs of Pranavan, Kirubamoorthi and Rasamma respectively as the persons who had inquired from him about the missing school girl.

About 6:00 p.m. on the same day Samarawickrama heard that the three persons whom he had met in the early afternoon that day were detained at the Chemmuni Security Check Point. On hearing this Samarawickrama has sent a message to one Corporal Ajith Asoka who was in charge of the Check Point No. 3.
Sexual Assault and Rape

which was about half a kilometer away from the Check Point No. 2 to intervene and rescue the persons who were detained at Chemmuni Check Point. According to Samarawickrama Corporal Ajith Asoka was senior in rank to the 1st appellant.

When the request was made to hand over the persons who were looking for a missing girl both by Asoka and Samarawickrama the 1st appellant had turned down their requests. The 1st appellant had further stated that the Military Police had also learnt about the said people detained and therefore he would look after them. Samarawickrama’s version had been corroborated by Corporal Asoka.

In consequence of the information provided by the 1st, 2nd, 3rd, and 4th appellants bodies of the four deceased persons with their clothing were recovered by Inspector Senarath. According to Inspector Senarath, four appellants had separately shown the places where the bodies were buried. This exercise was carried out in the presence of the magistrate, Jaffna.

The body of the deceased Rasamma was identified by her sister and brother on the basis of a surgical scar that was found immediately below her navel. The saree worn by Rasamma on the fateful day was also identified by her sister as one belonging to Rasamma. A gold chain which was with the 1st appellant was taken by the Prison Authorities and had given it to his brother who had later given it to his sister Rohini who had pawned the same at the Mawathagama Rural Bank. The brother and the sister of 1st appellant identified the chain marked P11 as the chain that was given to them by the Prison Authorities. The sister of Rasamma identified this chain as the chain that belonged to the deceased Rasamma. According to her Rasamma always wore this chain. The 1st appellant had given no explanation as to how this chain which was ‘regularly worn’ by the deceased Rasamma came into his possession.

Nagendra Sashideran who gave evidence in this case had stated that Pranavan had fixed a badge which had the letters to read as “HONDA” in his cycle. Pranavan was last seen searching for his sister and at that time he was on this cycle.

A bicycle chain case with a Honda Badge was found at a point close to the place of the incident. Sashideran in his evidence had stated that he had seen such a badge at a cycle repair shop at Ariyal and had informed his uncle about it. This was corroborated by the evidence of Sashideran’s uncle Kodeswaran. Sashideran had specifically stated in his evidence that this particular badge was fixed on to the cycle by both of them about 2-3 months before Pranavan’s disappearance. This badge was fixed using ‘mechanical screws’ which are
generally used to fix children’s toys. Pranavan’s clothes were also identified by this witness Nagendra Sashideran.

The wife of Kirubamoorthi, Kamaleswari identified the clothes of her husband which was confirmed by the laundry mark that appeared on the clothing.

In R v Gunaratne ([1946] 47 NLR 145) the Court of Criminal Appeal cited with approval the following quote which suggested that despite certain weaknesses circumstantial evidence would afford sufficient proof of the facts in issue. It was stated that,

“It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several chords. One strand of the rope might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.”

It is to be noted that the following main items of circumstantial evidence were led at the trial in this case.

(1) All the appellants involved were either from the Chemmuni Security Check Point or from the check point No.2 which was about 50 meters away from the Chemmuni Security Check Point. Due to the close proximity to one another, all appellants would have been in a position to be aware of the events that took place on the day of the incident.

(2) According to the evidence of Samnarawickrama and Asoka, Krishanthi Kumaraswamy was last seen detained in a bunker by the 1st appellant around 2-35 p.m. on the day of the incident. At that time the 4th appellant also had been present at the bunker. The evidence of Samarawickrama and Asoka has not been challenged and remained unimpeded.

(3) The bodies of the 4 deceased persons and their clothes were found buried and the place they were buried were shown separately by the 1st, 2nd, 3rd, 4th appellants.

(4) The Honda Badge which was attached to Pranavan’s cycle on which he was last seen going in search of his sister Krishanthi, was found in a place close to the security check points.

(5) A gold chain belonging to Rasamma was found in the possession of the 1st appellant.

With all this damning evidence against the appellants with the charges including murder and rape, the appellants did not offer, any explanation with regard to
Sexual Assault and Rape

any of the matters referred to above. Although there cannot be a direction that
the accused person must explain each and every circumstance relied on by the
prosecution and the fundamental principle being that no person accused of a
crime is bound to offer any explanation of his conduct, there are permissible
limitations in which it would be necessary for a suspect to explain the
circumstances of suspicion which are attached to him. As pointed out in Queen
v Santin Singho ([1962] 65 NLR 445) if a strong case has been made out
against the accused, and if he declines to offer an explanation although it is in
his power to offer one, it is a reasonable conclusion that the accused is not
doing so because the evidence suppressed would operate adversely on him.
The dictum of Lord Ellenborough in R v Lord Cochrane (Gurney’s Reports
479) which has been followed by our Courts [R v Seeder de Silva ([1940] 41
NLR 337), Q v Santin Silngho ([1962] 65 NLR 445), Premathilake v The
NLR 534), Illangantillake v The Republic of Sri Lanka ([1984] 2 Sri L.R.
38)] described this position in very clear terms.

“No person accused of a crime is bound to offer any explanation of his conduct
or of circumstance of suspicion which attach to him: but, nevertheless if he
refused to do so, where a strong prima facie case has been made out, and
when it is in his own power to offer evidence, if such exist, in explanation of
such suspicious appearance which would show them to be fallacious and
explicable consistently with his innocence, it is a reasonable and justifiable
conclusion that he refrains from doing so only from the conviction that the
evidence so suppressed or adduced would operate adversely to his interest.”

On a consideration of the totality of the evidence that was placed before the
Trial at Bar and the judicial evaluation of such evidence made by the judges,
the appellants have not been able to establish any kind of misdirection, mistake
of law or misreception of evidence. In such circumstances, taking into
consideration the position that there is no principle in the law of evidence
which precludes a conviction in a criminal case being based entirely on
circumstantial evidence and the fact that the appellants, decided not to offer
any explanations regarding the vital items of circumstantial evidence led to
establish the serious charges against them. I am of the view that the Trial at
Bar has not erred in coming to a finding of guilt against the appellants.

Ground 6

The Trial at Bar erred in law by rejecting the Dock Statement made by the
appellants on the basis of a consideration of the contents of the confession
admitted in evidence.

Learned Counsel for the appellants submitted that inadequate consideration
was given to the clock statements made by the appellants.
The 1st appellant had not made any dock statement and the 2nd, 3rd, 4th, and 5th appellants stated that they are totally innocent of the crimes they were accused of committing. Their position was that the statements were not made voluntarily by them and that they were forced to sign some documents.

On a consideration of the judgments of the Trial at Bar, I find it difficult to agree with the submission of the learned Counsel for the appellants that inadequate consideration was given to dock the statements as it would appear that due consideration has been given to them.

Ground 7

The trial at Bar erred in law by the addition of a charge of rape following an amendment to the indictment which was illegal and therefore vitiated the entire proceedings.

Learned President’s Counsel for the 1st appellant took up the position that the Trial at Bar did not have the legal competency to have tried the rape charge as it was not an offence in respect of which the Chief Justice made order on 24.06.1997 for the holding of the Trial at Bar in terms of Section 450 (2) of the code of Criminal Procedure, Act as amended by Act No 21 of 1988. Learned President’s Counsel submitted that the procedure of a Trial at Bar is an extraordinary method of trial which could be invoked only in terms of Section 450 of the code as amended. According to the learned President’s Counsel, Section 450(1) specified the offences which could be tried before a Trial at Bar, but none of the offences charged in the instant case would come within that category.

Therefore his submission is that action in this matter had to be taken in terms of Section 450 (2) where the Chief Justice is empowered to make a specific order ‘under his hand’ directing that, “the trial of any person for that offence be held before the High Court at Bar by three judges without a jury”.

The contention of the learned President’s Counsel was that before making an order in terms of Section 450 (2) of the Code of Criminal Procedure Act, the Chief Justice is required to take into consideration ‘the nature of the offence’ or the circumstances relating to the ‘commission of the offence’. Based on the letter sent by the Hon. Attorney General dated 13.06.1997, requesting the nomination of three judges of the High Court to constitute a Trial at Bar on the charges contained in the information sent to the High Court, the Hon The Chief Justice had appointed a Trial at Bar and that information contained 11 charges on which His Lordship the Chief Justice’s determination was based. Learned President’s Counsel further submitted that the offence of Rape was not specified in the information sent by the Hon. The Attorney
General and the charge of rape was included in the indictment later before the three Judges at the Trial at Bar on a motion of the prosecuting Counsel. His position is that although Section 167 (3) of the code of Criminal Procedure Act permits the addition of a new charge ‘to an indictment’, there is no reference to an amendment of the ‘information’, which was the method of instituting the case before the Trial at Bar. Accordingly learned President’s Counsel submitted that such an addition would constitute an unwarranted variation of the specific mandate of the Hon. The Chief Justice who is the only legally competed authority to constitute a Trial at Bar in respect of any given offence.

In terms of Section 450 (2) of the Code of Criminal Procedure Act (as amended), only the Hon. The Chief Justice is empowered to constitute a Trial at Bar taking into consideration the nature of the offence and circumstances relating to the commission of such offence. However, Section 450 (3) specifically provides that such proceedings would be based either on an indictment or information furnished by the Hon. The Attorney General. Furthermore Section 450 (5) provides that the Trial at Bar shall proceed as nearly as possible in the manner provided for trials before the High Court without a Jury. In all trials before the High Court without a Jury, Hon. The Attorney General is entitled to amend an indictment before the judgment is pronounced in terms of Section 167 of the Code of Criminal Procedure Act. None of the provisions stipulated in the Amending Act No. 21 of 1988, indicate that the right given under Section 167 to alter any indictment or charge either expressly or by implication in cases before a Trial at Bar has been taken away. In fact a careful examination of Section 450 (2), which provides for the Hon. The Chief Justice to decide that a Trial at bar should be commenced considering the nature of the offence and the circumstances relating to the commission of such offence indicate no requirement for the Hon. The Chief Justice to decide on the charges or the indictment.

Section 160(3) of the Code of Criminal Procedure Act provides that the Hon. The Attorney General has the power to substitute or include in the indictment any charge in respect of any offence, which is disclosed in evidence. In such circumstances, considering the aforementioned provisions in section 450, it would be absurd to contend that the Attorney General has no authority to amend an indictment.

For the aforementioned reasons I am of the view that there is no merit in any of the grounds urged by learned Counsel on behalf of the appellants except the ground relating to the admissibility of the confessions made to the Military Police Officer. After leaving out the confessions, the evidence referred to above establishes beyond reasonable doubt that the appellants are guilty of the offences with which they have been convicted. In the circumstances I
affirm the conviction and the sentences imposed on the appellants and dismiss this appeal.

Judge of the Supreme Court
P. Edussuriya, J
I agree.

Judge of the Supreme Court
H.A.S.Yapa, J.
I agree

Judge of the Supreme Court
J.A.N. de Silva, J
I agree.

Judge of the Supreme Court
Nihal Jayasinghe, J.
I agree.
Criminal Law - Abduction, Gang rape and murder - Penal Code, sections 296, 364(2) and 357 - Offences committed in the course of the same transaction - Abduction and murder in furtherance of the common intention.

Newly married Rita Joan and Mr. Manoharan were staying with her father-in-law in Crow Island. The island was about 60 acres and situated in proximity of the estuary of the Kelani river. On the eastern side was a mangrove jungle. With creepers forming a canopy which prevented light reaching the land underneath. A waterway extending from the river ran through the forest in which weeds and water hyacinth grew.

On 11.10.1998 at about 6.15 p.m. Rita Joan the deceased and Manoharan had walked towards the estuary of the Kelani river and were returning when they were accosted by the three accused whom Manoharan identified at an identification parade. Despite resistance in the course of which the 2nd accused bit Manoharan causing an injury which was medically confirmed, the three accused took Rita Joan by force.

Having failed to save his wife Manoharan ran home. The police arrived and with other people meticulously searched for Rita until 11.00 p.m. but unsuccessfully. The search continued on the 12th and 13th but in vain. On 13.10.98 the 2nd and 3rd accused were arrested. The 1st accused was arrested on 14.10.98 away from his residence. Jewellery worn by the deceased were recovered from the 2nd and 3rd accused. All the accused had injuries which according to medical evidence could have resulted from having had intercourse on the ground.

The statements of the 2nd and 3rd accused were recorded in consequence of which they were taken to the scene separately. Each showed the place where
the deceased’s body lay in a stream in the jungle area. According to medical evidence injuries on the deceased were consistent with gang rape and anal intercourse and strangulation of the neck with a creeper. The clothes worn by the deceased were found in consequence of a statement of the 1st accused.

Held:

(1)

(2)

(3)

The failure of the court to call Lakshman Perera who was on the list of State witnesses did not prejudice the case. He had been given a conditional pardon. But the failure to call him does not raise any issue of non compliance with section 256 of the Code of Criminal Procedure Act because the Attorney-General could not legally give him a pardon as he was not an accomplice. In any event the court examined his statement and decided that to call him as a witness of court would have been prejudicial to the accused; and left it open to the defence to call him if necessary. The trial court did not attach a probative value to the statement of the 2nd and 3rd accused which resulted in the discovery of the deceased’s body. In all the circumstances there was no misdirection in the matter. Only the accused knew where the deceased’s body lay.

The objection that common intention had not been proved in regard to the abduction and murder is without justification in view of the strong prima facie case established which required an explanation from the accused.

(4) The conviction of the accused is justified.

1. Walimunige John v The State - 76 NLR 488 at 496
3. Pulukuri Kottaya v Emperor - Al R 1947 PC 67 at 70
4. Richard v The State - 76 NLR 534
5. Rishideo v The State of Uttar Pradesh - 1955 AIR 331 at 335
6. Commonwealth v Webster - 5 Cush 295
7. Seetin v The Queen - 68 NLR 316 at 322
8. Rv Lord Cochrane and others - (1814) Guruey’s Reports 479

APPEAL from the order of the High Court Colombo Dr. Ranjith Fernando for 1st, 2nd and 3rd accused-appellants. CR.de Silva, P.C. Solicitor-General with Wasantha Bandara, Senior State Counsel and Harippriya Jayasundera, State Counsel for Attorney-General.
The accused above named were tried before the High Court at 01 Bar by three Judges without a jury on an order made by the Chief Justice in terms of section 450(2) of the Code of Criminal Procedure Act, No.15 of 1979, as amended by Act, No.21 of 1998.

The following charges were included in the information exhibit-ed by the Attorney General to the High Court.

1. That on or about the 11th of October 1998, the said accused did, at Modera, within the jurisdiction of this High Court, abduct Rita Joan Manoharan in order that she may be forced into illicit intercourse and that they did thereby commit an offence punishable under section 357 read with section 32 of the Penal Code.

2. At the time and place aforesaid and in the course of the same transaction that the 1st accused together with the 2nd and the 3rd accused constituted a gang and whilst being a member of such gang, the 1st accused did commit rape on the said Rita Joan Manoharan or that he did aid and abet the 2nd and/or 3rd accused to commit rape on the said Rita Joan Manoharan and that he did thereby commit gang rape, an offence punishable under section 364(2) of the Penal Code, as amended by Act, No.22 of 1995.

3. At the time and place aforesaid and in the course of the same transaction the 2nd accused together with the 1st and 3rd accused constituted a gang and whilst being a member of such gang, the 2nd accused did commit rape on the said Rita Joan Manoharan or that he did aid and abet the 1st and/or 3rd accused to commit rape on the said Rita Joan Manoharan and that he did thereby commit gang rape, an offence punishable under section 364(2) of the Penal Code, as amended by Act, No. 22 of 1995.

4. At the time and place aforesaid and in the course of the same transaction that the 3rd accused together with the 1st and 2nd accused constituted a gang and whilst being a member of such gang, the 3rd accused did commit rape on the said Rita Joan Manoharan or that he did aid and abet the 1st and/or 2nd accused to commit rape on the said Rita Joan Manoharan and that he did thereby commit gang rape, an offence punishable under section 364(2) of the Penal Code, as amended by Act, No. 22 of 1995.

5. At the time and place aforesaid and in the course of the same transaction set out in count I above, the said accused did cause the death of Rita Joan Manoharan and did thereby commit an offence punishable under 296 read with section 32 of the Penal Code.
6. At the time and place aforesaid and in the course of the said same transaction the said accused did commit robbery of a Chain worth Rs.25,000/-, a pair of gold bangles worth Rs.15,000/- and a ring worth Rs.10,000/-, the property in the possession of the said Rita Joan Manoharan and that they did thereby commit an offence punishable under section 380 read with section 32 of the Penal Code.- 50 The deceased Rita Joan, an Indian citizen who was living in Bombay married Jude Mohan Sunanthiran Manoharan, a Marine Engineer from Sri Lanka, on 12.9.1998 at St. Michael’s Church, Maniff, India. The couple came to Sri Lanka soon thereafter on 20.9.1998. She lived with her husband at the residence of her father-in-law, a retired Senior Superintendent of Police, at Crow Island, Modera.

Crow Island was approximately 60 acres in extent extending on the north to the estuary of the Kelani river. On the eastern side was 60 a mangrove jungle about 16 acres in extent. This area had large bushes with an extensive growth of creepers. The creepers provided a canopy covering the surface preventing the fall of sunlight and thus the area was in total darkness. A waterway extending from the river ran through the parts of the jungle on the eastern side which were marshy and covered with an intense growth of weeds and water hyacinth. A sketch of the area (P12a) was plotted by Mr. S. M. W. Fernando, Deputy Surveyor General, based on aerial photographs previously taken and on data compiled by the Surveyor General’s Department and the sketch ‘P12’ made by Chief Inspector Dehideniya in the course of his investigation. On the evening of 11.10.1998, at about 6.15 p.m. Rita Joan went with her husband for a walk towards the estuary of the Kelani river. Having spent about 10 to 15 minutes there, they were returning home along a winding road by the river. They ate some gram bought from a gram vendor whom they had met on the way back.

When they had come about 200 to 300 meters from the estuary, they observed three persons coming towards them from the opposite direction. The tallest of them was on one side. The shortest of them was in the centre and the other person who was also tall was 80 a few steps behind them. The evidence of the husband of the deceased Jude Manoharan was that the tallest person had long hair which was tied as a ‘pony tail’. He was dressed in a blue T-shirt with two white stripes on it and was wearing a pair of blue denim trousers. He had not seen that person prior to that day. He was the 1st accused. The other person who was walking with the 1st accused was dressed in a black T-shirt and a pair of black shorts. He was the 2nd accused. The third person who was behind the 1st and 2nd accused was dressed in a light mauve ‘V neck T-shirt and was wearing a pair of light blue 90 denim trousers. He was the 3rd accused. Manoharan identified these three persons as the accused above named at an identification parade held on 27.10.1998.
As the three accused were passing them, the 3rd accused held his wife’s hand and tried to pull her. He managed to drag his wife towards him and asked the 3rd accused as to what he was doing. The 3rd accused abused him in obscene language and all three accused proceeded a distance of about 21/2 yards. All of a sudden the 3rd accused started running towards them followed by the 1st and 2nd accused. As they came towards them he asked his wife to 100 run away. Before she could run away, the 3rd accused held him by his T-shirt while the 2nd accused held him by his neck. The 1st accused went behind his wife and grabbed her saying that he was armed with a pistol. The 3rd accused kicked him on his abdomen and when he was trying to extricate himself from the clutches of the 2nd accused, the white T-shirt that he was wearing came off and his pair of spectacles fell on the ground. While the 2nd accused held the witness by his neck, the 3rd accused came towards him to assault him. He kicked the 3rd accused and dealt a blow towards the genitals of the 2nd accused. Both he and the 2nd accused fell 110 down. At that time he had heard his wife shouting out his name and calling for his assistance. When he and the 2nd accused were fall-en down, the 2nd accused bit him just below the left nipple. This resulted in an injury which was later identified by the Medical Officer as a bite mark. He dealt a blow on the face of the 2nd accused. Then the 3rd accused came towards him and attempted to trample him. At that time too he heard his wife calling out his name. He did not hear the cries of his wife thereafter.

The 2nd accused had also attempted to strangle him with a silver coloured chain. He shouted out to his wife and there was no response from her. As he was unable to continue to fight with these persons, he decided to escape and to run away to seek assistance. While he was running towards his house he met a neighbour of his father named Balakrishnan. He informed him of the incident. Balakrishnan advised him to run to his house and inform his father and seek assistance. He then ran home and having informed his father as to what had taken place, he returned in the direction of the place where the incident had taken place followed by 10 to 15 persons from the neighbourhood. A short while later, a team of police officers together with some army personnel came towards the 130 place where the incident had taken place on motor cycles and in jeeps. They began a search for his wife and the three accused. It was dark at the time and the area was covered by shrub jungle, creepers and huge trees. That evening all attempts to find his wife were unsuccessful. The police informed him that they had found his T-shirt and a pair of slippers that belonged to his wife. The search for his wife was given up at about 11 p.m. that night. The following morning too police officers, army personnel and the neighbours made a search in the jungle and the marshy land for his wife and the accused but were unsuccessful in locating
them. He saw the naked body of his wife at about 2 p.m. on 13.10.1998, immersed in the waterway filled with water hyacinth plants, behind the Nara Institute building at Crow Island. The police took the body out of the water and at that time, he observed that the items of jewellery that she was wearing at the time she was abducted were missing, except for the pair of ‘gypsy’ ear-rings on her ears. The evidence of Jude Manoharan was that at the time he went for a stroll with his wife towards the estuary of the Kelani river on the evening of 11.10.1998, he was dressed in a white T-shirt and a mauve coloured pair of shorts. He wore a pair of slippers. His wife was dressed in a bluish pair of denim trousers and a light green shirt which could be unbuttoned from the front. She was wearing a pair of ‘gypsy’ ear-rings and ‘thali’, also known as a ‘mangala suthra’, which was tied by him on the day of their wedding, a pair of gold bangles, a wedding ring, a diamond ring and a pair of ear-studs which had the shape of a Bo leaf, and a pendant attached to the ‘thali’, which had the initials K.D.M. and the number 916 engraved on it. The pair of bangles had a design depicting the number 8 with a design of flowers at the centre. She was also wearing a white coloured Indian brassiere and grey coloured under-wear, purchased in Singapore, with the trade name ‘Marks & Spencer’ on it. At the time the body was recovered, none of the above items of jewellery and clothing were found on her body, except for the pair of ‘gypsy’ ear-rings.

Dr. Vidanapathirana, Assistant Judicial Medical Officer, visited the Crow Island on 13.10.1998, accompanied by officers of the Modera Police and had observed the body of the deceased Rita Joan Manoharan lying in the waterway covered with water hyacinth plants. The body was naked and lay face downwards. The body was taken out of the water and taken to the JMO’s Office in Colombo, where on the following day, on 14.10.1998, the post-mortem examination was held. The body was identified as being that of Rita Joan by her husband Jude Manoharan and his brother. At the time of the post-mortem examination, the body was found to be putrefied and the nails along with the skin had peeled off as the condition known as “glove and stockings” had set in. The following injuries on the body of the deceased have been set out in the post-mortem examination report:

1. Multiple parallel lacerations on the face.
2. Multiple parallel lacerations over the left nipple.
3. Multiple abrasions over the left scapular area, 2” x 2”, involving the dermis with criss-cross patterns.
4. Multiple parallel abrasions over right scapular area 2” x 1”, involving the dermis.
5. Multiple criss-cross abrasions over the left buttock area 2” x 1” involving the dermis.

6. Multiple post mortem chlorophyll stains, on the back of the chest, abdomen and buttocks in criss-cross patterns involving only the epidermis. These marks were lost when removing the epidermis at autopsy. 190

7. Multiple abrasions over the back of the left ankle 2” x 1” involving the dermis.

8. Ligature (creeper) around the neck 39 cm long below the thyroid cartilage running over the hair on the back side. The knot was on the back of the right side of the neck, one end was 25 cm and the other end 111 cm.

The ligature was removed by cutting it a few cm to the right of the knot. Out of the injuries set out above, the 1st and 2nd injuries were post-mortem injuries caused by animal bites. The other injuries were all ante-mortem. The mark of the ligature was 2 cm in depth, and 1 cm thick and of a length of 25 cm, running horizontal around the neck pairing at the back of the neck, due to the hair. There was no underlying hemorrhage of the skin or muscles. There were no laryngeal cartilage fractures. The thyroid gland was putrefied. The carotid arteries were normal. There were no fractures of the cervical vertebrae. On an examination of the urinary and sexual area of the body, the Assistant Judicial Medical Officer found that the area was moderately putrefied. He found fibrosis of the hymen at the 5 and 210 7o’clock positions. There was a contusion on the right labia majora on the inner aspect 1 cm.x 1 cm. There was a vaginal contusion of the right side of the posterior wall 1 cm.x 1 cm, 2 cm above the hymen. The cervix and the uterus were normal. There was contusion of the posterior wall of the anus 1 cm.x 1 cm and 2 cm above the anal verge. Upon a consideration of these injuries, the evidence of Dr. Vidanapathirana was that in his opinion the deceased had been subjected to intra vaginal and anal intercourse by more persons than one.

The cause of death was due to strangulation of the neck by a 220 ligature. His considered view was that death had taken place 36 to 40 hours prior to the post-mortem examination, between 6 pm and 11 pm on 11.10.1998. In fixing the probable time of death he had taken into account the presence of partly digested food in the stomach identified as gram and had formed the view that death had taken place within one hour of its consumption. The post-mortem examination report was produced at the trial marked ‘P18’. Dr. Vidanapathirana also examined the three accused. He examined the 1st accused on 14.10.1998 at 1.30 p.m. He has listed 5 injuries found on him in the medico-legal report ‘P21’. (i) 4”x2” multiple linear criss-cross
abrasions over the left shin. (ii) 4”x2” multiple linear criss-cross abrasions over the right shin. (iii) 1/2”x1/2” contusion on the upper lip. (iv) 1”x1” contusion on the right wrist. (v) 1/2”x1/2” contusion on the left wrist. He examined the 2nd accused at 12.55 pm on 13.10.1998. He had the following injuries as set out in the medico-legal report ‘P20’. (i) 4”x1” multiple linear criss-cross abrasion over the left knee. (ii) 2” linear abrasion on the left shin. (iii) 4” linear abrasion on the left shin. (iv) 2” linear abrasion on the dorsum of the left foot. (v) 2”x2” multiple linear abrasions on the right knee. (vi) 1/2” linear abrasion over the back of the left hand. (vii) 1” linear abrasion on the back of the right hand.

He examined the 3rd accused on 13.10.1998 at 2.30 p.m. at the JMO’s office on being produced by the Modera Police. He had four injuries as set out in the medico-legal report ‘P19’. (i) 1” linear abrasion over the left knee (ii) 2” linear abrasion over the right knee (iii) 1/2”x1/2” contusion over the right shin (iv) 1/2”x1/2” contusion over the left wrist. Dr. Vidanapathirana expressed the opinion that the injuries found on the legs of all three accused could have been sustained while lying face downward on a rough surface probably in the act of having sexual intercourse and that such injuries could have been sustained between 6.30 p.m. and midnight on 11.10.1998. In the course of his evidence, Dr. Vidanapathirana produced several photographs taken by him at the scene and also some photographs taken by an official photographer which were taken during 260 the post-mortem examination. ‘P17A’ is a photograph taken by him at the scene before the body was taken out of the stream covered with water hyacinth. ‘P17B’ is one which shows the chlorophyll stains on the body of the deceased. Photograph ‘P17C shows the peeling of the skin and the nails described by him as the ‘glove and stocking’ effect. Photograph ‘P17D’ shows the injury in front of the neck caused by the ligature ‘P3’. P17E shows the injury on the back of the neck as a result of the ligature. ‘P17F’ shows the injury caused to the labia majora of the deceased. ‘P17G’ is a photograph showing the injuries on the knee of the 3rd accused. ‘P17H’ is a 270 photograph showing the injuries on the knee of the 3rd accused. ‘P17I shows the injuries with black scabs on the skin of the 1st accused. Jude Manoharan was examined by Dr. H.P. Wijewardena, Assistant Judicial Medical Officer at about 11.20 a.m. on 13.10.1998. He had an injury 20 mm x 3 mm on the left side of the chest about 12 cm below the left nipple with redness around the injury. It was identified as a bite mark. There were abrasions below the ankle on both his legs which could have been caused while running through the scrub jungle. A photograph showing the bite mark was produced at the trial. Chief Inspector Ranjith Dehideniya received the first information regarding the abduction of the deceased Rita Joan Manoharan by way of a telephone call at 6.50 p.m. on 13.10.1998.
11.10.1998. He proceeded to Crow Island which was about 11/2 miles from the police station with a police party and met Jude Manoharan at about 7.05 pm. He questioned him at the scene and made inquiries with regard to the place where his wife was abducted and the direction in which she was taken away. He searched the area with the assistance of other police officers and some villagers who had gathered there. He found a pair of slippers ‘P10’ at the scene which was that of the deceased. Although the police dog was given the scent from the slippers and from the clothing of the deceased obtained from her residence nearby, the search with the police dog was unsuccessful.

The police, villagers and army personnel continued to search the area till about 11 p.m. but it was of no avail. The search continued the next day. Although he and others went into jungle in Crow Island they were unable to trace Rita Joan who was abducted. Upon the receipt of some information in the early hours of the 300 morning on 13.10.1998, he proceeded to St.Andrew’s Lower Road, Modera and took into custody Mahamalage Lakshman Perera on suspicion. Having questioned him, he along with the police party proceeded to the railway quarters in Slave Island and arrested K.Balapuwaduge Basil Mendis, the 2nd accused, at about 6.00 a.m. at the house of one Sunil. Thereafter he proceeded with the party to Kohalwila in Dalugama and arrested the 3rd accused, P.Chaminda Kumara Fernando, at about 6.35 a.m. He returned to the Police Station with the police party and the suspects at about 7 a.m. Although they were on the lookout for the 1st accused on the 13th, they were unable to arrest him. Having recorded the statements of the 2nd and 3rd accused they were separately taken to the spot marked ‘X’ in the sketch and from there each of them pointed out an area marked ‘Y’. Lakshman Perera who was also taken there did not point to any place. Upon a search of the area pointed to by the 2nd and 3rd accused, IP Dehideniya discovered the body of the deceased in the water which was fully covered with water hyacinth plants at point ‘C’ on the sketch ‘P12A’. The body was recovered at about 12 noon on 13.10.1998.

The extracts of the statements made by the 2nd and 3rd accused which led to the discovery of the body were produced at the trial marked ‘P24’ and ‘P25’ respectively under the provisions of section 27 of the Evidence Ordinance. The body was naked and was dumped face downward in the stream covered with water hyacinth plants. After the discovery of the body he notified the Magistrate who arrived at the scene at about 4.15 p.m. and after he made his observations, the body was taken out of the water and was taken to the JMO’s office. The pair of ‘gypsy’ earrings on her ears was produced marked ‘P16’ at the trial and was identified by the husband of the deceased. Inspector Dehideniya also produced 330 a set of 9 photographs marked ‘P1’ which
was taken by him of the body with a ligature round her neck at the scene. SI Udayakumara took the 1st accused-appellant into custody at Hasalaka and produced him at the Modera Police Station at 10.30 a.m. on 14.10.1998. He questioned the 1st accused and after his statement was recorded, he was taken at about 11 a.m. on 14.10.98 in a covered police vehicle to Crow Island. At a place which was 10 to 15 yards from where the body was discovered, he recovered a pair of blue denim trousers, a yellowish blouse and a lady’s underwear with the trade name Marks & Spencer underneath some leaves near a ‘Kottan’ tree. These items of clothing were identified by Jude Manoharan as the items of clothing that were worn by his wife at the time of the abduction and were produced marked ‘P7’, ‘P8’ & ‘P9’. An extract of the statement leading to the discovery of these items was produced marked ‘P27’ by IP Udayakumara.

The 1st accused was examined by the Judicial Medical Officer at 1.30 p.m. and produced thereafter at the Colombo Magistrate’s Court and was remanded till 27.10.1998. The wife of the 1st accused handed over a pair of bangles to IP Dehideniya at the Police Station on 15.10.1998. It was produced marked ‘P15’. Inspector Chandrathilake, the Officer-in-Charge at the Modera Police Station testified at the trial that after the identification parade was held, having obtained an order from Court, he questioned the 2nd accused in the presence of prison officers. On the following day on 28.10.1998, he searched the house of the 2nd accused situated at 173/46, Modera Street and recovered a gold chain with a pendant with the mark K.D.M. and the number 916 engraved on it. It had been concealed under a plank on the roof of the said house. He produced the chain marked ‘P15’. It was identified by Jude Manoharan as the ‘thali’ which was worn by the deceased at the time of her abduction.

After the case for the prosecution was closed, an application was made by counsel who appeared for the 1st and 2nd accused-appellants in terms of section 199(4) of the Code of Criminal Procedure Act for the Court to call a witness named in the list of witnesses in the indictment but not called by the prosecution.

The Court having examined the statement made by the said witness Lakshman Perera refused the application on the basis that the evidence of the witness, if called by Court, would be prejudicial to the 370 accused. However, an order was made permitting the accused to call the said witness as a witness for the defence if they so desired. Lakshman Perera was not called as a witness for the defence. Thereafter, the three accused-appellants made statements from the dock denying the charges against them and stated that they have been falsely implicated. At the conclusion of the trial, the 1st accused was found guilty and was convicted on counts 1, 2, 5 and 6. The 2nd accused was found guilty and convicted on counts 1, 3, 5 and 6. The 3rd accused was found
Sexual Assault and Rape
guilty and was convicted on counts 1, 4, and 5. The 1st accused was sentenced on count 1, to 12 yrs R.I; on count 2, to 20 yrs R.I; and on count 6, to 10 yrs R.I. The sentences were ordered to run consecutively. The death sentence was passed on Court 5. The 2nd accused was sentenced on count 1, to 12 Yrs R.I; on count 3, to 20 Yrs R.I; and on count 6, to 10 Yrs R.I. The sentences were ordered to run consecutively. The death sentence was passed on Count 5. The 3rd accused was sentenced on count 1, to 12 Yrs R.I; and on count 4, to 20 Yrs R.I; The sentences were ordered to run consecutively. The death sentence was passed on Count 5. This appeal is by all three accused-appellants against the said convictions and sentences. Learned Counsel for the appellants submitted, firstly, that the learned Judges of the High Court at Bar erred in law by failing to deal with the non-compliance at the trial of the mandatory provisions of section 256(2) of the Code of Criminal Procedure Act. It was submitted that compliance with this provision is necessary in the interests of justice and that this section is not meant to serve the interests of a suspect accepting a pardon.

The words of the section are that every person accepting a pardon shall be examined as a witness and the failure to do so would vitiate the trial and conviction. Mahamalage Lakshman Perera who accepted a conditional pardon granted to him by the Attorney-General under section 256(1) of the Code of Criminal Procedure Act was not examined as a witness at the trial. The provisions of section 256 of the Code are as follows: (1) In the case of any offence triable exclusively by the High Court the Magistrate inquiring into the offence may, after having obtained the Attorney-General’s authority so to do, or the Attorney-General himself may, with the view of obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence under inquiry, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence and to every other person concerned whether as principal or abettor in the commission thereof. (2) Every person accepting a tender under this section shall be examined as a witness in the case. Such person if not on bail shall be detained in custody until the termination of the trial. The object of tendering a pardon is to obtain the evidence of an accomplice, a person supposed to have been directly or indirectly concerned in or privy to an offence. "Granting a pardon and examining the evidence of an approver is at best a necessary evil, in view of both the approver’s escape from punishment, and of the natural suspicion with which any court would look upon the evidence in the best circumstances. The secrecy of the crime and the scarcity of clues, sometimes necessitates this course, solely for the apprehension of other offenders, the recovery of incriminating objects, and production of evidence..."
otherwise unobtainable. These can be safely considered to be the only grounds on which a pardon may be granted. The object of tendering a pardon is to obtain the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which the section applies" - Sohoni on The Code of Criminal Procedure 1973, 18th Edition, Volume IV at page 3192. The Attorney-General can tender a pardon only to a person supposed to have been directly or indirectly concerned in or privy to the 440 offence under inquiry with the view of obtaining his evidence to prevent the escape of other offenders from punishment in grave cases for lack of evidence.

The considerations which should guide the Attorney-General in granting or withholding of the pardon has been stated as follows by R.F.Dias in “A Commentary on the Ceylon Criminal Procedure Code”, vol. II, pg.727, paragraph 5. “Before tendering the pardon the Attorney-General shall be satisfied that the accused has in fact committed the crime charged in conjunction with others, or that he has some active part towards its commission; in other words he should be satisfied that the accused is really an accomplice. A mere suspicion that he may have committed the offence is insufficient.

The police inquiry notes, the recorded evidence and statements of the accused should all be placed before him to decide whether or not there is sufficient evidence, apart from the testimony which the accused can give, to bring about the conviction of the other accused. If such evidence exists, he will, as a rule, refuse to tender a pardon ... He should consider the degree of complicity of the accomplice.” It would therefore be appropriate to consider whether Mahamalage Lakshman Perera could have in the first instance been granted a pardon. He was the first person to have been arrested on suspicion and was produced before a medical officer. He did not have any injuries. His statement which was recorded did not show any complicity on his part in any of the offences. He was not identified at the identification parade by the eye witness Jude Manoharan. No productions relevant to the case were recovered consequent to his statement being recorded.

He was taken to the alleged scene of the offence but he, unlike the 2nd and 3rd accused was unable to point to any spot that could have helped the police 470 in its investigation. A close scrutiny of his statement clearly reveals that he cannot be regarded as a person who could have been directly or indirectly concerned in or privy to the offence under inquiry. A pardon may not be granted in instances where there is no evidence available to connect an accused with the crime. An examination of the statement of Lakshman Perera shows that at best he was a witness to the abduction of the deceased by the three appellants and was certainly not an accomplice. Dias in his Commentary on
the Ceylon Criminal Procedure Code, Vol.11 at Pg.728 observes 480 that, “A pardon would be illegally tendered if it is made to a person who is not an accomplice and who is no way responsible for the crime alleged.” In such a case the evidence of a suspect to whom a pardon has been illegally tendered would neither be admissible nor could he be dealt with for any breach of the conditions of the pardon. The unambiguous words in section 256 of the Code of Criminal Procedure Act and the authorities cited above make it abundantly clear that a pardon may be granted to a person supposed to have been directly or indirectly concerned in or privy to the offence; in other words, to a guilty associate of a crime, meaning an accomplice. It may be so granted only in instances where there is no other evidence available to connect the accused with the crime. In the instant case the direct evidence of the husband of the deceased was available in regard to the abduction of his wife by the three accused. Having regard to the factors which should guide the Attorney-General in granting or withholding a pardon, Lakshman Perera could not, in my view, have been tendered a pardon in terms of the provisions of section 256(1) of the Code of Criminal Procedure Act. The pardon so granted has, in the circumstances, 500 been wrongly granted by the Attorney-General.

Counsel for the appellants submitted, however, that even if the pardon has been wrongly granted, section 256(2) mandates that the person accepting the pardon should be examined as a witness. He submitted that the Judges erred in law in refusing the application made by the defence for Lakshman Perera, who was a witness listed in the indictment, to be called as a witness of Court in terms of provisions of section 199(4) of the Code of Criminal Procedure Act.

The Court having considered the said application made by the 510 defence at the trial and having perused the statement of Lakshman Perera took the view that it would have been prejudicial to the accused if he was called as a witness of Court and left it open to the defence to call him as their witness. The refusal of the application by the defence to call Lakshman Perera as a witness of Court in terms of section 199(4) of the Code of Criminal Procedure Act had not occasioned a miscarriage of justice. He was not a witness whose evidence was necessary to unfold the narrative and no presumption adverse to the prosecution case could be drawn by its failure to call Lakshman Perera. As G.P.A.Silva, S.P.J. observed in Walimunige John v The State(1), “The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution, and the failure to call such witness constitutes a vital missing link in the prosecution case, and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness’ evidence is cumulative of the other and would be a
mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114(f) of the Evidence Ordinance."

The next submission of Counsel was that the Judges erred in law by attaching a probative value to the discovery of the body consequent to statements made by the 2nd and 3rd accused as they were inadmissible under section 27 of the Evidence Ordinance and that such information was not the cause of the discovery. In any event, it was submitted, that even if such statements were admissible, the Judges have erred in attributing to the accused more than “the knowledge of the whereabouts” of the body. Counsel submitted that in terms of section 27 of the Evidence Ordinance, the information must be such as has caused the discovery of a fact. This follows from the words “thereby discovered”; the fact must therefore be the consequence and the information the cause for the discovery. The connection must be that of cause and effect. The evidence of IP Dehideniya was that the 2nd and 3rd accused separately pointed towards an area which was marked “Y” on the sketch and that the body of the deceased was recovered from the point “C” in the canal and that this point was near this area. Learned Counsel submitted that as the spot from which the body was recovered was not within the area “Y”, that the relevant statements could not have been the cause for the discovery. The extensive search for the body by the police, army personnel and the villagers on the night of the 11th and the 12th was not successful. However, after their statements were recorded, the 2nd and 3rd accused were taken to the vicinity of the mangrove swamp and both accused separately pointed to the area marked “Y”. The body was recovered from a point in front of the area “Y” in the sketch. Shortly thereafter and in consequence of such information the body which was initially not visible as it lay in the water covered with a thick growth of water hyacinth was recovered.

The medical evidence that there were chlorophyll stains on the body confirms this fact. In the circumstances, the submission that the body could have been discovered consequent to information from other sources including Lakshman Perera cannot be accepted. Considering that the area pointed to by the accused was marshy and in their words ‘muddy’ and a ‘muddy hole’, the exact location where the body lay could not have been pointed to, even by them, with pinpoint accuracy. I am of the view that the prosecution has established that the recovery of the body was the consequence and that the information from the 2nd and 3rd accused was the cause for such recovery. The requirement of the nexus has been fulfilled and thus the prosecution has established that the two accused who pointed to the area marked ‘Y’ had knowledge of the place where the body could be found.
In this connection, the learned Solicitor General has appropriately referred to the observations made by Fernando, J. when he considered this principle in *Chuin Pong Shiek v The Attorney General* (2) In this case it was sought to be argued that the discovery of six screws in the pocket of the jacket was improperly admitted contrary to section 27 of the Evidence Ordinance because that part of the petitioner’s statement did not refer to the contents of the bag. Fernando, J. observed as follows: “The Court of Appeal rejected that submission, and I would venture to summarize its reasoning as follows. The bag was the ‘fact’ discovered; it was deposed to as having been discovered in consequence of the petitioner’s statement; so much of that statement as related distinctly to the bag - the ‘fact’ discovered - could therefore be proved. The ‘fact’ discovered was the bag including its contents. Accordingly as held in *R v Krishnapillai and Etn Singho v The Queen*, the petitioner’s statement established that he had knowledge of the place at which was found the bag containing the jacket and the screws. The petitioner failed to explain how he had acquired that knowledge. In my view, no question of law arises in relation to the interpretation or application of section 27(1).”

Learned Counsel for the appellant submitted while dealing with the evidence regarding the discovery of the body, that the judges of the High Court at Bar erred in law in attributing more than the knowledge of its whereabouts. He referred in particular to the finding that the accused were present during the disposal of the body and that they were aware of her death. In this connection the observations of the Privy Council in *Pulukuri Kottaya v Emperor*, (3) has an important bearing. It was held that “it is fallacious to treat the ‘fact discovered’ within the section as equivalent to the object produced. The ‘fact discovered’ embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact”. The finding of the High Court at Bar was not unreasonable considering the other items of evidence led in this regard.

The information provided by the 2nd and 3rd accused which led to the discovery of the body confirmed their knowledge of the whereabouts of the body which was not clearly visible and was found submerged in water covered with a thick growth of water hyacinth. The three accused were identified by the husband as the only persons who forcibly took the deceased away shortly prior to her death. The finding of the Judges arrived at on the basis of the cumulative effect of the entirety of the evidence besides the evidence relating to the discovery of the body is not unreasonable and is justified. The submissions of counsel in regard to the discovery of the body cannot therefore be accepted. The next ground of appeal, in regard to the conviction for murder, was that the available evidence did not support an irresistible
inference that all three accused entertained a common murderous intention at the time of committing the offence. Counsel for the appellants submitted that the original plan of the accused was abduction apparently for the purpose only of illicit sexual intercourse; that there was no evidence of sharing of a common intention; that there was no prior preparation as the creeper used as a ligature was readily available at the scene and that the medical evidence did not point to the use of force in its application or the involvement of more than one individual to effect the strangulation. Counsel also drew attention to the evidence that all the items of jewellery worn by the deceased at the time of the abduction were recovered only from the 2nd and 3rd accused. They did not abscond, although it was only the 1st accused who was absent from his usual place of residence and was arrested the day after the other two accused were taken into custody. On the other hand, it was submitted by the Solicitor General that the following items of evidence have to be taken into account in this regard.

The deceased was forcibly abducted with the active participation of all three accused after assaulting her husband. She was raising cries at that time. Shortly thereafter police and army officers together with the villagers were making a search of the area with the aid of lights. If the deceased had raised cries or was permitted to escape there was a strong likelihood of her abductors being identified and arrested. In the circumstances, realising the predicament they were in, silencing her effectively and killing her would presumably have been the only means for all the accused to escape detection. There was reliable evidence of the abduction which has not been challenged and of the identity of the three accused had been established. The failure of the accused to offer an explanation was a factor that the judges could reasonably have taken into consideration in arriving at their finding in regard to a common murderous intention. It was held in Richard v The State, (4) that the cumulative effect of all the items of circumstantial evidence against one of the appellants was sufficient, in the absence of evidence to explain his presence at the scene, to establish that he acted in furtherance of a common murderous intention with the 660 other accused to kill the deceased.

The question whether a particular set of circumstances establish that the accused acted in furtherance of a common intention is a question of fact and if the view of the trial Court cannot be said to be unreasonable, it is not the function of an appellate court to interfere. In Rishideo v State of Uttar Pradesh, (5) the Supreme Court of India has expressed this principle as follows: “After all the existence of a common intention said to have been shared by the accused person is, on an ultimate analysis, a question of fact. We are not of opinion that the inference 670 of fact drawn by the Sessions Judge appearing from the facts and circumstances appearing on the record of
this case and which was accepted by the High Court was improper or that these facts and circumstances were capable of an innocent explanation.” In this instance it was essential that the accused should have either given or offered evidence to explain their conduct subsequent to the abduction of the deceased. Their failure to do so did attract a presumption adverse to them. I am therefore of the view that the finding of the judges that the accused were actuated by a common murderous intention is justified and cannot be said to be unreasonable. While urging further that the judges of the High Court at Bar erred in law by attributing guilt on the basis that the accused failed to offer any explanation in regard to the prima facie evidence led against them, it was contended that the burden did lie on the prosecution to prove its case beyond reasonable doubt, independent of any explanation required to be offered by the accused.

The rule regarding circumstantial evidence and its effect, if not explained by the accused, has been stated by Chief Justice Shaw in the 690 American Case of Commonwealth v Webster(6) in the following words which have been referred to in Seetin v The Queen(7). “Where probable proof is brought of a statement of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered though not alone entitled to much weight, because the burden of proof lies on the accused to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they exist, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charge.”

E.R.S.R. Coomaraswamy on the Law of Evidence, Vol.1 at page 21 has observed in this regard as follows: “The recent tendency of the Supreme Court of Sri Lanka also appears to be to expect an explanation of telling circumstances, though the failure that is commented on is the failure 710 of the accused to offer evidence and not to give evidence himself. A party’s failure to explain damning facts cannot convert insufficient into prima facie evidence, but it may cause prima facie evidence to become presumptive. Whether prima facie evidence will be converted into presumptive evidence by the absence of an explanation depends on the strength of the evidence and the operation of such rules as that requiring a specially high standard of proof on a criminal charge.” The items of evidence relied upon by the prosecution were as follows: 720

a) The three accused were identified as the only persons who abducted the deceased at about 6.30 pm on 11th October ’98. This aspect of the prosecution case has not been disputed.
b) The death had occurred within one hour, close to the place of the abduction.

c) The medical evidence is that the deceased had been subjected to vaginal and anal intercourse by more persons than one after the abduction.

d) The injuries found on the knees and shin of each of the 730 accused and the opinion of the medical evidence suggestive of the circumstances in which they could have been sustained.

e) The body of the deceased was found submerged in water covered with an extensive growth of water hyacinth and was discovered only upon the information provided separately by the 2nd and 3rd accused. This attributed knowledge to them of the place where the body of the deceased whom they had abducted could be found.

f) The clothes worn by the deceased were found hidden in the 740 mangrove swamp and were discovered upon information provided by the 1st accused.

g) The 1st and 2nd accused had access to the jewellery worn by the deceased at the time of her abduction. The cumulative effect of the aforesaid items of evidence was that a strong prima facie case had been made out in regard to the culpability of the accused, in relation to the offences of abduction, rape and murder having been committed in the course of the same transaction.

The place from where the body was recovered and the place at which the items of clothing worn by the deceased lay hidden were within the knowledge of the accused. The accused had been in possession of the jewellery worn by the deceased at the time of her abduction. The failure of the accused to give or offer evidence in respect of these matters justify the application of the following dictum of Lord Ellenborough in R v Lord Cochrane and others:

“No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from he conviction that the evidence so suppressed or not adduced would operate adversely to his interest.” However, learned counsel for the appellants contended that the dictum of Lord Ellenborough has been misapplied in this case which involved more than one offence. Learned Solicitor General submitted in reply that the several offences in the indictment were committed in the course of the same transaction and that the dic-tum which is not a principle of evidence but a rule of logic applies only when the prosecution has established a strong
prima facie case against the accused. I am of the view that there is no rational basis for a selective application of the dictum and it is to be noted that it has been applied previously in cases where the accused have been convicted of more offences than one. For the reasons set out above, the appellants cannot succeed on the grounds of appeal relied upon by them. The conviction of each of the accused-appellants is therefore affirmed. At the outset counsel for the appellants submitted correctly that the sentence of imprisonment imposed on all the accused on count 1 of the indictment exceeded the maximum term of imprisonment specified in section 357 of the Penal Code. The sentence of imprisonment imposed on all three accused appellants in respect of Count 1 of the indictment is therefore set aside. In lieu thereof, I impose a sentence of 10 years R.I. on each of the accused-appellants on count 1 of the indictment. Subject to the variation in regard to the sentence only on count 1 as above, the sentences imposed on each of the accused-appellants are affirmed. Considering the heinous nature of the offences committed by the accused-appellants, the order that the sentences of imprisonment should run consecutively is affirmed. Subject to the above, the appeals of the 1st, 2nd and 3rd accused-appellant are dismissed.

Edussuriya, J.
I agree.

Yapa, J.
I agree.

Wigneswaran, J.
I agree.

Jayasinghe, J.
I agree.
Keerthi Bandara
Vs.
Attorney General

Court of Appeal
Jayasuriya, J., De Silva, J.

CA No. 157/96.

HC PANADURA 868/92.

MC HORANA 90666 NS.

03rd, 16th, 18th, 23rd, 24th June, 1998.
07th July, 1999.

Appeal dismissed sentences on count one varied.


Held

(1) If the evidence volunteered by the prosecution witness is accepted as truthful, the identification is not an identification effected in a fleeting glance or a fleeting encounter.

(2) ‘Turnbull Rules’ apply, wherever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken’.

Where the accused asserts and alleges that it is not a mistake but a frame up (like in this case) no useful purpose would be served by considering the ‘Turnbull’ guide lines.

(3) The Best Evidence Rule would totally exclude the oral evidence of a Police Officer in regard to the contents of a matter which is required by law and which in fact has been reduced to writing to be led after refreshing his mind from the document without the document being marked.

Quare:

‘Do not the provisions of the Criminal Procedure Code expressly provide that the interpretation of a document is a question of law which falls within the exclusive province of the Judge’.

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(4) It is for the Judge to peruse the Information Book in the exercise of his overall control of the said Book and to use it to aid the Court at the inquiry or trial.

(5) There is nothing in S. 157 of the Evidence Ordinance which required that before a corroborating witness deposes to the former statement, the witness to be corroborated must also say in his testimony in court that he had made the former statement to the witness who is corroborating him.

(6) Evidence given by the witness at the trial relating to his identification of the accused at a parade is substantive evidence establishing identity in terms of Section 9 Evidence Ordinance. The proceedings of the identification parade including the evidence given at the parade by the witness would only be admissible to establish consistency on the part of the witness and thereby advance his credibility in terms of S.157 Evidence Ordinance.

Appeal from the Judgment of the High Court of Panadura.

Cases referred to:
2. Rex vs Oakwell (1978) 1 All ER 1223 at 1227
4. K.B. Muttu Banda vs Queen 73 NLR 8 at page 11
5. Queen vs Raymond Rernando 66 NLR 1
7. King vs Coory 28 NLR 83
9. Mt. Misni vs Emperor – AIR (1934)
10. Nazar Singh vs The State – Air (1951) Pepsu 66
11. Queen vs Julis 65 NLR 505
12. Rex vs Christie 10 Cr. Appl. Reports 141 at 159
16. C.P. Fernando vs Union Territory of Goa (1977) SCC (Crim) 154
Ranjit Abeysuriya P.C., with Priyadharshani Dias and M. Thalgodapitiya for the Accused Appellant.


Cur. adv. vult.
August 31, 1999

Ninian Jayasuriya, J.

The accused appellant who was an Inspector of Police attached to the Horana Police Station was indicted on five counts before the High Court of Panadura and at the conclusion of the trial the High Court Judge acquitted the accused on counts one, four and five of the indictment and arrived at an adverse finding against the accused and convicted him on counts two and three of the indictment.

On count two, the accused was charged with having at Horana on the 7th of April 1990, committed rape on Wilegoda Liyanage Lalitha Ranjini and thereby committed an offence punishable in terms of section 364 of the Penal code.

On count three, the accused was charged with having at the same place and time and in the course of the same transaction with having intentionally abetted persons unknown to the prosecution to commit the offence of rape on the said Wilegoda Liyanage Lalitha Ranjini and that he thereby committed an offence punishable in terms of Section 102 read with Section 364 of the Penal Code.

The learned trial Judge on the 14th of August 1996 has sentenced the accused to a term of twelve years rigorous imprisonment on count two of the indictment and to a term of five years rigorous imprisonment on count three of the indictment.

The following witnesses have given evidence for the prosecution and defence:

The virtual complainant and prosecutrix Wilegoda Liyanage Lalitha Ranjani, the father of the prosecutrix Wilegoda Liyanage Robies Singho, the elder sister of the prosecutrix Wilegoda Liyanage Sunethra, the mother of the prosecutrix Karadana Gamage Somawathie, M.M. Tudor Dias the Assistant Superintendent of Police, Horana, the Chief Inspector; hearath Mudiyanaselge Dharamasena, Sub-Inspector of Police Don Ekmon Wijesiriwardena who was attached to the Horana Police station Police Sergeant V. de Silva Jayasinghe P.S. 9422, Court Mudiliyar M.M. Wijeweera Peiris, Duggath Mudiyanaselge Tillekeratne, Police Sergeant 24560 and the boarding master of the accused appellant Danja Amarasena Walatara and the accused appellant.

At the argument of this appeal learned President’s Counsel strenuously contended that the Learned High Court Judge had culpably failed to consider
and apply the guide lines laid down in Regina vs Turnbull in regard to the issue of visual identification testified to by the prosecution witnesses. The learned President Counsel argued that though the alleged identification was not in a fleeting glance, that the identification in the instant case was in difficult conditions and circumstances and therefore the consideration and application of the guide lines spelt out in the Turnbull case was of paramount importance. He referred to the guidelines italicized by him as BC and G and submitted that there is no finding in the judgment of the trial judge as to how long witnesses did have the accused under observation and that the evidence led in regard to the recognition as opposed to identification was suspect and that a longer observation by the witnesses was necessitated in the instant case because the identification was effected in difficult circumstances and conditions. I have spot–lighted the thrust of the contention of learned President Counsel prior to referring to the basic facts volunteered by the witnesses at the trial against the accused.

The main prosecution witness who lived in the residential house of Robies Singho had testified to the following effect:

“On the 7th April 1990 at about 3.20 a.m. in the early hours of the morning there was thumping on the front door of Robie’s residential house shouting out we are from the Police, open the door”.

Robies Singho’s wife, witness Somawathie was awakened by this knock at the door and she had woken up her three daughters who were sleeping in the same room as herself and she had thereafter lit a Kerosene oil bottle lamp and had left it on a teapoy in the drawing room and had thereafter taken a torch into her hand and had opened the from door of her house, when three persons entered her house and inquired about her husband Robies Singho and when she replied that he was not in the house on of such persons had stated that on the previous occasion too you have lied to us and today also you are uttering a palpable falsehood.

Thereafter the Police party had searched for Robies singho by proceeding to all parts of the house and one person in this group was identified as a person who came previously to this house on the 30th March 1990 dressed in uniform. On the instant occasion he had a gun flung over his shoulder and it is alleged that this individual had grabbed her second daughter Ranjini – the prosecutrix – by her hand and by her frock and had dragged her towards the kitchen. Witness Ranjini has stated thereafter that she was taken through the kitchen towards the building which housed the chimney and that she was placed against the wall by the person who dragged her and that she had been subjected to sexual intercourse against her will, whilst she was positioned against the wall and while she was in a standing position. Thereafter, she has asserted that this
person who had a moustache and who on entry had a gun flung over his shoulder had after subjecting her to sexual intercourse, handed her to the other members of the party, and two members of the party had thereafter placed her on a concrete slab and two of them had proceeded to have sexual intercourse with her against her will.

The mother of the prosecutrix Somawathie, and the elder sister of the prosecutrix, Sunethra, have stated that the entry of the Police into their house was on the 7th of April 1990 at 3.20 a.m. in the morning and the Police party had spent about 20 minutes in searching and looking for Robies Singho by proceeding to all parts of the house and they had spent sometime in smashing some glasses fixed to the window and opening certain cupboards and removing some articles and that thereafter the accused had grabbed Ranjini and taken her towards the kitchen.

Witness Sunethra stated that another member of this Police party had got hold of her, but she had shouted and struggled and had been successful in releasing herself from his hold and thereafter both she and her mother had run into jungle in the premises and hid themselves in the thicket. Thereafter Somawathie and Sunethra had come out of their hiding places on hearing the shouts of Ranjini after the Police party had left the premises at about 4.30 a.m. in the morning.

Witness Sunethra at page 95 of the record refers to the actions of the Police party in looking for her father Robies Singho by proceeding to all part’s of the house. There is also evidence in regard to the damaging of certain window glasses with the aid of the gun and the removing of some articles from certain cupboards in the house.

Witness Sunethra at page 92 of the record also testified to the search for her father and the examination fo the rooms in the compound. Witness Somawathie at pages 60, 62 and 66 of the record states that after the Police party entered the house at 3.20 a.m. in the morning that they were observing what was happening inside the house for about 20 minutes and thereafter Ranjini was dragged away to the kitchen that they had proceeded towards the jungle and hid in the thicket and that they stayed in the thicket for about 15 to 20 minutes till hearing the exhortations of Ranjini inviting them to come back; the evidence in the case is that the Police officers left the premises at about 4.15 – 4.30 a.m.

In these attendant circumstances the question arises whether the evidence volunteered by these witnesses refer to identification in a fleeting glance or a fleeting encounter or not. We hold that if the aforesaid evidence of the prosecution witnesses is accepted as truthful, the identification in the instant case is not an identification effected in a fleeting glance or a fleeing encounter. In Rex vs Oakwell at 1227 Lord Widgery, CJ in dealing with a similar
contention that the directions given in Rex vs Turnbull (supra) were not applied to the identification issue which is alleged to have arisen in that case, succinctly, observed:

“This is not the sort of identity problem which Rex vs Turnbull is really intended to deal with. Rex vs Turbull is primarily intended to deal with the ghastly risk run in cases of fleeting encounters. This certainly was not that kind of case”.

We now proceed to consider whether the identification in the instant case having regard to the testimony of the prosecution witnesses has been accomplished in difficult conditions and circumstances. Witnesses have been accomplished in difficult conditions and circumstances. Witnesses have testified to the effect that they both recognized the accused in regard to what took place in Robies’s house on the 30th March 1990 and on the 7th of April 1990. Their evidence is to the effect that when the Police party came on the 30th of March 1990 the accused was in uniform and therefore they concluded that the persons who came on the 30th of March 1990 were Police officers. Though the accused wore civil clothing on the 7th of April they had identified him as one of the members of the party who previously visited their house on the 30th of March. The witnesses have given the physical features and a description of the accused referring to his colour and the moustache which he carried. It is a strong point in the prosecution case that when Robies was sent for on the 7th of April 1990 and arrived at his house, the witnesses have narrated to him what had happened in his absence and had specifically stated that members of the Police force attached to the Horana Police have committed these acts. The witnesses have reached this conclusion according to their versions because on the 30th of March this accused was dressed in Police official uniform and they had recognized him on the 7th of April too as being a member of the party that had visited their house on the 30th of March. In view of the narration made by these prosecution witnesses, Robies Singho decided not to proceed to the Horana Police station but proceeded to meet the Assistant Superintendent of Police, Horana to make a contemporaneous complaint against the officers attached to the Horana Police., This is a highly significant fact in this case and the learned trial Judge has specifically referred to this fact and concluded that the conduct of Robies Singho in proceeding to the Assistant Superintendent’s office in Horana instead of proceeding to the Horana Police station to make his complaint; substantiated and advanced in strength the testimony of the prosecution witnesses to the effect that the accused came to their house on the 30th of March 1990 dressed in official uniform and therefore they were able to recognize him on the 7th of April 1990 as his being a member of the Police party that had visited them previously. [vide page 581 – Judgment of the trial Judge]
If the testimony of the prosecution witnesses is true, is this an identification effected under difficult conditions or circumstances? In regard to the light and the opportunity for identification. There is evidence that Somawathie had lit bottle lamp and left it on the teapoy in the drawing room and that she had armed herself with a torch before opening the front door. She has stated that she identified the accused with the aid of the light which shed from the bottle lamp. There is some evidence given by a prosecution witnesses that there was another lamp burning in the bedroom. Somawathie states that she identified the accused with the assistance of the light emanating from the bottle lamp.

Mr. Tudor Dias the Assistant Superintendent of Police who also investigated into the complaint has observed that he saw a bottle lamp which had been upset on the teapoy and that the smell of Kerosene oil was emanating from the surrounding area. This evidence substantiates the evidence of Somawathie and the other prosecution witnesses, in regard to the fact that the bottle lamp was burying and lit at the time of the incident.

According to the testimony of the witnesses, after the Police officer had entered the premises at 3.20 a.m. they had observed their movements in the house for about twenty minutes. One witness has stated that the process of examination of the rooms itself took five to ten minutes on the part of the Police officers.

Somawathie states in her evidence that she ran into the thicket and hid herself after twenty minutes subsequent to the entry of the Police officers into her house. In these circumstances can one legitimately contend that the identification was accomplished in difficult conditions and circumstances? There was no gathering of a multitude of persons in the immediate vicinity soon after the Police officers entered the house. There were only three members of the Police who entered the house and possibly a shadow of another was seen standing outside the house near a window and the other persons present at scene were Somawathie and her three daughters. Hence, the identification was not effected in the midst of a multitude of persons or in a crowd.

In this regard the evidence given by the accused is also highly pertinent and relevant. The accused’s position was that the charges have been fabricated and foisted on him on account of a certain motive, which had been specifically imputed by him. Thus the assertion of the accused in his testimony is that these charges have been falsely and fraudulently fabricated and framed up against him. In view of the persistent assertion of the accused of a frame up and fabrication in regard to the charges levelled against him, the question arises in law whether the consideration and application of the Turnbull guide lines ever arises for consideration in these attendant circumstances.
In Regina vs Curtnel the assertion of the accused in that case was that the identification involving himself was fabricated. His position was not one of mistaken identity but that the identification was fabricated and framed up by the prosecution witnesses. The accused was charged in that case with the offence of robbery and wounding. In view of the defence assertion that identification was fabricated the trial Judge purported to withdraw the issue of mistaken identity from the jury. A complaint on that score was urged at the argument of the appeal. The Court of Appeal observed that this withdrawal would have been a serious and possibly a fatal misdirection if mistaken identity had been an issue at the trial. Nevertheless counsel argued a substantial issue arose in the case on the accuracy of the identification and therefore the trial Judge should have directed the jury in accordance with the Turnbull guidelines, whether or not the identification was asserted by the defence to be fabricated. The Court held that the contention seemed to beg the question in that instant case because there was no substantial issue as to the accuracy of the identification, the sole issue being the veracity of the evidence of identification given by the virtual complainant was mistaken in identifying, the Court of Appeal was of the view that a direction on Turnbull guidelines in those circumstances would only have confused the jury and there was no evidence or an assertion of mistaken identity in that case for the judge to leave the issue to the jury. This decision lays down the principle that where the accused asserts and alleges is not a mistake but a frame up, no useful purpose would be served by considering the Turnbull guidelines. In fact the Turnbull rules are expressly couched to apply in these circumstances only to wit:

“Wherever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken.”

In these circumstances the issue arises whether a consideration and application of the Turnbull guidelines were necessary and whether such an exercise was an incumbent duty on the trial Judge. Our view is that the application of the said guidelines was not warranted having regard to the aforesaid attendant facts, which have been already enumerated in our judgment. But we will assume for purposes of argument that such a consideration was necessary. The learned trial Judge in his judgment has described at length the light which emanated from the bottle lamp placed on the teapoy in the drawing room and has arrived at a finding that there was sufficient light for identification. There was ample evidence recorded before this that after the entry of the Police officers into the house, there had been an examination of the rooms by the Police officers, opening of cupboards and the process of breaking of the windowpanes by using the end of the gun. It was thereafter alleged, that the prosecutrix Ranjini was grabbed and taken through the kitchen into the rear
compound of the house. I have already referred to the times and duration of time referred to by the witnesses. This evidence was prominently before the trial Judge. There was never a gathering or crowding of a multitude of persons, which fact at times renders identification difficult. I have already referred to the paucity of the number of persons present inside the house when the events spoken to by the witnesses are alleged to have taken place. In these circumstances, the identification accomplished in this case is certainly not an identification in a fleeting encounter nor an identification in difficult circumstances.

The fact that Robies Singho proceeded on the 7th of April 1990 and made a contemporaneous complaint to the Assistant Superintendent of Police, Horana – Mr. Tudor Dias, rather than at the Police Station, Horana, was in consequence of what his wife and children had narrated to him. This fact manifests that this is not identification for the first time, but an identification due to the process of recognition.

On the issue of recognition, a pertinent issue raised was whether the accused had visited the house of Robies Singho on the 30th of March 1990. Witnesses Somawathie, Sunethra and Ranjini have testified to that issue in the affirmative. However, the trial Judge has not acted on the evidence of Ranjini because she had failed to identify the accused at the identification parade held on 10.04.1990 and as she had not been convincing in her explanation for failing to identify the first accused at the said parade and in view of the proof of D1. Even if the evidence of Lalitha Ranjini – the prosecutrix is excluded as unacceptable on this issue, there is the testimony in court of witness Somawathiwe and Sunethra on this particular point.

Learned President Counsel strenuously urged that there were omissions proved in relation to the statements they had made at the Assistant Superintendent’s office at Horana. When the Assistant Superintendent of Police Mr. Tudor Dias was asked under cross examination as to whether these two witnesses had stated in their statements to the police that the first accused had come to this house on the 30th of March 1990, he has answered this question in the negative. The right to prove omissions emanated and was conceived after the delivery of the judgment in K.B. Muttu – Banda vs Queen at page 11 pronounced by Justice Alles. His Lordship in the course of his judgment referred to the decision in Queen vs Raymond Fernando where it was laid down that an omission to mention in a police statement a relevant fact narrated by the witnesses in evidence subsequently, does not fall within the ambit of the expression ‘former statement’ in Section 155 of the Evidence Act. Having stated thus, Justice Alles proceeded to consider how such vital omissions could be brought to the notice of the jury and that in terms of Section 122 (3) of the
Criminal Procedure Code the Court has overall control over statements recorded in the course of a police investigation and the court has a right to utilize the statements to aid it at the inquiry or trial and that for the intervention of the court in the Interests of justice and for the due administration of justice, the court is entitled through its use of the information book to bring such vital omissions to the notice of the jury.

Thereafter Justice Alles proceeded to enumerate the procedure by which such vital omissions could be proved in a Court of law and remarked thus:

“If a police officer who recorded the statement of a witness in the courts of a police investigation was asked whether there was any mention in the statement of a material fact and he answers in the negative after refreshing his memory from the written record, we see no reason why the oral evidence so elicited should not be admissible without the necessity of the record being proved and marked”.

We after due and respectful consideration, beg to dissent and record our total disagreement in regard to the procedure advocated by Justice Alles. The best evidence rule which is a fundamental tenet in the law of evidence would totally exclude the oral evidence of a police officer in regard to the contents of a matter which is required by law and which in fact has been reduced to writing, to be led after refreshing his mind from the document without the document being marked. Section 91 of the Evidence ordinance would exclude such oral evidence and none of the Exceptions to Section 92 of the Evidence Ordinance are applicable to the situation under consideration. In the circumstances, we hold the procedure spelt out by Justice Alles is wholly irregular and illegal.

At this juncture, I wish to place on record my experience in the trial court. Often when a police constable who has been called as a prosecution witness is under cross-examination he is suddenly thrust with the information Book, asked to read it. In a short space of time and thereafter in terms of the procedure advocated by Justice Alles he is called upon to interpret the document and express an opinion whether there is omission on a particular point. This police constable at times has received an education only up to the eighth standard. Can he be safely entrusted with the process of interpreting a document? He is called upon to perform an arduous task at times in determining whether such a statement appears either expressly or by implication. Is he competent to do this onerous task? When he purports to do so, does he not violate the best evidence rule and violate the stringent provision of Section 91 of the Evidence ordinance? Is it not a matter exclusively for the trial Judge to interpret documents that arise for considerations upon a trial? Do not the provisions of the Criminal Procedure code expressly provide that the interpretation of a document is a question of law, which falls within the exclusive province of
the Judge? We respectfully frown on and deprecate the procedure advocated by Justice Alles.

We lay it down that it is for the Judge to peruse the Information Book in the exercise of his overall control of the said book and to use it to aid the Court at the inquiry or trial. When defense counsel spot lights a vital omission, the trial Judge ought to personally peruse the statement recorded in the Information Book, interpret the contents of the statement in his mind and determine whether there is a vital omission or not and thereafter inform the members of the jury whether there is a vital omission or not and his direction on the law in this respect is binding on the members of the jury. Thus when the defence intends that there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial Judge who should peruse the Information Book and decide on that issue. When the matter is again raised before the Court of Appeal. The Court of Appeal Judges are equally entitled to read the contents of the statements recorded in to the Information Book and determine whether there is a vital omission or not and both Courts ought to exclude altogether the illegal and inadmissible opinions expressed orally by police officers [who are not experts but lay witnesses] in the witness box on this point.

Learned President Counsel did not accord his approval and acceptance of the aforesaid procedures spelt out by us at the stage of argument. Learned President’s Counsel relied strongly on the judgment in Sheila Sinharage vs Attorney-General particularly at page 17. We hold that the decision in that case has no application whatsoever to the issue which arises in the instant case. In Singharage’s case the learned High Court Judge proceeded to peruse the evidence given at the non-summary inquiry by Dr. Wass in regard to a statement made by the deceased to him and the trial Judge wrongly and illegally used the matter recorded at the non-summary inquiry as substantive evidence to arrive at his findings on the issue in the case and for his adjudication, without taking any steps to have such material placed before him as evidence. In those circumstances Justice Ranasinghe very correctly held that the procedure that was adopted was wholly illegal and unjustifiable in law. The process that we are advocating is certainly not the use of the statements as substantive evidence. The evidence of a witness is assailed as being testimonially untrustworthy on account of an alleged vital omission, the trial Judge or the Court of Appeal merely looks into the statement, interprets that the statement and thereafter decides whether there is a vital omission as urged by counsel? In indulging in such a process, certainly both the trial Judge and the Court of Appeal are not using the contents of the statements as substantive evidence to determine the issues arising in the case. Both Courts are looking into the statements only to ascertain whether there is a vital omission. According to the judgment
pronounced by Justice Alles the very origin of the right to prove omissions is traceable and referable to the Judge’s use of the Information Book to aid the Court at the trial. Therefore, there could be no valid and sustainable legal objection to the trial Judge and the Court of Appeal looking into the statements recorded in the Information Book for such limited purpose and the decision cited by a learned President’s Counsel is clearly distinguishable for the reasons enumerated by us.

Though Tudor Dias the Assistant Superintendent of Police has stated his inadmissible opinion, on perusing the statements, that there is an omission in the statements of Somawathie and Sunethra on this point, the trial Judge would have necessarily done what this Court has performed in closely perusing the statement of Sunethra. Sunethra in her statement has referred expressly to the admission made by the accused and by narrating that admission she has incorporated and adopted the contents of that admission. This part of her statement reads as follows:

Thus, the admission of the accused that when he came previously that they had lied and today too they are lying – this admission as to his previous visit to this house which was uttered by the accused, had been adopted by Sunethra in her police statement, - the doctrine of adoption by incorporation or reference. In these circumstances it cannot be justifiably and reasonably be asserted that there is vital omission in regard to this point in her police statement and therefore her evidence ought to be deprived of testimonial trustworthiness and credibility.

Learned President’s Counsel relied for his aforesaid contention on the decision in Sheel Sinharage vs Attorney General, (supra). Having regard to the fact that the right to prove omissions emanates and is directly traceable to the rights conferred on a trial Judge over the use of the Information Book to aid the Court to an inquiry or trial. (Vide Section 110- (4) of the code of Criminal Procedure Act and the principles laid down by Justice Garvin in King vs Cooray in regard to the exercise of such right by the Trial Judge in the interests of justice), the resulting position of the acceptance of the aforesaid contention would be that while counsel practicing at the Bar have arrogated to themselves the right which was conferred on the Court, the trial Judge and the Court of Appeal Judges would be prevented from looking at the Information Book even for the limited purpose of ascertaining whether there is in fact an omission on a vital point in the case. No one would grudge pleaders arrogating to themselves the powers conferred on the trial Judges as there are officers of Court assisting the Court to arrive at the truth and a correct adjudication in the interests of justice. But, would any contention which has the necessary effect of thwarting the exercise of the Judge’s rights in the interests of justice and precluding him from perusing statements recorded in the Information Book
for the limited purpose of determining and ascertaining whether there is an omission on a vital point, be ever adopted and accepted?

If the trial Judge has an undoubted right to do so, certainly the Judges in the Court of Appeal hearing an appeal would also have the undoubted right to peruse such statements for such limited purpose in the interest of justice and in determining whether there is an omission on a vital point or not. The Judges would in this exercise only be concerned with the issue of the credibility of the witness and they would not in that exercise be using the contents of the statement as substantive evidence to arrive at an adjudication on the main issues in the case. That is the significant distinction between the process indulged in by the High Court Judge in Sheela Sinharage’s case and the issue that arises upon this appeal relating exclusively to the province of credibility.

Learned Additional Solicitor General has submitted that he is relying on the evidence given by witnesses – Somawathie and Sunethra – at the identification parade held on the 10th of April 1990 before the Additional district Judge / Magistrate of Horana to corroborate their testimony at the trial that the first accused has previously visited their house on the 30th of March 1990 and thereby advance their consistency and credibility. He contended that the evidence led in the identification parade which was produced and marked at the trial as Y1, witnesses Somawathie in particular and Sunethra have clarified details with regard to the date of the previous visit by the first accused and have given description in regard to the first accused who visited their home on the 30th of March 1990 and on the 7th of April 1990. Evidence elicited at the identification parade:

Sunethra in her statement to the police [ASP Tudor Dias] made on 06.04.90.

When learned President’s Counsel initially contended that learned Additional Solicitor General was not entitled in law to use the aforesaid evidence to advance the credit of the witnesses in regard to their testimony before the High Court, the learned Additional Solicitor General has very relevantly drawn the attention of this Court to a judgment of the Supreme Court of India in the decision in Ramratnam vs the State of Rajasthan(8) at 426 Justice Wanchoo delivering the Supreme Court judgment observed “The argument is that the corroboration that is envisaged by Section 157 of the Evidence Ordinance is that of the statement of the witness in Court, that he had told certain things to the person corroborating the witness’s statement, and if the witness did not say in Court that he had told certain things to that person, that person cannot state that the witness had told him certain things immediately after the incident and thus corroborates him. “We are of the opinion, that this contention is incorrect. Having regard to the provisions of Section 157, it is clear that there
are only two things which are essential for this Section to apply. First that the witness should have given testimony with respect to some fact. The second is that he should have made the statement earlier with respect to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact. If these two things are present the former statement can be proved to corroborate the testimony of the witness in Court. The former statement may be in writing or may be made orally to some person. That person would be competent to depose to the former statement and corroborate the testimony of the witness in Court. There is nothing in Section 157 which requires that before a corroborating witness deposes to the former statement to the witness to be corroborated must also say in his testimony in court that he had made the former statement to the witness who is corroborating him. But, in our opinion it is not necessary in view of the words of Section 157 that in order to make corroborative evidence admissible, the witness to be corroborated must also say in his evidence that he had made such and such a statement to the witness who is to corroborate him. It is not necessary that the witness corroborated should also say in his evidence in Court that he made some statement to the witness who is to corroborate him. We are therefore of the opinion that the decisions in Mt Misri vs Emperor (9) and Nazar Singh vs the State(10), were cases wrongly decided.

During the subsequent states in his argument learned President’ Counsel was compelled to admit that the correct legal position has been laid down by Justice Wanchoo in Ramaratnam’s case.

The evidence of Somawathie in particular and of Sunethra in their evidence at the identification parade have sufficiently described, that the reference to the Sinhala expressions were references to the visit made on the 30th of March and they have sufficiently described in detail particularizing regard to the accused – appellant as the person who came both on the 30th of March and on the 7th of April 1990. When all these matters are taken into consideration for the limited purpose of determining whether there is an omission on a vital issue. It is crystal clear that there is no such omission in the statements made by these witnesses to the police and in the evidence given by these two witnesses at the identification parade. We also hold the testimony in court of Somawathie and Sunethra is corroborated by the evidence given by them at the identification parade. In these circumstances, we are compelled to hold that there is no merit in the contentions urged on this score by learned President’s Counsel.

It must be observed that the evidence given by Sunethra at pages 191 to 192 of the record and the evidence given by Ranjini at pages 95, 195 and 150 of the record in regard to the process of the search indulged in by the police party on that day, by proceeding to all the rooms and looking for Robies Singho,
has not been challenged, impugned or assailed in any manner by learned counsel who appeared for the accused at the trial.

Dr. Jean Marita Perera, Assistant Judicial Medical officer who had examined the prosecutrix on 08.04.90 at 2 p.m., has stated convincingly and in clear terms that there had been a recent rupture of her hymen and that there was an injury in the vaginal passage and having regard to the redness and the swelling in the surrounding areas she was able to say that it was a recent rupture and that prior to that rupture Ranjini had been a virgin. These injuries in the hymen and the vaginal passage, according to the medical expert, could have been caused by the insertion of some object into the vaginal passage and hence could have been caused by sexual intercourse and penetration. The medical expert has described that there were injuries on Ranjini’s buttocks which, testimony substantiates the evidence of Ranjini when she stated that he subsequent acts of rape committed on her by other members of the police party were, after placing her on a concrete slab. The aforesaid evidence of the medical expert has not been impugned or assailed at all at the trial. The position of the defense being though Ranjini may have been raped, that the charges against the accused were a frame-up and a fabrication and that the accused has no hand whatsoever in the acts of rape which were committed on Ranjini on the 7th of April, 1990.

Learned President’s Counsel has complained in the course of his argument before this Court that the learned trial Judge has utilized the evident given by witnesses Somawathie and Sunethra at the identification parade held on the 10th of April 1990 as substantive evidence and referred this Court to pages 596 to 599, 600, 609 and 612 where extracts of the judgment appear. He relied on the judgment in Queen vs Julis (11), in particular, he relied on the judgment pronounced by Chief Justice Basnayake, wherein the learned Judge has stated thus:

“Both Judge and Counsel appear to have lost sight of the fact that the identification of the accused at a parade held before the trial is not substantive evidence at the trial. The fact that the witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification at the trial. The jury may act only on the evidence given before them. There is no section of the Evidence Ordinance which declares proceedings at an identification parade to be evidence of the fact of identity. The principal evidence of identification is the evidence of a witness given in court as to how and under what circumstances he came to pick out a particular accused person.”

It appears that Chief Justice Basnayake was dealing with the adduction of proceedings at an identification parade being adduced as substantive evidence
Sexual Assault and Rape

at the trial. Certainly such a course is not warranted an the proceedings and evidence at the identification parade could only be used to corroborate the witness who gives evidence at the trial under Section 157 of the Evidence Ordinance.

The question arises whether a witness at the trial could state before the trial Court that he identified the accused at the parade. Such testimony bereft of the contents of the proceedings and evidence led at the identification parade, would it be substantive evidence?

Senior Puisne Justice Weerasooriya in Queen vs Julis (supra) at 525 discussing this issue observed that:

“Evidence relating to the identification of an accused at an identification parade by a witness who is subsequently called at the trial and gives evidence implicating that accused would be relevant under Section 9 of the Evidence ordinance as a fact establishing the identity of the person whose identify is relevant”.

In so far as Justice Weerasooriya referred to the relevancy of such evidence under Section 9 of the Evidence ordinance, it is implicit in that pronouncement that His Lordship was of the view that evidence relating to the identification of an accused at a parade by a witness is substantive evidence, establishing the identity of the person concerned, as Section 6-55 of the Evidence Ordinance inclusive of Section 9 relate to the adduction of substantive evidence before a Court of Law whilst Section 157 of the Evidence Ordinance relates to the adduction of evidence to corroborate the witness and thereby, show consistency on the part of the witness and thereby advancing his credibility. This pronouncement by Justice Weerasooriya is a pointer to the fact, that evidence given by the witness at the trial relating to his identification of the accused at a parade is substantive evidence establishing identity in terms of section 9 of the Evidence ordinance. But certainly the proceedings of the identification parade, including the evidence given at the parade by the witnesses would only be admissible to establish consistency on the part of the witness and thereby advance his credibility in terms of Section 157 of the Evidence Ordinance.

Though Chief Justice Basnayake has relied on the judgment pronounced by Lord Moulton in Rex vs Christie at 159 (H.L.). I have discovered that on a reading of that judgment, it does not support the proposition that the evidence, of a witness at the trial Court is not substantive evidence but is only a circumstance corroborative of the identification at the trial.

One must in this context draw a distinction between the evidence given by a witness at the trial that he identified the accused at an identification parade
and the adduction in evidence of the proceedings of the identification parade, including the evidence given by the witness at the parade.

However, there is a *cursus curiae* emanating from the Supreme Court of India laying down the principle that the results of an identification parade do not constitute substantive evidence. *Matru vs State of Uttar Pradesh; Shinde vs State of Maharastra; State of Andhra Pradesh vs K.V. Reddy; C.P. Fernandes vs Union Territory Goa; Satya Narain vs State.*

Learned President’s Counsel appearing for the accused appellant contended that the learned trial judge had over emphasized and stressed unduly the identification of the accused at the identification parade held on the 10th of April 1990. One must investigate the causes and factors which induced the learned trial Judge to lay much emphasis in regard to the identification at the said parade. Witness Tudor Dias, Assistant Superintendent of Police, on reading the statement of Sunethra expressed his opinion as to the omission in the said statement. The learned trial Judge had before him that particular answer. Nevertheless, he had himself perused that statement which was recorded in the Information Book. All these matters related to the issue of the testimonial trustworthiness and credibility of witness Sunethra. These matters did not pertain to the ingredients of the offence or to the fact in issue and the relevant facts on which the findings had to be reached by the trial Judge. Thus, dealing with the question of credibility, he has discussed at length what took place at the identification parade and the evidence given by witnesses at the parade, to ascertain whether there was a vital omission or not and whether the evidence given by witness Sunethra at the identification parade, corroborated or not her evidence in terms Section 157 of the Evidence Ordinance. Thus, the Judge’s detailed analysis and discussion of the proceedings and the evidence elicited at the parade, was with a view to determining the credibility of Sunethra’s evidence. If there was such corroboration it would disclose consistency in her evidence and thereby help the trial Judge to arrive at a favorable finding in regard to her testimonial trustworthiness and credibility. It is in this background that the observations pronounced and the findings of the learned trial Judge should be viewed. Nowhere in the judgment has the learned trial Judge used the Sinhala expression which is a reference to substantive evidence.

The learned trial Judge was at all times engrossed with the answer given by the Assistant Superintendent of Police Tudor Dias, the conclusion he had reached on a perusal of the statement of Sunethra and therefore he looked into the proceedings and evidence given at the identification parade, (produced and marked as Y1) to ascertain whether there was an omission in those proceedings and whether that evidence did corroborate or not Sunethra’s evidence at the trial.
Learned President Counsel was not justified in contending that the leaned trial Judge had not reached a finding in regard to the testimonial trustworthiness and credibility of witness Sunethra. In his judgment at page 616, 580, 581 and 596 there is a clear implied finding upholding the credibility and testimonial trustworthiness of the evidence of witness Sunethra. Without arriving at such a finding the learned trial Judge could not have arrived at his adjudication that the prosecution has proved beyond reasonable doubt the charge of rape against the accused. The learned trial Judge in his judgment by necessary implication arrived at the adjudication and finding that witness Sunethra had given truthful evidence at the trial when she stated under affirmation that the accused had come to their house on the 30th of March 1990 and in the early hours of the morning on the 7th of April 1990 and in the circumstances the contentions advanced by learned President Counsel are unjustified and unsustainable.

Although the defense counsel at the trial has marked several other contradictions and omissions in an attempt to assail the credibility of the prosecution witnesses, learned President Counsel who appeared for the appellant at the argument of this appeal, did no refer to such contradictions and omissions except to those which I have so far specifically enumerated in my judgment. In the circumstances we do not propose to burden our judgment by recapitulating and adverting specifically to those contradictions and omissions. But we observe that the trial Judge in his judgment has adequately referred to the aforesaid contradictions and omissions and arrived at the conclusion that those discrepancies, contradictions and omissions do not relate to the core of the prosecution case which has been presented against the accused.

At this stage I would advert to the evidence given by the accused in the witness box under affirmation. The accused in the course of his evidence denied that he ever visited the house of Robies Singho on any day and specifically asserted that he had not gone to this house on the 30th of March 1990 and on the 7th of April 1990. The accused has further stated that on the 8th of April 1990, he was summoned by Tudor Dias to the Assistant Superintendent’s office, when he was recording a statement and that he came into that office dressed in civil clothing, as he had suffered an injury about one year prior to the alleged incident referred to in the indictment.

Under cross-examination he has stated that he had not taken part in any official duty or investigation while he was attached to the Horana police station in relation to Robies. He has specifically stated in evidence that prior to the 10th of April 1990 that he has never proceeded on any occasion to the house occupied by Robies, Sunethra and the other members of Robies’s family. He persisted in stating that in regard to any official investigations or duty that he has never proceeded to the house of Robies situated at Kindelpitiya, Milewa. He has further stated that prior to his being summoned to the Assistant...
Superintendent’s office, he had not ever known either in person or by name, either Robies, his children or any member of Robies’s house and that he does not know where Robies’s house is situated. At that stage he was confronted with a portion of the statement which the accused had made to Police Inspector Dharmasena. That part of the statement reads as follows:

“I have on several occasions searched Robies’s house on information received that he was distilling Kassippu. In carrying out these search operations I came to know the witnesses who have given evidence in regard to the incident referred to in the indictment”.

When the accused was confronted with this statement which was inconsistent with his evidence at the trial, he denied making any such statement and at that juncture the aforesaid statement was marked as 22 to contradict his testimony in Court.

The accused further, in his evidence stated that prior to the alleged incident narrated by the prosecution witnesses, that he had never known a person called Robies. At that stage the accused was confronted with a part of the statement he had made to Inspector Dharmasena which read as follows:

“I can remember that he (Robies) had been arrested and taken into custody”.

When he was confronted with this part of the statement, the accused stated even if it has been so recorded in the statement that he would not accept the correctness of the fact so recorded. At this stage the relevant portion of his statement referred to by me was marked as 23 to contradict his testimony in Court.

At page 394 of the record the accused gave his reason for witnesses Somawathie and Sunethra identifying him at the identification parade. Thereafter at page 395 the accused stated under affirmation that there was no animosity or disaffection towards him on the part of Robies or the members of his family. He further proceeded to state that there was no reason or cause attributable to animosity or disaffection which induced the witnesses to identify him at the identification parade. At this stage the accused was confronted with a part of his statement he had made to the Inspector of Police Dharmasena. That statement read as follows:

“I think the witnesses who identified me at the identification parade did identify me because the witnesses and Robies were harboring feelings of animosity and disaffection towards me.”

When the accused denied ever making such a statement this part of his statement was marked as 24 to contradict his testimony at the trial. These contradictions, which graciously impair the credibility of the accused, have induced the learned trial Judge to reject the accused’s version.
The accused has referred to the fact that on the 4th of May 1989 that the had suffered from a gun shot injury near the Horana police station at the hands of insurgents. He had been in hospital for six months and thereafter had reported for duty on the 4th of November 1989. The accused stated that he was put on light duty and entrusted with administrative duties and that he had donned the police official uniform on the 3rd of April 1990. The accused has stated in the course of his evidence that he made an oral application for authorization to be dressed in civil clothing and that an oral order was made by the Superintendent of Police permitting him to work dressed in civil clothing.

The learned trial Judge has commented on the fact that no questions were put to Assistant Superintendent of Police Tudor Dias in Cross-examination to elicit such authorization to engage in official duty whilst being dressed in civil clothing. The learned trial Judge has observed that if the Superintendent of Police had granted such authorization, such a communication having regard of the normal official routine would have been communicated by the Superintendent of Police to the Assistant Superintendent of Police and thereafter transmitted to the Inspector of Police and in the circumstances, the version of the accused in regard to the oral authorization is inherently improbable, having regard to the proved attendant circumstances. No questions have been put to Assistant Superintendent of Police Tudor Dias as to whether the accused when summoned to the assistant superintendent’s office on the 8th of April, came to that office dressed in civil clothing. Learned Additional Solicitor-General submitted that the evidence discloses that the accused was clad in trousers and that he wore shoes on all occasions and in the circumstances, learned Solicitor General queried – what was the impediment to the wearing of khaki trousers on account of a previous injury to the thigh bone? He contended that material facts which were interwoven with his defense had not been put to witness Tudor Dias in cross-examination, at the first opportunity that presented itself and therefore the belated version of the accused that he wore civil clothing on the 30th of March 1990, certainly does not satisfy the Test of spontaneity / promptness. The material part of the accused’s evidence appears at page 391 of the record and the learned trial Judge indulges in an evaluation of the accused’s evidence in his judgment at page 588.

Police officer Tillekeratne gave evidence for the defense at the trial. His evidence was directed at dis-crediting the evidence already adduced by witnesses Sunethra and Somawathie in regard to the visit of the accused to Robies’s house on the 30th of March and it was also directed at establishing that the accused was engaged in official work whilst being dressed in civil clothing. Witness Tillekeratne sates that he left the Horana police station on 6th / 07th April at midnight and that he came back in a lorry to the police station at 2 a.m. He has stated that the police party left on the occasion to
make investigations in regard to a gun. Vide page 432. He does not state that on this occasion that they proceeded to Robies’s house. The evidence in the case is that the accused proceeded to Robies Singho’s house and knocked at the door at 3.20 a.m. Hence the evidence of Tillekeratne does not establish any impediment to the accused proceeding to the house of Robies at 3.20 a.m.

Witness Tillekeratne has stated that he made an entry in regard to his departure from the Horana Police station on the 30th of March in his diary. He has filed to support his oral testimony by producing the diary in Court. Neither did he gave a satisfactory explanation as to why he had failed to make an entry in regard to his departure in the official book maintained at the Horana Police station. At page 448 of the record (ad finem) answering a question in cross-examination he had given a palpably false answer that besides the 6th of April 1990 that he has engaged in official police duties and functions with other officers without making any entries. The material part of Tillekeratne’s evidence commences at page 432 of the record and the learned Judge having carefully analyzed and evaluated the evidence of witness Tillekeratne has very rightly rejected his evidence holding that his evidence does not satisfy the Test of Probability and the Test of Interest and Disinterestedness of the witness whilst holding that he is a partial and partisan witness. He stated that witness Tillekeratne made no entry anywhere in regard to his alleged official activity on the 6th of April but has falsely stated that he made an entry in regard to his departure from the Horana police station on the 30 of March in his diary. Vide page 437. He also failed to produce his diary to support his bare oral statement to the Court.

The other defense witness who has given evidence is Dananja Amarsena Walatara in whose house the accused resided as a boarder. He has stated under affirmation that on the 6th of April 1990 the accused did not depart from his boarding house after 7.30-8.00 o’clock in the night. He has stated that he slept in the hall and if the accused had the necessity to go out, he would have had to proceed past him while he was sleeping in the hall. Although this witness attempted to state that after the accused came to his boarding house on 06.04.1990 that he did not get out of his house till 5 o’clock on the 7th of April, as the learned trial Judge has very rightly observed, this witness was compelled to admit that it was possible for the accused to have left the boarding house unseen an un-noticed by the witness and that if a certain highly confidential raid or detection had to be indulged in, that the accused would not have disclosed the fact of his leaving the house of the boarding master.

The learned trial Judge has applied the Test of Interest and Disinterestedness of a witness and proceeded to analyze and evaluate witness Walatara’s evidence. He has observed though the witness was unable to recollect important events in his own life and his business activities, that the witness evinced a
recollection of events and incidents relating to the accused and thereby, the learned trial Judge has applied the Test of Probability and also arrived at the conclusion that he is an interested and partisan witness. This witness had made a belated statement one month and seven days subsequent to the arrest of the accused. In the circumstances, the learned trial Judge has applied the Test of Spontaneity / Promptness and arrived at adverse findings in regard to his testimonial trustworthiness. The learned trial Judge has commented that in regard to the accused, the witness has admitted that he has kept in mind and recollected facts only after the accused was arrested. This witness had attempted to state that he had taken special interest and devoted special attention to the accused and therefore the accused could not have gone out on the 6th of April 1990 at night without his knowledge and notice.

The learned trial Judge has applied the Test of Probability and Improbability and has arrived at the conclusion that his testimony is replete with inherent and intrinsic improbability. He has observed though this witness was unable to remember and recollect the day when he closed up his business, the witness was able to recollect the day that this accused is alleged to have committed the offence and also the day he was arrested. The learned trial Judge has in arriving at this adverse finding on the credibility of the witness stated thus:

This Court is unable to say that the learned trial Judge, who had the benefit of the demeanor and deportment of the witnesses who had given evidence before him, has not indulged in a just and correct evaluation of the testimony of the defense witnesses. In these circumstances, this Court upholds the evaluation of the evidence indulged in by the trial Judge.

For the aforesaid reasons, we hold that there is no merit in the appeal of the accused – appellant and the submissions advanced by the learned President’s Counsel who appeared for the accused – appellant are untenable and unsustainable. In the circumstances we uphold the findings, conclusions and adjudications reached and pronounced by the learned trial Judge on counts two and three of the indictment.

In regard to the sentence the learned trial Judge has sentenced the accused to a term of twelve years rigorous imprisonment on count two (charge of rape) and to a term of five years imprisonment in respect of count three of the indictment (charge of abetment of rape) and made order that the sentences do run concurrently. However, we observe that the accused had been convicted on the 14th of August 1996 and that he has been in remand after conviction to the present day for a period of three years. Extending a hand of mercy to the accused – appellant we proceed to deduct the aforesaid period of three years spent in remand and thereby we reduce the term of imprisonment imposed on count two to a term of nine years imprisonment. We affirm the sentence of
five years imprisonment imposed by the learned trial Judge on count three. We make order that both sentences do take effect and run concurrently. The accused is directed to serve these terms of imprisonment from today. Subject to this variation in the term of imprisonment on count two, we proceed to dismiss the appeal.

In conclusion, we wish to place on record our appreciation of the assistance rendered to this court by Learned Additional Solicitor General on the varied issued of fact and of law which arose for consideration during the protracted argument of this appeal.

J.A.N. De Silva, J
I agree.
Appeal dismissed.
Sentence varied.
Sexual Assault and Rape
CHAPTER IV
SEXUAL HARASSMENT AT THE WORKPLACE

Context

Sexual harassment at the workplace has been recognised to be the most intimidating form of violence that can be perpetrated against a woman at her workplace. While western jurisprudence, especially that of the United States, has been based on the principle of discrimination, the courts in this region have taken a rather radical approach by declaring that it is a violation of the fundamental right to work. Though jurisprudence has not developed very well in this sector, the legal status relating to sexual harassment is far more developed than that of the USA where more claims on the ground of sexual harassment at the workplace are brought in. In the USA, sexual harassment at the workplace is seen as merely another form of discrimination. Additionally, there is a ceiling to the amount of damages that can be awarded in a case relating to sexual harassment.

Even in the absence of a comprehensive law on sexual harassment at the workplace, the judiciary in different countries has attempted to provide justice to victims. In 1997, when the Supreme Court of India recognised that sexual harassment at the workplace was a violation of the fundamental right of a woman to work, it was indeed a giant step in the realisation of the rights of women. The right of a woman to sue her employer for not protecting her while working and the responsibilities of the employer in dealing with these cases was clearly laid out. Though there are many problems with the case decided by the Supreme Court in terms of its enforcement, it was a big step in recognising the fact that a safe environment at work was a right. The Sri Lankan Court has dealt with this issue in a most interesting manner. It has classified the demand for a sexual favour as a bribe and recommended prosecution under its Bribery Act to grant justice to the victim. The Nepal Court used Nepal’s ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in recognising sexual harassment as a punishable crime.
In India, it has been eight years since sexual harassment was recognised for the first time by the Supreme Court as a human rights violation, and a gender based systemic discrimination which affects a woman’s Right to Life and Livelihood through the judgment on Vishaka and Others vs. State of Rajasthan and others, (1997).

Nevertheless, none of the four countries—Bangladesh, India, Nepal and Sri Lanka—have a comprehensive law on Sexual Harassment at Workplace today. However, there are enough instances when the Apex Court in each country has recognized it as a punishable offence, and laid the foundation for providing justice to the victims.

While the Vishaka guidelines constitute a step in the right direction, there is still room for improvement in the area of protection to employees against sexual harassment. The guidelines require the establishment of a Sexual Harassment Committee (SHC) by the employer, a body that then supplies a report to the employer. In practice, although nearly every government department and many public sector organizations in India have established such a committee, very few firms in the private and unorganized sectors have done so. As for legal ramifications, the report submitted by the SHC is not binding and has no persuasive value. The Supreme Court failed to clarify if the recommendations of the SHC were binding and whether the committee could be given the authority to determine penalties for offences committed.

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Synopses

Vishaka and Others vs. State of Rajasthan and Others

Highlight

- Acknowledged sexual harassment at workplace as a violation of a right
- Defined sexual harassment at the workplace
- Established a set of guidelines for ensuring a safe work environment for women
- Made it mandatory for the employer to take responsibility in cases of sexual harassment

The petition was filed following the brutal gang rape of a social worker in Rajasthan while she was performing her duties. The Court held that women were entitled to gender equality and a safe workplace free from sexual harassment, and that it was the duty of the employer to prevent, deter and resolve all incidents of abuse. Relying on Articles 14, 15, 19 (1) (g), 21 and 32 of the Indian Constitution, as well as international conventions and norms, the Supreme Court established a set of guidelines for observance at the workplace until other such legislation was enacted. The Court defined sexual harassment as “unwelcome sexually determined behaviour (whether directly or by implication)” including: (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 a sexual nature. To help protect the rights of employees, the Supreme Court emphasised that sexual harassment policies should be notified, published and circulated at the workplace.

However, in a subsequent case, vide an interim order, the Supreme Court held that the enquiry by the sexual harassment complaints committee would be the final enquiry and would be equivalent to a statutory enquiry against misconduct.

Apparel Export Promotion Council vs. A.K. Chopra

Highlight

- Established that sexual harassment may not necessarily involve physical contact

Soon after the judgment of the Supreme Court in the case of Vishaka, a second case came for hearing before the Supreme Court of India with respect to the powers of the enquiry committee. In this case, the High Court had set aside the conviction on the ground that physical contact had not been established. The other aspect related to the powers of the enquiry committee. The High Court had held that as the offence was under Section 354 IPC, for an attempt to “outrage the modesty” of a woman (an offence that can be brought regardless
of whether the conduct takes place within an employment context) it necessitates the establishment of physical contact. The Supreme Court reversed the High Court and reinstated the sentence imposed by the lower court, holding that sexual harassment does not necessarily involve physical contact. Where a supervisor has harassed and made unwelcome sexual advances to his clerk, a reduction of sentence merely because the supervisor made no physical contact is inappropriate when there is no factual dispute. In the Court’s words, the supervisor’s conduct “did not cease to be outrageous for want of an actual assault or touch...” it matters whether the conduct is “unwanted.” While the conduct must be assessed from the victim’s standpoint, in the Indian context there is a danger of under protection when determining whether a certain conduct was “unwanted” as a victim’s past sexual history and conduct may be introduced as relevant evidence to erode her credibility. In the present case, for instance, the clerk’s ignorance of sexual matters and the fact that she was unmarried, although irrelevant, helped to establish that the conduct of her superior was “unwanted.”

Rajendra Thapalia vs. General Manager(personnel) T.R. Bhatta, on behalf of the Management of the Royal Casino Royal

**Highlight**

- Established sexual harassment at the workplace as a crime through the constitution and international instruments, in the absence of a law
- Asked the government to amend the existing labour laws so as to include sexual harassment

This is the first case relating to sexual harassment at the work place in Nepal. The learned judge has capably analysed the facts, interpreted the constitution, and applied international instruments on human rights including the CEDAW, to conclude that the appellant had actually harassed his co-worker. He has also pointed out the lacunae in the Labour Act and drawn the attention of the authorities including Parliament, to the necessity of an amendment to the Act.

The charge was that the perpetrator [the Appellant] had stood very close to a woman employee of the casino, looked at her lecherously, used indecent and offensive words, and behaved indecently with her. The management came to the conclusion that the perpetrator had indeed gone close to the victim. Following an issuance of a warning letter to the Appellant-perpetrator, he challenged the same before the Court.

The Court held that women generally do not like to come to the limelight by bringing such matters into public when someone tries to offend their dignity, unless they are compelled to fight to imposing a penalty on the culprit by taking exemplary action. The court specifically mentioned that “In our country
as attempts have just begun to be made to encourage women to take up outdoor works and as priority is being given to encourage them to economic and professional activities, in order therefore to prevent women being dissuaded due to sexual harassment by colleagues and bosses in work place, it is necessary to be sensitive and sympathetic for providing legal remedies to them against such acts. The court should also look into these types of cases with sympathy and sensitivity”.

In the absence of any direct law to address the issue, the court recorded that as Nepal is one of the signatories to CEDAW, the Treaty Act is as good as Nepali law. To support their view, two other Supreme Court cases (Reena Bajracharya and Meera Dhungana, on behalf of FWLD) that had interpreted that “CEDAW is operational like [any other] Nepali law” were cited.

Studies have shown that sexual harassment has adversely affected the physical and mental health of women, caused frustration in work, and situations may arise, where they are compelled to leave their jobs for this reason. Therefore, the Court mentioned that while this may pollute the environment of the work place, it may also adversely affect the image, production, service and industrial relations of the institution. This kind of behaviour is considered as a criminal act under section 1 of the chapter “Of Indecent Assault (Ashaya Karani)” of the Muluki Ain, and a provision for punishment has also been made. As none or less punishment to such persons may adversely affect the morale of workers/employees or the working environment, the warning given to the appellant seems appropriate pursuant to the provision of the Labour Act, 1991 and hence holds good. Sexual harassment is not included in the misconducts enumerated in Chapter 8 of the Labour Act, 1991. Currently, only the By-laws include sexual harassment, and these can be amended. Moreover, only a warning can be given to the perpetrator as per the existing law. It is the opinion of this court that provisions relating to sexual harassment should be incorporated in the Act itself, and in view of the gravity of the offence, the degree of punishment should also be increased.

The court also mentioned that “While by bringing such subject upfront the women trying to fight for justice will be encouraged, courts should also need to take into account that attempts can also be made to take undue advantage of such positive sensitivity also.”

Abdul Rashak Kuthubdeen vs. Republic of Sri Lanka

Highlight
- Interpreted demand for sexual favour in consideration of job promotion as a bribe and held guilty under the Bribery Act
Prior to the enactment of the Penal Code amendments in 1995, an employee at the Urban Development Authority filed action in 1993 on the grounds of sexual harassment against a superior officer who allegedly demanded sexual favours in return for a promotion.

However, since sexual harassment was not acknowledged as a crime under the Penal Code, the demand for sexual favours in consideration of job promotion was interpreted as a “bribe”. The accused was found guilty under the Bribery Act No 9 of 1980 since he had “solicited an unlawful gratification in soliciting sex from a woman employee in return for a transfer”.

In a noteworthy judgment, the judge refused to accept the contention of counsel for the accused that the complainant woman was an untrustworthy witness, remarking that “she was a young married woman...testifying about embarrassing circumstances...even in camera...and (that she had)...embarked on a journey which many other women would dread to undertake”.

This is a liberal judicial interpretation of the existing law, which is an indication that women can allege sexual harassment under statutes such as the Bribery Act if judicial attitudes are sympathetic.
Judgments

Petitioner
Vishaka & Ors.
Vs.
Respondent:
State of rajasthan & ors.

Date of Judgment: 13/08/1997

Bench:
CJI, Sujata V. Manohar, B. N. Kirpal

Judgment:

Verma, CJI:

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

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

Each such incident results in violation of the fundamental rights of ‘Gender Equality’ and the ‘Right of Life and Liberty’. It is clear violation of the rights under Articles 14, 15 and 21 of Constitution. One of the logical consequences of such an incident is also the violation of the victim’s fundamental right under Article 19(1)(g) ‘to practice any profession or
Sexual Harassment at the Workplace
carry out any occupation, trade or business’. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women. This class action under Article 32 of the Constitution is for this reason. A writ of mandamus in such a situation, if it is to be effective, needs to be accompanied by directions for prevention; as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a “safe” working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.

The notice of the petition was given to the State of Rajasthan and the Union of India. The learned Solicitor General appeared for the Union of India and rendered valuable assistance in the true spirit of a Law Officer to help us find a proper solution to this social problem of considerable magnitude. In addition to Ms. Meenakshi Arora and Ms. Naina Kapur who assisted the Court with full commitment, Shri Fali S. Nariman appeared as Amicus Curiae and rendered great assistance. We place on record our great appreciation for every counsel who appeared in the case and rendered the needed assistance to the Court which has enabled us to deal with this unusual matter in the manner considered appropriate for a cause of this nature. Apart from Article 32 of the Constitution of India, we may refer to some other provision which envisage judicial intervention for eradication of this social evil. Some provisions in the Constitution in addition to Articles 14, 19(1)(g) and 21, which have relevance are:

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

(1) The State shall not discriminate against any citizen on only of religion, race, caste, sex, place of birth or any of them.

(2) xxx xxxx xxxx

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

(4) xxx xxxx xxxx” Article 42: “42. Provision for just and humane conditions of work and maternity relief - The State shall make provision for securing
just and humane conditions of work and for maternity relief.” Article 51A: “51A. Fundamental duties. - It shall be the duty of every citizen of India,

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

(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; 

Before we refer to the international conventions and norms having relevance in this field and the manner in which they assume significance in application and judicial interpretation, we may advert to some other provisions in the Constitution which permit such use. These provisions are: Article 51 : “51. Promotion of international peace and security - The State shall endeavour to -

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

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

Seventh Schedule : “List I - Union List: 

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

In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.

This is implicit from Article 51(c) and enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till the parliament enacts to expressly provide measures needed to curb the evil. Thus, the power of this Court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the
challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful. Governance of the society by the rule of law mandates this 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. 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. Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance.

The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of the Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are: “Objectives of the Judiciary: 10. The objectives and functions of the Judiciary include the following: (a) to ensure that all persons are able to live securely under the Rule of Law; (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and (c) to administer the law impartially among persons and between persons and the State.” Some provisions in the ‘Convention on the Elimination of All Forms of Discrimination against Women’, of significance in the present context are:

Article 11: “1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings; xxxx xxxx xxxx (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. xxx xxxx xxxx

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Article 24: “States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognised in the present Convention.” The general recommendations of CEDAW in this context in respect of Article 11 are: “Violence and equality in employment:

22. Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the work place.

23. Sexual harassment includes such unwelcome sexually determined behavior as physical contacts and advance, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints procedures and remedies, including compensation, should be provided.

24. States should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence or coercion in the workplace.” The Government of India has ratified the above Resolution on June 25, 1993 with some reservations which are not material in the present context. At the Fourth World Conference on Women in Beijing, the Government of India has also made 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.

The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to compass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of Judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in
the domestic law. The High Court of Australia in Minister fro Immigration and Ethnic Affairs vs. Tech. 128 ALR 535, has recognised the concept of legitimate expectation of its observance in the absence of contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia. In Nilabati Behera vs. State of Orissa 1993(2) SCC 746, a provision in the ICCPR was referred to support the view taken that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right, as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity. In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution.

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

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

2. Definition: For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as: a) physical contact and advances; b) a demand or request for sexual favours; c) sexually coloured remarks; d) showing pornography; e) any other
unwelcome physical, verbal or non-verbal conduct of sexual nature. Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim’s employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. Preventive Steps: All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps: (a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways. (b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender. (c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946. (d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal Proceedings: Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority. In particular, it should ensure that victims or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

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

6. Complaint Mechanism: Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer’s organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.
7. Complaints Committee: The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality. The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any under pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment. The Complaints Committee must make an annual report to the government department concerned of the complaints and action taken by them. The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

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

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

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

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

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993. Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These Writ Petitions are disposed of, accordingly.
Appellants: Apparel Export Promotion Council
Vs.
Respondent: A.K. Chopra

In The Supreme Court of India
C.A. Nos. 226-227 of 1999
(Arising out of SLP (C) Nos. 15099-15100 of 1997)

Hon’ble Judges
A.S. Anand, CJI., V.N. Khare, J.

Decided On: 20.01.1999

Acts/Rules/Orders
Constitution of India - Articles 309 and 7

Cases Referred

Case Note
Constitution – sexual harassment at working place - Articles 7 and 309 of Constitution of India – whether act of superior against female employee that is against moral sanctions and does not withstand test of decency and modesty not amount to sexual harassment – act of respondent was not of good conduct and not expected behaviour from superior officer – act of respondent undoubtedly amounted to sexual harassment of miss ‘X’ - punishment imposed by appellant commensurate with gravity of his objectionable behaviour and did not warrant interference by High Court – any lenient action in such case is bound to have demoralizing effect on working women – sympathy in such cases is not called for – punishment imposed by disciplinary authority upheld – held, such act of superior is against of moral character.
HELD See paras 26, 29 and 30.

Order
Dr. Anand CJI.

1. Special Leave granted.

2. Does an action of the superior against a female employee which is against moral sanctions and does not withstand test of decency and modesty not amount to sexual harassment? Is physical contact with the female employee an essential ingredient of such a charge? Does the allegation that the superior ‘tried to molest’ a female employee at the “place of work”, not constitute an act unbecoming of good conduct and behaviour expected from the superior? These are some of the questions besides the nature of approach expected from the law courts to cases involving sexual harassment which come to the forefront and require our consideration.

3. Reference to the facts giving rise to the filing of the present Appeal by Special Leave at this stage is appropriate:

4. The respondent was working as a Private Secretary to the Chairman of the Apparel Export Promotion Council, the appellant herein. It was alleged that on 12.8.1988, he tried to molest a woman employee of the Council, Miss X (name withheld by us) who was at the relevant time working as a Clerk-cum-Typist. She was not competent or trained to take dictations. The respondent, however, insisted that she go with him to the Business Centre at Taj Palace Hotel for taking dictation from the Chairman and type out the matter. Under the pressure of the respondent, she went to take the dictation from the Chairman. While Miss X was waiting for the Director in the room, the respondent tried to sit too close to her and despite her objection did not give up his objectionable behaviour. She later on took dictation from the Director. The respondent told her to type it at the Business Centre of the Taj Palace Hotel, which is located in the Basement of the Hotel. He offered to help her so that her typing was not found fault with by the Director. He volunteered to show her the Business Centre for getting the matter typed and taking advantage of the isolated place, again tried to sit close to her and touch her despite her objections. The draft typed matter was corrected by Director (Finance) who asked Miss X to retype the same. The respondent again went with her to the Business Centre and repeated his overtures. Miss X told the respondent that she would “leave the place if he continued to behave like that”. The respondent did not stop. Though he went out from the Business Centre for a while, he again came back and resumed his objectionable acts. According to Miss X, the respondent had tried to molest her physically in the lift also while coming to the basement but she saved herself by pressing the emergency button, which made the door of the
On the next day, that is on 16th August, 1988 Miss X was unable to meet the Director (Personnel) for lodging her complaint against the respondent as he was busy. She succeeded in meeting him only on 17th August, 1988 and apart from narrating the whole incident to him orally submitted a written complaint also. The respondent was placed under suspension vide an order dated 18th August, 1988. A charge-sheet was served on him to which he gave a reply denying the allegations and asserting that “the allegations were imaginary and motivated.” Shri J.D. Giri, a Director of the Council, was appointed as an Enquiry Officer to enquire into the charges framed against the respondent. On behalf of the management with a view to prove the charges as many as six witnesses were examined including Miss X. The respondent also examined seven witnesses. The Enquiry Officer after considering the documentary and oral evidence and the circumstances of the case arrived at the conclusion that the respondent had acted against moral sanctions and that his acts against Miss X did not withstand the test of decency and modesty. He, therefore, held the charges levelled against the respondent as proved.

5. The Enquiry Officer in his report recorded the following amongst other findings:

“8.1. Intentions of Shri A.K. Chopra were ostensibly manifested in his actions and behaviour; Despite reprimands from Miss X he continued to act against moral sanctions;

8.2. Dictation and subsequent typing of the matter provided Shri A.K. Chopra necessary opportunity to take Miss X to the Business Centre a secluded place. Privacy in the Business Centre room made his ulterior motive explicit and clear.

8.3. Any other conclusion on technical niceties which Shri A.K. Chopra tried to purport did not withstand the test of decency and modesty.”

6. The Enquiry Officer concluded that Miss X was molested by the respondent at Taj Palace Hotel on 12th August, 1988 and that the respondent had tried to touch her person in the Business Centre with ulterior motives despite reprimands by her. The Disciplinary Authority agreeing with the report of the Enquiry Officer, imposed the penalty of removing him from service with immediate effect on 28th June, 1989.

7. Aggrieved, by an order of removal from service, the respondent filed a departmental appeal before the Staff Committee of the appellant. It appears that there was some difference of opinion between the Members of the Staff Committee and the Chairman of the Staff Committee during the hearing, but before any decision could be arrived at by the Staff Committee, the respondent, on the basis of some unconfirmed minutes of the Staff Committee meeting,
filed a Writ Petition in the High Court inter alia challenging his removal from service. On January 30, 1992, the Writ Petition was allowed and respondent Nos. 1 and 3, therein, were directed to act upon the decision of the Staff Committee, assuming as if the decision, as alleged, had been taken at the 34th Meeting of the Staff Committee on 25th July, 1990. The appellant challenged the judgment and order of the High Court dated 30th January, 1992, through Special Leave Petition (Civil) No. 3204 of 1992 in this Court. While setting aside the judgment and order of the High Court dated 30th January, 1992, a Division Bench of this Court opined:

“We have been taken through the proceedings of the meeting starting from 33rd meeting upto 38th meeting by both the learned Counsel appearing for the respective parties. Considering the same it appears to us that the alleged decision taken on the said Agenda No. 5 in the 33rd and 34th meeting is in dispute and final decision on the same has not yet been taken and the alleged resolution on the said Item No. 5 still awaits ratification. In that view of the matter, the High Court was wrong in deciding the disputed question of fact in favour of Respondent No. 1. We, therefore set aside the impugned order of the Delhi High Court as according to us the final decision on the resolution taken on the said Agenda No. 5 has not yet been finally ratified. We are not inclined to consider the other questions sought to be raised in this appeal and the said questions are kept open. In view of the pendency of the matter for a long time, we direct the appellant-company to convene the meeting of Staff Committee as early as practicable but not exceeding two months from today so that the question of ratification of the resolution on the said Agenda No. 5 taken in the meeting of the Staff Committee is finally decided.”

8. Pursuant to the above directions, the Staff Committee met again and considered the entire issue and came to the conclusion that the order passed by the Director General terminating the services of the respondent on 28th June, 1989 was legal, proper and valid. The appeal was dismissed and the removal of the respondent for causing “sexual harassment” to Miss X was upheld. The respondent, thereupon, filed Writ Petition No. 352 of 1995 in the High Court, challenging his removal from service as well as decision of the Staff Committee dismissing his departmental appeal.

9. The learned Single Judge allowing the Writ Petition opined “that...... the petitioner tried to molest and not that the petitioner had in fact molested the complainant.” The learned Single Judge, therefore, disposed of the Writ Petition with a direction that “the respondent be reinstated in service” but that he would not be entitled to receive any back wages. The appellant was directed to consider the period between the date of removal of the respondent from service and the date of reinstatement as the period spent on duty and to give him consequential
promotion and all other benefits. It was, however, directed that the respondent be posted in any other office outside Delhi, at least for a period of two years.

10. The appellant being aggrieved by the order of reinstatement filed Letters Patent Appeal No. 27 of 1997 before the Division Bench of the High Court. The respondent also filed Letters Patent Appeal No. 79 of 1997 claiming “back wages and appropriate posting”. Some of the lady employees of the appellant on coming to know about the judgment of the learned Single Judge, directing the reinstatement of the respondent, felt agitated and filed an application seeking intervention in the pending L.P.A. The Division Bench vide judgment and order dated 15th July, 1997, dismissed the L.P.A. filed by the appellant against the reinstatement of the respondent. The Division Bench agreed with the findings recorded by the learned Single Judge that the respondent had tried to molest and that he had not “actually molested” Miss X and that he had “not managed” to make the slightest physical contact with the lady and went on to hold that such an act of the respondent was not a sufficient ground for his dismissal from service. Commenting upon the evidence, the Division Bench observed:

“We have been taken in detail through the evidence/deposition of Miss X. No part of that evidence discloses that A.K. Chopra even managed to make the slightest physical contact with the lady. The entire deposition relates that A.K. Chopra tried to touch her.

As we have said that no attempts made, allegedly by A.K. Chopra, succeeded in making physical contact with Miss X, even in the narrow confines of a Hotel ‘lift’.

To our mind, on such evidence as that was produced before the Enquiry Officer, it is not even possible to come to a conclusion that there is an “attempt to molest” as there have been no physical contact. There being no physical contact between A.K. Chopra and Miss X, there cannot be any attempt to “tried to molest” on the part of A.K. Chopra”.

11. Aggrieved by the judgment of the Division Bench, the employer-appellant has filed this appeal by special leave.

12. We have heard learned counsel for the parties and perused the record.

13. The Enquiry Officer has found the charges established against the respondent. He has concluded that the respondent was guilty of molestation and had tried to physically assault Miss X. The findings recorded by the Enquiry Officer and the Disciplinary Authority had been confirmed by the Appellate Authority (the Staff Committee) which admittedly had co-extensive powers to re-appreciate the evidence as regards the guilt as well as about the nature of punishment to be imposed on the respondent. The Staff Committee while dealing with the question of punishment has observed:
“Shri Chopra has also mentioned in his appeal that the penalty on him was harsh and disproportionate to the charge levelled against him. On this, the Staff Committee observed that no lenient view would be justified in a case of molestation of a woman employee when the charge was fully proved. Any lenient action in such a case would have a demoralizing effect on the working women. The Staff Committee, therefore, did not accept the plea of Shri Chopra that a lenient view be taken in his case.”

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

“15. In the totality of facts and circumstances, ends of justice would meet if the petitioner is reinstated in service but he would not be entitled to any back wages.

The Council shall consider this period as on duty and would give consequential promotion to the petitioner. He shall be entitled to all benefits except back wages. The petitioner shall be posted in any other office outside Delhi, at least for a period of two years.”

15. The Division Bench of the High Court also while dismissing the L.P.A. filed by the appellant did not doubt the correctness of the occurrence. It also concluded that since the respondent had not actually molested Miss X and had only tried to assault her and had “not managed” to make any physical contact with her, a case of his removal from service was not made out. Both the learned Single Judge and the Division Bench did not doubt the correctness of the following facts:

1. That Miss X was a subordinate employee while the respondent was the superior officer in the organization;
2. That MISS X was not qualified to take any dictation and had so told the respondent;
3. That the respondent pressurized her to come with him to Taj Palace Hotel to take dictation despite her protestation, with an ulterior design;
4. That the respondent taking advantage of his position, tried to molest Miss X and in spite of her protestation, continued with his activities which were against the moral sanctions and did not withstand the test of decency and modesty;
5. That the respondent tried to sit too close to Miss X with ulterior motives and all along Miss X kept reprimanding him but to no avail;

6. That the respondent was repeating his implicit unwelcome sexual advances and Miss X told him that if he continued to behave in that fashion, she would leave that place;

7. That the respondent acted in a manner which demonstrated unwelcome sexual advances, both directly and by implication;

8. That action of the respondent created an intimidated and hostile working environment so far as Miss X concerned.

16. The above facts are borne out from the evidence on the record and on the basis of these facts, the departmental authorities keeping in view the fact that the actions of the respondent were considered to be subversive of good discipline and not conducive to proper working in the appellant Organization where there were a number of female employees, took action against the respondent and removed him from service.

17. The High Court appears to have over-looked the settled position that in departmental proceedings, the Disciplinary Authority is the sole Judge of facts and in case an appeal is presented to the Appellate Authority, the Appellate Authority has also the power and jurisdiction to re-appreciate the evidence and come to its own conclusion, on facts, being the sole fact finding authorities. Once findings of fact, based on appreciation of evidence are recorded, the High Court in Writ Jurisdiction may not normally interfere with those factual findings unless it finds that the recorded findings were based either on no evidence or that the findings were wholly perverse and/or legally untenable. The adequacy or inadequacy of the evidence is not permitted to be canvassed before the High Court. Since, the High Court does not sit as an Appellate Authority, over the factual findings recorded during departmental proceedings, while exercising the power of judicial review, the High Court cannot normally speaking substitute its own conclusion, with regard to the guilt of the delinquent, for that of the departmental authorities. Even insofar as imposition of penalty or punishment is concerned, unless the punishment or penalty imposed by the Disciplinary or the Departmental Appellate Authority, is either impermissible or such that it shocks the conscience of the High Court, it should not normally substitute its own opinion and impose some other punishment or penalty. Both the learned Single Judge and the Division Bench of the High Court, it appears, ignored the well-settled principle that even though Judicial Review of administrative action must remain flexible and its dimension not closed, yet the Court in exercise of the power of judicial review is not concerned with the correctness of the findings of fact on the basis of which the orders are made so
long as those findings are reasonably supported by evidence and have been
arrived at through proceedings which cannot be faulted with for procedural
illegalities or irregularities which vitiate the process by which the decision was
arrived at. Judicial Review, it must be remembered is directed not against the
decision, but is confined to the examination of the decision-making process.
All ER 141 observed:

“The purpose of judicial review is to ensure that the individual receives fair
treatment, and not to ensure that the authority, after according fair treatment,
reaches, on a matter which it is authorized by law to decide for itself, a
conclusion which is correct in the eyes of the court.”

18. Judicial Review, not being an appeal from a decision, but a review of the
manner in which the decision was arrived at, the Court while exercising the
power of Judicial Review must remain conscious of the fact that if the decision
has been arrived at by the Administrative Authority after following the principles
established by law and the rules of natural justice and the individual has received
a fair treatment to meet the case against him, the Court cannot substitute its
judgment for that of the Administrative Authority on a matter which fell squarely
within the sphere of jurisdiction of that authority.

19. It is useful to note the following observations of this Court in Union of
India v. Sardar Bahadur, MANU/SC/0700/1971:

“Where there are some relevant materials which the authority has accepted
and which materials may reasonably support the conclusion that the officer is
guilty, it is not the function of the High Court exercising its jurisdiction under
Article 226 to review the materials and to arrive at an independent finding on
the materials. If the enquiry has been properly held the question of adequacy
or reliability of the evidence cannot be canvassed before the High Court.”

20. After a detailed review of the law on the subject, this Court while dealing
with the jurisdiction of the High Court or Tribunal to interfere with the
disciplinary matters and punishment in Union of India v. Parma Nanda, MANU/
SC/0636/1989, opined:

“We must unequivocally state that the jurisdiction of the Tribunal to interfere
with the disciplinary matters or punishment cannot be equated with an appellate
jurisdiction. The Tribunal cannot interfere with the findings of the Enquiry
Officer or Competent Authority where they are not arbitrary or utterly perverse.
It is appropriate to remember that the power to impose penalty on a delinquent
officer is conferred on the competent authority either by an Act of Legislature
or Rules made under the proviso to Article 309 of the Constitution. If there has
been an enquiry consistent with the rules and in accordance with principles of
natural justice what punishment would meet the ends of justice is a matter of exclusively within the jurisdiction of the competent authority. If the penalty can lawfully be imposed and is imposed on the proved misconduct, the Tribunal has no power to substitute its own discretion for that of the authority.”

21. In B.C. Chaturvedi v. Union of India, MANU/SC/0118/1996, this Court opined:

“The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to reappreciate them evidence or the nature of punishment. In a Disciplinary Enquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequency of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal.”

Further it was held:

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

22. Again in Government of Tamil Nadu and another v. A Rajapandian, MANU/SC/0113/1995, this Court opined:

“It has been authoritatively settled by string of authorities of this Court that the Administrative Tribunal cannot sit as a court of appeal over a decision based on the findings of the inquiring authority in disciplinary proceedings. Where there is some relevant material which the disciplinary authority has accepted and which material reasonably supports the conclusion reached by the disciplinary authority, it is not the function of the Administrative Tribunal to review the same and reach different finding than that of the disciplinary authority. The Administrative Tribunal, in this case, has found no fault with the proceedings held by the inquiring authority. It has quashed the dismissal order by re-appreciating the evidence and reaching a finding different than that of the inquiring authority.”
23. In the established facts and circumstances of this case, we have no hesitation
to hold, at the outset, that both the learned Single Judge and the Division Bench
of the High Court fell into patent error in interfering with findings of fact
recorded by the departmental authorities and interfering with the quantum of
punishment, as if the High Court was sitting in appellate jurisdiction. From the
judgments of the learned single Judge as well as the Division Bench, it is quite
obvious that the findings with regard to an “unbecoming act” committed by
the respondent, as found by the Departmental Authorities, were not found fault
with even on re-appreciation of evidence. The High Court did not find that the
occurrence as alleged by the complainant had not taken place. Neither the
learned Single Judge nor the Division Bench found that findings recorded by
the Enquiry Officer or the Departmental Appellate Authority were either
arbitrary or even perverse. As a matter of fact, the High Court found no fault
whatsoever with the conduct of Enquiry. The direction of the learned Single
Judge to the effect that the respondent was not entitled to back wages and was
to be posted outside the city for at least two years, which was upheld by the
Division Bench, itself demonstrates that the High Court believed the
complainant’s case fully for otherwise neither the withholding of back wages
nor a direction to post the respondent outside the city for at least two years was
necessary. The High Court in our opinion fell in error in interfering with the
punishment, which could be lawfully imposed by the departmental authorities
on the respondent for his proven misconduct. To hold that since the respondent
had not “actually molested” Miss X and that he had only “tried to molest” her
and had “not managed” to make physical contact with her, the punishment of
removal from service was not justified was erroneous. The High Court should
not have substituted its own discretion for that of the authority. What punishment
was required to be imposed, in the facts and circumstances of the case, was a
matter which fell exclusively within the jurisdiction of the competent authority
and did not warrant any interference by the High Court. The entire approach of
the High Court has been faulty. The impugned order of the High Court cannot
be sustained on this ground alone. But there is another aspect of the case which
is fundamental and goes to the route of the case and concerns the approach of
the Court while dealing with cases of sexual harassment at the place of work of
female employees.

24. The High Court was examining disciplinary proceedings against the
respondent and was not dealing with criminal trial of the respondent. The High
Court did not find that there was no evidence at all of any kind of “molestation”
or “assault” on the person of Miss X. It appears that the High Court re-
appreciated the evidence while exercising power of judicial review and gave
meaning to the expression “molestation” as if it was dealing with a finding in a
criminal trial. Miss X had used the expression “molestation” in her complaint
in a general sense and during her evidence she has explained what she meant. Assuming for the sake of argument that the respondent did not manage to establish any “physical contact” with Miss X, though the statement of management witness Suba Singh shows that the respondent had put his hand on the hand of Miss X when he surprised them in the Business Centre, it did not mean that the respondent had not made any objectionable overtures with sexual overtones. From the entire tenor of the cross-examination to which Miss X was subjected to by the respondent, running into about 17 typed pages and containing more than one hundred & forty questions and answers in cross-examinations, it appears that the effort of respondent was only to play with the use of the expressions “molestation” and “physical assault” by her and confuse her. It was not the dictionary meaning of the word “molestation” or physical assault which was relevant. The statement of Miss X before the Enquiry Officer as well as in her complaint unambiguously conveyed in no uncertain terms as to what her complaint was. The entire episode reveals that the respondent had harassed, pestered and subjected Miss X, by a conduct which is against moral sanctions and which did not withstand the test of decency and modesty and which projected unwelcome sexual advances. Such an action on the part of the respondent would be squarely covered by the term “sexual harassment”. The following statement made by Miss X at the enquiry:

“When I was there in the Chairman’s room I told Mr. Chopra that this was wrong and he should not do such things. He tried to persuade me by talking. .......... I tried to type the material but there were so many mistakes. He helped me in typing. There he tried to blackmail me ............ He tried to sit with me. In between he tried to touch me ........ Mr. Chopra again took me to the Business Centre. Thereafter again he tried. I told him I will go out if he does like this. Then he went out. Again he came back. In between he tried.”

unmistakably shows that the conduct of the respondent constituted an act unbecoming of good behaviour, expected from the superior officer. Repeatedly, did Miss X state before the Enquiry Officer that the respondent tried to sit close to her and touch her and that she reprimanded him by asking that he ‘should not do these things’. The statement of Miss Rama Kanwar, the management witness to the effect that when on 16th August she saw Miss X and asked her the reason for being upset, Miss X kept on weeping and told her “she could not tell being unmarried, she could not explain what had happened to her”. The material on the record, thus, clearly establishes an unwelcome sexually determined behaviour on the part of the respondent against Miss X which was also an attempt to outrage her modesty. Any action or gesture whether directly or by implication, aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of
sexual harassment. The evidence on the record clearly establishes that the respondent caused sexual harassment to Miss X, taking advantage of his superior position in the Council.

25. Against the growing social menace of sexual harassment of women at the work place, a three Judge Bench of this court by a rather innovative judicial law making process issued certain guidelines in Vishaka v. State of Rajasthan, MANU/SC/0786/1997, after taking note of the fact that the present civil and penal laws in the country do not adequately provide for specific protection of woman from sexual harassment at places of work and that enactment of such a legislation would take a considerable time. In Vishaka’s case (supra), a definition of sexual harassment was suggested. Verma, J., (as the former Chief Justice then was), speaking for the three-Judge Bench opined:

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

(a) physical contact and advances;
(b) a demand or request for sexual favours;
(c) sexually-coloured remarks;
(d) showing pornography;
(e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature. Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the 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 women 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.”

26. An analysis of the above definition, shows that sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her.
27. There is no gainsaying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty — the two most precious Fundamental Rights guaranteed by the Constitution of India. As early as in 1993 at the ILO Seminar held at Manila, it was recognized that sexual harassment of women at the workplace was a form of ‘gender discrimination against woman’. In our opinion, the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse and the courts are under a constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violation, admits of no debate. The message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (“CEDAW”) and the Beijing Declaration which directs all State parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. Article 7 recognises her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate working environment. These international instruments cast an obligation on the Indian State to gender sensitise its laws and the Courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. This Court has in numerous cases emphasised that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law. [See with advantage — Prem Sankar v. Delhi Administration, MANU/SC/0084/1980; Mackninnon Mackenzie and Co. v. Audrey D’ Costa, MANU/SC/0446/1987; Sheela Barse v. Secretary, Children’s Aid Society, MANU/SC/0118/1986; Vtshaka & others v. State of Rajasthan & Ors., JT 1997 (7) SC 392; People’s Union for Civil Liberties v. Union of India & Anr., MANU/SC/0274/1997 and D.K. Basu & Anr. v. State of West Bengal & Anr., MANU/SC/0157/1997.

28. In cases involving violation of human rights, the Courts must for ever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. In the instant case, the High
Court appears to have totally ignored the intent and content of the International Conventions and Norms while dealing with the case.

29. The observations made by the High Court to the effect that since the respondent did not “actually molest” Miss X but only “tried to molest” her and, therefore, his removal from service was not warranted rebel against realism and lose their sanctity and credibility. In the instant case, the behaviour of respondent did not cease to be outrageous for want of an actual assault or touch by the superior officer. In a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression “molestation”. They must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated in the background of the entire case. Where the evidence of the victim inspires confidence, as is the position in the instant case, the courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity. Sympathy in such cases in favour of the superior officer is wholly misplaced and mercy has no relevance. The High Court overlooked the ground realities and ignored the fact that the conduct of the respondent against his junior female employee, Miss X, was wholly against moral sanctions, decency and was offensive to her modesty. Reduction of punishment in a case like this is bound to have demoralizing effect on the women employees and is a retrograde step. There was no justification for the High Court to interfere with the punishment imposed by the departmental authorities. The act of the respondent was unbecoming of good conduct and behaviour expected from a superior officer and undoubtedly amounted to sexual harassment of Miss X and the punishment imposed by the appellant, was, thus, commensurate with the gravity of his objectionable behaviour and did not warrant any interference by the High Court in exercise of its power of judicial review.

30. At the conclusion of the hearing, learned counsel for the respondent submitted that the respondent was repentant of his actions and that he tenders an unqualified apology and that he was willing to also go and to apologize to Miss X. We are afraid, it is too late in the day to show any sympathy to the respondent in such a case. Any lenient action in such a case is bound to have demoralizing effect on working women. Sympathy in such cases is uncalled for and mercy is misplaced.

31. Thus, for what we have said above the impugned order of the High Court is set aside and the punishment as imposed by the Disciplinary Authority and upheld by the Departmental Appellate Authority of removal of the respondent from service is upheld and restored. The appeals, thus succeed and are allowed. We, however, make no order as to costs.
Rajendra Thapalia, working at the Hotel Yak and Yeti located at Ward No. 29 of Kathmandu Metropolitan City, Kathmandu District - Appellant
Vs.
General Manager (Personnel) T.R. Bhatta, on behalf of the Management of the Royal Casino Royal at Hotel Yak and Yeti located at Darvar Marg, Kathmandu—1 Respondent

Labour Court, Kathmandu

Adjudicating Officer
Nirmal Kumar Dhungana

Appeal no 93/125 of the year 2058

Date of Judgment: Monday, Mangshir 16 of the year 2059 of the Bikram

The facts and the decisions of this case, which have come to this court pursuant to Section 60 (g) of The Labour Act 1991, and Rule 26 of The Labour Court (Procedure) Rules 1995 are as follows:

The letter asking for clarification dated July 15, 2001 sent on behalf of the Management called [the appellant]: “It is learnt that on June 27, 2001 while on duty, you Rajendra Thapalia, in a very objectionable manner, passed derogatory remarks and used abusive words against a woman employee Ms. Shova Shah and since behaviour of this nature, pursuant to Section 51 (I), is considered bad conduct, why did you indulge in such bad conduct? You are hereby asked to submit a clarification within 7 days from the receipt of this letter.”

Rajendra Thapalia in his clarification letter dated July 20, 2001 inter alia stated; “I am working at this Casino for the last eight years and am aware of my duties and responsibilities. I have not used any indecent and objectionable words or done anything indecent with the said Shova Shah on June 27, 2001. It is a foolish and irrational thing to defame or question the personal honour of a colleague working in the same office. She used to frequently borrow cigarettes from me, as well as my lighter. That day when I said that I did not have the lighter with me, she did not believe me and began to look for it in the pocket of my coat. While she was trying to insert her hand into the pocket she stumbled. After that she stopped talking with me while on duty. This is the truth. I request you to clear me of the allegations leveled by her against me and allow me to work.”

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The Manager through a letter dated July 26, 2001 warned Rajendra Thapalia where it *inter alia* stated: “In a situation, wherein you have partially admitted the incident of June 27, 2001, if a woman worker had herself made a mistake, instead of remaining silent, she should not have alleged that you tried to behave indecently with her. As no other reason exists for making a complaint against you, and as you have also not been able to give reason therefor, and as it cannot be said that you did not use indecent words, and did not look at her and touch her indecently in private, we are not satisfied with your clarification. As you have conducted yourself badly you are hereby warned pursuant to section 50(a) and 52(1) of the Labour Act 1991.”

Rajendra Thapalia in the appeal filed to this court on Sept 9, 2001 *inter alia* stated; “I have not done anything indecent and no incident which could be termed indecent took place. The contents of the letter asking for a clarification from me are different from the one warning me. As the charge leveled by the management against me does not fall under the offences defined by Section 51(i) of the Labour Act 1991, the management has been biased against me and has implicated me on a false charge. Therefore the penalty given to me by the management should be reversed and I should be cleared of the false charges.”

This court issued an order on Dec 12, 2001 in which it mentioned; “In this case as the penalty imposed against the appellant needs to be reviewed, let the respondent be called for discussion, and let this case be submitted as per the rules after their discussion, or after the lapse of the time [given to them].

**The decision of the court**

This case has been submitted to us for hearing after being listed in the weekly and daily cause list. After going through the case file it seems to us that we have to decide whether or not the warning letter issued by the management [against the appellant] on July 26, 2001 holds good.

Here the appellant is seen to have been penalised on a charge of sexual misbehaviour. It has been mentioned in the letter which asked for a clarification that [the appellant] had gone closer to the woman employee of the casino, lecherously looked at the body, and used indecent and objectionable words and behaved indecently with her. In the complaint that the petitioner filed to the management asking for action she mentioned that this appellant went closer to her, touched her and said; “Let me see your hole”. Immediately after that she had complained to her superior officers. In the clarification submitted by the appellant on July 20, 2001 the petitioner had asked for a lighter and when he replied that he did not have the one, she put her hand into the pockets of his coat and when he tried to stop her she stumbled. [By saying this the appellant] admitted that he had gone closer to her.

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When someone tries to play with their dignity, unless they are compelled to fight for imposing a penalty on the culprit by taking exemplary action, women generally do not like to come to the limelight by bringing such matters into the public. This is a common belief and nothing needs to be said against this. In our country as attempts have just begun to be made to encourage women to take up outdoor work, and as priority is being given to encourage them to take up economic and professional activities, in order therefore to prevent women being dissuaded due to sexual harassment by colleagues and bosses in the workplace, it is necessary to be sensitive and sympathetic to providing legal remedies to them against such acts. The court should also look into these types of cases with sympathy and sensitivity. While by bringing such subjects upfront the women trying to fight for justice will be encouraged, the courts should also need to take into account that attempts can also be made to take undue advantage of such positive sensitivity.

In this case the appellant is found to have indulged in sexual harassment and acted against basic values with a colleague. Any direct or indirect act, or act by gesture which attacks the modesty of a women, if such act or gesture discourages women to work, such sexual delinquency can be called sexual harassment. The general recommendation No 19 of the UN Convention on the Elimination of all forms of Discrimination Against Women – CEDAW regards sexual harassment at the workplace as violence against women and maintains that it seriously affects equal enjoyment of rights by women as compared to those by men. “Sexual harassment includes such unwelcome sexually determined behaviour such as physical contact and advances, sexually coloured remarks, showing pornography and making 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 mean a disadvantage for her in connection with her employment including recruitment or promotion or when it creates a hostile work environment.” As Nepal is also a party to CEDAW and this Convention is pursuant to Section 9 of the Treaty Act, such Act is as good as Nepali law. Besides, the Supreme Court in Reena Bajracharya and also in the case relating to marital rape filed by Meera Dhungana on behalf of Forum for Law, Woman and Development (FLWD), has interpreted that CEDAW is operational like [any other] Nepali law.

In this case, the appellant is found to have touched a sensitive part of a woman colleague with malicious intentions. This kind of misbehaviour is against the right to sexual equality and also against the right to life and liberty. According to the study done by FLWD with ILO in 2001 titled “Sexual Harassment in the Workplace” where women are misbehaved with in the workplace, sexual harassment has adversely affected the physical and mental health of women,
caused frustration in work, and a situation may also arise where they are compelled to leave the job. This may pollute the environment of the work place. Such behaviour may adversely affect the image, production, service and industrial relation of the institution. This kind of behaviour is considered as a criminal act under section 1 of the Chapter “Of Indecent Assault (Ashaya Karani)” of the Muluki Ain, and a provision for punishment has also been made. As the lack of punishment or a lower punishment against such person may adversely affect the morale of workers, or employees or the environment of the working place, the warning given to the appellant seems appropriate pursuant to the provision of Labor Act 1991 and so holds good. Among the misconducts enumerated in Chapter 8 of our Labor Act 1991 sexual harassment is not included. Presently this is only included in the By-laws which can be amended, and as per the existing law only a warning can be given to the perpetrator. It is the opinion of this court that the provision relating to sexual harassment should be incorporated in the Act itself, and in view of the gravity of the offence, the punishment should also be increased. Let the attention of the concerned institutions be drawn to this issue. Let other things be as mentioned in the details.

**Details**

1. Let the copy of this decision be given to the concerned parties if they apply for the same.

2. Let attested copies of this decision be sent to the Parliament Secretariat; Ministry of Law, Justice and Parliamentary Affairs; Ministry of Labour and Transport; and the Law Reform Commission.

3. Let the original file of this case be sent to the respondent Authority after attaching an attested copy of the judgment.

4. Let the registration of this case be cancelled and the file be transferred to the concerned section as per the law.

Sd
Nirmal Kumar Dhungana
Adjudicating Officer

380 | Sexual Harassment at the Workplace
Kathubdeen
Vs.
Republic of Sri Lanka

Court of Appeal
Ismail, J., (P/CA)
DE Silva, J.,

C.A. No. 44/94
H.C. Colombo B 839/93
May 21st, 28th, 1998

Bribery act † s.19, 19(c), 25(1) † soliciting and attempting to accept a gratification † is sexual intercourse a gratification within the meaning of the bribery act † dock statement † credibility.

The accused appellant was indicted on four counts for soliciting and attempting to accept a gratification to wit sexual intercourse with the virtual complainant, as a reward or inducement for arranging a transfer. After trial the appellant was found guilty and convicted on all four counts.

Held
1. It is settled law that an unsworn statement must be treated as evidence. It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt. 2. S.90 of the Bribery Act defines gratification to include among other things, “any other service favour or advantage or any descriptive whatsoever”.

“The word gratification is used in its larger sense as connoting anything which affords gratification or satisfaction or pleasure to the taste, appetite or the mind. The craving for an honorary distinction or for sexual intercourse is an example of mental and bodily desires, the satisfaction of which is gratification which is not estimable in money”.

3. S.25 (1) of the Bribery Act makes ‘attempts’ to commit offences specified in the act punishable under the same provisions which make the principle offences punishable.

APPEAL from the judgment of High Court of Colombo.

July 31, 1998
DE Silva, J.

The Accused†Appellant (hereinafter referred to as the appellant) was indicted before the High Court of Colombo on four counts under section 19, 19(C) and
25(1) of the Bribery Act for soliciting and attempting to accept a “gratification”
to wit sexual intercourse with the virtual complainant Pallage Dona Damayanthi
Monica de Silva, as a reward or inducement for arranging a transfer for her
whilst the appellant was employed as the Security Manager of the National
Housing Development Authority.

The first and third counts were for allegedly having solicited a gratification in
the form of sexual intercourse with the said Monica de Silva, offences punishable
under section 19 and 19(C) respectively of the Bribery Act.

According to count 2 the appellant on 16.07.1993 in the course of the same
transaction as referred to in count 1 did attempt to have sexual intercourse with
Monica de Silva an offence punishable under section 19 read with section
25(1) of the Bribery Act. Count 4 also refer to the attempt of the appellant to
have sexual intercourse with Monica de Silva and thereby he committed an
offence punishable under section 19(C) read with section 25(1) of the Bribery
Act.

After trial the learned High Court Judge on 03.03.1994 found the appellant
guilty and convicted him on all four counts. On counts 1 and 3 he was sentenced
to a term of 5 years rigorous imprisonment on each count and in addition a fine
of Rs. 5000 had been imposed with a default sentence of 2 years rigorous
imprisonment on each count.

On counts 2 and 4 the appellant was sentenced to a term of 7 years rigorous
imprisonment with a fine of Rs. 5000 and a default sentence of 2 years rigorous
imprisonment on each count.

The trial Judge had directed that all these sentences run concurrently. This
appeal is against these convictions and sentences.

The case for the prosecution was that the accused/appellant was the Senior
Security Manager of the National Housing Development Authority at the
relevant time and in that capacity he was in charge of the Security Division of
that Authority. Monica de Silva joined the National Housing Development
Authority as a female security guard in December 1987 and came under the
supervision and control of the accused who was her immediate superior. As
she was a married lady and lived in Bandaragama she requested a transfer to
Kalutara which the appellant refused. Instead the appellant suggested that she
should spend time with him as husband and wife in order to help her to get a
transfer and also offered to get a National Housing Development Authority
house, in Colombo, for her, which offer Monica declined as she suspected his
motives.

During this period she gave birth to a child and due to the difficulties
encountered in feeding the baby and travelling to Colombo and back she
reapplied for a transfer to Kalutara. On or about the 25th of November 1989 she was transferred to the Gramodaya Centre at Kollupitiya. One day the appellant visited the Gramodaya Centre ostensibly to inspect the changing room facilities but Monica was of the view that the reason of his visit was to explore the possibility of achieving his purpose and to see whether the place was suitable for him to commit the said act.

According to Monica the appellant was refusing to give her the transfer she had requested because of her unwillingness to accede to his demands. At one stage she verbally informed the Deputy General Manager (Administration) regarding the harassment she received at the hands of the appellant. However she was reluctant to make a complaint in writing as she had to continue to work in the same institution.

Investigations into the activities of the appellant commenced on a confidential letter sent to the Bribery Commissioner’s Department by the General Manager of the National Housing Development Authority. On 10.07.1990 an officer from the Bribery Commissioner’s Department came to see Monica at the said Gramodaya Centre and made inquiries discreetly from her about the harassment she was receiving at the hand of the accused appellant.

After the Bribery officers spoke to her she agreed to cooperate with them and on 13.07.1990 she received a telephone call asking her to come to the Bribery Commissioner’s Department and on that day she made a statement to the Bribery officers.

The Bribery officers requested Monica to meet the appellant on the same day in the company of WPC Violet Senadheera who was to be introduced to the appellant as a married woman. whose husband had left her and was prepared to do “anything” in order to secure a job. Monica and Violet both visited the appellant in his office whereupon Monica spoke to him and presented to him an application for transfer which was produced by the prosecution as P(1) and introduced her friend to the appellant. She also “indicated” her willingness to sleep with him in return for the favour of getting the transfer. The appellant thereupon requested Monica to come with Violet to his apartment at Elivitigala Mawatha on 16.07.1990 and also requested her to bring her application P(1) and Violet’s a application for a job. The appellant stated that he would be on leave that day and would be alone in the house as his wife would be away. He has further stated that he would be taking steps to remove the National Housing Development Authority security guards from the housing scheme where he lives.

On 16.07.1990 around 9.00 a.m. Monica with Violet went to the appellants flat at Elivitigala Mawatha. As they approached the front door the appellant opened the front door and took them in. The appellant was in a sarong but
without a shirt and was drying his hair with a towel. They had been asked to sit in the hall. Having gone to the room the appellant had called Monica inside. The door to that room had a transparent curtain. According to Monica when she went inside the appellant removed his sarong and embraced her and requested her kiss his private parts which she refused to do.

Having observed Violet watching from the hall the appellant suggested that the door be closed to which Monica said that Violet is also like her and ready for “anything” therefore Violet being there was not a problem. Soon thereafter the officers of the Bribery Department walked in and arrested the accused. According to the Bribery officers the accused was naked at that time.

The learned counsel for the appellant submitted the following grounds of appeal.

(1) That there are material contradictions inter se and per se in the evidence of the chief prosecution witnesses and therefore the learned trial Judge could not have accepted them as truthful witnesses.

(2) The learned trial Judge had not given adequate consideration to the dock statement of the accused†appellant and the evidence led on his behalf.

(3) Counts 2 and 4 of the indictment do not have the elements known to law and for that reason they are unintelligible.

On the first ground the learned counsel for the appellant submitted that Monica is an untrustworthy and unreliable witness. He pointed out that it was the evidence of Monica that on the 13th when they met the appellant in the office the appellant questioned her in the presence of Violet whether she was willing to spend time with him as “husband and wife”.

Mr. Mustapha pointed out that in cross†examination she changed her position and stated that what the appellant told was not to come and spend time as husband and wife but “WUg wr jefvZg tkak mqMzkao?” Counsel submitted that there is a vast difference between calling Monica to spend time as husband and wife and “WTg wr jefvzg tkak mqMjkao?” It was urged that apart from using the word “Umba” no immoral suggestions had been made by the appellant.

In this connection WPC Violet, The decoy, stated that at that time the appellant said “wr jefvzg udj yuznfkak jfrikfida.”

It is to be noted that Monica’s position was that the appellant had been demanding from her to have sexual relationship as husband and wife for a long time. She merely narrated this in the examination in chief. State Counsel who prosecuted has not bothered to clarify this position in examination in chief. However in cross examination when questioned by the defence as to the exact words uttered by the appellant witness came out with the words. It is appropriate at this stage to set out the evidence relating to this at page 117.
From the above evidence it is clear that Monica’s position was that not only her even Violet understood the meaning of the words uttered by the appellant. At this point it is pertinent to note that Violet’s understanding of the words would have been in the context of the information supplied by Monica to the Bribery Commissioner’s Department.

Thus in the circumstances of this case I do not think the contradiction referred to by the counsel is a material contradiction. Both versions given by Monica and Violet are substantially same.

The learned trial judge has addressed his mind to this aspect of the evidence when he says that “it is indeed strange and therefore somewhat unbelievable that a man would arrange for a clandestine meeting with a woman in the presence and hearing of another woman, who in addition, was a total stranger to him. I have given careful thought to this situation of the plot arranged by the bribery officials. The conduct of the accused as well as violet who was presented as a woman of easy virtue desperately in need of a job. I am convinced beyond doubt that accused was prepared to throw caution to the winds in order to achieve his immoral purpose”.

The learned counsel also submitted that the trial Judge misdirected himself when he treated Violet as a woman of easy virtue without any evidence to that effect.

It is to be noted that Violet was introduced as a person whose husband has left her and was in desperate circumstance to get a job. Monica has also indicated that Violet too is willing to do “anything” with the appellant if she gets a job. In this situation the learned trial Judge has only commented that Violet was presented as a woman of easy virtue and not that Violet was in fact a woman of easy virtue. I see no error in the Judge’s comment in this regard.

The learned counsel has also complained that the trial Judge has erroneously treated Monica as a “disinterested” witness. He drew the attention of the court to the evidence given by her where she had admitted that she knew that there were no vacancies at Kalutara and the appellant too told her. Counsel submitted that in spite of this she persisted her quest for a transfer and she was angry with the appellant for not acceding to her request and was waiting for an opportunity to harm him.

It is to be noted that the trial Judge has considered this aspect on the basis that she never initiated a complaint to the Bribery officials. Till the Bribery officers contacted her she knew nothing about the complaint to the Bribery Department. It was the idea of the Bribery officials to send Violet with her to meet the appellant to the office. In the circumstances one cannot blame the Judge for describing Monica as a disinterested witness.
It was urged that witness Monica has deliberately given false evidence in this case. Counsel referred to P1 where according to the prosecution evidence the appellant had taken action on her application. He has informed the authority in writing that as there was no vacancy at Kalutara he cannot recommend the transfer. It was contended that if the appellant had acted on P1 there is no possibility that P1 could remain with Monica.

On an examination of her evidence at page (33) it is clear that she has forwarded several applications and on one occasion appellant refused to accept the application and on another occasion returned one to her and she identified P1 as that document. It is also relevant to note that when she went to meet the appellant on the 13th she had taken this application and appellant requested her to bring it on the 16th to his home. Bribery officers recovered this from Monica on the 16th after the said incident. In these circumstances I hold that there is no merit in the argument.

The next submission of the learned counsel for the appellant was that the trial Judge did not give adequate consideration to the defence evidence.

Apart from the dock statement, the defence called one Tuwan Raheem Jaya, a photographer, to produce certain photographs of the house of the appellant. The main purpose of this evidence was to show that there was a door from the bedroom to the hall. This was because Monica in her evidence has stated that there was no door to that room. Violet’s evidence on this point was that she cannot remember whether there was a door or not.

These photographs have been taken long after the event and the trial Judge has correctly rejected his evidence and has stated “In any case these two witnesses spent only about 15 minutes at the flat and that too under trying and tense circumstances. If they did not notice or did not remember the details of the apartment as much as the accused it is not a matter for surprise.”

The appellant made an unsworn statement from the dock. He stated that he ceased to function as the Senior Security Manager of National Housing Development Authority since 15.03.1990 on which date he received a transfer to the Ministry of Plan Implementation and worked under one A. C. Lawrence a security consultant to the said Ministry. On the instructions of Lawrence he had conducted investigations into several important persons including the Deputy General Manager to whom Monica had made certain representations against the appellant. He admitted that Monica came to his office on the 13th of July with another woman (Violet) and had requested that that woman be given employment and that he asked for an application and then Monica said that the application could be given on Monday, and he told them that he was on leave on Monday and suggested that Monica could come with that woman to his house on Monday, 16th of July with an application, and, if she was coming,
to bring some information regarding certain petitions he had received. He said even on prior occasions Monica had supplied him with necessary information. The appellant stated that he took leave for the 16th of July from Lawrence as he had to attend to a function in the school of his child. On the 16th morning whilst he was drying himself after a bath he heard his door bell ringing. He opened the door and saw Monica and Violet and invited them to come inside. As he was not wearing a shirt he went to the room to get a shirt and suddenly discovered Monica standing beside him. When he questioned her as to what she was doing there she laughed and sat on the bed. At that moment four persons entered the room and announced that they were from the Bribery Department. He denied that he kissed Monica or that he caused her any harm.

It is now settled law that an unsworn statement must be treated as evidence. *(Q v. Kularatne)*1, *(K v. Sittamparam)*2, *(Q v. Buddarakkitha)*3, *(Gunapala v. The Republic)*4. It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt.

The learned trial Judge rejected the dock statement in the following terms: “I have endeavored to evaluate the dock statement with utmost concern for the accused. I have to conclude that it is a tissue of lies concocted by a desperate man situated in an inescapable predicament of his own creation. It has entirely failed to create any doubt whatever in the prosecution case. “I am inclined to agree with the learned trial Judge on this matter. The appellant admits that it was he who had invited the women to come to his house. It is also a fact that the wife of the appellant was not present in the house on the 16th when the two women went there. Furthermore, it is rather questionable that the appellant suggests that they meet at his house merely to hand over an application. Account must also be taken of the fact that the appellant has not denied Monica’s evidence that when she questioned him about her leave he had said that he would look after it. So also, when she questioned regarding the security guards at the Elivitigala Flats, he had said that they would be removed. It is my view that the learned trial Judge has correctly rejected the dock statement of the appellant. The dock statement is not credible and nor does it create any reasonable doubt on the prosecution case.

With regard to the position taken up by the appellant that he was not an employee of the National Housing Development Authority the prosecution having obtained leave to lead evidence in rebuttal led the evidence of the Personnel Manager and succeeded in discrediting the accused. The evidence was led to establish that the appellant sat in tender Boards as Chairman representing the National Housing Development Authority during the relevant period. This position was not challenged by the defence.
The next question raised by the counsel for the defence was with regard to the validity of counts two and four of the indictment.

As mentioned earlier there are four counts on the indictment. 1st and 3rd counts refer to the solicitation of the gratification and allege that thereby the accused committed offenses punishable under section 19 and 19(C) of the Bribery Act respectively.

The gratification that is alleged to have solicited by the accused is “sexual intercourse”. Section 90 of the Bribery Act defines gratification to include among other things, “any other service, favour or advantage of any descriptive whatsoever”.

Dr. Gour in the Penal Law of India Vol. 1 has made the following observations “The word gratification is thus used in it’s larger sense as connoting anything which affords gratification or satisfaction or pleasure to the taste, appetite or the mind. Money is of course one source of affording pleasure, inasmuch as it implies command over things which afford gratification the satisfaction of ones desires, whether of body or mind, is a gratification in the true sense of the term. The craving for an honorary distinction or for sexual intercourse is an example of mental and bodily desires, the satisfaction of which is gratification which is not estimable in money”.

The fact that the alleged act in counts 1 and 3, namely, “sexual intercourse” is a “gratification” within the meaning of the Bribery Act was not disputed by the appellant and therefore no objection was raised regarding counts one and three which deal with the solicitation of sexual intercourse.

According to count two the accused appellant on 16.07.1993 in the course of the same transaction as referred to in count one, did attempt to have sexual intercourse with Monica de Silva and thereby committed an offence punishable under section 19 read with section 25(1) of the Bribery Act.

Count four also refer to the attempt of the accused to have sexual intercourse and allege that thereby he committed an offence punishable under section 19(C) read with section 25(1) of the Bribery Act.

Section 25(1) of the Bribery Act makes “attempts” to commit offences specified in the act punishable under the same provisions which make the principle offences punishable.

Counts two and four cannot be read in isolation but have to be read in conjunction with count one. Therefore it is clear that in the instant case reference to section 19 and 25(1) in counts two and section 19(c) and 25(1) in count four deal with a situation where the accused had made an attempt to “accept”
the gratification, which he solicited on 13.07.1990 as alleged in counts one and three in the indictment.

As pointed out by the Senior State Counsel who appeared for the Attorney General the evidence led at the trial clearly shows that the accused/appellant on 16.07.1990 did attempt to have sexual intercourse with the main witness. It is evident that the appellant in this attempt did several acts towards the commission of the offence of acceptance of the gratification i.e. invited the main witness to visit his house at a time when all other inmates were out, called her into his room, kissed her and removed the sarong he was wearing. The only and reasonable inference that could be drawn from these items of evidence is that the accused/appellant did attempt to accept the gratification he solicited as averred to in counts one and three.

In these circumstances I find that there is a legal and factual basis for these changes.

For the reasons set out above I affirm the convictions on all four counts. In regard to the sentence the counsel brought to the notice of court that after conviction the appellant was in custody for nearly two years until this court enlarged him on bail on 26.07.1996. In the circumstances I affirm the sentence of two years rigorous imprisonment imposed on counts one and three of the indictment. I set aside the sentence of seven years rigorous imprisonment imposed on counts two and four and in lieu of, I impose a sentence of three years rigorous imprisonment on each count. The sentences are to run concurrently. The fine and the default sentence imposed by the learned High Court Judge will remain. Subject to the above variation in the sentences as above, the appeal is dismissed.

Ismail. J, (P/CA)
I agree.

Appeal Dismissed.
Sexual Harassment at the Workplace
CHAPTER V
CHILD ABUSE

Context

Child abuse is an issue much talked about but hardly developed in the legal sector. It may not be completely wrong to say that in this region there is no legislation which addresses child abuse comprehensively. The same applies to the much talked about issue of child sexual abuse. Children as a class are not recognised for providing adequate legal protection to. Consequently, there is hardly any judgment which has addressed this issue, though an attempt was made by the Supreme Court in the case of Gaurav Jain vs. Union of India. However due to a technical problem, the questions that were raised were left open and no final solution could be arrived at.

Similarly, attempts to bring about changes with respect to child sexual abuse through the intervention of the Supreme Court were also diluted to a large extent. The judgment (Sakshi vs. Union of India, see below) has not addressed all the issues that cover the complexities in a case relating to child sexual abuse, and has merely given temporary redress.

The fact that there are very few judgments from Bangladesh, Nepal or Sri Lanka on the issue of child sexual abuse or any other form of child abuse also demonstrates that jurisprudence on this issue is yet to develop. However, it is interesting to note that all these countries have signed and ratified the Convention on the Rights of the Child (CRC) more than 10 years back!

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The State versus Seema Zahur and others

Highlight

- Established the need for transparency and a visible administration of justice
- Interpreted the inherent rights of the High Court, as established in the Code of Criminal Procedure

In a case reflecting police apathy and state complicity with the perpetrators of the crime, the Bangladesh High and Supreme Court have strongly come down on the perpetrators. A child aged about 4-5 years, was raped inside the police control room near to the office of Chief Metropolitan Magistrate, Dhaka. Instead of charging the police personnel who allegedly raped the child, two minors who happened to be in police custody at the time of incident were produced as the accused. An impartial judicial inquiry was requested to the High Court which was allowed. When the State went in appeal, the Supreme Court upheld the decision by stating that “It is in cases of public interest where there is an allegation of an overt act against the police personnel posted in the Court of the Chief Metropolitan Magistrate and in the interest of transparency and visible administration of justice there is no impediment to a judicial inquiry as ordered by the High Court Division.”

The State had also challenged the locus standi of the Respondent (Seema Zahur) as she was an Advocate and neither the informant nor an accused nor a witness in the case. Using the inherent powers granted to it under section 561A of the Criminal Procedure Code, the Court allowed the petition of the Activist. While the inherent power of the court is undefined and indefinable, it is well settled
that the paramount consideration in exercising power under section 561A is that such an order will prevent abuse of the process of any court or otherwise it would secure the ends of justice.

**Siraj Mal and others versus State**

*Highlight*

- Established the circumstances under which a changed statement can be considered valid

The question raised through this judgment is about the validity of two statements (in contradiction) made by the same victim before different magistrates and at different points in time, though explaining the circumstances under which the original statement was made.

A girl, who was abducted and subsequently raped by two men, during the initial inquiry, gave a statement before a magistrate about her age—that she was more than 16 years old and had had consensual sexual intercourse. Subsequently upon returning home, she recounted to her family that she had been intoxicated against her will, forcefully kept in confinement and had been raped by two of the accused. A second statement was made before the magistrate by her, explaining all the circumstances including the influence of intoxicants when she gave the earlier statement. While hearing the appeal of the accused—who were convicted by the trial court—the High Court held “But it is to be remembered that the statement under section 164 CrPC is not a substantive piece of evidence”. Other aspects considered by the court were the circumstances under which the earlier statement was given—it was established that the girl was under intoxication while giving the earlier evidence—and the other credible witnesses including the eye witness. Regarding the witnesses, the High Court also held that “...mere relationship cannot be a ground for discarding the evidence of a witness unless he is found to be biased and resorting to any falsehood”. Regarding witnesses, the court also quoted the decision in the case of *Hazrat Ali and others Vs. State* reported in 1984 BLD 257 wherein it has been observed (relying on another decision reported in 22 DLR 279) that “mere fact that names of witnesses examined in the cases were not mentioned in the FIR is no ground to disbelieve the evidence of those witnesses.”

**Sakshi vs. Union of India and Ors**

*Highlight*

- Expanded the circumstances where in-camera trials should be used
- Established procedures that would help child victims to testify at ease in court

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Sakshi vs. Union of India has drawn the attention of the Supreme Court to the fact that the laws relating to rape are not adequate to cover various sexual atrocities against women, or child sexual abuse. Sakshi, a voluntary organization for the welfare of women and children, proposed a draft amendment to the provisions in the Indian Penal Code and the same came up for examination by the Law Commission at the instance of the apex court.

Previously, the Delhi High Court found that an eight-year-old child penetrated in three orifices by her father is neither a rape nor an unnatural offence. Instead it is a mere “hurt”, an outrage of modesty. This motivated an appeal to the Supreme Court of India. At a time when the judiciary is seen at best as indifferent or, at worst, hostile to developing a legal culture based on gender justice, Sakshi filed this petition urging the court to seriously consider an interpretation of rape which could finally alter a status quo view of life, by altering the general perception of it. In its petition filed in 1997, Sakshi had contended that the scope of sections 375/376 IPC (rape) be enlarged to include other forms of sexual assault intended to humiliate, violate and degrade a woman or child, sexually which adversely affect the sexual integrity and autonomy of women and children, thereby violating Article 21 of the Constitution.

Recognising the sensitivity of cases of child sexual abuse and rape, the Supreme Court directed that the victims and witnesses be kept away from the accused during trial by means of a screen or similar arrangement separating them. Questions directly relating to the incident put in cross-examination on behalf of the accused should be given in writing to the trial judge, who may put them to the victim or witnesses in a clear language, and sufficient breaks should be allowed while giving testimony.

Till this judgment was passed, it was only mandatory to hold in camera proceedings in cases relating to rape. This judgment held that proceedings should be in camera even in cases which do not have penile penetration.

Sheba Abidi versus State of Delhi and another

**Highlight**
- Established that child victims can testify outside the court environment
- Child victims are entitled to get a support person during trial

Soon after the judgment was passed in the case of Sakshi, the Delhi High Court passed a judgment wherein it laid down further parameters with respect to the conduct of a case in child sexual abuse.

This is a case relating to a four year old boy who was sexually abused by his teacher. A complaint was filed, registered, and the trial began. The child was
scared of the perpetrator, and was very uncomfortable to come face to face with him. The mother of the child made an application before the trial court stating these difficulties. In her application she had attached the opinion/report of a reputed psychiatrist who had a chance to interact with the child, and had endorsed the child’s apprehension. However, the trial court did not accede the mother’s request that the evidence should be recorded elsewhere.

Aggrieved by this order, the mother filed a petition before the Delhi High Court. After hearing the case at length, the High Court passed a judgment, wherein it held that in cases of child sexual abuse, the Courts should strive towards ensuring that the child was not traumatised further. It further held that the child could give evidence in an environment outside the Court if he/she was uncomfortable going to the Court. It further held that in all these cases, the child would be entitled to get a support person with him/her during the trial, and this support person could be also be the parent of the child.

CEHAT versus Union of India and others

 Highlight:
- Was instrumental in bringing into focus the issue of female foeticide and also direct the Government to make amendments in the law;
- Monitored the problems relating to foeticide and law enforcement against it in the country;

In many South Asian countries, there is a conventional patriarchal preference for sons. Daughters are seen as a burden on the family and often neglected and discriminated against when it comes to feeding and care giving. In many Indian communities, female babies are killed by family members immediately or soon after birth, either actively or through neglect. More recently, with the advent of sex-selection tests in India, there has been a systematic misuse of the available technology by families that could afford them, to eliminate unwanted daughters. Such tests were advertised with slogans like, “Invest 500 rupees now, save 50,000 rupees later.” A disposal of daughters is considered necessary to relieve families of economic pressures, suffering, and humiliation. Over time, this preference for sons has led to a very high number of “missing women” in India; the 2001 Census revealed that with a sex ratio of 933 women for every 1000 men, India had a deficit of 35 million women when it entered the new millennium.

Attempting to end the practice of sex-selection, in 1994, the Indian Parliament enacted the pre-natal Diagnostic Techniques (PNDT) Act. While the Act came into force in 1996, even five years later it was not being implemented to a large extent. Often, rather than prosecuting the offending non-registered genetic
clinics or counselling centres that were operating in violation of the Act, a warning was issued and no action taken.

Since the PNDT Act was never properly implemented, this petition was filed by Indian NGOs seeking the compliance of the Central and State Governments with the Act. More specifically, the NGOs asked for the appropriate authorities to be appointed at both the State and the District levels as well as within the Advisory Committees. It also prayed that the Central Government be directed to ensure that the Central Supervisory Board met every six months as mandated by the Act and that all advertisements for pre-natal sex selection be banned, including those for techniques which could be similarly abused.

During the pendency of the case in the Supreme Court, it was observed that there were developments in technology whereby a person could pre-determine the sex before conception. This technique was also growing in a rapid phase and many doctors were party to these tests. The Government, on the direction of the Supreme Court passed an amendment to the PNDT act to include “Pre-Conception” tests in addition to pre-natal tests.

**His Majesty’s Government on the F.I.R. of Bhakta Bahadur Singh versus Harilal Rokaya, and others**

**Highlight**
- Established the guidelines on how the statement in a rape case should be evaluated, particularly in cases of minor contradictions
- Established that the judicial approach of imposing the burden of proof on the victim or the plaintiff does not suit the lifestyle of the women in the social context

This is a case of a rape of a minor girl where the FIR and the subsequent medical examination were delayed for more than two weeks due to family circumstances. The Supreme Court reversed the decision of the lower courts—where the accused were acquitted—and convicted three of the accused observing that “…instead of taking it as reliable or good presumption looking at it with suspicion and the judicial approach of imposing even the burden of proof on her or the plaintiff does not suit the lifestyle of the women in the context of social environment in which they grow.” The court was very critical of the gender insensitive approach of the lower courts.

The court stated—“To view the statement of the victim with doubt and suspicion and making similar presumptions or to try to establish the reliability of her statement in advance amounts to presumption of suspicion against women...courts should take it as an obvious judicial presumption that a simple
woman cannot come over to the court to tell a lie that prejudices her prestige or that of her family. It is rather appropriate to presume the opposite.”

Very candidly the learned judge observed; “There can be minor differences between the statement that she made to the police and the deposition she gave in the court, a few facts or their order here and there may also be missing. But in essence, if there exist, no vital contradiction which ruins the credence, the statement of the victim woman should be attached much importance from evidential point of view.”
From the materials on record it appears that the First Information Report alleged that the occurrence took place inside the police control room where rape was allegedly committed by police personnel which part was not investigated by the Investigation Officer and it appears that two witnesses were kept under the control of the police and were produced from their custody. In this case there is specific allegation that the alleged offence of rape was committed by a police personnel. But in the charge sheet police personnel who allegedly committed rape was let off and respondent No. 2 has been charge sheeted. It in case of public interest where there is allegation of overt act against the police personnel posted in the Court of the Chief Metropolitan Magistrate and in the interest of transparency and visible administration of justice there is no impediment to a judicial inquiry as ordered by the High Court Division. The High Court Division
has not committed any wrong in directing holding of judicial inquiry which will be in addition to the police report already submitted. [Para-4]

**Section-561A**

Respondent No. 1 who is an Advocate is neither the informant nor an accused nor a witness in the case.

Locus Standi - This section provided that the High Court Division in its inherent power may make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or otherwise to secure ends of justice. This section emphasized that the Supreme Court in its High Court Division has the widest jurisdiction to pass orders for ends of justice and for that purpose to entertain applications not contemplated by the Code. The inherent power can be exercised for either of the three purposes mentioned in the section although the purpose selected are illustrative, not exhaustive. The inherent power of the court is undefined and indefinable. It is well settled that the paramount consideration in exercising power under section 561A of the Code of Criminal Procedure is that such an order will prevent abuse of the process of any court or otherwise it would secure ends of justice. We hold that no illegality and wrong have been committed by the High Court Division in exercising its inherent power which has been initiated by respondent No. 1.        [para5]

**Judgment**

**Mr. Mahmudul Amin Choudhury, J:**This petition for leave to appeal is directed against orders dated 20.5.1999 and 31.5.1999 passed by a Division in Criminal Miscellaneous Case No 5799 of 1999 making the Rule absolute.

2. The facts leading to this petition are that respondent No. 1 as petitioner filed the aforesaid Miscellaneous Case Praying for quashing the proceeding of Nari-O-Shishu Nirjatan Case No. 150 of 1998 which arose out of Kotwali P. S. Case No. 25 dated 10.3.1998 pending in the court of Nari-O-Shishu Nirjatan Bishesh Adalat, Dhaka and also for further investigation into the aforesaid case. The allegation is that an offence of rape was committed upon child-Tania, a minor girl of 4/5 years inside the police control room near the office of the Chief Metropolitan Magistrate, Dhaka and she sustained injury on her private parts. She was ultimately taken to the office of the Bar Association and the Secretary of the Association sent her to National Hospital for treatment and thereafter he himself lodged the First Information Report of the aforesaid case. The police on investigation submitted charge sheet against accused Obaidur Rahman @ Obaidul Mathbor @ Mora and ultimately the matter came up before the Nari-O-Shishu Nirjatan Case No. 150 of 1988 where charge was framed against the accused. The Adalat examined two witnesses and of them cross
examination of P. W. 2 remained inconclusive. Thereafter respondent Seema Zahur, and Advocate of the local Bar moved the High Court Division under section 561 A of the Code of Criminal Procedure for quashing of the proceeding and also for directing further investigation alleging that the investigation was not proper though it has been mentioned in the First Information Report that the rape was committed by police personnel inside the police control room. The investigation was not directed towards that angle and that two witnesses who are minors were produced from the police custody and that the real offender has not been brought to task. A Division Bench of the High Court Division on hearing the matter made the Rule absolute directing holding of judicial inquiry by a proper officer into the allegations made by the Secretary of Dhaka Ainjibi Samity and to proceed in accordance with law.

3. Learned Deputy Attorney General on behalf of the petitioner submits that respondent No. 1 Seema Zahur who is an Advocate is neither the informant nor an accused nor a witness in the case and as such she has not locus standi to move the High Court Division under Section 561A of the Code of Criminal Procedure. He further submitted that the Nari-O-Shishu Nirjatan Bishesh Ain does not contain any provision for holding judicial inquiry. He submitted that section 7 of the Ain provided that unless a prosecution report is submitted a police officer not below the rank of Sub-Inspector or any other person specially empowered by the Government, the Adalat cannot take cognizance of any offence. It is submitted that the charge sheet has already been submitted and there cannot be any judicial inquiry as ordered by the High Court Division. It is also submitted that before exercising extraordinary inherent power under section 561 A of the Code of Criminal Procedure, the High Court Division ought to have held that the present case is not an appropriate case to exercise such power.

4. Section 23 of the aforesaid Ain provided that the provisions of the Code of Criminal Procedure will be applicable in such a case unless it is contrary to any of the provisions of this Ain and the Adalat will be considered as a court of Sessions. We have carefully gone through the provisions of this Ain and we find nothing which debars a judicial inquiry as ordered by the High Court Division. From the materials on record it appears that the First Information Report alleged that he occurrence took place inside the police control room where rape was allegedly committed by police personnel which part was not investigated by the Investigation Officer and it appears that two witnesses were kept under the control of the police and were kept produced from their custody. In this case there is specific allegation that the alleged offence of rape was committed by a police personnel. But in the charge sheet police personnel who allegedly committed rape was let off and respondent No. 2 has been charge sheeted. It is a case of public interest where there is allegation of overt act
against the police personnel posted in the Court of the Chief Metropolitan Magistrate and in the interest of transparency and visible administration of justice there is no impediment to a judicial inquiry as ordered by the High Court Division. The High Court Division has not committed any wrong in directing holding of judicial inquiry which will be in addition to the police report already submitted. This will help collect further and deter materials and find out the real or other culprits if any.

5. As regards the objection raised by the learned Deputy Attorney General on the locus standi of respondent No. 1 it appears that she moved the High Court Division under section 561A of the Code of Criminal Procedure. This section provided that the High Court Division in its inherent power may make such orders as may be necessary to give effect to any order under this Code of to prevent abuse of the process of any court or otherwise to secure ends of justice. This section emphasised that the Supreme Court in its High Court Division has the widest jurisdiction to pass orders for ends of justice and for that purpose to entertain applications not contemplated by the Code. The inherent power can be exercised for either of the three purposes mentioned in the section although the purpose stated are illustrative not exhaustive. The inherent power of the court is under fined and indefinable. It is well settled that the paramount consideration in exercising power under section 561A of the Code of Criminal Procedure is that such an order will prevent abuse of the process of any court of otherwise it would secure ends of justice. We hold that no illegality and wrong have been committed by the High Court Division in exercising its inherent power which has been initiated by respondent No. 1 and in that view of the matter we find no force in the objection raised by the learned Deputy Attorney General.

6. Furthermore, we fail to understand why the State is coming with such a petition. If there is transparency in investigation and trial the State will be benefited. Moving this court on the part of the State indicates that something is wrong somewhere.

7. The petition is therefore dismissed
Siraj Mal and others...................................
................................................... Appellant
Vs.
State.................... Respondent*

High Court Division
Criminal Appellate Jurisdiction

Judge
Md. Ansar Ali
Kazi Ebadul Haque J.J.

Date of Judgment: December 7th, 1992.

Evidence Act (I of 1872)

Section 3
Mere relationship cannot be a ground for discarding the evidence of a witness unless he is found to be biased and resorting to any falsehood.

Abul Karim Vs. State 1981 BLD (AD) 200 relied. ..........(8)

Section 45
The opinion of a doctor, unless supported by reliable evidence, does not carry any value.

Prafulla Kumar Bhattacharjya Vs. Ministry of Home Affairs Govt. of Bangladesh 28 DLR 123; Ghulam Quadir Vs. Noor Ahmed 6 DLR (WP Lahore) 178 & Muhammad Naeem Vs. Crown PLD 1950 (Lahore) 507 ref. .......... (8)

Section 134
In a case of sexual offence when the victim girl is a minor her evidence, if otherwise found to be reliable, may be sufficient for conviction of the accused even without independent corroboration.

Montaz Ahmed Khan Vs. State 19 DLR (SC) 559 found not applicable. .... (8)

Cruelty to Women (Deterrent Punishment) Ordinance (LX of 1983)

Sections 4(b) & 4(c)
* Criminal Appeal No. 20 of 1989 (Comilla)
   Criminal Appeal No. 654 of 1990 (Comilla)

Even if the plea of the defence that the victim girl gave her consent to the alleged marriage and sexual intercourse is accepted still that will not help the
defence, because she being a minor her consent was in fact no consent in the eye of law. ........ (8)

**Code of Criminal Procedure (V of 1898) Section 265G**
The mere fact that witnesses examined were not mentioned in the FIR is no ground for disbelieving them.

Hazrat Ali & others Vs. State 1984 BLD 257 & 22 DLR 279 relied. ...... (8)
Majibur Rahman, Advocate with MA Jabbar, Advocate-For Appellants.
M Shamsul Alam, DAG wiht Fazlul Hoque Chowdhury, Advocate-For State.

**Judgment**

**Muhammad Ansar Ali J:** This appeal under section 30 of the Special Powers Act, 1974 is directed against the judgment and order dated 29.12.88 passed by the learned Sessions Judge and Ex-officio Special Tribunal No. 1, Chandpur in Special Tribunal Case No. 7 of 1988 convicting appellants Siraj Mal, Nurul Islam alias Nuru under section 4(b) and 4(c) of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 (Ordinance LX of 1983) and sentencing each of them to suffer rigorous imprisonment for 14 years and to pay a fine of Tk. 10,000.00 each, in default to suffer rigorous imprisonment for 2 years more and also convicting the other 7 accused appellants namely Abdur Rashid Prodhania, Adam Mal, Abdur Razzak Howlader, Abdul Khaleque, Abdul Batin, Misir Ali and Ruhul Amin under section 9 read with section 4(b) and section 4(c) of the said Ordinance and sentencing accused appellants Abdur Rashid Prodhania and Adam Mal to suffer rigorous imprisonment for 10 (ten) years and to pay a fine of Tk. 10,000.00 each, in default to suffer rigorous imprisonment for 2(two) years more and the rest 5 appellants to suffer RI for 5 years and to pay a fine of Taka 5,000.00 each in default to suffer RI for one year more.

2. The prosecution case as made out in the FIR lodged by the informant AL Mamun PW 1 with Matlab PS on 26.2.87 at 9-15 PM is inter alia, that the informant was a surveyor in the office of the Upazila Parishad at Matlab and that while at about 9-00 PM on 25.2.87 he was gossiping with his wife PW2 in the northern room of his western bhati hut and his son Jakir Hossain was around the study table and his daughters Jasmin Akhtar PW 4, Mosammat Aklima Khatun PW 5 and the victim Ferdousi Begum alias Shilpi PW 3 were standing there to hear the gossiping, the accused appellants namely Siraj Mal, Nurul Islam alias Nuru, Abdur Rashid Pradhania, Adam Mal, Abdur Razzak Howlader, Abdul Khaleque, Abdul Latif, Misir Ali and Ruhul Amin being armed with dagger, lathi, pistol, etc. forcibly entered into the room by its eastern door and upon pointing a pistol and a dagger asked the informant and other inmates of the room to keep quiet and then accused appellant Siraj Mal caught
hold of the victim girl Shilpi PW 3 and pressed a piece of cloth on her mouth and then accused Nurul Islam @ Nuru and Rashid lifted her on their shoulder and took her out from the room and left the place of occurrence firstly turning towards the east from the room and thereafter towards the south and then confined her in the house of co-accused Adam Mal. The informant and others raised alarm and tried to resist the kidnapping or abduction of the victim girl, but they could not advance as they were threatened with pistol and dagger by the accused. On hearing alarm, the neighbours came and saw the kidnapping or abduction of the victim girl, but they could not rescue victim from the hands of the miscreants who threatened them also. It is further alleged in the FIR that the accused Siraj Mal wanted to marry one Aklima Khatoon @ Baby, another daughter of the informant but that proposal for marriage was turned down. Thereupon accused Siraj Mal threatened the father of the girl saying that he would forcibly lift the girl from his house, but the said girl (Baby) was however given in marriage with another person a few days before the present occurrence and hence accused Siraj Mal being excited had caused this occurrence; that just after the lifting of the victim girl Shilpi, the witnesses hearing alarm came to the spot and tired to pursue the miscreants to a certain distance, but ultimately they could neither rescue the victim girl nor find out her whereabouts. However, on the above allegations made by the informant Motlab PS Case No. 5 dated 26.2.87 was started against the accused appellants under sections 147/447/448/366A/379 of the Penal Code.

3. PW 13 Amarendra Lal Roy, the Officer-in-Charge Matlab PS recorded the FIR and entrusted PW 15 Nepal Ranjan Barua with the investigation of the case who thereafter visited the place of occurrence, prepared a sketch map of the place of occurrence with the separate index and seized some alamats including a hurrican lantern with the light of which the witnesses had recognized the miscreants. While investigating into the case with the help of his force the Investigation-Officer came to know that the victim girl was kept confined in the house of accused Aamd Mal and the victim girl was going to be shifted elsewhere in the night following 27.2.87 and on receipt of such information he went there and recovered the victim girl along with accused Nurul Islam and arrested him when he tried to flee away. On recovery of the victim girl she was taken to the police-station and thereafter sent to the local Upazila Magistrate who sent the victim girl Shilpi to the judicial custody by an order and also recorded her statement under section 164 CrPC in which she alleged, inter alia, that she had love affairs with accused Nurul Islam to his maternal uncle’s house at Barua where she was given in marriage with the accused Nurul Islam and the same was solemnise by a moulvi and then their was consummation of the marriage and she was cohabited by the said accused Nurul Islam @ Nurul for a few days but she was not sexually intercoursed by any other person and
that because of enmity, her father lodged the FIR against the accused persons which was false and concocted. Thereafter on the prayer of the Investigation-Officer she was sent to a Medical Board by the local Upazila Magistrate for determination of her age. The Medical Board consisting of three doctors, one of whom was the Civil Surgeon, Chandpur medically examined her on 3.3.87 and gave their report on 4.3.87 which has been marked as Ext. Ka showing the age of the victim girl as between 15 to 16 years, but without any comment as to whether she was ravished. Thereafter the learned Magistrate on the prayer of the father of the victim girl granted her bail on 10.3.87, she then came back home with her father and disclosed the entire occurrence of kidnapping and abduction and also her raping, to all the inmates of the house of the informant, particularly, to her two sisters i.e. PWs 4 and 5 stating, inter alia, that she was after her kidnapping or abduction kept confined in a room in the hut of accused Adam Mal in the night of occurrence and then at about 12 in the said night she was taken to the adjacent kitchen room situated behind the hut of accused Adam Mal where she was administered wine together with “dhutra” juice against her will and having refused to take the same she was even given a kick with leg by accused Rashid and thereafter she was subjected to illegal intercourse by force against her will firstly by accused Siraj Mal and then by accused Nurul and this by force against her will firstly by accused Siraj Mal and then by accused Nurul and this was done for two consecutive nights and due to the adverse effect of the liquor administered to her, she became almost senseless and in fact she did not make any voluntary statement before the Magistrate and also she could not remember whether she had as actually put any signature on any paper before the Magistrate. She, made similar statement before the Investigation-Officer. The father of the victim thereafter took the victim girl to doctor Md. Ershadullah PW 11 who was private doctor of Chandpur for treatment. After medically examining the victim girl, the said doctor found blood still oozing out thinly from her private parts and also in her wearing clothes. He advised her complete rest for a substantial period and issued a certificate to that effect in Ext. 4. Thereafter she was given further treatment by Doctor Ismail Hossain PW 10 who was RMO of the Matlab Upazila Hospital. He also issue a medical certificate Ext. 3. Thereafter the father of the victim girl filed an application before the Magistrate. Matlab on 5.5.87 and also submitted an affidavit of the victim girl on 9.5.87 denying the alleged statements made earlier before the Upazila Hospital Magistrate, Matlab on 25.2.87 as she was in an abnormal condition on that date and at the relevant time because of intoxication; hence an application was however filed before the District Magistrate, Chandpur on 10.5.87 for allowing her to record another statement under section 164 CrPC before any competent Magistrate to give out the true and correct picture of the occurrence. The prayer was allowed and accordingly
her statement was again recorded by another Magistrate Mr. Waliullah Miah PW 12 in which she stated, inter alia, that the statement made earlier before the Magistrate on 28.2.87 was false and fabricated and the same was not true and voluntary and she asserted in her subsequent statement that she had no love affair with accused Nuru and there was no marriage tie with him by any free consent and that she was only 13 years of age and was a student of Class VIII and that the report of the Medical Board as regards her age was also not correct as she was born on 22.5.74 and that she was forcibly raped by the two accused Siraj and Nuru against her will. The Investigation-Officer on conclusion of the investigation submitted charge sheet on 14.5.87 under sections 143/447/448/366A/379 of the Penal Code read with section 4(a) & 4(b) of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 against the accused appellants and thereafter the case was sent to the learned Sessions Judge and Special Tribunal No. 1, Chandpur for trial. At the trial charge was framed under section 4(b)(c) of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 on 4.9.88 as against all the 9 accused persons. On the prayer of the learned Public Prosecutor, the charge was subsequently amended on 8.11.88 and accused Siraj Mal and Nurul Islam alias Nuru were charged under sections 4(b) and 4(c) and also under section 8 of the said Ordinance read with the Special Powers Act. 1974 and as against the rest of the accused charge was framed under section 9 read with section 4(b)(c) of the same. The charges were read over to the accused who pleaded not guilty to the same and claimed to be tired.

4. The prosecution examined in all 15 PWs and the defence examined only on DW.

5. From the trend of cross-examination of the PWs the defence case as transpired is that there was no kidnapping or abduction of the victim girl who had love affair with accused Nurul Islam since before and that she voluntarily left the house of her father and went away with her paramour accused Nuru who ultimately married her and then cohabited with her and that the prosecution case as made out is false and fabricated and the same has been brought against the accused persons due to existing enmity and litigations between the parties. The learned Special Judge on consideration of the facts and circumstances of the case and the materials on record found accused appellant Nos. 1 and 2 namely, Siraj Mal and Nurul Islam @ Nuru guilty of the charges under sections 4 (b) and (4c) of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 only and also found other accused appellant Nos. 3 to 9 guilty under section 9 read with sections 4(b) and 4(c) of the said Ordinance and convicted and sentenced accordingly as stated above by the impugned judgment and order dated 29.12.88 against which the present appeal has been taken to this court by all the 9 appellants.
6. Mr. M Mujibur Rahman, with Mr. MA Jabbar, the learned Advocates appeared for the appellants and Mr. M. Shamsul Alam, the learned Deputy Attorney-General along with Mr Fazlul Hoque Chowdhury, Advocate appeared for the State.

7. At the hearing of the appeal, we have been firstly taken through the FIR, the charges, the evidence on record, the exhibits in this case, the 342 statements of the accused and the impugned judgment under appeal. Thereafter Mr. Mujibur Rahman, the learned Advocate seriously assailed the conviction and sentence of the appellants on various grounds. He has firstly submitted that the ingredients of the offence under section 4(b) or 4(c) or section 9 of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 have not been established against the appellants by the prosecution in this case by reliable, disinterested and sufficient evidence beyond all reasonable doubt and that the case as made out is absolutely false and concocted and the same was instituted only to harass the appellants, as they have previous enmity and litigations with the complainant and some other witnesses.

8. Mr. M Shamsul Alam, the learned Deputy Attorney-General on the other hand has argued that the prosecution has been able to fully establish the ingredients of the offence under sections 4(b) and 4(c) of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 as against the two appellants namely Siraj Mal and Nuru and of the offence under section 9 read with sections 4(a) and 4(b) of the Cruelty to Women (Deterrent Punishment) Ordinance, 1883; as against the rest of the appellants beyond all reasonable doubt by the most natural and competent witnesses and hence the conviction and sentence passed against them should be upheld, now before entering into the discussion on the submissions of learned Advocates for the parties in the light of the evidence on record, we deem it fit and pertinent to quote below the relevant provisions of law namely sections 4(b) and 4(c) and also section 9 of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 which are as follows:

4. Whoever kidnaps or abducts any woman of any age:
   (a) ............................................................
   (b) with intent that such woman may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will.
   (c) In order that such woman may be forced or reduced to illicit intercourse, or knowing it to be likely that she will be forced or reduced to illicit intercourse, shall be punishable with transportation for life or with rigorous imprisonment for a term which may extend to fourteen years and shall also be liable to fine.

9. Abetment of Offence: Whoever abets any offence punishable under this Ordinance shall, if the act abetted is committed in consequence of the abetment,
be punishable with the punishment provided for the offence.” From a reading of the above provisions, it appears that the first requirement of the offence under sections 4(b) or 4(c) of the Cruelty to Women (Deterrent Punishment) Ordinance is either kidnapping or abduction of a woman of any age. It is however seriously contended by the learned Advocate for the appellants that in the instant case, there was no kidnapping as defined in section 361 of the Penal Code as the victim girl was not below the age of 16 years. She is rather 16 years of age or above. Then by referring to section 3 of the said Ordinance, the learned Advocate for the appellants further submits that the words and expressions used in the above Ordinance shall have the same meaning as in the Penal Code. Hence, unless it is proved by the prosecution that the victim girl was not under age of 16 years, the allegation of kidnapping cannot stand. To prove that the victim girl was not under age of 16 years the learned Advocate has referred to the medical report given by the Medical Board dated 4.3.87 i.e. Ext. Ka which shows that the age of the victim girl was between 15 and 16 years. He has further referred to the 1st statement of the victim girl under section 164 CrPC made before the Magistrate on 28.2.87 in which she appears to have controverter the statements of her father the informant PW 1 made in the FIR specially regarding the age of the victim girl which has been shown to be 13 years. Mr. M Shamsul Alam, the learned Deputy Attorney-General in this regard has drawn our attention to the evidence on record, particularly to the evidence of the father of the victim, PW 1 along with the evidence of PW 3 herself and the deposition of PW 14 the Headmaster together with the certificate given by him and marked as Exhibit-8 and submitted that the date of birth of the victim girl has been given in the school certificate issued by the Headmaster of the school where the victim was reading, as 22.5.74 and PW 1 the father of the victim girl also says that she was 13 years old at the time of occurrence and in her evidence also the victim has said that she was 13 years old according to the Admission Register and it transpires that she was a students of class VIII then and apart from that she has flatly denied a suggestion by the defence that she was 16 years old. At the same time the father of the victim girl PW 1 also denied a suggestion by the defence that she was 15 to 16 years old and maintained that she was only 13 years of age at the relevant time. Now, in view of the above evidences of the PWs as to the age of the victim girl and the certificate issued by the Headmaster of the school Ext. 8 the learned Deputy Attorney-General submits that the age of the victim girl was not all between 15 to 16 years or above. But she was only of 13 years of age at the time of the occurrence and as such she was undoubtedly below the age of 16 years as required for an offence of kidnapping. In this connection the learned Deputy Attorney-General has relied on two decisions, one in the case of Prafulla Kumar Bhattcharjya Vs. Ministry of Home Affairs Govt. of Bangladesh reported in 28 DLR 123 wherein it has been observed:
“that in the fact of other cogent evidence, the opinion of an expert may be rejected by the Court.” and another in the case of **Ghulam Quadir Vs. Noor Ahmed** reported in 6 DLR (WP Lahore) 178, wherein it has been observed:

“that the statement of a doctor as to age, not supported by reliable evidence carries no value”.

The learned Deputy Attorney-General further relied on a decision in the case of **Muhammad Naeem Vs. Crown** reported in 1950 PLD (Lahore) 507 wherein it has been held: “that the opinion of an expert is never binding on a Court.”

By the above submissions and references, the learned Deputy Attorney-General urges us to hold that in the facts and circumstances of the case and the evidence on record, the age of the victim girl who was a student of class VIII only, cannot be 16 or above 16 years and must be either 13 or 14 i.e. below 16 years. He further submits that the report given by the Medical Board about the age of the victim girl is also biased and incorrect as suggested by the prosecution to DW 1 and there is no other evidence led by the defence to show that she was 16 or above 16 years of age as claimed by the defence. Hence, the trial Court has rightly preferred to accept the statement of the father of the victim girl and the certificate of the Headmaster of the School regarding her age which was 13 years only at the relevant time. Apart from that, the submission of the learned Advocate for the appellants is that even if for the sake of argument, the report of the Medical Board is accepted as correct, still it will be found that the age of the victim girl was not at all 16 or above 16 years but it was between 15 to 16 years according to the medical report, that means below 16 years, and in that view of the matter, the requirement of section 361 of the Penal Code as to the age of the victim girl for kidnapping was satisfied and it was in fact a case of kidnapping the victim girl by the accused with the use of force and threat. Now as to the other ingredients of the charge under sections 4(b) (c) of the said Ordinance, it is submitted by the learned Advocate for the appellants that the victim girl had love affair with accused Nurul Islam @ Nuru and she voluntarily came out of her father’s house, accompanied her paramour Nurul Islam and got herself married with him and thereafter allowed her to be sexually intercoursed. So, there was no question of her taking away out of any lawful guardianship of her parents without their consent for the purpose of any illegal marriage of intercourse and, as such, the accused persons committed no offences as alleged by the prosecution. He has however relied much on the alleged earlier statement of the victim girl under section 164 CrPC Ext. Ga recorded by one Mr. Abu Bakar Siddique, the Upazila Magistrate as he was then. He was cited as witness in the charge-sheet. But in spite of issuing summons upon him at the instance of the defence, the said Magistrate could not be produced in court to depose in this case. The learned Advocate for the appellants has
drawn our attention to some parts of the deposition of the Investigation-Officer who appears to have stood in his cross-examination that the victim girl Shilpi in her statement under section 161 CrPC told him that the said Nurul Islam @ Nuru took her to their house and one Moulvi was called who then solemnised her marriage and thereby of course accused Nurul Islam cohabited with her. A statement of a witness under section 161 CrPC cannot be treated as substantive evidence. It may be used for the purpose of contradicting its makers. However we cannot be oblivious of the fact the victim girl was a minor who was kidnapped by the accused and kept under their control and at that time she was legally not capable of giving any free consent to her alleged marriage with accused Nurul Islam. The learned Deputy Attorney-General for the State on the other hand submits that in her very cross-examination, the victim girl has stated that she was forcibly kidnapped by the accused and further referring to the subsequent voluntary statement of the victim girl under section 164 CrPC before another Magistrate PW 12 upon an order for that by the District Magistrate, the victim girl has categorically denied her earlier alleged statement of love affair with accused Nurul Islam and the fact of going with him voluntarily to his house and the subsequent solemnisation of her alleged marriage with him and also an affidavit filed by the victim girl before a Magistrate. He further submits that the defence case of love affair of the victim girl with the accused Nuru and of her going with him voluntarily for the purpose of marriage is absolutely false and fabricated and that there is no reliable evidence to prove any such love affair and valid marriage. Rather, it is in the evidence that after kidnapping and confinement of the victim girl in the house of accused appellant Adam Mal she was ravished by the two accused Siraj Mal and Nurul Islam @ Nuru more than once against her will. We have heard the submissions of the learned Advocates on the above point and scrutinised the evidence on record. It may be pointed out that on the question of confinement of the victim girl in the house of accused Adam Mal and raping her by the said two accused, there is of course no eyewitness in this case save and except the victim girl PW 3. It is however submitted by the learned Advocate the appellants that when an accused is involved in a sexual offence, conviction should not be generally based against him only on the evidence of the prosecute alone and that it is also not safe and proper to rely on such evidence without any corroboration. The above contention of the learned Advocate appears to have some substance. But in view of section 134 of the Evidence Act the conviction of an accused may be given even on the evidence of a solitary witness, if he is wholly reliable but as a matter of prudence, though not of law, sometimes in the facts and circumstances of the case, an independent corroboration of the evidence of such witness is necessary. The learned Advocate for the appellant in support of his contention has relied on a decision in the case of *Mumtaz Ahmed Khan Vs. State* reported in *19 DLR SC 259*. The principle settled in the above decision is not disputed, but the
question is how far the above decision is helpful to the appellants in this case. It may be pointed out that the victim girl was a minor and found to be much below 16 years of age and she was a student of class VIII only.

It is true that in a case of sexual offence, if the victim is a woman of full age then of-course without independent corroboration of her evidence, the prosecution case should not be believed, as because of her full age she may be a willing or consenting party to the game, but when the victim girl is a minor, her evidence if otherwise found to be truthful and reliable may be sufficient for conviction of the accused even without independent corroboration.

Now, in the present case, we find that apart from the evidence of the victim girl, there are other independent witnesses of the prosecution case to corroborate the victim girl in the matter of her kidnapping and also circumstantial evidence to prove her ravishment. She was given treatment by a doctor PW 11 who found that still there was bleeding from her private parts while she was medically examined. If further appears that the Board also found bleeding from her private part but the members of the Board thought it to be blood of menstruation, though they did not give any opinion as to her sexual intercourse. The fact of her sexual intercourse by force by the accused Seraj and Nurul was however disclosed by the victim herself to her sisters PWs 4 and 5 who have categorically deposed in this case to that effect without being shaken. Apart from that, when it is the claim of the defence that there was a marriage of the victim girl with accused Nurul Islam alias Nuru which was thereafter consummated, there cannot be any denying of the fact that the victim girl Shilpi was sexually intercouresed but question is whether with her consent or without her consent. According to the prosecution, she was intercoursed against her will, but according to the defence, the intercouse was done after a due process of marriage with accused Nurul with her consent. Now, it has been found that the victim girl was aged only 13 years at the relevant time and admittedly she did not reach the age of maturity to give her free and valid consent to a marriage or to any sexual intercourse thereafter. in the instant case even if the plea of the defence that she gave her consent to the alleged marriage and sexual intercourse is accepted, still that will not help the defence, because she being a minor her consent was in fact no consent in the eye of law. But the facts are otherwise, We find from her evidence that she did not give any consent and it is her case that she was forced to the so-called marriage and illegal intercourse against her will. Hence, it was a case of raping. So, the other ingredients as required for the offence under sections 4(b) and 4(c) appear to have been well established in this case. Now, as to the first part of the prosecution story of kidnapping or abduction of the victim girl which of course has been denied by the defence, the prosecution examined as many as 8 eye-witnesses namely PWs 1-8 Pw 1 is the father of the victim who has narrated the prosecution case in the FIR as well as in his evidence
with particulars of date, time and also the manner of occurrence. The whole occurrence of the first phase of the prosecution story had taken place just before this witness in his house and also in presence of other witnesses, namely, PW 2 Fatima Khatun, wife of PW 1 and mother of the victim PW 3 Shilpi the victim herself, PW 4 Jasmin, elder sister of the victim who is aged about 14 years and was a student of Intermediate first year class and her date of birth was 1.11.73 and PW 5 Most. Aklima Khatun, the elder sister of the victim whose marriage and taken place only five (5) days before the occurrence and PW 6 Kalu who is a neighbour came on hearing the alarm just at the time of occurrence at about 9-00 PM and had seen accused Seraj Mal, Nuru and Rashid in the light of the burning hurricane. He is an independent, disinterested witness. PW 8 Monir Hossain is a nephew of the informant who is also a neighbour and came to the place of occurrence on hearing alarm and had seen accused Siraj Mal, Nuru and Rashid forcibly taking away the victim girl and other accused assisting them. PW 7 Shajahan is also a neighbour. He also lives in the house attached to the eastern house of the informant. He had also made similar version. He has denied a suggestion that the informant was his mama. So far this part of the occurrence of kidnapping or abduction it is not a case of solitary evidence of the victim. This part of the prosecution case has been proved by as many as 8 eye-witnesses. The learned Advocate for the appellants, of course, has argued that these witnesses 1 to 8 except PW 6 are all relations and interested and they had come to depose falsely against the accused persons as there was existing enmity between the parties. The learned Deputy Attorney General on the other hand has refuted the above submission of the learned Advocate for the appellants and has strongly submitted that these witnesses are the most natural and competent witnesses in this case to prove abduction or kidnapping or the victim girl. They have corroborated each other as regards the occurrence in all material particulars and in their exhaustive cross-examination they could not be shaken by the defence only discrepancy in the evidence of PW 3 the victim girl that has been tried to be made out by the defence in her cross-examination relating to her alleged marriage with the accused Nuru and his cohabitation with her thereafter against her will. In this regard, of course, the learned Advocate for the appellants has tried to obtain support from the earlier statement of the victim girl under section 164 CrPC Ext. Ga. But it is to be remembered that the statement under section 164 CrPC is no a substantive piece of evidence. Besides the same appears to have been made not voluntarily and the same was subsequently retreated by another affidavit and a statement under section 164 CrPC. It has been alleged by the victim PW 3 herself that at the time of making the alleged statement she was not in her normal condition as she was intoxicated due to administration of wine together with dhutra juice to her by the accused. This administration of wine and juice of dhutra to the victim girl by force finds place in her evidence and the same has been corroborated by some other
witnesses namely PWs 4 and 5 who had heard from her after recovery. Further, the above piece of evidence relating to her intoxication has not been challenged by the defence in its cross-examination. Thus, it is evident that she was administered wine with dhutra-juice and thereby was made almost senseless and in that abnormal condition the alleged statement under section 164 CrPC was recorded and her alleged signature was obtained thereon which she had denied vehemently by her subsequent petition with an affidavit Ext. 2 before another competent Magistrate PW 12. So, from our overall analysis of the evidence on record, and the facts and circumstances of the case we find no reason to disbelieve the prosecution case vis-as-vis the date, time and the manner of occurrence. It has been of course contended on behalf of the appellants that the witnesses are mostly related and interested.

And hence their evidence ought not to have been relied upon. But it may be pointed out that mere relationship cannot be a ground for discarding the evidence of a witness unless he is found to be biased and resorting to any falsehood. In support of this view, the learned Advocate for the State has referred to decision in the case of *Abul Karim Vs. State* reported in 1981 BLD 200. We, therefore, find that the trial Court has rightly relied on the evidence of the witnesses including the eye-witnesses in this case who did not appear to be biased or resorting to any falsehood, though they were all relations except PW 6. We have carefully scrutinised the evidence of these witnesses and we find no reason to disbelieve them. It also appears that there is noticeable corroboration of their evidence by PW 6 Kalu Gazi who is absolutely an independent and disinterested witness in this case. It has been, of course contended by the learned Advocate for the appellants that the PWs 9, 10 and 14 were not cited either in the FIR or in the charge-sheet as witnesses but they have been subsequently brought and examined to support the prosecution case and, according to him, no reliance on their evidence ought to have been placed. When asked, of course, he could not show any law or authority as regards any legal bar in examining any such witness and relying upon him in the interest of justice, though not named in the FIR or in the charge-sheet. In this regard, we may however rely on a decision in the case of *Hazrat Ali and others Vs. State* reported in 1984 BLD 257 wherein it has been observed relying on another decision reported in 22 DLR 279 that “mere fact that names of witnesses examined in the cases were not mentioned in the FIR is no ground to disbelieve the evidence of those witnesses.”

9. Hence, respectfully agreeing with the above view, we find no substance in the contention of the learned Advocate for the appellant.

10. We have however carefully examined the evidence of the said witnesses and we find that their evidence is quite reliable and trustworthy. Besides, the said witnesses are men of letters and status and they have no enmity with the
accused to implicate them falsely. Lastly, it has been contented by the learned Advocate for the appellants that the prosecution has withheld some material witnesses namely the local chairman, member, etc. who came on the spot just after occurrence and hence the court below ought to have drawn an adverse presumption against the prosecution case under section 114(g) of the Evidence Act. The Deputy Attorney-General, in reply to the above contention, has submitted that those witnesses might have come just after the occurrence, but they did not claim to have seen the actual occurrence of lifting the victim girl from her parent’s house on the date of occurrence by the accused, and as such, they were not so material for the purpose of proving the prosecution case. It is true that some of the charge-sheet witnesses we not produced in court as witnesses, but it is not the law that the prosecution is bound to examine all the witnesses cited in the charge-sheet or in the FIR. In this regard the learned Advocate for the State has referred to some decision one in the case of *Hazrat Ali and others Vs State* reported in 1984 BLD 257 and another in the case of *Mahitullah and others Vs. State* reported in 1983 BLD 277. In the instant case when there are 8 eye-witnesses to prove the prosecution case and when the alleged non-produced witnesses did not see the actual occurrence, their non-prosecution as witnesses in this case cannot and should not be a ground for drawing an adverse presumption against the prosecution case. Now, as to the grievance made by the learned Advocate for the appellants that the non-production of the Magistrate Mr. Abu Bakar Siddique and two other members of the Medical Board has seriously prejudiced the defence and the court acted illegally in not bringing them as witnesses before the court and as a result there has been miscarriage of justice, we may however consider the same in the facts and circumstances of this cases. The Magistrate who allegedly recorded the earlier statement of the victim girl was cited in the charge-sheet as a witness, but subsequently the complainant came to learn that the Magistrate concerned as well as the other doctors of the Medial Board were not in favour of deposing in the case being gained over and hence an application was filed before the Court concerned for exemption from production of the said witnesses and the Court after hearing both the sides allowed the prayer by an order but the defence did not go to challenge that offer in any forum; rather it accepted the same. It further appears that after the said order of the court, the defence however cited these persons namely, the Magistrate concerned and the other 3 doctors of the Medical Board as witnesses and summons was according issued to all of them, but only one doctor namely Md. Shamsuzzaman appeared in court and deposed as PW 14 in this case and the other 3 did not turn up. PW 1 only proved the medical certificate and the examination of the victim girl by Medical Board Ext. ‘Ka’. He admitted in his evidence that he was not a Radiologist and no report of any X-ray of the girl was there. He of course denied a suggestion that being influenced, the Board gave a false report. At this stage, the defence filed
an application for taking the earlier statement of the victim girl under section 164 CrPC into evidence without the recording Magistrate being examined in court. But in spite of objection by the prosecution the said statement under section 164 CrPC was taken into evidence and marked as Ext. Ga. We have however scrutinised the said exhibit, the contents of which have been denied by the victim girl PW 3 by an affidavit and also by a statement under section 164 CrPC before another Magistrate. The statement in Ext. ‘Ga’ on the face of it appears to be not genuine. The signature purported to be of the recording Magistrate is not reliable and at the same time it is seen that it does not bear any seal or designation of the person signing the same and the contents also appear to be so broad, detailed and well guarded that it would create normally a doubt in the mind of a reasonable man as to its genuinities and also the capacity of its maker who was admittedly in her disturbed and worried physical and mental condition. However, in the facts and circumstances of the case, we are of the view that for non-production of the Magistrate concerned and the said doctors, no adverse presumption against the prosecution case could be justifiably drawn in this case. Thus having regard to our above elaborate discussion of the facts and circumstances of the case and the evidence together with the other materials on record we like to hold that the prosecution has been able to establish the ingredients of the charges under section 4(b) and 4(c) of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 as against appellant Nos. 1 and 2 by sufficient and reliable evidence beyond all reasonable doubt and they have been rightly convicted and sentenced by the learned Special Tribunal. But so far as the charge under section 9 read with sections 4(b) and 4(c) of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 as against the rest of the appellants, namely, appellant Nos. 3. to 9, it may be noticed that except as against accused appellant Abdur Rashid Pradhania, there is no allegation of abduction or kidnapping the victim girl or abetting commission of such offence has been specifically made and proved as against them. It appears that accused appellant Abdur Rashid had played a vital role in the matter of kidnapping or abduction of the victim girl and he also abetted in the commission of her raping by accused Siraj Mal and Nurul Islam. It is in evidence that almost all the eye-witnesses stated that he (Rashid) directly participated in the lifting of the victim girl, that is in her kidnapping or abduction and he also took part to administer wine with ‘dhutra’ juice to the victim girl Shilpi before she was raped by accused Siraj Mal and Nurul Islam. But we find no such overt act on the part of the other appellants namely appellant Nos. 4-9. Of course, it is in the evidence of the PWs that they were found along with other accused at the time of occurrence, but it is the case of prosecution that apart from the 9 accused persons there were other accused and the night was dark and when the eye-witnesses made a general allegation that other accused persons without naming them assisted the main accused Siraj Mal, Nuru and Rashid but said nothing as to which way
and how and whether there was any kind of weapons with them, we have every
doubt as to whether they were at all present there at the time of occurrence and/ 
or participated in any way in the commission of the alleged offence. Besides, it 
also difficult for us to believe in the facts and circumstances of the case that 
accused Adam Mal being the father of accused appellant Siraj Mal would 
participate with his son in the matter of abduction or kidnapping of the victim 
girl. It is on record that there was enmity between the informant and said accused 
Adam Mal, so out of such enmity, false involvement of the said accused Adam 
Mal by the informant cannot be brushed aside.

11. From the above consideration, we feel that these appellant Nos. 4 to 9 are 
entitled to get benefit of doubt, but so far appellant No. 3 Abdur Rashid is 
concerned we are of the opinion that the charge under section 9 read with 
sections 4 (b) and 4 (c) of the Cruelty to Women (Deterrent Punishment) 
Ordinance 1983 has been well proved against him beyond all reasonable doubt 
by reliable and sufficient evidence. We are, therefore, of the view that the 
conviction and sentence passed as against appellant Nos. 1 and 2 also appellant 
No. 3 must be upheld and maintained and those against the rest of the appellants 
be set aside and they be acquitted.

12. In the result, the appeal is allowed in part. The appeal so far as it relates to 
appellant Nos. 1, 2 and 3 is dismissed and their conviction and sentence are 
affirmed, but so far as it relates to appellant Nos. 4 to 9, is allowed and their 
conviction and sentence are affirmed, but so far as it relates to appellant Nos. 
4 to 9, is allowed and their conviction and sentence are set aside and they are 
acquitted of the charges leveled against them. Let the appellant Nos. 5, 6, 7, 8 
and 9 namely Abdur Razzak Howlader, Abdul Kahaleque, Abdul Latif, Misir 
Ali and Ruhul Amin, be set at liberty forthwith, if not wanted in connection 
with any other case and appellant No. 4 Adam Mal who is already on bail 
early granted by this court be discharged from his bail bond.

Let the LC Records be sent down to the court below expeditiously.
Appellants: Sakshi
Vs.
Respondent: Union of India (UOI) and Ors.
with
Appellants: Smt. Sudesh Jakhu
Vs.
Respondent: Narender Verma and Ors.

In the Supreme Court of India
Writ Petition (Crl.) No. 33 of 1997 with SLP (Crl.) Nos. 1672-1673/2000
Decided On: 26.05.2004

Hon’ble Judges
S. Rajendra Babu, C.J. and G.P. Mathur, J.

Counsels

Acts/Rules/Orders
Constitution of India - Articles 13, 14, 15(3), 17, 18, 19, 20(1), 21 and 32; Indian Penal Code, 1860 - Sections 354, 375, 376, 376(2), 376A to 376D, 377, 506 and 511; Criminal Law (Amendment) Act, 1983; Dowry Prohibition Act - Section 2; Foreign Exchange Regulation Act - Section 35 and 35(2); Customs Act - Section 104; Sexual Offences (Amendment) Act, 1976 - Section 1(1); Offences against Person Act, 1861 - Sections 18, 20, 42 and 47; Aliens Control Act, 1991 - Section 25(5); Criminal Procedure Code (CrPC) - Sections 167(1), 167(2), 273, 327(1), 327(2) and 715.1

Cases Referred

Citing Reference:
* Mentioned
** Relied On
**** Distinguished

S. Gopal Reddy v. State of A.P. *
Seaford Court Estates Ltd. v. Asher *
Rv. R ****
Directorate of Enforcement v. Deepak Mahajan and Anr. *
Regina v. Burstow; Regina v. Ireland ****
Gay and Lesbian Equality and Ors. v. The Minister of Home Affairs and Ors. *
Vishaka v. State of Rajasthan *
Lakshmi Kant Pandey v. Union of India *
State of Punjab v. Major Singh **
Mishri Lal v. Dhierendra Nath **
Her Majesty The Queen v. D.O.L. and the Attorney General of Canada, etc. **
State of Maharashtra v. Dr. Praful B Desai **
State of Punjab v. Gurmit Singh **

Case Note
Civil - Indian Penal Code, 1860 - Sections 354, 375, 376, 376(2), 376A to 376D, 377, 506 and 511 - Constitution of India - Articles 13, 14, 15(3), 17, 18, 19, 20(1), 21 and 32 - Public interest litigation – Writ petition filed by Sakshi, a woman organization to issue a writ declaring “interalia” that “sexual intercourse” as contained in Section 375 IPC to include all forms of penetration such as penile/vaginal penetration, penile/anal penetration, and object/vaginal penetration and for issue of a direction for registration of all such cases to be falling under Sections 375, 376 and 376A, 376D (IPC) – Contention of petitioner organization that the existing trend of respondent authorities to treat sexual violence, other than penile/vaginal petitioner as lesser offences falling under either section 377 or 354 IPC and not as a sexual violence under Section 375/376 IPC was without any justification – Contention that limiting understanding of “rape” to abuse by penile/Vaginal penetration only, was contrary to contemporary understanding of sexual abuse law as it denied majority of women and children access to adequate redress in violation of Article 14 and 21 – Contention of petitioner that registration of cases of sexual violence as cases of moral turpitude under Section 377 by respondent authorities
was without any justification as these cases would otherwise fall within scope and ambit of Section 375/376 – Validity – Although - Sections 354, 375 and 377 IPC have come up for consideration before superior courts of the country on innumerable occasions – However wide definition which petitioner wants to be given to “rape” as defined in Section 375 IPC so that the same may become an offence punishable under Section 376 IPC has neither been considered nor accepted by any Court in India so far - Prosecution of an accused for an offence under Section 376 IPC on radically enlarged meaning of Section 375 IPC would violate the guarantee enshrined in Article 20(1) which says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence - An exercise to alter the definition of rape, as contained in Section 375 IPC, by a process of judicial interpretation, and that too when there is no ambiguity in the provisions of the enactment is bound to result in good deal of chaos and confusion, and would not be in the interest of society at large – Since Accepting contention of the writ petitioner and giving a wider meaning to Section 375 IPC would lead to a serious confusion in minds of prosecuting agency and the Courts which instead of achieving object of expeditiously bringing a criminal to book may unnecessarily prolong the legal proceedings and would have an adverse impact on the society as a whole, held that it would not be in the larger interest of the State or the people to alter the definition of “rape” as contained in Section 375 IPC by a process of judicial interpretation

Indian Penal Code, 1860 - Sections 354, 375, 376, 376(2), 376A to 376D, 377, 506 and 511 -Constitution of India - Articles 13, 14, 15(3), 17, 18, 19, 20(1), 21 and 32 - Criminal Procedure Code (CrPC) - Sections 167(1), 167(2), 273, 327(1), 327(2) and 715.1 - Public interest litigation – Writ petition filed by Sakshi, a woman organization for protection of a victim of sexual abuse at time of recording his statement in Court - Whole inquiry before a Court being to elicit the truth, it is absolutely necessary that victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment – Since Section 273 Cr.P.C. merely requires evidence to be taken in the presence of the accused and does not require that the evidence should be recorded in such a manner that accused should have full view of the victim or the witnesses, recording of evidence by way of video conferencing vis-a-vis Section 273 Cr.P.C. has been held to be permissible in a recent decision of Court in State of Maharashtra v. Dr. Praful B Desai – Direction given in State of Punjab v Gurmit Singh to hold trial of rape cases in camera and that trial to be conducted by lady judges wherever available so that prosecutrix can make statement with greater ease – Directions given that provisions of Sub-section (2) of Section 327 Cr.P.C. would in addition to the offences mentioned
in the sub-section, would also apply in inquiry or trial of offences under Sections 354 and 377 IPC – Direction also given to make arrangement for a screen in holding trial of child sex abuse or rape, questions put in cross examination on behalf of accused to be given in writing to presiding officer who may present it to victim, and victim to be given sufficient breaks during trial.

Judgment

G.P. Mathur, J.

1. This writ petition under Article 32 of the Constitution has been filed by way of public interest litigation, by Sakshi, which is an organisation to provide legal, medical, residential, psychological or any other help, assistance or charitable support for women, in particular those who are victims of any kind of sexual abuse and/or harassment, violence or any kind of atrocity or violation and is a violence intervention centre. The respondents arrayed in the writ petition are (1) Union of India; (2) Ministry of Law and Justice; and (3) Commissioner of Police, New Delhi. The main reliefs claimed in the writ petition are as under:

A) Issue a writ in the nature of a declaration or any other appropriate writ or direction declaring inter alia that “sexual intercourse” as contained in Section 375 of the Indian Penal Code shall include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration;

B) Consequently, issue a writ, order or direction in the nature of a direction to the respondents and its servants and agents to register all such cases found to be truly on investigation, offences falling within the broadened interpretation of “sexual intercourse” set out in prayer (A) aforesaid as offences under Section 375, 376 and 376A to 376D of the Indian Penal Code, 1860;

C) Issue such other writ order or direction as this Hon’ble Court may deem appropriate in the present facts and circumstances.

The petition is thus restricted to a declaratory relief and consequential directions.

2. It is set out in the writ petition that the petitioner has noticed with growing concern the dramatic increase of violence, in particular sexual violence against women and children as well as the implementation of the provisions of Indian Penal Code namely Sections 377, 375/376 and 354 by the respondent authorities. The existing trend of the respondent authorities has been to treat sexual violence, other than penile/vaginal penetration, as lesser offences falling under either Section 377 or 354 of the IPC and not as a sexual offence under Section 375/376 IPC. It has been found that offences such as sexual abuse of minor children and women by penetration other than penile/vaginal penetration,
which would take any other form and could also be through use of objects whose impact on the victims is in no manner less than the trauma of penile/vaginal penetration as traditionally understood under Section 375/376, have been treated as offences tailing under Section 354 of the IPC as outraging the modesty of a woman or under Section 377 IPC as unnatural offenses.

3. The petitioner through the present petition contends that the narrow understanding and application of rape under Section 375/376 IPC only to the cases of penile/vaginal penetration runs contrary to the existing contemporary understanding of rape as an intent to humiliate, violate and degrade a woman or child sexually and, therefore, adversely affects the sexual integrity and autonomy of women and children in violation of Article 21 of the Constitution.

4. The petitioner submits that a plain reading of Section 375 would make it apparent that the term “sexual intercourse” has not been defined and is, therefore, subject to and is capable of judicial interpretation. Further the explanation to Section 375 IPC does not in any way limit the term penetration to mean penile/vaginal penetration. The definition of the term rape as contained in the Code is extremely wide and takes within its sweep various forms of sexual offenses. Limiting the understanding of “rape” to abuse by penile/vaginal penetration only, runs contrary to the contemporary understanding of sexual abuse law and denies majority of women and children access to adequate redress in violation of Article 14 and 21 of the Constitution. Statistics and figures indicate that sexual abuse of children, particularly minor girl, children by means and manner other than penile/vaginal penetration is common and may take the form of penile/anal penetration, penile/oral penetration, finger/vaginal penetration or object/vaginal penetration. It is submitted that by treating such forms of abuse as offenses falling under Section 354 IPC or 377 IPC, the very intent of the amendment of Section 376 IPC by incorporating Sub-section 2(f) therein is defeated. The said interpretation is also contrary to the contemporary understanding of sexual abuse and violence all over the world.

5. The petitioner submits that mere has for some time now been a growing body of feminist legal theory and jurisprudence which has clearly established rape as an experience of humiliation, degradation and violation rather than an outdated notion of penile/vaginal penetration. Restricting an understanding of rape in terms sought to be done by the respondent authorities and its agents reaffirms the view that rapists treat rape as sex and not violence and thereby condone such behaviour especially when it comes to sexual abuse of children.

6. In this regard, reference is invited to the observations of a renowned expert on the issue of sexual abuse:

“...... in rape .... the intent is not merely to “take”, but to humiliate and degrade ..... Sexual assault in our day and age is hardly restricted to forced genital

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copulation, nor is it exclusively a male-on-female offence. Tradition and biologic opportunity have rendered vaginal rape a particular political crime with a particular political history, but the invasion may occur through the mouth or the rectum as well. And while the penis may remain the rapist’s favourite weapon, his prime instrument of vengeance...... it is not in fact his only tool. Sticks, bottles and even fingers are often substituted for the “natural” thing. And as men may invade women through other offices, so too, do they invade other men. Who is to say that the sexual humiliation suffered through forced oral or rectal penetration is a lesser violation of the personal, private inner space, a lesser injury to mind, spirit and sense of self?” (Susan Brownmiller, Against Our Will 1986).

7. The petitioner further submits that the respondent authorities and their agents have failed to take into consideration the legislative purpose of Section 377 IPC. Reference has also been made to The Law Commission of India Report (No. 42) of 1971 pp. 281. While considering whether or not to retain Section 377 IPC, the Commission found as under:

“There are, however, a few sound reasons for retaining the existing law in India. First it cannot be disputed that homosexual acts and tendencies on the pan of one spouse may affect the married life and happiness of the other spouse, and from this point of view, making the acts punishable by law has social justification. Secondly, even assuming that acts done in private with consent do not in themselves constitute a serious evil, there is a risk involved in repealing legislation which has been in force for a long time....... Ultimately, the answer to the question whether homosexual acts ought to be punished depends on the view one takes of the relationship of criminal law to morals. ..... We are inclined to think that Indian society, by and large, disapproves of homosexuality and this disapproval is strong enough to justify it being treated as a criminal offence even where adults indulge in it in private.”

In view of the Commission’s conclusions regarding the purview of Section 377 IPC, the said section was clearly intended to punish certain forms of private sexual relations perceived as immoral. Despite the same, the petitioner submits, the respondent authorities have, without any justification, registered those cases of sexual violence which would otherwise fall within the scope and ambit of Section 375/376 IPC, as cases of moral turpitude under Section 377 IPC. It is submitted that the respondent authorities and their agents have wrongly strained the language of Section 377 IPC intended to punish “homosexual” behaviour to punish more serious cases of sexual violence against women and children when the same ought to be dealt with as sexual offences within the meaning of Section 375/376 IPC in violation of Articles 14 and 21 of the Constitution of India.
8. It is submitted that Article 15(3) of the Constitution of India allows for the State to make special provision for women and children. It follows that “special provision” necessarily implies “adequate” provision. Further, that the arbitrary and narrow interpretation sought to be placed by the respondent authorities and their agents on Section 375/376 renders the effectiveness of redress under the said Sections and in particular under Section 376(2)(f) meaningless in violation of Article 15(3) of the Constitution of India. The petitioner has also referred to the U.N. Right of Child Convention ratified by the respondent No. 1 on 11th December, 1993 as well as the U.N. Convention on the Elimination of Discrimination Against Women which was ratified in August 1993. In view of the ratification, the respondent No. 1 has created a legitimate expectation that it shall adhere to its International commitments as set out under the respective Conventions. In the present case, however, the existing interpretation of rape sought to be imposed by the respondent authorities and their agents is in complete violation of such International commitments as have been upheld by this Court.

9. By an order passed on 3.11.2000 the parties were directed to formulate issues which arise for consideration. Accordingly, the petitioner has submitted the following issues and legal propositions which require consideration by the Court:

(a) Given that modern feminist legal theory and jurisprudence look at rape as an experience of humiliation, degradation and violation rather than an outdated notion of penile/vaginal penetration, whether the term “rape” should today be understood to include not only forcible penile/vaginal penetration but all forms of forcible penetration including penile/oral penetration, penile/anal penetration, object or finger/vaginal and object or finger/anal penetration.

(b) Whether all forms of non-consensual penetration should not be subsumed under Section 373 of the Indian Penal code and the same should not be limited to penile, vaginal penetration only.

(c) In particular, given the widespread prevalence of child sexual abuse and bearing in mind the provisions of the Criminal Law (Amendment) Act, 1983 which specifically inserted Section 376(2)(f) envisaging the offence of “rape” of a girl child howsoever young below 12 years of age, whether the expression “sexual intercourse” as contained in Section 375 of the Indian Penal Code should correspondingly include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration; and whether the expression “penetration” should not be so clarified in the Explanation to Section 375 of the Indian Penal Code.
(d) Whether a restrictive interpretation of “penetration” in the Explanation to Section 375 (rape) defeats the very purpose and intent of the provision for punishment for rape under Section 376(2)(f) “Whosoever commits rape on a woman when she is under twelve years of age.”

(e) Whether, penetration abuse of a child below the age of 12 should no longer be arbitrarily classified according to the ‘type’ of penetration (ignoring the ‘impact’ on such child) either as an “unnatural offence” under Section 377 IPC for penile/oral penetration and penile/anal penetration or otherwise as “outraging the modesty of a woman” under Section 354 for finger penetration or penetration with an inanimate object.

(f) Whether non-consensual penetration of a child under the age of 12 should continue to be considered as offences under Section 377 (“Unnatural Offences”) on par with certain forms of consensual penetration (such as consensual homosexual sex) where a consenting party can be held liable as an abettor or otherwise.

(g) Whether a purposive/teleological interpretation of “rape” under Section 375/376 requires taking into account the historical disadvantage faced by a particular group (in the present case, women and children) to show that the existing restrictive interpretation worsens that disadvantage and for that reason fails the test of equality within the meaning of Article 14 of the Constitution of India.

(h) Whether the present narrow interpretation treating only cases of penile/vaginal penetration as rape, adversely affects the sexual integrity and autonomy of women and children in violation of Article 21 of Constitution of India.

10. Counter affidavit on behalf of respondents No. 1 and 2 has been filed by Mrs. G. Mukerjee, Director in the Ministry of Home Affairs. It is stated therein that Sections 375 and 376 have been substantially changed by the Criminal Law (Amendment) Act, 1983. The same Act has also introduced several new Sections viz. 376A, 376B, 376C and 376D IPC. These sections have been inserted with a view to provide special/adequate provisions for women and children. The term “rape” has been clearly defined under Section 375 IPC. Penetration other than penile/vaginal penetration are unnatural sexual offences. Stringent punishments are provided for such unnatural offences under Section 377. The punishment provided under Section 377 is imprisonment for life or imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine. Section 377 deals with unnatural offences and provides for a punishment as severe as that provided for rape in Section 376. Section 354 and 506 have been framed with a view to punish lesser offence of criminal assault in the form of outraging the modesty of a woman, whereas
Sections 376 and 377 provide stringent punishment for sexual offences. The types of several offences as mentioned by the petitioner i.e. penile/anus penetration, penile/oral penetration, finger/anile penetration, finger/vaginal penetration or object/vaginal penetration are serious sexual offences of unnatural nature and are to be covered under Section 377 which provides stringent punishment. Therefore, the plea of petitioner that offences under Section 377 are treated as lesser offences is incorrect. It is also submitted in the counter affidavit that penetration of the vagina, anus or urethra of any person with any part of the body of another person other than penile penetration is considered to be unnatural and has to be dealt with under Section 377 IPC. Section 376(2)(f) provides stringent punishment for committing rape on a woman when she is under the age of 12 years. Child sexual abuse of any nature, other than penile penetration, is obviously unnatural and are to be dealt with under Section 377 IPC. It is further submitted that Section 354 IPC provides for punishment for assault or criminal force to woman to outrage her modesty. Unnatural sexual offences can not be brought under the ambit of this Section. Rape defined under Section 375 is penile/vaginal penetration and all other sorts of penetration are considered to be unnatural sexual offences. Section 377 provides stringent punishment for such offences. It is denied that provisions of Sections 375, 376 and 377 are violative of fundamental rights, under Articles 14, 15(3) and 21 of the Constitution of India. Sexual penetration as penile/anal penetration, finger/vaginal and finger/anal penetration and object and vaginal penetration are most unnatural forms of perverted sexual behaviour for which Section 377 provides stringent punishment.

11. Ms. Meenakshi Arora, learned counsel for the petitioner has submitted that Indian Penal Code has to be interpreted in the light of the problems of present day and a purposive interpretation has to be given. She has submitted that Section 375 IPC should be interpreted in the current scenario, especially in regard to the fact that child abuse has assumed alarming proportion in recent times. Learned counsel has stressed that the words “sexual intercourse” in Section 375 IPC should be interpreted to mean all kinds of sexual penetration of any type of any orifice of the body and not the intercourse understood in the traditional sense. The words “sexual intercourse” having not been defined in the Penal Code, there is no impediment in the way of the Court to give it a wider meaning so that the various types of child abuse may come within its ambit and the conviction of an offender may be possible under Section 376 IPC. In this connection, she has referred to *United Nations Convention On The Elimination Of All Forms Of Discrimination Against Women, 1979* and also *Convention On The Rights Of The Child* adopted by the General Assembly of the United Nations on 20th February, 1989 and especially to Articles 17(e) and 19 thereof, which read as under:
Article 17

States Parties recognise the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall —

(a) ............... (Omitted as not relevant)

(c) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of Articles 13 and 18.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other persons who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

12. In support of her submission, learned counsel has referred to following passage of statutory interpretation by F.A.R. Bennion (Butterworths — 1984) at page 355-357:

“While it remains law, an Act is to be treated as always speaking. In its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.

It is presumed that Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed.

In particular where, owing to developments occurring since the original passing of an enactment, a counter-mischief comes into existence or increases, it is presumed that Parliament intends the Court so to construe the enactment as to minimise the adverse effects of the counter-mischief.
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The ongoing Act. In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred, since the Act’s passing, in law, social conditions, technology, the meaning of words, and other matters.

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials.”

In this connection, she has also referred to S. Gopal Reddy v. State of A.P. MANU/SC/0550/1996 where the Court referred to the following words of Lord Denning in Seaford Court Estates Ltd. v. Asher (1949) 2 All ER 153 :

“............... It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a detect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give ‘force and life’ to the intention of the legislature ....... A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out ? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases.”

And held that it is a well known rule of interpretation of Statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used in a Statute and that the Courts must look to the object which the Statute seeks to achieve while interpreting any of the provisions of the Act and a purposive approach is necessary. Accordingly, the words “at or before or after the marriage as consideration for the marriage” occurring in Section 2 of the Dowry Prohibition Act were interpreted to mean demand of dowry at the “negotiation stage” as a consideration for proposed marriage and “marriage” was held to include the “proposed marriage” that may not have taken place. Reference is also made to Directorate of Enforcement v. Deepak Mahajan and Anr. MANU/SC/0422/1994, wherein it was held that a mere mechanical interpretation of the words devoid of concept or purpose will reduce
most of legislation to futility and that it is a salutary rule, well established, that the intention of the legislature must be found by reading the Statute as a whole. Accordingly, certain provisions of FERA and Customs Act were interpreted keeping in mind that the said enactments were enacted for the economic development of the country and augmentation of revenue. The Court did not accept the literal interpretation suggested by the respondent therein and held that Sub-section (1) and (2) of Section 167 Cr.P.C. are squarely applicable with regard to the production and detention of a person arrested under the provisions of Section 35 of FERA and Section 104 of Customs Act and that a Magistrate has jurisdiction under Section 167(2) Cr.P.C. to authorize detention of a person arrested by an authorised officer of the Enforcement Directorate under FERA and taken to the Magistrate in compliance of Section 35(2) of FERA.

13. Ms. Meenakshi Arora has submitted that this purposive approach is being adopted in some of other countries so that the criminals do not go unscathed on mere technicality of law. She has placed strong reliance on some decisions of House of Lords to substantiate her contentions and the most notable being R v. R (1991) 4 All ER 481 where it was held as under:

“The rule that a husband cannot be criminally liable for raping his wife if he has sexual intercourse with her without her consent no longer forms part of the law of England since a husband and wife are now to be regarded as equal partners in marriage and it is unacceptable that by marriage the wife submits herself irrevocably to sexual intercourse in all circumstances or that it is an incident of modern marriage that the wife consents to intercourse in all circumstances, including sexual intercourse obtained only by force. In Section 1(1) of the Sexual Offences (Amendment) Act, 1976, which defines rape as having ‘unlawful’ intercourse with a woman without her consent, the word ‘unlawful’ is to be treated as mere surplusage and not as meaning ‘outside marriage’, since it is clearly unlawful to have sexual intercourse with any woman without her consent.”

The other decision cited by learned counsel is Regina v. Burstow and Regina v. Ireland 1997 (4) All ER 74 where a person accused of repeated silent telephone calls accompanied on occasions by heavy breathing to women was held guilty of causing psychiatric injury amounting to bodily harm under Section 42 of Offences against the Person Act, 1861. In the course of the discussion, Lord Steyn observed that the criminal law has moved on in the light of a developing understanding of the link between the body and psychiatric injury and as a matter of current usage, the contextual interpretation of “inflict” can embrace the idea of one person inflicting psychiatric injury on another. It was further observed that the interpretation and approach should, so far as possible,
be adopted which treats the ladder of offences as a coherent body of law. Learned counsel has laid emphasis on the following passage in the judgment:

“The proposition that the Victorian, legislator when enacting Sections 18, 20 and 47 of the Act 1861, would not have had in mind psychiatric illness is no doubt correct. Psychiatry was in its infancy in 1861. But the subjective intention of the draftsman is immaterial. The only relevant enquiry is as to the sense of the words in the context in which they are used. Moreover the Act of 1861 is a statute of the “always speaking” type: the statute must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury.”

It has thus been contended that the words “sexual intercourse” occurring in Section 375 IPC must be given a larger meaning than as traditionally understood having regard to the monstrous proportion in which the cases of child abuse have increased in recent times. She has also referred to a decision of Constitutional Court of South Africa in the National Coalition for Gay and Lesbian Equality and Ors. v. The Minister of Home Affairs and Ors. — Case CCT 10/99 wherein it was held that Section 25(5) of the Aliens Control Act 96 of 1991, by omitting to confer on persons, who are partners in permanent same sex life partnerships, the benefits it extends to spouses, unfairly discriminates, on the grounds of their sexual orientation and marital status, against partners in such same-sex partnerships who are permanently and lawfully resident in the Republic. Such unfair discrimination limits the equality rights of such partners guaranteed to them by Section 9 of the Constitution and their right to dignity under Section 10. It was further held that it would not be an appropriate remedy to declare the whole of Section 25(5) invalid. Instead, it would be appropriate to read in, after the word “spouse” in the section, the words “or partner, in a permanent same-sex life partnership”.

14. Ms. Meenakshi Arora has also placed before the Court the judgments rendered on 10th December, 1998 and 22nd February, 2001 by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. Under Article 5 of the Statute of the International Tribunal, rape is a crime against humanity. Rape may also amount to a grave breach of the Geneva Conventions, a violation of the laws or customs of the war or an act of genocide, if the requisite elements are met and may be prosecuted accordingly. The Trial Chamber after taking note of the fact that no definition of rape can be found in international law, proceeded on the following basis:

“Thus, the Trial Chamber finds that the following may be accepted as the objective elements of rape:

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the sexual penetration, however slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

(b) of a mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.”

In the second judgment of the Trial Chamber dated 22\textsuperscript{nd} February, 2001, the interpretation which focussed on serious violations of a sexual autonomy was accepted.

15. Shri R.N. Trivedi, learned Additional Solicitor General appearing for the respondents, has submitted that International Treaties ratified by India can be taken into account for framing guidelines in respect of enforcement of fundamental rights but only in absence of municipal laws as held in Vishaka v. State of Rajasthan MANU/SC/0786/1997 and Lakshmi Kant Pandey v. Union of India MANU/SC/0054/1984. When laws are already existing, subsequent ratification of International Treaties would not render existing municipal laws ultra vires of Treaties in case of inconsistency. In such an event the State through its legislative wing can modify the law to bring it in accord with Treaty obligations. Such matters are in the realm of State policy and are, therefore, not enforceable in a Court of law. He has further submitted that in International law, ratified Treaties can be deemed interpreted in customary law unless the former are inconsistent with the domestic laws or decisions of its judicial Tribunals. The decision of the International Tribunal for the Crimes committed in the Territory of the Former Yugoslavia cannot be used for interpretation of Section 354 and 375 IPC and other provisions. Even decisions of International Court of Justice are binding only on the parties to a dispute or intervenors in view of Articles 92, 93 and 94 of the UN Charter and Articles 59 and 63 of the IJC Statutes. Learned counsel has also submitted that no writ of mandamus can be issued to the Parliament to amend any law or to bring it in accord with Treaty obligations. He has also submitted that Sections 354 and 375 IPC have been interpreted in innumerable decisions of various High Courts and also of the Supreme Court and the consistent view is that to hold a person guilty of rape, penile penetration is essential. The law on the point is similar both in England and USA. In State of Punjab v. Major Singh 1966 (Supp) SCR 266 it was held that if the hymen is ruptured by inserting a finger, it would not amount to rape. Lastly, it has been submitted that a writ petition under Article 32 of the Constitution would not lie for reversing earlier decisions of the Court on the supposed ground that a restrictive interpretation has been given to certain provisions of a Statute.

16. In support of his submission Shri Trivedi has placed reliance on Volume 11(1) of Halsbury’s Laws of England para 514 (Butterworths —1990) wherein
unlawful sexual intercourse with woman without her consent has been held to be an essential ingredient of rape. Reference has also been made to Volume 75 Corpus Juris Secundum para 10, wherein it is stated that sexual penetration of a female is a necessary element of the crime of rape, but the slightest penetration of the body of the female by the sexual organ of the male is sufficient. Learned counsel has also referred to Principles Of Public International Law by Ian Brownlie, where the learned author, after referring to some decisions of English Courts has expressed an opinion that the clear words of a Statute bind the Court even if the provisions are contrary to international law and that there is no such thing as a standard of international law extraneous to the domestic law by a Kingdom and that international law as such can confer no rights cognizable in the municipal courts. Learned counsel has also referred to Dicey and Morris on The Conflict of Laws wherein in the Chapter on the enforcement of foreign law, following Rule has been stated:

“English Courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law.”

With regard to penal law, it has been stated as under:

“The common law considers crimes as altogether local, and congnisable and punishable exclusively in the country where they are committed.... Chief Justice Marshall, in delivering the opinion of the Supreme Court, said : ‘The Courts of no country execute the penal laws of another’.”

17. This Court on 13.1.1998 referred the matter to the Law Commission of India for its opinion on the main issue raised by the petitioner, namely, whether all forms of penetration would come within the ambit of Section 375 IPC or whether any change in statutory provisions need to be made, and if so, in what respect? The Law Commission had considered some of the matters in its 156th Report and the relevant extracts of the recommendation made by it in the said Report, concerning the issue involved, were placed before the Court. Para 9.59 of the Report reads as under:

“9.59 Sexual-child abuse may be committed in various forms such as sexual intercourse, carnal intercourse and sexual assaults. The cases involving penile penetration into vagina are covered under Section 375 of the IPC. If there is any case of penile oral penetration and penile penetration into anus, Section 377 IPC dealing with unnatural offences, i.e., carnal intercourse against the order of nature with any man, woman or animal, adequately takes care of them. If acts such as penetration of finger or any inanimate object into vagina or anus are committed against a woman or a female child, the provisions of the proposed
Section 354 IPC whereunder a more severe punishment is also prescribed can be invoked and as regards the male child, the penal provisions of the IPC concerning ‘hurt’, ‘criminal force’ or ‘assault’ as the case may be, would be attracted. A distinction has to be naturally maintained between sexual assault/use of criminal force falling under Section 354, sexual offences falling under Section 375 and unnatural offences falling under Section 377 of the Indian Penal Code. It may not be appropriate to bring unnatural offences punishable under Section 377 IPC or mere sexual assault or mere sexual use of criminal force which may attract Section 354 IPC within the ambit of ‘rape’ which is a distinct and graver offence with a definite connotation. It is needless to mention that any attempt to commit any of these offences is also punishable by virtue of Section 511 IPC. Therefore, any other or more changes regarding this law may not be necessary.”

Regarding Section 377 IPC, the Law Commission recommended that in view of the ongoing instances of sexual abuse in the country where unnatural offences is committed on a person under age of eighteen years, there should be a minimum mandatory sentence of imprisonment for a term not less than two years but may extend to seven years and fine, with a proviso that for adequate and special reasons to be recorded in the judgment, a sentence of less than two years may be imposed. The petitioner submitted the response on the recommendations of the Law Commission. On 10/18.2.2000, this Court again requested the Law Commission to consider the comments of representative organisations (viz. SAKSHI, IFSHA and AIDWA).

18. The main question which requires consideration is whether by a process of judicial interpretation the provisions of Section 375 IPC can be so altered so as to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration within its ambit. Section 375 uses the expression “sexual intercourse” but the said expression has not been defined. The dictionary meaning of the word “sexual intercourse” is heterosexual intercourse involving penetration of the vagina by the penis. The Indian Penal Code was drafted by the First Indian Law Commission of which Lord Mecaulay was the President. It was presented to the Legislative Council in 1856 and was passed on October 6, 1860. The Penal Code has undergone very few changes in the last more than 140 years. Except for clause sixthly of Section 375 regarding the age of the woman (which in view of Section 10 denotes a female human being of any age) no major amendment has been made in the said provision. Sub-section (2) of Section 376 and Sections 376A to 376D were inserted by Criminal Law (Amendment) Act, 1983 but Sub-section (2) of Section 376 merely deals with special types of situations and provides for a minimum sentence of 10 years. It does not in any manner alter the definition of
‘rape’ as given in Section 375 IPC. Similarly, Section 354 which deals with assault or criminal force to woman with intent to outrage her modesty and Section 377 which deals with unnatural offences have not undergone any major amendment.

19. It is well settled principle that the intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. Similarly it is wrong and dangerous to proceed by substituting some other words for words of the statute. It is equally well settled that a statute enacting an offence or imposing a penalty is strictly construed. The fact that an enactment is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear. (Principles of Statutory Interpretation by Justice G.P. Singh p.58 and 751 Ninth Edition).

20. Sections 354, 375 and 377 IPC have come up for consideration before the superior courts of the country on innumerable occasions in a period of almost one and a half century. Only sexual intercourse, namely, heterosexual intercourse involving penetration of the vagina by the penis coupled with the explanation that penetration is sufficient to constitute the sexual intercourse necessary for the offence of rape has been held to come within the purview of Section 375 IPC. The wide definition which the petitioner wants to be given to “rape” as defined in Section 375 IPC so that the same may become an offence punishable under Section 376 IPC has neither been considered nor accepted by any Court in India so far. Prosecution of an accused for an offence under Section 376 IPC on radically enlarged meaning of Section 375 IPC as suggested by the petitioner may violate the guarantee enshrined in Article 20(1) of the Constitution which says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

21. The decision of Constitutional Court of South Africa cited by learned counsel for the petitioner does not commend to us as the Court there treated “Gays and Lesbian in permanent same sex life partnerships” at par with “spouses” and took upon itself the task of Parliament in holding that in Section 25(5) of the Aliens Control Act, after the word “spouse”, the words “or partner in a permanent same sex life partnership” should be read. The decision of House
of Lords in R. v. R. was given on its own facts which deserve notice. Here the wife had left her matrimonial home with her son on 21st October, 1989 and went to live with her parents. She had consulted solicitors about matrimonial problems and had left a letter for the husband informing him that she intended to petition for divorce. On 23rd October, 1989 the husband spoke to his wife on telephone indicating that it was his intention also to seek divorce. In the night of 12th November, 1989 the husband forced his way into the house of his wife’s parents, who were out at that time and attempted to have sexual intercourse with her against her will. In the course of doing so he assaulted her by squeezing her neck with both hands. On the facts of the case the conviction of the husband may not be illegal. It is very doubtful whether the principle laid down can be of universal application. In Regina v. Burstow psychiatric injury was held to be bodily harm under Section 20, having regard to the meaning of the word in the usage of the present day. In our opinion the judgment of the International Tribunal can have no application here as Tribunal itself noted that no definition of rape can be found in International law and it was dealing with prosecution of persons responsible for serious violations of International Humanitarian Law committed in the Territory of former Yugoslavia. The judgment is not at all concerned with interpretation of any provision of domestic law in peace time conditions. The decisions cited by the learned counsel for the petitioner, therefore, do not persuade us to enlarge the definition of rape as given in Section 375 IPC which has been consistently so understood for over a century through out the country. 

22. It may be noted that ours is a vast and big country of over 100 crore people. Normally, the first reaction of a victim of crime is to report the incident at the police station and it is the police personnel who register a case under the appropriate Sections of the Penal Code. Such police personnel are invariably not highly educated people but they have studied the basic provisions of the Indian Penal Code and after registering the case under the appropriate sections, further action is taken by them as provided in Code of Criminal Procedure. Indian Penal Code is a part of the curriculum in the law degree and it is the existing definition of “rape” as contained in Section 375 IPC which is taught to every student of law. A criminal case is initially handled by a Magistrate and thereafter such cases as are exclusively triable by Court of Session are committed the Court of Session. The entire legal fraternity of India, lawyers or Judges, have the definition as contained in Section 375 IPC engrained in their mind and the cases are decided on the said basis. The first and foremost requirement in criminal law is that it should be absolutely certain and clear. An exercise to alter the definition of rape, as contained in Section 375 IPC, by a process of judicial interpretation, and that too when there is no ambiguity in the provisions of the enactment is bound to result in good deal of chaos and confusion, and will not be in the interest of society at large.
23. Stare decisis is a well known doctrine in legal jurisprudence. The doctrine of stare decisis, meaning to stand by decided cases, rests upon the principle that law by which men are governed should be fixed, definite and known, and that, when the law is declared by court of competent jurisdiction authorised to construe if, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority. It requires that rules of law when clearly announced and established by a Court of last resort should not be lightly disregarded and set aside but should be adhered to and followed. What it precludes is that where a principle of law has become established by a series of decisions, it is binding on the Courts and should be followed in similar cases. It is a wholesome doctrine which gives certainty to law and guides the people to mould their affairs in future.

24. In Mishri Lal v. Dhierendra Nath MANU/SC/0241/1999 importance of this doctrine was emphasised for the purpose of avoiding uncertainty and confusion and paras 14, 15, 16 and 21 of the Reports read as under:

"14. This Court in Muktul v. Manbhari MANU/SC/0146/1958 explained the scope of the doctrine of stare decisis with reference to Haralsbury’s Laws of England and Corpus Juris Secundum in the following manner:

“The principle of stare decisis is thus stated in Halsbury’s Laws of England, 2nd Edn.:

‘Apart from any question as to the courts being of coordinate jurisdiction, a decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts of higher authority than the court establishing the rule, even though the court before whom the matter arises afterwards might not have given the same decision had the question come before it originally. But the Supreme Appellate Court will not shrink from overruling a decision, or series of decisions, which establish a doctrine plainly outside the statute and outside the common law, when no title and no contract will be shaken, no persons can complain, and no general course of dealing be altered by the remedy of a mistake.’

The same doctrine is thus explained in Corpus Juris Secundum -

‘Under the stare decisis rule, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases. This rule is based on expediency and public policy, and, although generally it should be strictly adhered to by the courts, it is not universally applicable.’"
15. Be it noted however that Corpus Juris Secundum adds a rider that
“previous decisions should not be followed to the extent that grievous wrong
may result; and, accordingly, the courts ordinarily will not adhere to a rule of
principle established by previous decisions which they are convinced is
erroneous. The rule of stare decisis is not so imperative or inflexible as to
preclude a departure therefrom in any case, but its application must be
determined in each case by the discretion of the court, and previous decisions
should not be followed to the extent that error may be perpetuated and grievous
wrong may result.”

16. The statement though deserves serious consideration in the event of a definite
finding as to the perpetration of a grave wrong but that by itself does not denude
me time-tested doctrine of stare decisis of its efficacy. Taking recourse to
the doctrine would be an imperative necessity to avoid uncertainty and contusion.
The basic feature of law is its certainty and in the event of there being uncertainty
as regards the state of law - the society would be in utter confusion the resultant
effect of which would bring about a situation of chaos - a situation which
ought always to be avoided.

21. In this context reference may also be made to two English decisions:
(a) in Admiralty Commrs. v. Valverda (Owners) 1938 AC 173 (AC at p. 194)
wherein the House of Lords observed that even long established conveyancing
practice, although not as authoritative as a judicial decision, will cause the
House of Lords to hesitate before declaring it wrong, and

(b) in Button v. Director of Public Prosecution 1966 AC 591 the House of
Lords observed:
“In Corpus Juris Secundum, a contemporary statement of American Law, the
stare decisis rule has been stated to be a principle of law which has become
settled by a series of decisions generally, is binding on the courts and should
be followed in similar cases. It has been stated that this rule is based on
expediency and public policy and should be strictly adhered to by the courts.
Under this rule courts are bound to follow the common law as it has been
judicially declared in previously adjudicated cases and rules of substantive
law should be reasonably interpreted and administered. This rule has to preserve
the harmony and stability of the law and to make as steadfast as possible
judicially declared principles affecting the rights of property, it being
indispensable to the due administration of justice, especially by a court of last
resort, that a question once deliberately examined and declared should be
considered as settled and closed to further argument. It is a salutary rule, entitled
to great weight and ordinarily should be strictly adhered to by the courts. The
courts are slow to interfere with the principle announced by the decision, and
it may be upheld even though they would decide otherwise were the question a new one, or equitable considerations might suggest, a different result and although it has been erroneously applied in a particular case. The rule represents an element of continuity in law and is rooted in the psychologic need to satisfy reasonable expectations, but it is a principle of policy and not a mechanical formula of adherence to the latest decision however recent and questionable when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder and verified by experience.”

25. It may be noticed that on July 26, 1966, the House of Lords made a departure from its past practice when a statement was made to the following effect:

“Their lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection they will boar in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House.”

26. While making the above statement a rule of caution was sounded that while departing from a previous decision when it appears right to do so, the especial need for certainty as to criminal law shall be borne in mind. There is absolutely no doubt or confusion regarding the interpretation of provisions of Section 375 IPC and the law is very well settled. The inquiry before the Courts relate only to the factual aspect of the matter which depends upon the evidence available on the record and not on the legal aspect. Accepting the contention of the writ petitioner and giving a wider meaning to Section 375 IPC will lead to a serious confusion in the minds of prosecuting agency and the Courts which instead of achieving the object of expeditiously bringing a criminal to book may unnecessarily prolong the legal proceedings and would have an adverse impact on the society as a whole. We are, therefore, of the opinion that it will not be in the larger interest of the State or the people to alter the definition of
“rape” as contained in Section 375 IPC by a process of judicial interpretation as is sought to be done by means of the present writ petition.

27. The other aspect which has been highlighted and needs consideration relates to providing protection to a victim of sexual abuse at the time of recording his statement in court. The main suggestions made by the petitioner are for incorporating special provisions in child sexual abuse cases to the following effect:

(i) permitting use of a videotaped interview of the child’s statement by the judge (in the presence of a child support person),

(ii) allow a child to testify via closed circuit television or from behind a screen to obtain a full and candid account of the acts complained of.

(iii) The cross examination of a minor should only be carried out by the judge based on written questions submitted by the defense upon perusal of the testimony of the minor

(iv) Whenever a child is required to give testimony, sufficient breaks should be given as and when required by the child.

28. The Law Commission, in its response, did not accept the said request in view of Section 273 Cr.P.C. as in its opinion the principle of the said Section which is founded upon natural justice, cannot be done away in trials and inquiries concerning sexual offences. The Commission, however, observed that in an appropriate case it may be open to the prosecution to request the Court to provide a screen in such a manner that the victim does not see the accused while at the same time provide an opportunity to the accused to listen to the testimony of the victim and give appropriate instructions to his counsel for an effective cross-examination. The Law Commission suggested that with a view to allay any apprehensions on this score, a proviso can be placed above the Explanation to Section 273 of the Criminal Procedure Code to the following effect: “Provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the Court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.”.

29. Ms. Meenakshi Arora has referred to a decision of the Canadian Supreme Court in Her Majesty The Queen, Appellant v. D.O.L., Respondent and the Attorney General of Canada, etc. (1993) 4 SCR 419, wherein the constitutional validity of Section 715.1 of the Criminal Code was examined. This section provides that in any proceeding relating to certain sexual offences in which the complainant was under age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the
alleged offence in which the complainant describes the act complained of, is admissible in evidence, if the complainant while testifying adopts the contents of the videotape. The Court of Appeal had declared Section 715.1 unconstitutional on the ground that the same contravened Sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms and could not be sustained under Section 1. The Supreme Court took note of some glaring features in such type of cases viz. the innate power imbalance which exists between abuser and the abused child; a failure to recognise that the occurrence of child sexual abuse is one intertwined with the sexual abuse of all women, regardless of age; and that the Court cannot disregard the propensity of victims of sexual abuse to fail to report the abuse in order to conceal their plight from institutions without the criminal justice system which hold stereotypical and biased views about the victimisation of women. The Court accordingly held that the procedures set out in Section 715.1 are designed to diminish the stress and trauma suffered by child complainants as a byproduct of their role in the criminal justice system. The “system induced trauma” often ultimately serves to re-victimise the young complainant. The Section was intended to preserve the evidence of the child and to remove the need for them to repeat their story many times. It is often repetition of the story that results in the infliction of trauma and stress upon a child who is made to believe that she is not being believed and that her experiences are not validated. The benefits such a provision would have in limiting the strain imposed on child witness who are required to provide detailed testimony about confusing, embarrassing and frightful incidents of abuse in an intimidating, confrontational and often hostile court room atmosphere. Another advantage afforded by the Section is the opportunity for the child to answer delicate questions about the abuse in a more controlled, less stressful and less hostile environment, a factor which according to social science research, may drastically increase the likelihood of eliciting the truth about the events at hand. The videotape testimony enables the Court to hear a more accurate account of what the child was saying about the incident at the time it first came to light and the videotape of an early interview if used in evidence can supplement the evidence of a child who is inarticulate or forgetful at the trial. The Section also acts to remove the pressure placed on a child victim of sexual assault when the attainment of “truth” depends entirely on her ability to control her fear, her shame and the horror of being face to face with the accused when she must describe her abuse in a compelling and coherent manner. The Court also observed that the rules of evidence have not been constitutionalised into unaltered principles of fundamental justice. Neither should they be interpreted in a restrictive manner which may essentially defeat their purpose of seeking truth and justice. Rules of evidence, as much as the law itself, are not cast in stone and will evolve with time. The Court accordingly
30. We will briefly refer to the statutory provisions governing the situation. Section 273 Cr.P.C. lays down that except as otherwise expressly provided, all evidence taken in the course of the trial or other proceedings shall be taken in the presence of the accused, or when his personal attendance is dispensed with, in the presence of his pleader. Sub-section (1) of Section 327 Cr.P.C. lays down that any Criminal Court enquiring into or trying any offence shall be deemed to be open Court to which the public generally may have access, so, far as the same can conveniently contain them. Sub-section (2) of the same Sections says that notwithstanding anything contained in Sub-section (1) the inquiry into the trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code shall be conducted in camera. Under the proviso to this sub-section 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. It is rather surprising that the legislature while incorporating Sub-section (2) to Section 327 by amending Act 43 of 1983 failed to take note of offences under Section 354 and 377 IPC and omitted to mention the aforesaid provisions. Deposition of the victims of offences under Section 354 and 377 IPC can at times be very embarrassing to them.

31. The whole inquiry before a Court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. Section 273 Cr.P.C. merely requires the evidence to be taken in the presence of the accused. The Section, however, does not say that the evidence should be recorded in such a manner that the accused should have full view of the victim or the witnesses. Recording of evidence by way of video conferencing vis-a-vis Section 273 Cr.P.C. has been held to be permissible in a recent decision of this Court in State of Maharashtra v. Dr. Praful B Desai MANU/SC/0268/2003. There is major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are hand-maiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the Court to expand or enlarge the meanings of such provisions in order to elicit the truth and do justice with the parties.

32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such

reversed the judgment of Court of Appeal and upheld the constitutionality of Section 715.1.
arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the Presiding Officer of the Court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of Sub-section (2) of Section 327 Cr.P.C. should also apply in inquiry or trial of offences under Section 354 and 377 IPC.

33. In State of Punjab v. Gurmit Singh MANU/SC/0366/1996 this Court had highlighted the importance of provisions of Section 327 (2) and (3) Cr.P.C. and a direction was issued not to ignore the mandate of the aforesaid provisions and to hold the trial of rape cases in camera. It was also pointed out that such a trial in camera would enable the victim of crime to be a little comfortable and answer the questions with greater ease and thereby improve the quality of evidence of a prosecutrix because there she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of the public. It was further directed that as far as possible trial of such cases may be conducted by lady Judges wherever available so that the prosecutrix can make a statement with greater ease and assist the court to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities.

34. The writ petition is accordingly disposed of with the following directions:

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

(2) In holding trial of child sex abuse or rape:
   (i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
   (ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;
   (iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.
These directions are in addition to those given in State of Punjab v. Gurmit Singh.

35. The suggestions made by the petitioners will advance the cause of justice and are in the larger interest of society. The cases of child abuse and rape are increasing at alarming speed and appropriate legislation in this regard is, therefore, urgently required. We hope and trust that the Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves.

36. Before parting with the case, we must place it on record that Ms. Meenakshi Arora put in lot of efforts and hard labour in placing the relevant material before the Court and argued the matter with commendable ability.

G.P. Mathur, J.

37. For the reasons given in WP(Crl.) No. 33 of 1997 decided today, Special Leave Petitions are dismissed.
Sheeba Abidi .. Petitioner
through Mr.D.C.Mathur, Sr. Advocate with Ms.Rebecca M.John,
Ms.Vrinda and Mr.Vishal Gosain, Advocates
Versus
State and Another ..Respondents
through Mr.Akshay Bipin for the State,
Mr.Kailash Gambhir for UOI
Mr.Harish Gulati for respondent No.3

In the High Court of Delhi at New Delhi
Writ Petition (Crl) 356/2003
28.07.2004
Coram
Hon'ble Mr. Justice R.C. Chopra

(i) Whether the Reporters of Local Papers may be allowed to see the judgement?
(ii) To be referred to the Reporter or not?
(iii) Whether the judgement should be reported in the Digest?

R.C.Chopra, J.
The petitioner in this Writ petition, under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, is the mother of a child, aged about 6 years, who is alleged to be a victim of an offence under section 377 read with Section 511 of the Indian Penal Code at the hands of his teacher-respondent No.3. FIR No.938/2002 was registered at P.S. Malviya Nagar, New Delhi against respondent No.3. The trial is pending.

According to the petitioner, the child complained of sexual abuse on 25.10.2002 and on inquiries, revealed that he was a victim of sexual abuse by respondent No.3 on many occasions and at different locations in the school. The child was examined by Ms Achla Bhagat, a consultant psychiatrist and psycho therapist at Apollo Hospital, New Delhi. She categorically opined that it would be in the best interest of the child not to expose him to the perpetrator of the crime which may compound the impact of he abuse. She opined that the child was showing signs of Post Trauma Stress Disorder and was likely to suffer further psychological trauma if he was confronted with the accused. In these premises, the petitioner, who is the mother of the child victim, prays that the trial be conducted in a child friendly environment outside the Court room so that the child can give his evidence without fear, apprehension or intimidation. It is
also prayed that the testimony of the child be recorded with the help of a close
circuit live television link to avoid confrontation and eye contact between
the child and the accused-respondent No.3 and at the time of the examination
of the child a support person, preferably the mother of the child, be allowed to
remain present. She also seeks permission for the use of testimonial aids so
that child may freely express himself in ways other than oral testimony.

The State has no objection to the issuance of appropriate directions by this
Court to ensure that the testimony of the child victim is recorded in a friendly
and congenial atmosphere and the child does not suffer any mental trauma.

Learned counsel for respondent No.3 also does not oppose the prayer made by
the petitioner but has two reservations. First is that the support person should
not be a prosecution witness. He agrees that the father may be allowed to
remain present at the time of the examination of the child as a support person.
His second objection is in regard to the mode and method of the cross-
examination. He submits that while issuing directions, this Court must ensure
that the valuable right of the accused to cross-examine the child witness is not
frustrated or defeated.

The issues raised in this petition and the directions sought are squarely covered
by the recent Apex court judgement in “Sakshi Vs. Union of India and Ors.”
reported in 2004 (2) JCC Page-892. This judgement was given in a Public
Interest Litigation filed by a Social Organization “Sakshi”. The relief claimed
in the said petition was primarily in regard to the enlargement of the definition
of “sexual intercourse” as contained in Section 375 of the Indian Penal Code
and directions to the Union of India and others for registration of cases falling
within the broadened interpretation of “sexual intercourse”. Their Lordships,
after in-depth examination of the question of enlargement of the definition of
“rape” as contained in Section 375 of the Indian Penal Code came to the
conclusion that it would not be in the larger interests of the State or the people
to alter the definition by a process of judicial interpretation. However, in para
27 of the judgement, their Lordships considered certain suggestions made by
the petitioner for the protection of a victim of sexual abuse at the time of
recording of his statement in Court. These suggestions read as under :

(i) Permitting use of a videotaped interview of the child’s statement by the
judge (in the presence of a child support person).

(ii) Allow a child to testify via closed circuit television or from behind a screen
to obtain a full and candid account of the acts complained of.

(iii) The cross examination of a minor should only be carried out by the judge
based on written questions submitted by the defence upon perusal of the
testimony of the minor.
(iv) Whenever a child is required to give testimony, sufficient breaks should be given as and when required by the child.”

After examining the various implications of the suggestions, the Apex Court disposed of the writ petition with the following directions as contained in para 34 of the judgement:

‘34. The writ petition is accordingly disposed of with the following directions:-

(1) The provisions of sub-section (2) of the section 327 Cr.PC shall, in addition to the offences mentioned in the sub-section, would also apply in inquiry or trial of offences under sections 354 and 377 IPC.

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

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

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

(iii) the victim of child abuse or rape, while giving testimony in Court, should be allowed sufficient breaks as and when required. These directions are in addition to those given in State of Punjab V. Gurmit Singh.”

In view of the directions issued by the Apex Court as quoted above, there is hardly any scope for this Court to issue any additional directions or guidelines for the protection of a child victim of sex abuse or a witnesses to such an incident. The prayer made by the petitioner in Sakshi Vs. Union of India and Ors. (supra) for permitting use of a videotaped interview of the child’s statement by the Judge did not find favour. However, the prayer for allowing the child or witness to testify via closed circuit television or from behind a screen to obtain a full and candid account of the acts complained of, received approval in Sub-Clause 2(i) of para 34 of the judgement. The words ‘or some such arrangements” used in this sub-para cover examination through close circuit television also. Regarding cross-examination also, the procedure prescribed by the Apex Court is that the questions to be put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the Presiding Officer of the Court, who may put them to the victim or witness in a language, which is clear and not embarrassing. The apprehension of learned counsel for respondent No.3 that sometimes a further question may have to be put on a witness in view of the answer to a question put in the cross-
examination which may not be possible by this procedure, is misconceived inasmuch as after the questions given in writing to the Presiding Officer are put to the witness, the defence counsel may give some further questions in writing to the presiding officer, which may also be put to the witness by the presiding officer of the Court, if deemed fit and relevant.

The presence of a support person with the victim of child abuse or rape at the time of his testimony in Court with sufficient breaks as and when required is fully justified. In the absence of a support person, a child of tender age may not be able to say anything. The objection of learned counsel for the respondent No.3-accused that the support person should not be a prosecution witness himself has some substance and as such in the present case, instead of the mother, who is a prosecution witness, the father of the child can be permitted to be a support person. The question as to whether the child witness in the present case should be allowed to be examined by keeping him behind a screen or through closed circuit television can be left to the discretion of the Trial Judge inasmuch at times the equipment required for examination of witness through closed circuit television may not be readily available and returning the witness without examination may not be deemed fit by Trial Judge. In view of the facts and circumstances of the case and in the light of the Apex Court judgment in Sakshi Vs. Union of India and Ors.(supra), this Court has no hesitation in concluding that the time has now come when the Courts should firmly step in to prevent harassment and humiliation of the witnesses and victims of sexual abuse in the course of their cross-examination in Courts. The spate of questions put to them in cross-examination which sometimes cross the limits of decency even make them re-live the whole incident. This appears to be a major factor which prompts numerous victims of such crimes to resile from their statements for fear of humiliation. It happens in spite of holding of a trial in-camera because the presence of the prosecutor, defence counsel, accused as well as staff is unavoidable.

The directions given by the Apex Court in Sakshi Vs. Union of India (supra) have to be applied not only to the victims of child sex abuse or rape but some witnesses also who may be equally vulnerable like a child victim. In appropriate cases, the Courts may apply these directions to the victims or witnesses of other sexual offences also if it appears that they are vulnerable to mental pressure of Court proceedings. In the case of "State of Maharashtra Vs. Dr. Praful B. Desai and Anr." reported in JT 2003(3) C P-382, the recording of evidence through video conferencing stands approved. It has been clearly held that evidence so recorded meets the requirements of Section 273 Cr.PC so long as the accused and/or his pleader are present when evidence is recorded by video conferencing. The ratio of the said judgement can be applied to the victims and witnesses of sex abuse and rape cases also. However, a child victim has to
be provided additional protections also as contained in Sakshi Vs. Union of India and Ors (supra).

The petition accordingly stands disposed of with the directions to Trial Judge to examine the child witness in FIR No.938/2002 registered at P.S. Malviya Nagar, New Delhi in terms of the directions issued by the Apex Court in Sakshi Vs. Union of India and Ors. (supra) and the observations made by this Court. The father of the child would be the support person who will remain present at the time of the examination/cross-examination of the child. The questions to be put by the defence counsel in cross-examination would be handed over to the learned presiding Judge, who would put them to the child witness in his own language ensuring that the child does not suffer any further trauma. Further questions may also be allowed to both the sides after the cross-examination of the child is over so that the clarifications, if required, are obtained. The testimonial aids may also be permitted so that the child can express himself freely and meaningfully.

The learned Trial Judge may also consider the feasibility of examining the child witness in his Chamber so that the child is not overawed by the Court atmosphere. The presiding Judge must ensure that the child victim is examined in a congenial, cordial and friendly atmosphere. It would be better if the evidence is recorded in post-lunch session at the end of Board when other cases are over and Court is less crowded. This Court need not say that necessary equipment/gadgets for compliance of directions have to be arranged by the prosecution.

The petition stands disposed of accordingly.

A copy of this order be circulated to all the officers of District Judiciary so that these directions are followed while examining the victims/witnesses of sex abuse or rape and especially when the victim or witness is a child.

July 28, 2004 R.C. Chopra, J.
Appellants: Centre for Enquiry Into Health and Allied Themes (CEHAT) and Ors.

Vs.

Respondent: Union of India (UOI) and Ors.

In the Supreme Court of India

Writ Petition (Civil) No. 301 of 2000

Hon’ble Judges

M.B. Shah and Ashok Bhan, JJ.

Decided On: 10.09.2003

Counsels


Acts/Rules/Orders

Dowry Prohibition Act; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 - Sections 2, 3, 7(2), 9(1), 16, 16A, 17, 17(5), 17(6), 22, 23, 28 and 30; Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act - Section 3B; Constitution of
India - Article 32; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Rules, 1996 - Rules 15 and 17(3)

Case Note

Civil – Pre-natal Diagnostic Techniques (Regulation Act and Prevention of Misuse) Act, 1994 – Section 2, 3, 7, 9, 16, 17, 22, 23, 28, 30 – Preconception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act – Section 3B – Discrimination against girl child which ultimately affects the sex ratio – Prevention of birth of a girl child by sex determination before birth which ultimately result in greater decline in sex ratio – Petition filed for implementation of the prohibition of the Sex Selection Act by banning all advertisements including sex determination techniques which can be abused – Notices were issued and orders were passed from time to time for the Central Govt. and State Govt. to comply with for effective implementation of the Act through creating awareness in public about non-discrimination between male and female child

Judgment
Shah, J.

1. It is an admitted fact that in India Society, discrimination against girl child still prevails, may be because of prevailing uncontrolled dowry system despite the Dowry Prohibition Act, as there is no change in the mind-set or also because of insufficient education and/or tradition of women being confined to household activities. Sex selection/sex determination further adds to this adversity. It is also known that number of persons condemn discrimination against women in all its forms, and agree to pursue, by appropriate means, a policy of criminating discrimination against women, still however, we are not in a position to change mental set-up which favours a male child against a female. Advance technology is increasingly used for removal of foetus (may or may not be seen as commission of murder) but it certainly affects the sex ratio. The misuse of modern science and technology by preventing the birth of girl child by sex determination before birth and thereafter abortion is evident from the 2001 Census figures which reveal greater decline in sex ratio in the 0-6 age group in States like Haryana, Punjab, Maharashtra and Gujarat, which are economically better off.

2. Despite this, it is unfortunate that law which aims at preventing such practice is not implemented and, therefore, Non-Governmental Organisations are required to approach this Court for implementation of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 renamed after amendment as “The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act” (hereinafter referred to as ‘the PNDT Act’) which is the normal function of the Executive.
3. In this petition, it was *inter alia* prayed that as the Pre-natal Diagnostic Techniques contravene the provisions of the PNNDT Act, the Central Government and the State Governments be directed to implement the provisions of the PNNDT Act (a) by appointing appropriate authorities at State and District levels and the Advisory Committees; (b) the Central Government be directed to ensure that Central Supervisory Board meets every 6 months as provided under the PNNDT Act; and (c) for banning of all advertisements of pre-natal sex selection including all other sex determination techniques which can be abused to selectively produce only boys either before or during pregnancy.

4. After filing of this petition, notices were issued and thereafter various orders from time to time were passed to see that the Act is effectively implemented.

5. A\^ On 4\textsuperscript{th} May 2001, following order was passed:—

“It is unfortunate that for one reason or the other, the practice of female infanticides still prevails despite the fact that gentle touch of a daughter and her voice has soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional system of female infanticide whereby female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advance medical techniques. Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing full well that it is immoral and unethical as well as it may amount to an offence, foetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected overall sex ratio in various States where female infanticide is prevailing without any hindrance.

For controlling the situation, the Parliament in its wisdom enacted the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as “the PNNDT Act”). The Preamble, *inter alia*, provides that the object of the Act is to prevent the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide and for matters connected therewith or incidental thereto. The Act came into force from 1\textsuperscript{st} January, 1996.

It is apparent that to a large extent, the PNNDT Act is not implemented by the Central Government or by the State Governments. Hence, the petitioners are required to approach this Court under Article 32 of the Constitution of India. One of the petitioners is the Centre for Enquiry Into Health and Allied Themes (CEHAT) which is a research center of Anusandhan Trust based in Pune and Mumbai. Second petitioner is Mahila Sarvangeen Utkarsh Mandal (MASUM) based in Pune and Maharashtra and the third petitioner is Dr. Sabu M. Georges who is having experience and technical knowledge in the field. After filing of
this petition, this Court issued notices to the concerned parties on 9.5.2000. It took nearly one year for the various States to file their affidavits in reply/ written submissions. *Prima facie it appears that despite the PNDT Act being enacted by the Parliament five years back, neither the State Governments nor the Central Government has taken appropriate actions for its implementation.* Hence, after considering the respective submissions made at the time of hearing of this matter, as suggested by the learned Attorney General for India, Mr. Soli J. Sorabjee following directions are issued on the basis of various provisions for the proper implementation of the PNDT Act:

**I. Directions to the Central Government**

1. The Central Government is directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through appropriate releases/programmes in the electronic media. This shall also be done by Central Supervisory Board ("CSB" for short) as provided under Section 16(iii) of the PNDT Act.

2. The Central Government is directed to implement with all vigor and zeal the PNDT Act and the Rules framed in 1996. Rule 15 provides that the intervening period between two meetings of the Advisory Committees constituted under Sub-section (5) of Section 17 of the PNDT Act to advise the appropriate authority shall not exceed 60 days. It would be seen that this Rule is strictly adhered to.

**II. Directions to the Central Supervisory Board (CSB)**

1. Meetings of the CSB will be held at least once in six months. [Re. Proviso to Section 9(1)] The constitution of the CSB is provided under Section 7. It empowers the Central Government to appoint ten members under Section 7(2) (e) which includes eminent medical practitioners including eminent social scientists and representatives of women welfare organizations. We hope that this power will be exercised so as to include those persons who can genuinely spare some time for implementation of the Act.

2. The CSB shall review and monitor the implementation of the Act. [Re. Section 16(ii)].

3. The CSB shall issue directions to all State/UT. Appropriate Authorities to furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:-

- (i) Survey of bodies specified in Section 3 of the Act.
- (ii) Registration of bodies specified in Section 3 of the Act.
(iii) Action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records.

(iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.

(v) Number and nature of awareness campaigns conducted and results flowing therefrom.

4. The CSB shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in implementation of the Act and to make recommendations to the Central Government. [Re. Section 16]

5. The CSB shall lay down a code of conduct under Section 16(iv) of the Act to be observed by persons working in bodies specified therein and to ensure its publication so that public at large can know about it.

6. The CSB will require medical professional bodies/associations to create awareness against the practice of pre-natal determination of sex and female foetocide and to ensure implementation of the Act.

III. Directions to State Government/UT Administrations

1. All State Government/UT Administrations are directed to appoint by notification, fully empowered Appropriate Authorities at district and sub-district levels and also Advisory Committees to aid and advise the Appropriate Authority in discharge of its functions [Re. Section 17(5)]. For the Advisory Committee also, it is hoped that members of the said Committee as provided under Section 17(6)(d) should be such persons who can devote some time for the work assigned to them.

2. All State Governments/UT Administrations are directed to publish a list of the Appropriate Authorities in the print and electronic media in its respective State/UT.

3. All State Governments/UT Administrations are directed to create public awareness against the practice of pre-natal determination of sex and female foetocide through advertisement in the print and electronic media by hoarding and other appropriate means.

4. All State Governments/UT Administrations are directed to ensure that all State/UT appropriate Authorities furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:-

(i) Survey of bodies specified in Section 3 of the Act.

(ii) Registration of bodies specified in Section 3 of the Act.
(iii) Action taken against non-registered bodies operating in violation of Section 4 of the Act, inclusive of search and seizure of records.
(iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.
(v) Number and nature of awareness campaigns conducted and results flowing therefrom.

IV. Directions to Appropriate Authorities

1. Appropriate Authorities are directed to take prompt action against any person or body who issues or causes to be issued any advertisement in violation of Section 22 of the Act.

2. Appropriate Authorities are directed to take prompt action against all bodies specified in Section 3 of the Act as also against persons who are operating without a valid certificate of registration under the Act.

3. All State/UT Appropriate Authorities are directed to furnish quarterly returns to the CSB giving report on the implementation and working of the Act. These returns should inter alia contain specific information about:
   (i) Survey of bodies specified in Section 3 of the Act.
   (ii) Registration of bodies specified in Section 3 of the Act including bodies using ultrasound machines.
   (iii) Action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records.
   (iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.
   (v) Number and nature of awareness campaigns conducted and results flowing therefrom.

The CSB and the State Governments/Union Territories are directed to report to this Court on or before 30th July 2001. List of the matter on 6.8.2001 for further directions at the bottom of the list.”

6. B) Inspite of the above order, certain States/UTs did not file their affidavits. Matter was adjourned from time to time and on 19th September, 2001, following order was passed:—

“Heard the learned counsel for the parties and considered the affidavits filed on behalf of the various States. From the said affidavits, it appears that the directions issued by this Court are not complied with.

1. At the outset, we may state that there is total slackness by the Administration in implementing the Act. Some learned counsel appointed out that even though
the Genetic Counselling Centre, genetic Laboratories or Genetic Clinics are not registered, no action is taken as provided under Section 23 of the Act, but only a warning is issued. In our view, those Centres which are not registered are required to be prosecuted by the Authorities under the provisions of the Act and there is no question of issue of warning and to permit them to continue their illegal activities.

It is to be stated that the Appropriate Authorities or any officer of the Central or the State Government authorised in this behalf is required to file complaint under Section 28 of the Act for prosecuting the offenders.

Further wherever at District Level, appropriate authorities are appointed, they must carry out the necessary survey of Clinics and take appropriate action in case of non-registration or non-compliance of the statutory provisions including the Rules. Appropriate authorities are not only empowered to take criminal action, but to search and seize documents, records, objects etc. of unregistered bodies under Section 30 of the Act.

2. It has been pointed out that the States/Union Territories have not submitted quarterly returns to the Central Supervisory Board on implementation of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as “the Act”). Hence it is directed that the quarterly returns to Central Supervisory Board should be submitted giving the following information:-

(a) Survey of Centres, Laboratories/Clinics,
(b) Registration of these bodies,
(c) Action taken against unregistered bodies,
(d) Search and Seizure,
(e) Number of awareness campaigns, and
(f) Results of campaigns”

7. C] On 7th November, 2001, learned counsel for the Union of India stated that the Central Government has decided to take concrete steps for the implementation of the Act and suggested to set up National Inspections and Monitoring Committee for the implementation of the Act. It was ordered accordingly.

8. D] On 11th December, 2001, it was pointed out that certain State Governments have not disclosed the names of the members of the Advisory Committee. Consequently, the State Governments were directed to publish the names of advisory committee in various districts so that if there is any complaint, any citizen can approach them. The Court further observed thus:—
“For implementation of the Act and the rules, it appears that it would be desirable if the Central Government frames appropriate rules with regard to sale of ultrasound machines to various clinics and issue directions not to sell machines to unregistered clinics. Learned counsel Mr. Mahajan appearing for Union of India submitted that appropriate action would be taken in this direction as early as possible.”"

9. E] On March 31, 2003, it was pointed out that in conformity with the various directions issued by this Court, the Act has been amended and titled as “The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act”. It was submitted that people are not aware of the new amendment and, therefore, following reliefs were sought:—

a) direct the Union of India, State Governments/UTs and the authorities constituted under the PNDT Act to prohibit sex selection techniques and its advertisement throughout the country;

b) direct that the appropriate authorities shall also include “vehicles” with ultrasound machines etc., in their quarterly reports hereinafter as defined under Section 2(d);

c) any person or institution selling Ultra Sound machine should provide information to the appropriate State Authority in furtherance of Section 3-B of the Amended Act;

d) direct that State Supervisory Boards be constituted in accordance with the amended Section 16A in order to carry out the functions enumerated therein;

e) direct appropriate authorities to initiate suo moto legal action under the amended Section 17(iv)(e);

f) direct that the Central Supervisory Board shall publish half yearly consolidated reports based on the quarterly reports obtained from the State bodies. These reports should specifically contain information on:

1) Survey of bodies and the number of bodies registered.

2) Functioning of the regulatory bodies providing the number and dates of meetings held.

3) Action taken against non-registered bodies inclusive of search and seizure of records.

4) Complaints received and action taken pursuant thereto.

5) Nature and number of awareness programmes.

6) Direct that the Central Supervisory Board shall carry out all the additional functions as given under the amended Section 16 of the Act, in particular, to oversee the performance of various bodies constituted under the Act and take appropriate steps to ensure its proper and effective implementation.
As against this, Mr. Mahajan learned counsel appearing for the Union of India submits that on the basis of the aforesaid amendment, appropriate action has already been taken by Union of India for implementation and almost all State Governments/UTs are informed to implement the said Act and the Rules and the State Governments/UTs are directed to submit their quarterly report to the Central Supervisory Board.

Considering the amendment in the Act, in our view, it is the duty of the Union Government as well as the State Governments/UTs to implement the same as early as possible.”

10 F] At the time of hearing, learned counsel for the petitioners substituted that appropriate directions including the steps which are required to be taken on the basis of PNDT Act and the suggestion as given in the written submission be issued.

11. On this aspect, learned counsel for the parties were heard.

12. In view of the various directions issued by this Court, as quoted above, no further directions are required except that the directions issued by this Court on 4th May, 2001, 7th November, 2001, 11th December, 2001 and 31st March, 2003 should be complied with. The Central Government/State Governments/UTs are further directed that:

a) For effective implementation of the Act, information should be published by way of advertisements as well as on electronic media. This process should be continued till there is awareness in public that there should not be any discrimination between male and female child.

b) Quarterly reports by the appropriate authority, which are submitted to the Supervisory Board should be consolidated and published annually for information of the public at large.

c) Appropriate authorities shall maintain the records of all the meetings of the Advisory Committees.

d) The National Monitoring and Inspection Committee constituted by the Central Government for conducting periodic inspection shall continue to function till the Act is effectively implemented. The reports of this Committee be placed before the Central Supervisory Board and State Supervisory Board for any further action.

e) As provided under Rule 17(3), public would have access to the records maintained by different bodies constituted under the Act.

f) Central Supervisory Board would ensure that the following States appoint the State Supervisory Board as per the requirement of Section 16A.

g) As per requirement of Section 17(3)(a), the Central Supervisory Board would ensure that the following States appoint the multi-member appropriate authorities:


13. It will be open to the parties to approach this Court in case of any difficulty in implementing the aforesaid directions.

The Writ Petition is disposed of accordingly.

14. In view of the aforesaid order, pending IAs have become infructuous and are disposed of accordingly.
Appellants: CEHAT and Ors.
Vs.
Respondent: Union of India (UOI)

In the Supreme Court of India

WP (C) No. 301 of 2000

Equivalent Citation: 2003(10)SCALE11, (2003)8SCC412

Hon’ble Judges:
M.B. Shah and Arun Kumar, JJ.

Decided On: 31.03.2003

Acts/Rules/Orders
Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 - Section 2; Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act - Sections 3B, 16, 16A and 17(4); PNDT Act

Order

WP (C) No. 344 of 2002

1. The learned counsel for the petitioners seeks leave to withdraw this petition. Permission granted. The writ petition stands disposed of as withdrawn.

WP (C) No. 301 of 2000

2. Heard the learned counsel for the parties. The learned counsel for the petitioners points out that on 14-2-2003, the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 was amended and it is now named as the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act. She submits that very few persons are aware of the new amendment. According to her submission the said amendment is in conformity with the various directions issued by this Court and, therefore, the amended Act also requires to be properly implemented. For this purpose, the learned counsel for the petitioners seeks the following reliefs:

(i) direct the Union of India, State Governments/UTs and the authorities constituted under the PNDT Act to prohibit sex-selection techniques and its advertisement throughout the country;

(ii) direct that the appropriate authorities shall also include ‘vehicles’ in their quarterly reports hereinafter as defined under Section 2(d);

(iii) any person or institution selling ultrasound machine should provide information to the appropriate State authority in furtherance of Section 3-B of the amended Act;
(iv) direct that the State Supervisory Boards be constituted in accordance with the amended Section 16-A in order to carry out the functions enumerated therein;

(v) direct appropriate authorities to initiate suo motu legal action under the amended Section 17(4)(e);

(vi) direct that the Central Supervisory Board shall publish half-yearly consolidated reports based on the quarterly reports obtained from the State bodies. These reports should specifically contain information on:

1. Survey of bodies and the number of bodies registered.

2. Functioning of the regulatory bodies providing the number and dates of meetings held.

3. Action taken against non-registered bodies inclusive of search and seizure of records.

4. Complaints received and action taken pursuant thereto.

5. Nature and number of awareness programmes. (vii) direct that the Central Supervisory Board shall carry out all the additional functions as given under the amended Section 16 of the Act, in particular, to oversee the performance of various bodies constituted under the Act and take appropriate steps to ensure its proper and effective implementation.”

3. As against this, Mr Mahajan, learned counsel appearing for the Union of India submits that on the basis of the aforesaid amendment, appropriate action has already been taken by the Union of India for its implementation and almost all the State Governments/UTs are informed to implement the said Act and the rules and the State Governments/UTs are directed to submit their quarterly reports to the Central Supervisory Board.

4. Considering the amendment in the Act, in our view, it is the duty of the Union Government as well as of the State Governments/UTs to implement the same as early as possible. Hence, the State Governments/UTs are directed to file necessary affidavits within a period of ten weeks from today.

5. List after ten weeks.

WP (C) No. 339 of 2002

6. To be listed along with WP (C) No. 301 of 2000
Appellants: Centre for Enquiry into Health and Allied Themes (CEHAT) & Ors.
Vs.
Respondent: Union of India and Ors.

In the Supreme Court of India
Writ Petition (C) No. 301 of 2000
(Under Article 32 of the Constitution of India)

Equivalent Citation:
Decided On: 04.05.2001

Hon’ble Judges:
M.B. Shah and S.N. Variava, JJ.

Counsels

Acts/Rules/Orders:
Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 - Sections 3, 7, 9(1), 17 and 22; Constitution of India - Article 32

Case Note
Civil – implementation of Act – Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 - petition filed for issuance of directions
to Government in respect of proper implementation of Act of 1994 – Act was enacted 5 years back - no steps were taken by Government and concerned authorities (CAs) for proper implementation of Act – various directions regarding implementation of Act issued to Government and CAs – Government and CAs directed to report to Court on next date.

Order

1. It is unfortunate that for one reason or the other the practice of female infanticide still prevails despite the fact that gentle touch of a daughter and her voice has soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional system of female infanticide whereby female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advance medical techniques. Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing full well that it is immoral and unethical as well as it may amount to an offence, foetus of a girl child is aborted overall sex ratio in various States where female infanticide is prevailing without any hindrance.

For controlling the situation, the Parliament in its wisdom enacted the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994(hereinafter referred to as the PNDT Act”). The Preamble, inter alia, provides that the object of the Act is to prevent the misuse of such techniques for the purpose of pre-natal sex determination leading to female feticide and for matter connected therewith or incidental thereto. The Act came into force from 1st January, 1996.

It is apparent that to a large extent, the PNDT Act is not implemented by the Central Government or by the State Governments. Hence, the petitioners are required to approach this Court under Article 32 of the Constitution of India. One of the petitioners is the Central for Enquiry into Health and Allied Themes (CEHAT) which is a research center of Anusandhan Trust based in Pune and Mumbai. Second petitioner is Mahila Sarvangeen Utkarsh Mandal (MASUM)based in Pune and Maharashtra and the third petitioner is Dr. Sabu M. Georges who is having experience and technical knowledge in the field. After filing of this petition, this Court issued notices to the concerned parties on 9.5.2000. It took nearly one year for the various States to file their affidavits in reply/written submissions. Prima facie it appears that despite the PNDT Act being enacted by the Parliament five years back, neither the State Governments nor the Central Government has taken appropriate actions for its implementation. Hence, after considering the respective submissions made at the time of hearing of this matter, as suggested by the learned Attorney General
for India, Mr. Soll J. Sorbajee following directions are issued on the basis of various provisions for the proper implementation of PNDT Act:-

I. Directions to the Central Government

1. The Central Government is directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through appropriate releases/programmes in the electronic media. This shall also be done by Central Supervisory Board (“CSB” for short) as provided under Section 16(iii) of the PNDT Act.

2. The Central Government is directed to implement with all vigor and zeal the PNDT Act and the Rules framed in 1996 Rule 15 provides that the intervening period between two meetings of the Advisory Committees constituted under sub-section (5) of Section 17 of the PNDT Act to advise the appropriate authority shall not exceed 60 days. It would be seen that this Rule is strictly adhered to.

II. Directions to the Central Supervisory Board(CSB)

1. Meetings of the CSB will be held at least once in six months.[Re Proviso to Section 9(1)]. The constitution of the CSB is provided under Section 7. It empowers the Central Government to appoint ten members under Section 7(2)(e) which includes eminent medical practitioners including eminent social scientists and representatives of women welfare organizations. We hope that this power will be exercised so as to include those persons who can genuinely spare some time for implementation of the Act.

2. The CSB shall review and monitor the implementation of the Act. [Re Section 16(ii)].

3. The CSB shall issue directions to all State UT Appropriate Authorities to furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:-

   (i) Survey of bodies specified in section 3 of the Act.
   (ii) Registration of bodies specified in section 3 of the Act.
   (iii) Action taken against non-registered bodies operating in violation of section 3 of the Act, inclusive of search and seizure of records.
   (iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.
   (v) Number and nature of awareness campaigns conducted and results flowing therefrom.
4. The CSB shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in implementation of the Act and to make recommendations to the Central Government. [Re. Section 16]

5. The CSB shall lay down a code of conduct under section 16(ic) of the Act to be observed by persons working in bodies specified therein and to ensure its publication so that public at large can know about it.

6. The CSB will require medical professional bodies associations to create awareness against the practice of pre-natal determination of sex and female foeticide and to ensure implementation of the Act.

III. Directions to State Governments/UT Administrations

1. All State Governments/UT Administrations are directed to appoint by notification, fully empowered Appropriate Authorities at district and sub-district levels and also Advisory Committees to aid and advise the Appropriate Authority in discharge of its functions [Re. Section 17(5)]. For the Advisory Committee also, it is hoped that members of the said Committee as provided under section 17(6)(d) should be such persons who can devote some time for the work assigned to them.

2. All State Governments/UT Administrations are directed to publish a list of the Appropriate Authorities in the print and electronic media in its respective State/UT.

3. All State Government/UT Administrations are directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through advertisement in the print and electronic media by hoardings and other appropriate means.

4. All State Governments/UT Administrations are directed to ensure that all State/UT Appropriate Authorities furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:-

(i) Survey of bodies specified in section 3 of the Act.
(ii) Registration of bodies specified in section 3 of the Act.
(iii) Action taken against non-registered bodies operating in violation of section 3 of the Act inclusive of search and seizure of records.
(iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.
(v) Number and nature of awareness campaigns conduct and results flowing therefrom.
IV. Directions to appropriate Authorities

1. Appropriate Authorities are directed to take prompt action against any person or body who issues or causes to be issue any advertisement in violation of section 22 of the Act.

2. Appropriate Authorities are directed to take prompt action against all bodies specified in section 3 of the Act as all against persons who are operating without a valid certificate of registration under the Act.

3. All State/UT Appropriate Authorities are directed to furnitures quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:-
   (i) Survey of bodies specified in section 3 of the Act.
   (ii) Registration of bodies specified in section 3 of the Act including bodies using ultrasound machines.
   (iii) Action taken against non-registered bodies operating in violation of section 3 of the Act inclusive of search and seizure of records.
   (iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.
   (v) Number and nature of awareness campaigns conducted and results flowing therefrom.

4. The CSB and the State Governments/Union Territories are directed to report to this Court on or before 30th July 2001. List the matter on 6.8.2001 for further directions at the bottom of the list.
His Majesty’s Government on the F.I.R. of Bhakta Bahadur
Singh Appellant/plaintiff
Vs.
Harilal Rokaya, a resident Leki Gaun at Ward no 7 of Kotdeval
V.D. C in Bajhang District
Gagan Bahadur Rokaya alias Gonga, a resident of the same place
Rajendra Bahadur Rokaya alias Raju, a resident of the same place
Kesh Bahadur Rokaya alias Kesya, a resident of the same place
Dhan Rokaya, a resident of the same place
Dhal Bahadur Rokaya alias Gonga, a resident of the same place
Man Bahadur Rokaya, a resident of the same place
Bishne Rokaya, a resident of the same place
Dhan Rokaya, a resident of the same place

Supreme Court
Division Bench
Judge
Hon. Justice Kedarnath Upadhyaya
Hon. Justice Chandra Prasad Parajuli

Criminal Appeal No 1179 of the year 2054 B.S.

Date of Judgment: Fourth day of Bhadra in the year 2058 of the Bickram
Calendar (corresponding to Aug 18, 2001)

This court has granted permission for revisions in this case pursuant to section
12 of the Judicial Administration Act 1991 against the decision of the Court of
Appeal dated May 16, 1994. The facts are briefly as follows:

Bhakta Bahadur Singh, in his F.I. R. *inter alia* stated; “In the evening of Aug
09, 1990, at around 7 o’clock, my sister Devi Kumari Singh aged 13 years and
6 months had gone to a place called Meltola Gera to collect fodder and weed
[for animals]. During the same time 8 people who are residents of Leki Gaon
of the Kotdeval V.D.C in Bajhang district, namely, Hari Lal Rokaya, Gagan
Bahadur Rokaya, Dhan Bahadur Rokaya, Kesh Bahadur Rokaya, Dhan Rokaya,
Bishne Rokaya, and Man Bahadur Rokaya taking advantage of dusk and the
deserted place surrounded the victim. [Then] Hari and Gagan caught hold of
her hand, covered her mouth and threatened her. The others also caught hold
of her to prevent her from fleeing, and then turn by turn raped her and left her
when she fainted. After coming back to her senses, she began to cry, and Nandu
Sharki and Nego Sharki reached her at around 8 o’clock in the evening and
brought her home. As I am the main person of my family and as I was in
Kathmandu on government employment I was called home through a telegram message. When I returned I came to know about the rape of my sister by the people mentioned above, and have come to lodge the First Information Report. I pray for action against them as per the law.”

In her statement to the Police the victim Devaki Kumari Singh, inter alia said; “In the evening of Aug 09, 1990, I had gone to a place called Meltola Gera to look after our [agricultural] land and to collect grass/weed. As it was getting dark I was cutting grass in a hurry, and suddenly Hari Rokaya came from behind, snatched the sickle from my hand and threw it away. When I protested he threatened me and said that if I cried he would chop off my head. Then with one hand he covered my mouth and with his other hand he tried to catch hold of my hands. When I tried to hit him back Gagan Bahadur came from behind and caught my left hand, and tied my other hand to his waist and when both of them were dragging me towards the stream the others namely, Dhan Rokaya, Keshya Rokaya, Rajesh Rokaya, Bishne Rokaya, and another person whom I did not know, joined them. While some of them began to grab my breasts the others put their hands on my shoulder and took me towards the stream. Then on the grassland near the stream they made me lie down. Rajesh Rokaya, and Gagan Rokaya covered my mouth with their hands and tied my hand. Hari Rokaya unfurled my petticoat and sari and tried to have sex with me. But when I tried to cover my genitals with my legs, Hari hit my thighs with his fist and made me keep my legs wide open. While they were raping me I felt severe pain and tried to cry out but they covered my mouth with their hands. When Hari was raping me he untied my Choli [the upper garment] and bit my breasts and my cheeks. After he finished Rajesh mounted me and both Hari and Gagan with their hands closed my mouth and tied my hands. Rajesh also bit my breast and cheeks. Then Gagan climbed on top of me and started raping me while Hari and Rajesh closed my mouth and held me down. After these three had raped me and were leaving, another person whom I did not know appeared, covered my mouth, pressed my neck, threatened to kill me and pushed me down again. Keshya then covered my mouth, tied my hands and Dhane mounted me and raped me. Then the other person whom I did not know also raped me. When Keshya was raping me I fainted, and I did not know who else raped me. When I came back to my senses I cried out, and Nego Sharki and Nandu Sharki, whose house was just above the scene of crime, came to the spot and asked me as to what had happened. I told them that several persons including Hari had taken my chastity. As I could not move, Nandu and Nego took me on their backs to my home. I told my father everything. When the perpetrators raped me my vagina bled, and my sari was torn off. The bite marks on my cheeks and breasts are still there.”
The Medical Report of the District Hospital, Bajhang stated the age of the victim to be between 13 and 15 years. It also mentioned that there were marks of biting by teeth on the right cheek, on both left and right breasts, and these marks support the incident of rape.

Nandu Sarki, in his statement to the police *inter alia*, said; “On the evening of Aug 9, 1990 I was inside my house. My father called me from outside to come out, and when I asked what had happened he told me that a woman was crying at Maltola Gera. When my father and I were on our way to that place to find out who it was and what had happened, we saw some 7 or 8 people going towards Gani Mugra. When we reached the place we saw the victim Devaki Kumari Singh in a half naked position and crying. When we asked her what had happened she told us that Hari Rokaya and others had taken her chastity. When she told us that she could not walk, my father and I took her on our back turn by turn and took her home. I told her family members everything. That day before dark, I had seen 6 or 7 people including Gagan, Dhan, Rajesh Rokaya, etc., at Gani Mugra. It is a nearby place from where the scene of crime can be seen. The fact that these people were seen at that place and that the chastity of Devaki was looted I am of the view that these people have raped her.”

The Medical Board of the Seti Zonal Hospital in its report maintained that in the external part of vagina of Devaki Kumari, a 20 to 25 days old split wound was seen. The girl’s hymen was ruptured and infected.

Hari Lal Rokaya, the accused who made a statement to the police *inter alia* said; “As my ear was hurting, I went to Bajhang District Hospital on Aug 9, 1990. Upon my return, I met several people including Gagan Rokaya, (The peon). When we reached Gadi Mugre Dhara we saw four other defendants Bishne Rokaya, Keshya Rokaya, Dhan Rokya and Gagan Rokaya, (The shopkeeper) who were sitting there. When they saw us they called us, and and Gagan and I approached them. When I asked them the reason, the shopkeeper Gagan asked me whether I had freed the restriction imposed by myself on sexual intercourse. I told him that as 45 days had elapsed since my father’s death, I had begun to have sexual intercourse. Then he asked me to look towards Meltola Gaira where a girl cutting grass/weed was inviting us through signals. Then as I felt like having sexual intercourse, I went down straightway to Devaki. I caught hold of her breasts and kissed her. As we were sitting on the ground Dhan Rokaya and Bishnu Rokaya arrived. Dhan Rokaya also caught hold of Devaki’s breasts and kissed her. Then as I was leaving without having had any sexual intercourse - leaving Dhan Rokaya with Devaki and Peon Gange, the shopkeeper Gange and Keshya arrived. After that Dhan Rokaya also came with me leaving the other three with Devaki. As it was dark and as they spent
a lot of time with Devaki I suspect that they had sexual intercourse with her. After leaving Devaki there all six of us went to our respective homes.”

Dhan Bahadur Rokaya, another accused in his statement to the Police inter alia said; “In the evening of Aug 9, 1990 when Bishnu Rokaya and myself were going home from school we met Gagan Bahadur Rokaya on the road, and on our way home we came to Gagra Ghara. As we were there, Keshya Bahadur Rokaya, Hari Lal Rokaya and Gagan Rokaya also came there. After Hari Lal and Gagan spoke in private, Hari Lal went to talk with Devaki. When I reached the place Hari Lal had already had sexual intercourse with Devaki. When I also asked her to allow me to have sexual intercourse with her, she declined. Then as I was kissing her, Dhan Bahadur Rokaya (The peon) and Gagan Bahadur Rokaya (The shopkeeper) arrived, after which I left. Since they returned after around 20 minutes I suspect that they had had sexual intercourse with her. I just tried to have sexual intercourse.”

Keahav Rokaya alias Kesya in his statement to the Police inter alia said; “On Aug 9, 1990 when I came to Gagri Mugra I met Gagan Rokaya, Dhan Rokaya, Bishnu Rokaya there. Hari Rokaya and Gagan Rokaya (the peon) also came there. After seeing Devaki who was cutting weed/grass Hari Lal went near her. Then Dhan Bahadur Rokaya, Bishnu Rokaya, and Gagan Rokaya (the peon) followed them. Gagan (the shop keeper) and I also followed them. When we reached Hari Lal Rokaya was on his way back. After Hari Lal had had sexual intercourse with Devaki, Dhan was trying to make Devaki agree to have sexual intercourse with him. Then Gagan (peon) caught hold of the girl by her waist and forcefully made her lie down. Then Gagan (the shopkeeper) also went to the girl and returned after five minutes. I also went there but as Devaki was weeping I came back without having sexual intercourse with her”

Rajendra Rokaya in his statement to the Police inter alia said; “On Aug 9, 1990 when I came to Chainpur Bazar from the school, I met my nephew and went to his home at Simkela in Hemant V.D.C. I was not at the place when the crime occurred.”

Kunti Singh in her statement to the Police inter alia said; “In the evening of Aug 9, 1990 Nandu Sharki and Nego Sharki brought my daughter Devaki on their backs and when I asked her what had happened she said some 7 or 8 people including Hari Lal Rokaya, Dhan, and Gagan had taken her chastity. That time Devaki had tooth marks on her cheeks and breasts. Her clothes were torn. As there was nobody at home who could act on it, we informed our son Bhakta Bahadur in Kathmandu.”

In the Sarjamin Muchulka some 21 people said that they believed that on the evening of Aug 9, 1990 the seven men including Hari Lal had raped Devaki.
In the charge sheet it was mentioned that on the date and time of the incident six people namely, Hari Lal Rokaya, Kesh Bahadur, Dhan Bahadur, Bishnu, Gagan Bahadur, Peon Dhal Bahadur Rokaya alias Gange had gathered at a place called Gadi Mugra Dhara and had conspired to rape the victim and went to Meltola Gaira where Devaki Kumari Singh was alone. Among them Larilal Rokaya, Dhan Bahadur Rokaya, Kesh Bahadur in their statement said that with a view to have sexual intercourse, they had manhandled her, but when she declined they came back and others might have had sexual intercourse with her. Their statement and other evidence prove that all six people were involved in the incident. As they had conspired to have sexual intercourse and had spotted the girl at a lonely place in the evening, it is unbelievable that after manhandling her they would have left her without having had sexual intercourse with her. And therefore, from the evidence it is proved that the six people who had gathered at Gadi Mugra and conspired to rape Devaki did gang rape her. By that as the accused violated Section 1 of the Chapter “Of Rape” of the National Code it is claimed that these people be punished under Section 3 of the same chapter and that half of their property which accrues to them through partition be given to the victim. The accused Hari Lal Rokaya, Kesh Bahadur Rokaya and Rajendra Bahadur Rokaya have been presented with the charge sheet, and let a warrant be issued against the five namely, Gagan Bahadur Rokaya, Dhal Bahadur Rokaya, Bishnu Rokaya, Man Bahadur Rokaya and Dhan Rokaya who are absconding.”

Dhan Bahadur Rokaya in his statement in the court inter alia said; “I and Devaki Kumari Singh and we had a quarrel on the loss of millet harvest [due to grazing some time back] and due to this she complained against me. I have not met Devaki on Aug 9, 1990. I do not know whether or not she was raped”.

Keshya Bahadur Rokaya, in his statement in the court inter alia said; “I started for Dadeldhura on Aug 4 for procuring merchandise for the shop and came back home only on the 13th of Aug. I do not even know the girl I have been charged of having raped. I have also not colluded in the rape. I do not know why the people in the Sarjamin made allegations against me. I am innocent.”

Hari Lal Rokaya in his statement in the court inter alia said; “As my ear was aching I had gone to the hospital on Aug 9, 1990. From there I went with Kalak Bahadur Khadka to Lekhi Khola via Cheuri. From there we went to the house of Dhangadhi Thapa to buy a cow. Next day in the morning I went to my school. As I have myself taught Devaki I know her very well. But I did not meet her on Aug 8, 1990. I had some enmity with Bishnu Bahadur Singh, and they have entrapped me. I have not committed such a grave and serious crime on a girl I have taught. I do not know who has raped Devaki.”
Rajendra Bahadur Rokaya in his statement before the court *inter alia* said; “On Aug 9, 1990 I was at my sister’s place at Simtola. I had gone there to see my brother in law who had just come home from India. I know Devaki very well. I have not raped her nor have I colluded and assisted in raping her. The statement recorded in the Police was not given out of my free will.”

Gagan Bahadur Rokaya in his statement in the court *inter alia* said; “On Aug 9, 1990 I was in Nepalgunj. As I had enmity with Hari Lal Rokaya he has entrapped me. The allegation made in the F.I.R and Sarjamin are false.”

Bishnu Bahadur Rokaya in his statement in the court *inter alia* said; “I was at my school on Aug 9, 1990. I do not know where other defendants were on that day. As there was enmity between the people of Leki and Cheuri, they have leveled charges against me to entrap me.”

Dhal Bahadur Rokaya alias Gange, in his statement in the court *inter alia* said; “On Aug 9, 1990 I went to Dabal Bahadur’s house from my office at around 5.30 P.M. and came back on Aug 10th. As I had enmity with Hari Lal Singh he has made a false complaint to entrap me.”

Man Bahadur Rokaya, in his statement in the court *inter alia* said; “I had gone to Talkot as a porter carrying a load on Aug 9, 1990. There I fell sick and stayed at the health post. From there I came back to my home only on the 13th of August. I did not rape Devaki Kumari Singh. Due to enmity, Hari Lal Rokaya and persons in the Sarjamin have complained against me.”

The witnesses of the defendant gave depositions in support of their parties.

Devaki Kumari Chand alias Devaki Kumari Singh in her deposition in the court *inter alia* said; “I had gone to Meltola Gaira on Aug 9, 1990 to collect/ cut grass/weed. On that occasion the defendants, Dhan, Raju, Kesya, Bishnu, Gagan, Hari Lal, Dhan Bahadur and one more person whom I did not know, came to me. Then Raju covered my face, Gange tied my hand, Kesha caught hold of my legs and Raju raped me first. Thereafter when Gange raped me the other two and Kesha caught hold of my hands, and similarly when Hari Lal raped me Gange caught hold of me. They raped me turn by turn. I was partially in my senses till three of them raped me. My genital was hurting. They had removed my clothes while having sexual intercourse with me. Semen had fallen on my petticoat.”

In its judgment dated May 30, 1992 the Bajhang District Court acquitted all the defendants from the charge. It observed; “In the court all the defendants denied the charge. Their witnesses made depositions in their support. There were contradictions in the report of the Bajhang District Hospital and that of the Seti Zonal Hospital. On the basis of the other evidence it cannot be clearly
be seen that the defendants had committed rape, and the benefit of doubt goes to the accused and hence the defendant are cleared from the charge.”

His Majesty’s Government filed an appeal against the decision of the district court in which it prayed to the Court [of Appeal] to reverse the decision of the district court which gave the benefit of the doubt to the defendants. It argued that circumstantial evidence such as the F.I.R., the statement of the defendants to the Police, the statement of the victim and other people who were consulted by the police, the report of the Medical Board at the Seti Zonal Hospital which *inter alia* stated that the hymen had ruptured and due to which there was infection in the genitals of the victim clearly established that the defendants had committed the crime.

The Court of Appeal, Doti through its order dated March 26, 1993, called for the presence of the defendants for discussion pursuant to section 202 “Of Court Procedure” on the grounds that the report of the Medical Board of the Seti Zonal Hospital dated Sept 28, 1990 stated that the hymen was ruptured due to which there was infection inside the vagina, and that the victim Devaki Kumari had made a categorical statement in the court. This, according to the court, could be a ground to set aside the decision of the district court.

Rejecting the appeal of His Majesty’s Government, the Court of Appeal through its decision dated May 16, 1994 confirmed the decision of the district court. It observed; “The Seti Zonal Hospital through its letter dated March 4, 1993 said that it could not find the copy of the decision of the Medical Board or an evidence of the constitution of such a committee. [Therefore] the report of the Medical Board cannot be called as undisputed. The defendants have denied that they had raped the victim Devaki Kumari Singh. Their witnesses through their depositions have also cleared them of the charge. In this situation as we do not find any substantial evidence to confirm that these defendants raped the victim, we endorse the decision of the district court which cleared them of the charge. “

His Majesty’s Government filed a petition to the Supreme Court against the decision of the Court of Appeal stating that the decision of the Court of Appeal was against the established precedents and law.

[Following this] the Division Bench of this court granted permission for a revision of the case pursuant to section 12(a)(b) of the Judicial Administration Act 1991 on the ground that the decision [of the Court of Appeal] conflicted with the precedent established by the Full Bench (Nepal Law reports 2042 p 153). It hence called for the case file and ordered the presence of the respondents.

**The Decision**

This case was listed in the daily cause list for hearing to this Bench as per the rules. The learned Deputy Government Attorney on behalf of His Majesty’s
Government, Mr. Bharat Mani Khanal making an oral submission argued that the statement made by the victim to the Police and her deposition to the court gave a detailed account of the rape. This is also substantiated by the report of the Medical Board. The expressions made at the Sarjamian and the statement of the defendants [to the Police] where they have made allegations against each other also established their involvement in the incident. In this situation the decision of the court to acquit the defendant is faulty and hence should be reversed.

The defendants who were called by the order of this court, from the file are seen to have stopped appearing in Tarikh (The dates for appearance given by the court).

As we move on to examine the decision of the Court of Appeal, Dipayal, and review whether or not the decision was correct, and for this, look at the reasoning given therein, the court has taken note of the discrepancy in the statement of the victim to the police and her deposition in the court such as the order of the defendant who are alleged to have raped her. The fact that the F.I.R was in the first place filed after 14 or 15 days of the incident, and that while in her statement to the Police the victim said that she was lifted and taken home from the scene of the incident by Medi Sharki and Nandu Sharki - in her deposition to the court she said that Nandu Sharki [only] lifted her from the site. This seems to have led the court to think that the statement was contradictory and hence not reliable. In addition to this, with regard to the marks of bites on the right cheek and right and left breasts, it is found that the court has taken note that the hospital has not measured the size of the mark(s) and neither has it recorded how old these marks are.

When we examine the case against the backdrop of the above mentioned reasoning of the Court of Appeal to acquit the defendants, we find that the victim seems to be a girl of 14-15 years and on the evening of Aug 9, 1990 she had gone to collect fodder/weed from her land on the east side of her house. There seems to be no houses in the surrounding areas. At that time in the evening the defendant Hari Lal Rokaya and Rajesh alias Raju Rokaya and Gagan Rokaya alias Gange approached her, took her to the bank of the stream and gang raped her. The victim has categorically stated these things while making a statement to the police and while making a deposition to the court. As to the reason for lodging the F.I.R. after 14 days, [it is seen that] the incident has taken place in such a remote district like Bajhang, one need not disbelieve the contention in view of the possible stigma that a young girl could face as it took some time for her to make up her mind. The F.I.R is lodged by Bhakta Bahadur Singh, brother of the victim, who is an inspector (Doctor), after he came home from Kathmandu. Even during the time when the Medical Board
of the Seti Zonal Hospital, which consisted of a female doctor, examined the private parts of the victim it found the outer side of the vagina split and the hymen ruptured leading to an infection. This is in conformity with what had been stated in the F.I.R. and the statement of the victim. One cannot overlook the fact that after 20 or 25 days one cannot examine the presence of sperm on the cloth or body or the vaginal swab [in the accused]. Disregarding the report of the Medical Board and also the statement of the victim in the court, the Court of Appeal has acquitted the defendant on the grounds that the statement of the victim is not supported by any evidence.

While giving their statement to the police defendants, Hari Lal Rokaya, Gagan Rokaya and Rajendra Bahadur Rokaya alias Raju have stated that no enmity existed between the family of the victim and the defendants which could have prompted the victim’s family to make false allegations even though in the court they have pretended that the family of the victim and they have had a minor scuffle. But due to such a minor enmity it cannot be believed that the family of the victim, which is a prestigious family in that area, could put the reputation of a female member of their own family at stake, and have leveled the charge. Even though [the defendants] have changed their versions in the court one cannot interpret their statements to the Police otherwise where they have said that they did not have any enmity with the victim’s family.

Though these defendants Hari Lal Rokaya, Raju Rokaya and Gagan Rokaya have taken the defense of alibis, this is not substantiated. Despite the victim giving a detailed account of the rape as to how she was captured and threatened to succumb to, and despite her telling necessary facts for judicial decisions correctly and clearly, the acquittal of the defendant on the grounds that while taking their names she missed the order, or that she missed some of their names or that the size of the marks of the teeth on her cheek and breasts was not measured is irrational. Therefore, the decision to acquit the defendant does not seem right.

The approach that the statement of the victim in a rape should be corroborated by other evidence, and instead of taking it as reliable or good presumption looking at it with suspicion and the judicial approach of imposing even the burden of proof on her or the plaintiff does not suit the lifestyle of the women in the social context in which they grow. To view the statement of the victim with doubt and suspicion and making similar presumptions or to try to establish the reliability of her statement in advance amounts to presumption of suspicion against women. Unless there exists solid grounds or evidence to doubt the statement of women, the courts should take it as an obvious judicial presumption that a simple woman will not come to the court to tell a lie that prejudices her prestige or that of her family. It is rather appropriate to presume the opposite.
There may be minor differences between the statements that she makes to the police and the deposition she gives to the court, a few facts or their order here and there may also be missing. But in essence, if there exists no vital contradiction which ruins the credence or the statement of the victim-woman, she should be attached much importance from an evidential point of view. Therefore, the decision of the District Court and the Court of Appeal which have acquitted all the defendants of the charge without taking note of the time bound obvious erosion of the physical evidence or marks of rape and minor differences that occur due to different stages and times in which the description of the incident was made and the views expressed by the victim and other people presented as witnesses as mentioned above does not hold good. From the analysis of evidence made above it is seen that when the defendants Hari Lal Rokaya, Rajendra Bahadur Rokaya and Gagan Bahadur Rokaya raped the victim up to the point that she began to faint. Following this, as she was not in her senses, whom of the defendants raped her is a matter of doubt. Devaki has not identified or categorically leveled any charges against Bishnu Rokaya and the other defendants in her original statement and hence in the case of the defendants other than Hari Lal Rokaya, Gagan Bahadur Rokaya and Rajendra Bahadur Rokaya there exists no grounds to convict them. As demanded in the charge sheet we hold the three defendants namely, Hari Lal Rokaya, Rajendra Bahadur Rokaya alias Raju and Gagan Bahadur Rokaya alias Gange guilty. The decision of the Bajhang District Court and the Court of Appeal Dipayal is partially reversed. Among the defendants, Hari Lal who is a school teacher is seen as a main culprit of the crime. He is imposed the maximum punishment of five years’ imprisonment pursuant to Section 3 of the chapter of “Rape” of National Code. The other two, namely, defendants Rajendra Bahadur Rokaya and Gagan Bahadur Rokaya are imposed with three years imprisonment under Section 3 of the same chapter. Further, pursuant to section 10 of the same chapter, the victim is entitled to half of the property of all the three defendants. Let the necessary records be created and at the earliest be sent to Bajhang District Court for execution. Let the case file be transferred to the concerned section.

Sd
Kedarnath Upadhyaya
Justice

I concur
Chandra Prasad Parajuli
Justice
CHAPTER VI
DOMESTIC VIOLENCE

Context

Domestic violence as a form of violence against women has been one of the earlier forms of violence recognised and acknowledged by legislators. However, the laws relating to domestic violence, despite a large number of cases that are brought in, are still developing. A reflection of this fact is also the aspect that though the judiciary has pronounced various judgments on cases brought in by women complaining of domestic violence, except one or two cases, there has not been a radical development of the law. Violence against women assumes a totally different dimension in the case of domestic violence. For a long time, there was a great deal of hesitation to enter into people’s homes to understand and intervene in situations of domestic violence. It took a number of women’s deaths in dreadful circumstances, and persistent lobbying by women for a long period of time for legislators to accept that domestic violence does indeed exist, and that there is a serious need to have legislative protection for women.

Even though the aforementioned is accepted today, courts are still wary to transgress into what they consider private domain. In India, marital rape is not recognized as rape, while in Nepal the Supreme Court interpreted the definition of rape and observed that sexual intercourse made without consent is rape even if it is carried out with one’s own wife.

There are many complaints against the misuse of domestic violence laws. Right wing patriarchs actually want to do away with domestic violence legislation. However, as of now, as weak as they may be, laws against domestic violence do exist.

Recently, the Indian government has approved a domestic violence bill to protect the civil rights of women in cases of domestic violence. This is a big step in the history of women’s movements.
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**Synopses**

**The State vs. Md.Shafiqul Islam allias Rafique and another**

**Highlight**
- In cases where it is proved that the wife died of assault in the house of her husband, there would be strong suspicion against the husband that at his hands the wife died. It further held that to make the husband liable, the minimum fact that must be brought on record, either by direct or circumstantial evidence, it that he was in the house at the relevant time.

The victim was killed brutally while she was living with her in-laws and husband. The brother of the victim had informed his mother that the victim had informed that there was a demand for dowry and if the promised articles were not given, the victim would be killed.

The victim’s father filed a complaint where he contended that the victim had died as a result of torture inflicted upon her by her husband and in-laws and it is not a case of suicide. He further said that there was a demand for dowry.

The trial court convicted the accused. However, in appeal, the High Court reversed the conviction. The State filed an appeal contending that the mere fact that the victim was found dead at the residence of her husband and the absence of any cogent explanation, the suicide theory having been rejected by the High Court, the reversal of the trial court judgement was patently erroneous.
The Court held that in a wife-killing case, from its very nature, there could be no eye witness of the occurrence. The only probable eye witnesses are other people living in the house who may be interested persons. In cases where it is proved that the wife died of assault in the house of her husband, there would be strong suspicion against the husband that at his hands the wife died. It further held that to make the husband liable, the minimum fact that must be brought on record, either by direct or circumstantial evidence, it that he was in the house at the relevant time.

**Ajit Kumar Pramanik and others versus Bokul Rani Pramanik and others**

*Highlight*

- Expanded the definition of dowry to include demands made after marriage

The question brought up in this case was whether dowry included a fresh demand of money after a marriage had been solemnised, to continuing the same.

The accused demanded dowry of Tk. 30,000 from the informant, assaulted her, and sent her back to her father’s house. The High Court Division was of the opinion that such an incident constituted dowry punishable under section 61 of the Cruelty to Woman (Dowry Punishment Ordinance) Ordinance, 1983.

While interpreting section 6, the Court upheld that “dowry, which ordinarily means wedding gift or money or property made by the parents, guardian or other relations of the wife to her husband at the time of her marriage, will also include any other demand made subsequently”. It was stated that when the husband or his parent, guardian or any other relatives demand money etc. from the wife of her parents, guardian of any other relatives after the marriage not as unpaid part of the money etc., agreed to be delivered before or at the time of the marriage, then that must be treated as a payment or reward to continue the existing marriage.

Further emphasising their point, the Court specified that “had ‘dowry’ under the said section 6 meant only unpaid part of the money etc promised before or at the time of the marriage and not money etc. demanded afresh after the marriage, explanation to the said section 6 would have clearly spelt out the same. In the absence of such exposition, we cannot give restricted meaning to the words ‘consideration for the marriage’ only to mean money etc. promised before or at the time of the marriage to exclude large number of offences committed in connection with demand afresh of money etc. after the marriage, to prevent which, deterrent punishment has been provided under the said Ordinance”.

This view was also supported by citing the case of *Reazul Karim Vs. Mst. Taslima Begum* (40 DLR. 360) where demanding money by the husband from the brother of the wife after marriage for taking the wife to his house was found to prima facie constitute an offence under the provisions of Dowry
Prohibition Act, 1980 by interpreting section 2 thereof and giving extended meaning to the expression ‘in consideration for the marriage used in the said section 2 of the Act.

**State vs. Munir and another**

**Highlights**
- Burden of proof though with the prosecution, in cases where it is found that the accused had some special knowledge which only he could explain under what circumstances the wife was murdered the onus lies on him to explain.

The police found the body of a woman on the bank of a canal. The body was half in water and half outside. A complaint was registered. It was thereafter found that the body belonged a person named Rima who was the wife of the accused. It was further found that the accused had a mistress and this relationship came to the knowledge of the wife. The wife thereafter left her matrimonial home and returned to her mother’s place. The accused convinced her to go back to him and promised her that he would not be in touch with his mistress anymore.

During a journey in a pajero jeep, the accused dragged Rima out of the vehicle, killed her and threw away her dead body at the canal. It was the case of the prosecution that the accused had made an extra-judicial confession and he had also attempted suicide. He had also made a confession before a magistrate.

The trial court found him guilty and convicted him.

The question before the Appellate Court was to affix the burden of proof on either parties and to determine standard procedures in cases where a crime has taken place but there are no eye witnesses.

According to the prosecution, when a fact is specially within the knowledge of any person, the burden of proving the fact is upon him. The accused contended that there were no eye witnesses and the confessions were not voluntary.

The Court held that eventhough it was for the prosecution to prove beyond reasonable doubt that the accused had committed the crime, the prosecution was able to prove that the statement of the accused before the Magistrate and the extra-judicial confessions were in order and the fact that the knife was also recovered from him, proves beyond reasonable doubt that the accused had committed the crime.

**Munir Hossain vs. State**

**Highlights**
- Death sentence in case of murder as a consequence of domestic violence.

On May 9, 1989, Rima, a young college girl, was murdered by her husband, Munir Hossain, while they were travelling from Chittagong to Dhaka. Her
body was found in a ditch near Kachpur Bridge on the Dhaka-Chittagong highway, on the morning of May 10, 1989. The couple belonged to well-known professional families (Rima’s father was a reputed journalist, killed by the Pakistani Army in 1971, and Munir’s parents are famous physicians), and the case attracted considerable public attention.

Investigations revealed that relations between the husband and wife had soured soon after marriage. Rima was shocked to find that Munir was engaged in anti-social and illegal activities, smuggling, and stocking contraband drugs and liquor in a rented apartment, and was in an adulterous relationship with an older married woman. At first, she tried to persuade him to give up these activities, but when he did not agree and abused her, left him and went to stay with her mother. Two days before the murder, Munir visited her family and proposed reconciliation. He suggested a brief trip to Chittagong to which Rima agreed and on the way to which destination he murdered her. Women’s organisations were afraid that Munir’s family would try to influence the legal procedure and system in their favour, and launched a vigorous campaign for exemplary punishment. The lower court found Munir guilty of murder and sentenced him to death. Munir’s family appealed to the High Court, and two years later the High Court upheld the sentence. The Appellate Division dismissed the review petition in the absence of any extenuating circumstances or signs of penitence.

**Abdul Motleb Howlader vs. State**

**Highlight**

- In a situation where the wife is found dead while the husband was living with her, there is an obligation on the husband to disclose the cause of her death failing which adverse inference may be drawn against him.

Similar facts as the case above. The only difference being that there was also an element of dowry demand.

Relying upon the judgement in Kalu Bepari, the Court held that the presumption would be against the husband if it is proved that the wife has died in unnatural circumstances while in the custody of her husband and the husband offers no explanation.

**Ilias Hussain (Md) vs. State**

**Highlights**

- When a wife meets with an unnatural death while in custody of the husband and while in his house, the husband has to explain under what circumstance the wife met with her death

The victim’s father got information that the victim was unwell. Hearing this, he went to visit her when he got information that the victim has committed
suicide by hanging herself. As he also got information that his son-in-law had murdered her and thereafter hung her to make it appear like a case of suicide, a police report was lodged. The post mortem report revealed that the death was homicidal in nature. The accused was absconding for sometime and after he was arrested a fresh charge sheet was filed. The trial court convicted the accused. He went in appeal against the same to the High Court where the appeal was dismissed.

The appeal came to be filed before the Supreme Court. The main contention before the Court was that the prosecution had examined only four witnesses, out of which three were formal and the fourth one was the brother of the deceased and therefore an interested party. It was further contended that the mere fact that the deceased was living with the accused cannot be a ground for his conviction.

The Court held that the prosecution had produced only four witnesses as there were no other witnesses. It further held that the conduct of the accused clearly established that the deceased was murdered while she was in his custody and in the absence of any other explanation coming from him, it would be a natural presumption that he had committed the murder.

State vs. Kalu Bepari

**Highlights**

- In a situation where the wife is found dead while the husband was living with her, there is an obligation on the husband to disclose the cause of her death failing which adverse inference may be drawn against him.

The victim’s father came to know from his brother that his married daughter had died. On receiving this information, he rushed to his daughter’s house. He found his son-in-law (the accused) and his relatives trying to bury the victim. As he suspected some foul play, he asked for the reasons of her death and also demanded to know whether any police complaint had been filed. As he got no response, he lodged a police complaint. The police sent the body of the victim for post mortem examination. When the post mortem report disclosed that the victim had died due to strangulation, the accused was arrested.

The trial court found him guilty and sentenced him to death. The accused had remained absent during the trial and even after the sentence was pronounced, he was not available and had not preferred an appeal. As a death sentence had been passed, the same came up for confirmation before the High Court Division. The Code of Criminal Procedure made it obligatory on the superior court to examine the legality of the sentence.

On examining the facts of the case, the Court concluded that the question of marriage between the accused and the victim was established. As the victim
had died due to strangulation which still being with her husband and the accused had not informed the police about the death and the accused was not offering any other explanation, the Court felt that the accused would have caused the victim to die.

However, as the children were young, the sentence of death was commuted to life imprisonment.

**Hem Chand versus State of Haryana**

*Highlight*

- Interpreted the circumstances where section 304B, IPC can be admissible, to include suicide

In this case, the wife stayed for two months in her matrimonial home and thereafter returned to her parents’ home. She complained that her husband was demanding more dowry. This demand of dowry continued for quite sometime and after two years, the wife died of strangulation. The question that arose for determination in this case was whether section 304B of the Indian Penal Code which relates to dowry death, could be applied. The Supreme Court of India where the matter was heard eventually, reached the conclusion that it was indeed a case where section 304B was attracted, even if it was not conclusively proved, whether the strangulation had been caused by the husband, or was suicidal. It was held that the key test in these cases was to understand whether the death was a result of harassment for dowry or not.

**Dr. G.M. Natarajan versus State and others**

*Highlight*

- Emphasised that in the case of harassment and death of a women under unnatural circumstances, the burden of proof is on the accused, and not on the prosecution

Though a judgment of the High Court, this judgment is important for laying out the manner in which the burden of proof shifts to the accused. In this case, unable to tolerate demand of dowry and cruelty, the wife lodged a police complaint after a year of marriage. On the intervention of the police, the matter was settled. However, the harassment continued. Three years later, the wife jumped into a well with her six month old child. The child was saved but the wife drowned. However, it was not conclusively established whether the wife had jumped into the well of her own choice, or had been pushed in by the husband. The High Court held that the onus of proving that the death was suicidal and not murder was on the accused, and not on the prosecution.
Landmark Judgments on Violence Against Women and Children from South Asia

Pawan Kumar and others versus State of Haryana

Highlight
- Interpreted the circumstances where section 304B can be admissible, to include mental cruelty even in the absence of physical cruelty sufficient for charge under 304B

In this case the couple was married in 1985. There was demand of dowry right from the day of marriage. The wife was mentally tortured by various means. Two years later, the wife mentioned to her sister and brother in law that she was being ill-treated by her husband because of dowry. The following day, she committed suicide. The question that arose for consideration was that when there was no clear evidence of physical torture prior to her death, could the husband be held guilty for causing a dowry death. The Supreme Court held that mental cruelty is cruelty too and that ground was sufficient to meet the requirements of section 304B of the Indian Penal Code. It further held that dowry demands need not be related to the wedding. Persistent demands made thereafter would also amount to dowry demands.

Sanaboina Satyanarayana vs. Government of Andhra Pradesh and Ors

Highlight
- Established that those charged with crime against women and children should not be eligible for a remission of sentence

In this case, the Supreme Court reaffirms the view that remission is a concession rather than an entitlement that is given to a certain class of convicts. The appeal is grounded on the interpretation of a statute passed by the Government of Andhra Pradesh which grants remission of sentence to all convicted prisoners sentenced to life who have undergone an actual and total sentence of seven and ten years respectively, excluding certain categories of prisoners. One of the excepted classes includes those prisoners who are “convicted for crime against women such as Section 376 and 351 IPC while being sentenced to imprisonment for life”. Appellant-convict urges first that since he was convicted of crimes against women other than those listed in the statute (302 and 498-A IPC), and second, that because to exclude this class of convicts would be discriminatory under Article 14 of the Constitution of India, he should also receive the benefits of remission. The Supreme Court then praises the Government for excluding such a class of convicts, noting the increase of crimes against “women and children particularly female” and states that “the classification therefore sounds just reasonable, proper and necessitated in the larger interests of society and greater public interest and … the real object is to ensure that those who prey on the community and violate fundamental values of mankind, society and of national interests should not get underserved benefits.”
Smt Shanti and Anr vs. State of Haryana

**Highlight**
- Interpreted the circumstances under which section 304B is admissible
- Established section 304B is inclusive of 498A

After suffering cruel treatment and dowry harassment at the hands of her husband and in-laws, Smt. Kailash died and was cremated hastily. Her parents were not informed of her death. While it was claimed that the death was natural and that the victim had suffered a heart attack, the court concluded that it could only have been an unnatural death that led the in-laws to act in such an unusual way. The death therefore attracted the presumption of dowry-death under §113-B IEA. At the lower court, the appellants were convicted under both §§ 498-A and 304-B IPC, but the high court set aside the conviction under § 498-A under the assumption that the two charges were mutually exclusive. This appeal was then filed in the Supreme Court, with the appellants claiming that because the conviction for cruelty to women had been set aside, there could be no finding of cruelty, an essential element of the charge under § 304-B. The Court held that the High Court’s view was erroneous and that the two offences were distinct, and while cruelty was an essential part of both charges, there was a specified time period under section 498A and the cruelty can be convicted under § 498-A without being charged under that provision, it is important to frame charges under both sections to avoid technical defects. However, because there was a substantial sentence awarded under § 304-B, the Court found that no separate sentence needed to be awarded under § 498-A.

In this judgment, the Court also laid out the four essential elements to a charge under § 304-B IPC: (1) The death of a woman should be caused by burns or bodily injury or otherwise than under normal circumstances; (2) Such death should have occurred within seven years of her marriage; (3) She must have been subjected to cruelty or harassment by her husband or any relative of her husband; (4) Such cruelty or harassment should be for or in connection with a demand for dowry. Although the Court failed to mention the importance of the cruelty having occurred “soon before death,” subsequent judgments and the IPC emphasise the necessity of such a finding while neglecting to define “soon” in any precise terms.

State of Rajasthan vs. Hat Singh

**Highlight**
- Interpreted the two sections 5 and 6 of the Rajasthan Sati (Prevention) Ordinance/Act, 1987 are mutually exclusive

This judgment pertains to three incidents that followed the infamous Roop Kanwar sati case that occurred in Rajasthan in 1987. The first was a mass
rally, organized on 08-10-1987; the second, a contravention of the prohibitory
order on 20-10-1987 by the pro-sati Hindi Dharam Raksha Samiti, Kotputli
Branch; and third, a demonstration against the Ordinance on 28-10-1987,
headed again by the Dharam Raksha Samiti. The Supreme Court reversed the
High Court order, which had quashed all prosecutions under the Rajasthan
Sati (Prevention) Ordinance/ Act, 1987. The High Court had erred in its belief
that the offences contemplated by § 5 (Punishment for glorification of sati)
and § 6 (Power to prohibit certain acts) necessarily overlapped, making
prosecution and punishment under both these two sections a violation of the
rule against double jeopardy. The Supreme Court found that the offences
under § 5; under § 6 (1) with § 6 (3); and under 6 (2) read with 6 (3) were three
distinct offences, and noted that while § 5 punishes the commission of an act,
§ 6 is preventive in nature. The Supreme Court also held that the Ordinance
had come into effect despite not being published in the Official Gazette; its
publication and broadcast in local newspapers and the media respectively was
sufficient to put the populace on notice.

However, notwithstanding the Supreme Court’s judgment, all the accused
involved in the case were acquitted by the Special Sati Court in Jaipur on the
31st of January 2004. In what is widely believed to be a miscarriage of justice,
the court interpreted the Ordinance to mean that all acts of glorification, to be
punishable, must be in relation to a particular incident. It then went on to hold
that because the Roop Kanwar incident had not been established to be one of
sati, sati glorification could not be established. Despite protests and demands
from a number of women’s groups, the State failed to file an appeal.

Bachhi Bista vs. Kabindra Bahdur Bista and Others

Highlight

- Established that to determine fatherhood, the version of the mother may
  be considered true, unless proved otherwise

The petitioner sued the defendant asking for a determination of the relationship
of a husband and wife. In the process of the disposal of the case, the apex court
made certain significant observations such as: generally, no direct evidence
could be found to prove the existence of sexual intercourse. Sexual intercourse
between two consenting adults was not performed in full view of the common
people. For this reason, no eye-witness could be found to prove that such an
act had indeed taken place. Therefore, it would depend upon the conduct of
the concerned parties and other circumstantial evidence to ascertain the facts
as regards an alleged sexual intercourse.

It is not usual in our society that a woman would move about declaring that she
had had sexual intercourse with a male. If a lady did indeed declare so, then
that matter would either be true, or would have been motivated with a vested interest in mind. As the question of fatherhood was always dependant on presumption so long as it was not proved otherwise, the version of the concerned mother, in that regard ought to be treated as true.

**His Majesty’s Government, Ministry of Law, Justice and Parliamentary Affairs vs. Forum for Women, Law and Development (FWLD)**

*Highlight*
- Recognised that husbands who compel their wives to have sex can be charged with rape (Marital rape)

The Supreme Court of Nepal has declared that husbands who force their wives to have sex with them can now be charged with rape. The apex court’s ruling was made in response to a petition filed by the Forum for Women, Law and Development (FWLD) in July 2001. On May 2, 2002, the Supreme Court of Nepal ruled that marital sex without a wife’s consent should be considered rape. The Kathmandu-based NGO FWLD had earlier challenged provision No.1 of the Chapter on Rape in the Country Code as discriminatory since it excluded the act of rape by a husband of his own wife. Under the Nepali law, a charge of rape can only be filed against a man who is not the husband, who has had sexual intercourse with a woman under 16 years of age, with or without consent, or one who has forced the act upon a woman over age 16.

In its verdict, the court reverses this by interpreting that the act of raping one’s own wife was equal to the crime of raping another woman. It also directed the Nepali Parliament to amend the present laws relating to rape to reflect this new ruling, but did not set a deadline for its completion. The amendment also has to undergo royal approval. This includes provision No. 8 of the Chapter of the National Code which will give women the right to self-defence in the case of rape or attempted rape, and provision No. 10 of the same law to provide compensation to the victim: “In case any person commits rape of a woman, half of his property shall be confiscated and given to the woman”.

**Sapana Pradhan Malla and Others versus Ministry of Law, Justice and Parliamentary Affairs and others**

*Highlight*
- Recognised the need for to rectify sections in the laws that do not guarantee equal treatment to men and women

This is a public interest litigation filed by two young advocates on behalf of Pro-Public, established to work for safeguarding the public interest in different areas of law. In this case they claimed that the different provisions of National Code (Muluki Ain) including section 2 and 3 of the Chapter “Of Bestiality” and Section 8 “Of Marriage” discriminated between men and women, and
were in conflict with Art 11 of the Constitution, which guaranteed the right to equality. The Supreme Court agreed to the contention of the petitioner and issued a directive to the government asking it to introduce legislation in Parliament within two years after fulfilling a consultative process. Read with Chandra Bajracharya, this case heralds a new era of judicial activism where the court has called upon Parliament to enact gender sensitive laws and do away with provisions that go against the right to equality as guaranteed by the Constitution.

**Annapurna Rana vs. Gorakh Shamsher JB Rana and others**

*Highlight*
- Defined and acknowledged the right to privacy for women, particularly in situations where proof is demanded

An applicant in an alimony lawsuit is ordered to get her vagina and womb tested by the district court and the appellate court on the basis of the demand by the respondents to prove that she is a married lady and is not entitled to any kind of alimony. The Supreme Court through the writ of certiorari rectifies the straying judgments of the two initial courts. The Supreme Court takes a jurisprudential stance that virginity remaining intact and being married are two diverse situations. The Supreme Court elaborately dwells on the necessity of such virginity tests, while the analysis and evaluation of the proof of marriage as alleged by the respondents obviously demands priority. The Court defines and acknowledges the right to privacy as is established in accordance with Article 22 of the Constitution of Nepal, 1990, and holds that the court order leading to the examination of private parts without the consent of the concerned person would mean depriving her of the right to privacy. The Court takes the prevalent social norms and values into consideration, and observes that the demand in the lawsuit itself to take the test may not be an unacceptable one, but the serious issue involved here is the test of the virginity of a woman, which in itself is a sensitive subject. This might lead to public concern, and may also affect the social status and other considerations of the concerned person. Which is why the court needs to exercise enormous restraint while issuing orders in such sensitive cases. The Court makes it amply clear that the establishment of sexual relations does not bring a definite change in a woman’s legal status. Besides, the Court highlights that a woman cannot be deprived of her share of property if she had established sexual relations and her virginity is not intact.

**Chandrasena vs. Attorney General**

*Highlights*
- The benefit of causing hurt due to grave and sudden provocation cannot be given to an accused who initiates the abuse.
The victim-wife had married the Appellant and they had three children. As the victim and the Appellant had some differences, the victim had gone to work in the middle east and she was regularly sending money to the Appellant. As the Appellant was not keeping proper accounts of the same, she stopped sending the money after some time. The Appellant threatened her and had also sent letters to her stating that he would deal with her when she returns. After her employment contract expired, she came back to Srilanka but started living with her parents without informing the Appellant. The Appellant came to know of the same and visited his in-laws. After this, the victim and the Appellant live together for about two weeks. In this time, the Appellant assaulted her following which she left him and started living with her parents. She also initiated proceedings seeking maintenance from him.

On her way to the Court one day, the victim was accosted by the Appellant who forced her to settle. The victim refused at which the Appellant started attacking her with a razor blade when the victim fell on the ground. The victim’s mother who was accompanying her fell on her daughter (victim) in order to protect. The Appellant continued to attack and in this process injured his mother in law. A police office who happened to witness this incident separated the victim and her mother from the Appellant and took the victim’s mother to the hospital where she was declared dead.

The case of the Appellant was that the trial judge had misdirected the jury on the law with respect to exception one to section 294 of the Penal Code relating to grave and sudden provocation. The Court held that this was not a case of sudden provocation as the provocation was sought by the Appellant and he initiated the attack and was also armed.
The State, represented by the Solicitor to the People’s Republic of Bangladesh………………..Appellant
Vs.
Md Shafiqul Islam alias Rafique and Another…….Respondents

Supreme Court
Appellate Division
(criminal)

MH Rahman J, ATM Afzal J,
Mustafa Kamal J And Latifur Rahman J

Evidence Act (I of 1872) Section 5

Chance witness: He is found to be at the place of occurrence by chance or coincidence at the time the offence was committed. His evidence need not be rejected outright, but it is to be weighed with caution and may be viewed with suspicion if witnesses are partisan or inimically disposed towards the accused … (13)

Wife killing case - In such a case, there could be no eye witness of the occurrence, apart from inmates of the house who may refuse to tell the truth. The neighbours may not also come forward to depose. The prosecution is, therefore, necessarily to rely on circumstantial evidence.

In a case of this nature, like any other case of circumstantial evidence, one normally starts looking for the motive and the opportunity to commit the crime. The prosecution case as to motive, the deceased’s failure to bring home the promised articles of dowry from her father has not been seriously challenged. PW 1 merely omitted to mention one of the promised articles in the FIR. Where it is proved that the wife died of assault in the house of her husband, there would be strong suspicion against the husband that at his hands the wife died. To make the husband liable, the minimum fact that must be brought on record, either by direct or circumstantial evidence, is that he was in the house at the relevant time. In this case PW 1’s statement that the husband of the murdered wife was in his house on the date of occurrence remains unchallenged. There is nothing on record to show that the husband took any step for alleviating his wife’s alleged colic pain or to inform his wife’s relations after her alleged suicide. PW 8, the uncle of the victim stated that the husband was not at home when the police took his wife’s dead body away. The husband’s continued abscondence from 20.3.82, the date of occurrence, till his surrender on 6.1.1983, is by itself not conclusive either of his guilt or guilty conscience, but it lends weight to the circumstantial evidence against him.
Kasiruddin Sarkar Vs. State 24 DLR 164 held not applicable … (10, 16 – 18)
B. Hossain, Advocate on Record for the Appellant Sharifuddin Chaklader,
Advocate on Record – For the respondents

Judgment

MH Rahman J: This appeal, at the instance of the State, is directed against the judgment and order dated 10th March 1986 of the High Court Division, Rangpur Bench, passed in Death reference case no. 6 of 1983 rejection the reference and setting aside the order of conviction and sentence passed against the respondents by the Additional Sessions Judge, First Court, Pabna in Sessions Case no. 300 of 1982.

2. At the trial PW 1 Moked Ali, the informant, stated the prosecution case. His daughter Meherunnessa was married to respondent no.1 Shafiqul Islam alias Rafique in 1979. PW 1 promised to give his son in law one bicycle and a two in one (tape recorder-cum-radio) in January 1982. Respondent no.1 was at his home on leave in the month of March, 1982. After taking his wife home on 10th March 1982, he assaulted her at the instance of his father, respondent no.2 Rahmat Ali, a policeman and her mother Ayesha Khatun, for not bringing with her the promised articles of dowry. On 19th March 1982, Meher was again beaten by the accused PW 1’s son Mizanur Rahman who was at the house of the respondents came back and told his mother that his sister asked him to tell her that the promised articles must be given otherwise she would be killed. On the 20th March 1982 PW 1’s daughter was brutally killed by the accused persons. On that date PW 1 was serving at Pangsha, District Faridpur. On the following day his nephew PW 11 Shahjahan informed him about the killed. PW 1 reached the house of respondent no.1 at 5 PM and saw her daughter lying dead on the ground. He noticed burning signs on her head, face, nose and lips and injury marks on different parts of her body. He heard from PW 2 Mosleumuddin, PW 3 Majed Ali, PW 4 Wazeda Khatoon and PW 5 Rezia Khatoon and oher that the accused persons tortured his daughter for his failure to comply with his son in law’s demand for the promised articles and that they conspired together to murder her. He asserted that his daughter did not commit suicide and that she was brutally killed and hanged, and that for concealing the dead body the accused also dug out a grave. The accused Mokbul, a constable, and a friend and close neighbour of respondent no.1 instituted an unnatural death case with the local police station giving a false information that Meher committed suicide, the police came to the spot and held inquest on the dead body of meher and forwarded the sme to Pabna Morgue for post mortem examination. PW 1 went to the police station on 22nd March 1982 for lodging an information but the officer in charge told him that he would accept the information after the post mortem report. On 3rd April 1982 the police received PW 1’s information. PW 1 stated that he heard his daughter
was hanged with her feet touching the ground and her head a bit bent. He further stated that out of fear or for other reasons PW 17 Abus Sattar, brother in law of respondent no.2 his wife PW 5 and his daughter PW 4, PW 12 Hashem, PW 23 Surajennesa, PW 14 Fatema who are related to the accused, would not speak the truth.

3. The accused pleaded innocence. Their defence is that Meherunnesa was a patient of colic pain, she suffered from typhoid and that she committed suicide by hanging.

4. The trial court convicted respondent no.1 under section 302 of the Penal Code and sentenced him to death. Respondent no.2 Rahmat Ali was convicted under Sections 302/114 of the Penal Code and sentenced to transportation for life. Five other accused were acquitted.

5. The prosecution examined fourteen witnesses and tendered seven others. PW 2 and 4 were declared hostile.

6. In cross examination PW 1 stated that he did not give any explanation as to the delay in lodging the First Information Report and he did not mention there about the cassette, the happening of 19th March and the accused’s digging out a grave and that his daughter was hanged with her feet touching the ground and her head a bit bent.

7. There was no eye witness in this case. the High Court Division held that the circumstantial evidence did not exclude the possibility of the defence plea of innocence and relying on Siraj Vs. Crown 9 DLR SC 177, acquitted the accused.

8. On behalf of the State it is contended that the learned Judges of the High Court Division misapplied the decision in 9 DLR SC 177 in the instant case as the evidence of PWs 2, 3 and 9 show the complicity of the accused persons resulting in the death of the deceased on the date of occurrence. Further it is urged that the High Court Division fell into error by not considering that the accused respondents did not give any plausible reason as to how Meherunnessa was murdered at their own residence when their case of suicide was found by the High Court Division itself as blatantly false.

In Siraj vs. Crown 9 DLRE (SC) 177, Munir CJ observed : “If on the facts held proved no hypothesis consistent with the innocence of the appellant can be suggested, the conviction must be upheld. If, however, such facts can be reconciled with any reasonable hypothesis compatible with the innocence of the appellant, the case will have to be treated as one of no evidence and the conviction and sentence will in that case have to be quashed”.

9. After quoting the above, passage the learned judges hurriedly concluded without considering the persecution case in depth that the circumstances in the instant case do not exclude the possibility of innocence of the accused.
10. The respondent has placed much reliance on Kasiruddin Sarkar vs. The State 24 DLR 164. In that case the learned judges after ruling out the husband’s plea that his wife committed suicide gave him a benefit of doubt, but that was done after taking pains in pointing out that there was more than one possibility of involvement of assailant other than the husband in the commission of the murder.

11. We have referred to the evidence of PW 1, the informant earlier. Let us now consider the evidence of PWs 2, 3 and 9. PW 2 Moslemuddin stated that on the day of occurrence at 8 pm on his way back home from Sujanagar Bazar when he was passing by the house of Rahmat he heard a woman entreating not to beat her and asking for water. He advanced to the house of the accused Rahmat. PW 3 Majed Molla was with him. Rahmat resisted PWs 3 and 4 and asked them to go away. On the next day PW 2 heard that Rahmat daughter in law died by committing suicide. PW 3 heard that she was killed and hanged. PW 2 did not then meet PW 3. Each of them saw the victim hanging with her feet touching the ground and her head bent. In cross examination PW 2 denied that he was a bhagina of PW 1. PW 3 admitted that PW 2 calls him as a maternal uncle by village courtesy. They did not tell before the IO the exact words the victim, being assaulted, uttered. PW 9 Budai Sk also narrated a similar incident.

12. The High Court Division characterised the three witnesses as chance witnesses and discarded their evidence. The learned judges commented that they did not mention about any such incident to the police. In face, they omitted only to disclose the exact words of anguish the victim uttered when she was assaulted by the accused persons.

13. A person deposing before Court is termed as a chance witness when he is found to be at the place of occurrence by chance or coincidence at the time the offence was committed. The evidence of such a witness need not be rejected outright, but it is to be weighed with caution and may be viewed with suspicion if the witnesses are partisan or inimically disposed towards the accused, or the reason given by the witness for his being present at the place of occurrence appears to be untrue. In this case out of the three witnesses PW 2 and 3 are not related to the informant and they were named in the FIR. In any case for the prosecution case the evidence of PWs 2, 3 and 9 are not all that material.

14. The respondent relied on Criminal Appeal no. 10 of 1987 of this Court (The State vs. Mofazzal Hossain) where by a majority decision the husband was acquitted of the charge of killing his wife as the minimum evidence against him, that he was in the house where his wife was murdered, was lacking. It was held “In criminal cases section 106 of the Evidence Act is attracted in exception cases where a relevant fact is pre-eminently within the knowledge of
the accused. The rationale is simple. It is just and proper that the accused is to
prove a fact that is especially within his knowledge because he could do so
without difficulty or inconvenience, and for the prosecution it will be well nigh
impossible or highly inconvenient to throw any light on such a matter. However,
by invoking the provision of section 105 or 106 of the Evidence Act the
prosecution cannot relieve itself of its duty of discharging its general burden
of proving its case beyond reasonable doubt”.

15. In that case it was also observed: “Had it been established by evidence
that the accused was in his house at the material time, pointing a finger at him
as the probable assailant, then the Court could have in deciding the matter
considered his failure to adduce explanation or the falsity of his explanation
along with other incriminating circumstances”.

16. In a wife killing case, from its very nature, there could be no eyewitness of
the occurrence, apart from the inmates of the house who may refuse to tell the
truth. The neighbours may not also come forward to depose. The prosecution
is therefore necessarily to rely on circumstantial evidence. In a case of this
nature, like any other case of circumstantial evidence, one normally starts
looking for the motive and the opportunity to commit the crime. The prosecution
case as to motive, the deceased’s failure to bring home the promised articles of
dowry from her father has not been seriously challenged. PW 1 merely omitted
to mention one of the promised articles in the FIR.

17. Where it is proved that the wife died of assault in the house of her husband,
there would be strong suspicion against the husband that at his hands the wife
died. To make the husband liable, the minimum fact that must be brought on
record, either by direct or circumstantial evidence is that he was in the house at
the relevant time.

18. In this case PW 1’s statement that the husband of the murdered wife was in
his house on the date of occurrence remains unchallenged. There is nothing on
record to show that the husband took any step for alleviating his wife’s alleged
colic pain or to inform his wife’s relations after her alleged suicide. PW 8 the
uncle of the victim, stated that the husband was not at home when his wife’s
dead body was taken away by the police. The husband’s continued abscondence
from 20.3.82 the date of occurrence till his surrender on 6.1.1983 is by itself
not conclusive, but it lends weight to the circumstantial evidence against him.

19. In this case the prosecution has proved beyond any reasonable doubt that
the victim was brutally beaten and done to death by strangulation. The defence
plea that the victim committed suicide was disbelieved by both the courts below.
PW 4 Wazeda Khatun, a cousin of respondent no.1 was declared hostile. She
however, stated that Meher was of robust health and she heard her sister in law
crying for stomach pain only on two occasions. The assaults causung
ecchymosis all over the victim’s body, the neck, shoulder, upper part of the chest, thighs, legs and hands and, then, hanging of the body of a robust woman like Meher could not have been done by one person. More than one person conspired together to do tha. Respondent 1, the husband of the victim, cannot but be held as one of the assailants.

20. The evidence shows that the accused, having a strong enough motive, had the opportunity of committing or conspiring to commit the crime. The established circumstances on the record, considered along with the false examination of the accused, exclude the reasonable possibility of anyone else being the real culprit. The chain of evidence indicates unmistakably that within all human probability the crime must have been committed by the appellants. It is inconsistent with the innocence of the appellants and incapable for any other hypothesis than that of the appellant’s guilt.

In the result the appeal is allowed. During the pendency of this matter respondent no.2 “Rahmat Ali” died as disclosed in the respondent’s application dated 18.7.1990 and the appeal against him has thus abated. The judgment and order of the High court Divison with regard to respondent no.1 are set aside and the order of conviction of the trial court under section 302 is altered to one under Section 302 read with section 109 of the penal Code and respondent no.1 is sentenced to imprisonment for life. Respondent no.1 is directed to surrender to his bail bond. The trial court should report compliance of this order to this Court.

Ed.
Ajit Kumar Pramanik and others .................. Petitioners  
Vs.  
Bokul Rani Pramanik and others ............... Opposite Parties  
High Court Division  
(Criminal Revisional Jurisdiction)  
Kazi Ebadul Hoque and Md. Nurul Islam, JJ  
Criminal Revision No. 227 of 1988  
Date of Judgment : The 28th February, 1994  
Result : Rule discharged  
Synopsis of the Case  
Whether dowry include demanding of money afresh after the marriage for  
continuing the marriage already solemnised. Accused demanded dowry worth  
of Tk. 30,000/= from the informant after assaulting the informant and sent her  
to her father’s house. High Court Division was of the opinion that such incident  
constitute dowry punishable under section 6 of the cruelty to woman (Dowry  
Punishment Ordinance) ordinance 1983.  
Ordinance LX of 1983)  
Section – 6  
‘Dowry under Section 6 of the Ordinance not only includes money etc. agreed  
to be paid before or at the time of the marriage but also money etc. demanded  
afresh after the marriage for continuing the marriage already solemnized. So,  
any valuable property, which includes money, demanded by the husband or  
his relations from the wife or her relations afresh after the marriage is dowry  
within the meaning of Section 6 of the Ordinance.  
40 DLR 360- Cited.  
No one .... For the Petitioners  
No one ... for the Opposite Parties  
Judgment  
Kazi Ebadul Hoque, J: This Rule at the instance of the accused petitioner is  
for quashing the proceedings of the Special Tribunal Case no. 2/86 pending in  
the Court of the Assistant Sessions Judge and Special Tribunal Judge No. 3,  
Bagerhat.  
2. The opposite party No. 1 lodged a petition of complaint of 7.1.85 which  
subsequently was treated as F.I.R. in Sharankhola P.S. Case no. 1 dated 2.10.85  
Landmark Judgments on Violence Against Women and Children from South Asia | 495
alleging that she was married to accused petitioner No. 1, Ajit Kumar Pramanik 10/11 years before and of that marriage they have a son aged 7/8 years; that at the time of marriage some valuable articles and cash sum of Tk. 20,000/= in total dowry worth Tk. 75,000/= was given to the petitioner No. 1 who subsequently sold the same and squandered away the money and thereafter on the petitioner No. 1 with the active connivance of other petitioners caused her serious bodily injury and told her to bring Tk. 30,000/= from her father otherwise she will not be allowed to live in her husband’s house and drove her away to the house of her father that thereafter the informant opposite party No. 1 with the help of local respectable people held salish to allow her to go her husband’s house but the petitioner No. 1 refused to accept her without the demanded dowry and the cash money; that when the opposite party No. 1 went to her husband’s house on 25.12.84 to live there the accused-petitioner again assaulted her and drove her from the house.

3. After investigation police submitted charge-sheet against the accused-petitioners under Section 6 of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 (Ordinance LX of 1983). Thereafter on 4.2.86 the case record was received by the learned Sessions Judge and Ex-officio Special Tribunal and he after taking cognizance transferred the case to the Court of Special Tribunal and Assistant Sessions Judge who framed charge against the accused-petitioners on 23.3.86 and the petitioners pleaded not guilty to the charge and claimed to be tried. After some adjournments taken by the petitioners before the Special Tribunal they moved this court under Section 561 of the Code of Criminal Procedure and obtained the Rule.

4. No one appears for the petitioners. Perused the record. It appears that main ground of the petitioners for quashing the proceedings is that the allegations made in the F.I.R. do not constitute an offence under Section 6 of the Cruelty to Woman (Deterrent Punishment) Ordinance, 1983. It also appears from the Medical Certificate issued by Dr. SK. Younus Ali on 26.12.84, one day after the second day of occurrence and attached to the F.I.R. that he found amongst others crush injury of the left thumb with falling of nail and a chest injury. This prima facie shows that the informant opposite party No. 1 suffered grievous hurt and as such the allegations constitute an offence under Section 6 of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 provided the other allegation of demanding money is dowry within the meaning of that section. Explanation of the said section 6 is as follows:-

“Explanation — In this section dowry means any property or valuable security demanded from the wife or her parents, guardian or any other relations as consideration for the marriage, but does not include dower or mohar in the case of a person to whom Muslim Personal Law (Shariat) applies.”

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5. The above explanation has given a meaning to the word “dowry” which ordinarily means wedding gift or money or property made by the parents, guardian or other relations of the wife to her husband at the time of her marriage. All marriages are not contracts. Some marriages are religious sacraments and some others are civil contracts. But in a contract of marriage mutual promise of the parties is consideration for such contract. Contract of marriage subsists so long parties to such contract stick to the promise of mutual faithfulness to each other to the promise of mutual faithfulness to each other to live a happy conjugal life by performing the obligations of marriage. Wedding gift made by the parents guardian or other relations of the bride to her bridegroom is not the consideration of the marriage inasmuch as without such mutual promise no contract of marriage can be validly made. Even if such wedding gift made to the husband by the parents, guardian and other relations of the wife at the time of her marriage is treated as consideration of marriage that must have been settled before the marriage is solemnised. How con property etc demanded after the marriage be treated as consideration of marriage already solemnized? So when the husband or his parent, guardian or any other relations demand money etc. after the marriage from the wife or her parents, guardian of any other relations not as unpaid part of the money etc agreed to be delivered before or at the time of the marriage that must be treated as payment or reward for continuing the existing marriage. So the words “as consideration for the marriage” in the above explanation means reward or payment for smoothly continuing the marriage. Had ‘dowry’ under the said section 6 meant only unpaid part of the money etc promised before or at the time of the marriage and not money etc. demanded afresh after the marriage explanation to the said section 6 would have clearly spelt out the same. In the absence of such exposition we cannot give restricted meaning to the words ‘consideration for the marriage’ only to mean money etc. promised before or at the time of the marriage to exclude large number of offences committed in connection with demand afresh of money etc. after the marriage to prevent which deterrent punishment has been provided under the said Ordinance.

6. We are, therefore, of the view that ‘dowry’ under the said section 6 of the Ordinance not only includes money etc agreed to be paid before or at the time of the marriage for smoothly continuing the marriage already solemnized. As such any valuable property, which includes money, demanded by the husband or his relations from the wife or her relations afresh after the marriage for smoothly continuing the marriage is dowry within the meaning to Section 6 of the Ordinance. This view of ours finds support from the case of Reazul Karim Vs. Mst. Taslima Begum reported in 40 DLR. 360. In that case demanding money by the husband from the brother of the wife after marriage for taking the wife to his house was found to prima facie constitute an offence under the
provisions of Dowry Prohibition Act, 1980 by interpreting section 2 thereof and giving extended meaning to the expression ‘in consideration for the marriage used in the said section 2 of the Act. So the alleged demand of Tk. 30,000/= and grievous hurt inflicted to the informant opposite party No. 1 to enforce the same is an offence within the meaning of the said section 6 of the Ordinance and as such the allegations made in the FIR do constitute an offence under the said section. We, therefore, find no merit in the contentions raised in this rule.

7. In the result, the Rule is discharged and the order of stay granted at the time of issuance of the Rule stands vacated.

8. Let a copy of the order be forwarded to the Court below.
State … Petitioner  
Vs.  
Munir and another … … Respondents

High Court Division  
(Criminal Appellate Jurisdiction)

Judgment  
Badruzzaman J and Rahul Amin J.  
5th July

Evidence Act (I of 1872)  
Section 106
Murder of wife – Burden of proof – Failure to — discharge the onus lay on the accused, the prosecution - not relieved of its burden – As there was no - witness to the occurrence but husband and wife who were in the Pajero jeep which was an inanimate object - to speak and wife was dead and it was only within the special knowledge of husband who could only say how and under what circumstances and who murdered his wife. Even if the husband fails to discharge responsibility the onus lay on him, the prosecution is not relieved of its burden to prove beyond reasonable doubt that husband had murdered his wife …  
(17 & 18 )

Code of Criminal Procedure (V of 1898)  
Section 164
Evidence Act (I of 1872)  
Section 80
Confessional statement duly recorded – Its presumption – As the confessional statement of condemned prisoner was recorded in accordance with the provisions of section 164, Cr PC and it was signed by the confessing accused and Magistrate, the court shall presume under section 80 of the Evidence Act that the document is genuine and that the statement as to the circumstances under which it was taken by the magistrate are true and the confession was duly taken  
…. (20)

Evidence Act (I of 1872)  
Section 24
Retracted Confession – its value – Confessional statement of condemned prisoner was recorded on 27.4.89 and he did not retract it from judicial custody but he retracted his judicial confession on 17.5.89 by filing a typed written petition wherein he failed to state that who had murdered his wife and under
what circumstance it had happened, even it did not disclose the story of alleged abduction of his wife by miscreants and her eventual murder by them as alleged in the written statement and such retracted confession can solely form the basis of conviction if it is found voluntary and true. … (22 & 23)

**Code of Criminal Procedure (V of 1898)**

**Section 164**

Requirements of recording confession – Corroboration of – As the magistrate recorded the confessional statement after observing all the formalities as required under section 164, CrPC and there was no requirement under the law that the magistrate should give assurance to the accused that he would not be remanded to police custody after recording confessional statement unless the confessing accused complained to the magistrate about inducement, etc. by police and the evidence of the PWs that the deceased noticed marks of lipstick on the collar of the shirt of her husband and that wife made a row over it with the husband and as a result husband gave three kicks on the back of wife and decided to divorce her, and the threat of the accused Khuku at the time of encounter at the garment factory and the extra judicial confession corroborate the confessional statement and written statement of the accused husband for which the confessional statement can be the sole basis for conviction of husband as the confession was voluntary and true. …. (26, 28, 40, 53, 56 – 57)

**Evidence Act (I of 1827)**

**Section 114 (g)**

Tender of witness – Its effect – Prosecution should examine the important witness in chief but when sufficient evidence is already given or it is of no significance, the tendering of a witness will not be treated as withholding of such a witness unless it is from oblique motive. As the defence failed to challenge the evidence of other PWs, the tendering of the witnesses cannot attract the provision of section 114(g) of the Evidence Act to draw adverse presumption and the tendering of witnesses were not done with any oblique motive… (43 & 51)

**Section 27**

Discovery of incriminating materials at the instance of accused – Presumption of guilt – while the accused person was in police custody he led the police and pointed out the place where he threw the trouser and underwear which is admissible under section 27 of the Evidence Act as that led to the discovery of accused person’s blood and mud stained trouser and underwear which unerringly indicated that the accused had committed the murder of his wife. .....(44)
Code of Criminal Procedure (V of 1898)

Section 103
Search – Non – compliance with – Accused if prejudiced – The provision of Section 103 of the Code is meant to safeguard against planting of incriminating material or removal of any such material at the time of seizure. Although respectable neighbouring witnesses were not called at the time of recovery and seizure of different articles from the house of accused and consequent upon non compliance of section 103, CrPC no prejudice has been caused to the accused as the alleged removal of the knife was impossible because of the presence of the father and inmate of the house of the accused. … (49)

Section 167
Period of police remand in the whole – A magistrate exercising the power under section 167, CrPC can order police remand for a period not exceeding 15 days in the whole and the magistrate did not exceed such period by his 3 successive orders of police remand. … (59)

Section 342
Omission to draw the attention of accused – If prejudiced the accused – As the accused is a highly educated person and he was although present in court when the evidence relating to recovery of his trouser and underwear from the place pointed out by him was adduced and cross examination was made on his behalf and it was not even challenged during cross examination, the omission to state such recovery at the time of examination under section 342 CrPC had not prejudiced the accused and the trial was not vitiated … (62)


Serajul Huq with Abdul Malek Khan, Fariduddin Ahmed, Advocates for condemned prisoner, Munir Hossain ANM Gaziul Haque- with Syed Golam Abdul Mannan Khan, Mrs. Fazilatun Samsuddin Babul, Advocates -for the Condemned Prisoner, Hose Ara Khuku Cases cited and discussed: Kazi alias — Fazlur and others 29 DLR (SC) 271, State — Kibria 43 DLR 512; Monowarullah & others and State 40 DLR 443; Moslimuddin and others vs. State 1987 BLD (AD) 1; Serajul Mir vs. State 1964 ( Dhaka) 420; Daud Ali vs. State 27 DLR — Mujibur Rahman and others vs. State 39 DLR — Syed Sharifuddin pizzada vs. Shahabat Khan … 1972 (SC) 363; Dipak Kumar Sarkar vs. State — BLD (AD) 109; State vs. Ali Hossain 43 DLR … Rustam Ali & Ors vs. State 1989 BLD (HCD) … Natu vs. Uttar Pradesh PLD 1956 (Supreme
Court of India) 186; Haji Year mohammad vs. Rahim Din and ors. 13 DLR (wp) 58; Nowsher Ali Sikdar vs. — 39 DLR (AD) 194.

Judgment

Md. Badruzzaman J: This reference under section 374 of the Code of Criminal Procedure has been made by the Sessions Judge, Dhaka for confirmation of the sentence of death imposed upon accused Munir Hossain alias Suruj and Hosne Ara Khuku on their conviction for the offence punishable under sections, 302 and 302/109 of the Penal Code respectively passed on 21.5.90 in Sessions case no 137 of 1989. Being aggrieved by the said order of conviction and sentence, Munir Hossain preferred Criminal Appeal No. 404 of 1990 and Jail Appeal no. 416 of 1990 and Hosne Ara Khuku preferred Criminal Appeal no 405 of 1990 and Jail Appeal no. 416(A) of 1990. The reference and these appeals have been heard together as those arose out of the same judgment and order and this judgment would govern them all.

2. Facts leading to the prosecution may be stated as follows: On the information of Syed Serajudaullah, Inspector, Special Branch communicated through PW 58 ASI Mirza of the Special Branch that the dead body of an unknown woman was lying in water and half by the side of Mouchak Sarak in the field of Mizmizi village near Bishwa Road. PW 59 Abdul Quddus Khan, Officer in charge Siddhirganj police station recorded Siddhirganj PS GD entry no. 296 dated 9.4.89 (Ext. 51) at 11.30 AM and directed PW 1 SI Adbus Samad to take necessary action in the matter. PW 1 along with constable no. 344 Kowsar Ali, constable no. 974 Mohiuddin (PW 12) and constable Amzad Hossain (PW 61) went there and found the dead body of an unknown woman aged 20/22 years lying half in the water and half on the bank of the canal by the side of the Mouchak Sarak in the field of Mizmizi village. The dead body was pulled upon the bank of the canal and injuries were found on different parts of the body caused by sharp cutting weapon and the intestines came out. The dead woman had in her wearing a navy blue coloured skirt which was torn at places dues to infliction of injuries. She had in her right hand a lady’s wristwatch, and 10 numbers of gold bangles. On seeing the dead body PW 1 felt that the woman was killed by sharp cutting weapon at the said place or her dead body was left at that dark and solitary place after she was killed at some other place and that nobody of the locality could recognise her.

PW1 wrote a first information report Ex.1 on the spot and sent the same to the officer in charge of Siddhirganj police station who filled up the first information report form ext. 52 out of which Siddhirganj PS case no. 2(4) 89 under section 302 of the Penal Code was started and this case was registered as GR case no. 189 of 1989 of the court of upzzila Magistrate Narayanganj Sadar. Thereafter PW 1 took up investigation and held inquest over the dead body and sent the
same to the Narayanganj Morgue through Constable no. 969 Amzad Hossain. On the same day at about 9.30 PM PW 42 Munir Alam Mirza got an information that Sharmin Rima had been killed by her husband accused Munir Hossain and thereafter he contacted Demra police station over telephone and learnt that the dead body of an unknown woman had been recovered from Mizmizi and sent to Narayanganj Morgue. PW 42 along with others rushed to Narayanganj morgue where they met PW 1 SI Abdus Samad who showed them the dead body. PW 42 identified the dead body as that of Sharmin Rima, daughter of Shaiid journalist Nizamuddin of no. 5 Eskaton Road, Ramna, Dhaka and accordingly PW 1 struck out the word “Unknown women” in the inquest report and instead inserted the name, father’s name and other particulars of Sharmin Rima and on the following day the police handed over the dead body of Rima to her relations after the post mortem examination.

3. The case of the prosecution, in short is that deceased Rima was married on 11.12.88 to condemned prisoner Munir Hossain alias Suruj, the son of Dr. Abdul Kashem and Dr. Meherunnessa who are established medical practitioners at Dhaka. They had their residential house at house no. 5, Road no. 5Dhanmondi Residential area. The “Rosumat” was held on 31.12.1988 and Walima on 2.1.1989. Munir Hossain was not happy with his wife Rima. On return of Munir to his Dhanmondi house on the night of 29.3.89 Rima noticed marks of lipstick on the collar of his shirt and she protested as a result of which Munir beat her. Rima came to know that her husband Munir Hossain had a paramour named Hosne Ara Khuku and that he hired a house at Lalmatia for meeting Khuku. On 2.4.89 Rima discovered the Lalmatia house on information from one Ali Ahmed, an employee of Munir’s garment factory and on the same day she went to that house bearing no. 9/8 Block D Lalmatia by the car of her maternal uncle driven by driver PW 9 Mosharraf Hossain and met their Darwan Asgor who reported that Munir Hossain, proprietor of National Apparel Co Ltd. (a garment factory) took lease of that house and that some time before Munir along with Hosne Ara Khuku went out by jeep. On hearing this Rima started weeping and went back to the Dhanmondi residence of her husband and reported the matter to her parents in law and Nanad buit got no response from them. Thereafter Rima went to the house of her mother, PW Kohinoor Nizam and reported the matter to her. Accused Munir contacted Rima over telephone at her mother’s residence on that night and again on the following morning and persuaded Rima to come back to his Dhanmondi house which she did on 3.4.89 at about 10.00 AM. On 3.4.89 in the evening Munir along with his wife Rima went to the house of PW 3 Abdul Farah and Munir expressed his repentance for his ill treatment towards Rima and assured that he would not do so in future. On the following day in the evening accused Munir and Rima went to the house of Rima’s mother PW 2 Kohinoor Nizam and Munir sought
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forgiveness for his ill treatment towards Rima stating that Rima was a very
good girl and sought blessings of Rima’s mother. On 5.4.89 Munir took his
wife Rima to his garment factory where Rima met Hosne Ara Khuku and asked
her not to mix with her husband thereby ruin their family life. At this Khuku
called Munir cheat and Rima protested when Khuku got angry and threatened
her by saying “written in Bengali”… and left the place. Munir and Rima
stayed in the house of Kohinoor Nizam on that night and they returned to their
Dhanmondi house at 10.00 AM on the following morning. On the same day
i.e. 6.4.89 at about 4.00 pm Munir came to the house of Kohinoor Nizam
being prepared to go to Chittagong. At about 7.00 pm on 6.4.89 Munir along
with his wife Rima left for Chittagong by his Pajero jeep bearing registration
no. Dhaka Metro Cha 7703 inspite of kohinoor Nizam’s asking them not to go
at night. They reached Chittagong on the morning of 7.4.89 and stayed at
Hotel Saikat. During their stay at hotel Saikat, they made 9 telephone calls to
the residence of Rima’s mother, Munir’s mother and to PW 3. They cut short
their stay at Chittagong and left Hotel Saikat at about 8.30 / 9.00 pm on 8.4.89
for Dhaka by the said Pajero jeep. On their way to Dhaka by the Pajero jeep
they cross the Meghna Ferry ghat at about 1.30 pm on 9.4.89.

4. It is further the case of the prosecution that on reaching near village Mizmizi
to the south of Bishwa Road, accused Munir Hossain drove his jeep by the
side of the Mouhak Sarak of that village, dragged Rima out of the jeep, killed
her and threw away her dead body in the canal by the side of the Mouhak
Sarak. Accused Munir thereafter left towards Dhaka with the jeep but
abandoned the jeep at a place to the South of Saidabad Bus terminal and from
there went to Badar hotel where he took a double seated room The further case
of the prosecution is that during his journey from Saidabad bus terminal to
hotel badar, accused Munir Hossain made extra judicial confession before PW
32, sweeper and her son PW Nuruzzal Hossain stating that he had murdered
his wife and also made similar extra judicial confession to PW 36 Abdul Jalil
and PW 37 Ali Hossain at Badar Hotel. At about 3.30/ 4.00 PM it was reported
by the hotel boy Shafiq (PW 39) to the manager PW 38 that the boarder of
room no. 203 was showing unusual conduct and shouting “Murder” “Murder”,
and within 10/15 minutes thereafter accused Munir made an attempt to commit
suicide by hanging himself with the hook of the fan but the police and other
persons who assembled there entered into that hotel room by breaking open
the door and rescued accused Munir and sent him to Mitford hospital and a
case being Sutrapur case no. 14 dated 9.4.89 under section 309 of the penal
Code was started against accused Munir. Accused Munir was shifted to
Rajarbag police hospital on 10.4.89 and from there produced in court on 11.4.89
when he was shown arrested in this murder case It has been further alleged by
the prosecution that Hosne Ara khuku and Moshtaque abetted Munir in
murdering Rima which was committed in consequences of their abetment.
5. PW 1, SI Abdus Samad, the first investigating officer, seized the articles found the wearing of the dead body of Rima after seizure list Ext. 4 visited the place of occurrence and prepared a sketch map Ext. 5 and a separate index Ext. 6. The place of occurrence was shown as “Ka” in the sketch and which is situated at Mouchak Sarak one hundred yards to the south of Bishwa Road. On receipt of the information that Pajero jeep of Munir had been found abandoned near the bus terminal, it was brought to the police station. PW 1 along with officer in charge of Siddhirganj police station went to the Demra police station and seized the Pajero jeep and the articles found therein under the seizure list Ext. 7. Thereafter the CID Dhaka took up investigation of the case on 10.4.89 and CID Inspector Haider Ali (since dead) investigated into the case till 20.4.89 when investigation was taken up by PW 66 MC Moustafa, a senior ASP, CID Dhaka. He visited the place of occurrence, examined the witnesses and on completion of investigation submitted charge sheet on 6.6.89 against munir Hossain @ Suruj, Hosne Ara Khuku and Moshtaque Ahmed for the offence punishable under sections 302/109/34 of the Penal Code. During investigation accused Munir Hossain made judicial confession Ext. 50 on 27.4.89 which was recorded under section 164 of the Code of Criminal Procedure by PW 55 Mr. R.K Das, Metropolitan magistrate, Dhaka, Liakat Ali and Deen Mohammad, who were arrested during investigation were not charge sheeted and they were accordingly discharged.

6. The case was ultimately transferred from the court of the Sessions Judge, Narayanganj to the court of the Sessions Judge Dhaka where it was numbered as Sessions Case no.137/89. In the court of the sessions judge Dhaka accused Munir Hossain was charged for the offence punishable under section 302 of the penal code and accused hosne Ara khuku and moshtaque Ahmed were charged for the offence punishable under section 302/109 of the penal Code. The charges as framed were read over and explained to the accused persons wholepleaded not quilty to the respective charge and claimed to be tried.

7. The defence of accused munir, as if transpired from the suggestion put to PWs 1, 28,59 and 66 and the written statement filed by him at the time of Code of Criminal procedure (hereinafter referred to as the “written statement”) is that Selim and Deen mohammad, in collusion with accused Khuku either themselves or by engaging other people murdered his wife Rima at Mizmizi a solitary place and injured him. His further case is that when his Pajero Jeep, whith Rima inside reached the bnishwa Road, a truck speedily came there and blocked the road and simultaneously another car stopped in front of his jeep and some persons came out the car and abducted Rima from the jeep and injured him on hisright thigh by knife blow. The miscreants took away keys of the jeep from him and tollk cotrol of the jeep. The miscreants pushed needle on his arm and thigh where he felt pain and became unconscious and after
regaining sense, Munir found himself in a closed room at hotel Badar and on realising that his wife had been murdered he shouted “Murder” “Murder” and attempted to commit suicide.

8. The further plea of accused munir is that he did not make and extra-judicial confession recorded by the Magistrate PW 55. The judicial confession allegedly made by the was neither true nor voluntary.

9. The defence of accused Hosne Ara khuku is one of innocence. She denied that she denied that she abetted accused Munir for murdering Rima. She, however, did not deny that she had illicit relationship with accused Munir from before latter’s marriage with Rima.

10. The prosecution produced 66 witnesses out of whom 8 witnesses namely PWs 12,22, 29, 39, 40, 46, 58 and 64 were tendered for cross examination. But the accused persons did not examine any witness in support of their defence. The learned sessions judge, in consideration of the evidence on record, facts and circumstances of the case, convicted accused Munir Hossain for the offence punishable under section 302 and accused Hosne Ara Khuku for the offence punishable under sections 302/ 109 of the Penal Code and sentenced both of them to death and made the reference under Section 374 of the Code of Criminal Procedure for confirmation of their death sentence. The learned Sessions Judge, however, acquitted accused Moshtaque Ahmad of the charge under sections 302/ 109 of the penal Code.

11. Accused Munir Hussain is a mechanical engineer having obtained his degree from a University of USA. He returned to this country in 1981 and started business. He started a garment factory under the name National Apparel Company Ltd. and a supply company under the name National Trading House. The acquitted accused Moshtaque was the manager of the National Trading House of accused Munir. Munir came in contact with Hosne Ara Khuku in 1986/87.

Seizure list Ext. 36. We propose to . this aspect while discussing the evidence regarding recovery of the knife Ext. — said seized passports, air tickets and — cheques show that munir and Khuku undertook a journey abroad in 1988 and this fact — manifestly indicates the illicit relationship between Munir and khuku in 1988. the — of these seized articles in his Dhanmondi house, Khuku’s diary in the Lalmalia house and photo album in National Trading House even after marriage with Rime unmistakably indicated that Munir was least bothered and made no attempt to kip his illicit relationship with Khuku concealed from Rima. If Munir had any intention to — Khuku for ever after his marriage and wanted to lead a happy married life, Munir would have destroyed all those documents/ articles and at least would not have preserved thos incriminating materials in his residence, Lalmatia House and business….  

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14. PW 1 SI Abdus Samad of Shdirganj PS held the inquest over the dead body of an unknown woman aged 20/22 years which was lying half in the water and half on bank of a canal by the side of Mouchak Sarak in the field of village Mizmizi and sent the same to Narayanganj morgue for postmortem examination through PW 61 constable Amzad hossain. PW 42 Amir alam mirza maternal uncle of the deceased, went to Narayanganj Morgue and identified the dead body of that unknown woman as that of Sharmin Rima, wife of accused Munir Hussain and accordingly, with her particulars in the inquest report. PW 54 Dr. Ali Ashraf mia, the then Resident medical officer of Narayanganj General hospital held the post mortem examination on the dead body of Rima and he found the following injuries on the dead body.

1. one sharp cut injury 1"x1/2"x muscle deep in between the left of the right index and thumb finger.
2. one sharp cut injury 1"x1/2"x on the right side of the frontal bone.
3. one sharp cut injury in the medial aspect of the right nipple, measuring 2’x muscle deep.
4. Seven sharp stab injuries which are ragged on the middle and left of the abdomen of different size and shape with cavity deep by which intestinal coils are injured and came outside the abdomen.
5. One sharp cut injury below the right inguinal region 3”x1/2”x1”x1/2”x muscle deep. He also found there injured area in the left lobe of the liver.
6. One deep dissection he found dark clotted blood on the right parietal bone under the scalp. Both the chambers of the heart were empty. Dark clotted blood was present in the abdominal cavity due to injuries of the small intestines, mesocolon and liver.
7. The injury of the right parietal bone under the scalp may be caused by any blunt weapon. In the opinion of the post-mortem doctor the death of Rima was due to shock and haemorrhage, resulting from the above mentioned injuries which were ante-mortem and homicidal in nature.

15. The defence also admitted that Rima did not die a natural death, but was murdered by inflicting the injuries found on the body by the post-mortem doctor.

The only material point which called for determination in this case was whether accused Munir hossain committed the murder by intentionally or knowingly causing the death of his wife Rima and whether hosne Ara khuku abetted Munir and in consequence of abetment Rima was murdered.

16. The cardinal principle of criminal jurisprudence is that the accused must by presumed to be innocent unless otherwise proved. The onus of proving all the ingredients of an offence is always upon the prosecution and at no stage it
shifts to the accused. Even in cases where the defence of the accused does not appear to be credible or is palpably false that murder does not become any the less. It is only when this burden is discharged that it will be for the accused to explain the facts within his special knowledge or to controvert the essential elements in the prosecution case which would negative it.

17. There is no eye-witness to the occurrence which led to the murder of Rima. At the time of occurrence accused Munir and Rima were only in the pajero jeep being an inanimate object cannot speak and Rima is dead and consequently the only person who can give account of how Rima was murdered is her husband accused munir hossain. It was only within the special knowledge of munir and he could only say how and under what circumstances and who murdered Rima.

18. The learned Attorney-General referred to the provision of section 106 of the Evidence Act and submitted that the burden of proving as to who murdered Rima and under what circumstances, lay upon the accused Munir hossain. Section 106 of the Evidence Act provides that when a fact is specially within the knowledge of any person the burden of proving the fact is upon him. Notwithstanding the provision of section 106 of the Evidence Act even if the accused Munir fails to discharge responsibility the onus lay on him. The prosecution is not relieved of its burden to prove beyond reasonable doubt that accused Munir had murdered his wife.

19. Accused Munir gave two versions as to who had murdered his wife, the earliest one was in his confessional statement Ext.50 recorded by the Magistrate PW 55. He confessed that he had murdered Rima by first striking her on her neck and head by empty coca cola bottle and thereafter by inflicting cut injuries by knife blow on her abdomen and other parts of her body and threw away the dead body in the khal. He gave the second version in his written statement at the fag end of the trial where he stated that some miscreants abducted Rima forcibly after injuring him on his right thigh by knife blow and that he was made unconscious by pushing needle in his arm and thigh and that when he regained his sense, he found himself inside a closed room at hotel Badar.

20. The prosecution case rests on the judicial confession made by accused munir which was recorded by the Magistrate PW 55, the alleged extra-judicial confession of accused Munir made before pws 32,33,36 and 37 and the facts and circumstances which appear from the evidence on record. The confession statement of Munir Ext. 50 recorded in accordance with the provision of section 164 of the code of Criminal procedure was signed by the confessing accused and the magistrate and, as such the Court shall presume under section 80 of the Evidence Act that the document is genuine and that the statement as to the
circumstances under which it was taken by the magistrate are true and the confession was duly taken.

21. In the confessional statement accused Munir expressly acknowledged his guilt for the offence of murdering his wife Rima for which he had been charged. He amongst other things, gave an account of his love with accused khuku during the period from 1988, his marriage with Rima in December 1988, his realisation after one month of his marriage that Rima was not the wife of his liking and thereafter his frequent meeting with khuku, detection of marks of lipstick on the collar of his shirt by Rima and as a consequence his kicking Rima on her back and his decision to divorce her. He also stated in the confessional statement that his assurance to Rima on 5-4-88 that he would forget Khuku and would not keep connection with her, bringing of khuku before Rima in his garment factory for a face to face encounter where Rima protested and asked Khuku not to mix with her husband at that time Khuku wanted to know his position from the mouth of Munir but Munir remained silent when Khuku branded Munir as a cheat and left the place with tears in her eyes by telling Rima that she would teach her a good lesson and would see who wins. Accused Munir thereafter narrated about his journey to Chittagong with rima by his pajero jeep on the night following 6.4.89 and his return journey with Rima by same pajero jeep on the night following 8.4.89. In his confessional statement Munir thereafter gave a description as to how he had killed Rima at the place of occurrence and where and how he concealed the alamats, the abandonment of his pajero jeep at a place opposite to saidabad bus terminal and his going from saidabad to badar hotel at sutrapur and his extra judicial confession before PWs 32, 36 and 37 and his attempt to commit suicide at Badar hotel. He has also stated that the knife which has been seized by the police was the knife with which murder of Rima was committed by him and that the blood stained trouser which was seized by the police was in his wearing at the time of murder of Rima.

22. Accused Munir did not retract his confession by filing any petition through the jail authority. He retracted his judicial confession by filing a typed written petition in the court of magistrate on 17.5.89 wherein he stated that the police threatened him by saying that if he did not make judicial confession as per their dictation, he would be implicated in various cases one after another and also his parents would not be spared and that the state of affairs he became very much upset and bewildered and taking advantage of this situation, the police persuaded him to be taken to a magistrate on 27.4.89 in the late hours of the day being heavily guarded by the armed police and he was compelled to make a false and tutored judicial confession in presence of police which was involuntary and untrue. In that petition Munir did not say who had murdered his wife and under what circumstances. He did not even disclose in that petition.
the story of alleged abduction of his wife Rima by miscreants from the Bishwa road near village Mizmizi, and her eventual murder by them as alleged in his written statement.

23. The judicial confession, though retracted, if proved voluntary and true can lead to conviction of an accused on its sole basis. In this connection Mr. Amirul Kabir Chowdhury, learned Deputy Attorney General referred to a decision of the Supreme Court in the case of State vs. Fazu Kazi alias Kazi Fazlur and others reported in 29 DLR (SC) 271 in which their lordship observed:

“It is to be observed that a conviction of the confessing accused based on a retracted confession even if uncorroborated is not illegal if the court believes that it is voluntary and true.”

Mr. Abdul Malek, the learned Advocate for accused Munir, on the other hand, has contended that a retracted confession of an accused cannot form the basis of his conviction unless it is corroborated by other reliable evidence and in support of his contention he has relied on a decision of the Division Bench of this court in the case of State vs. Ali Kibria reported in 43 DLR 512 in which one of us was a party. It was observed in that case that a retracted confession needs corroborations in as much as it is always open to suspicion and cannot be acted upon unless corroborated by independent and credible evidence. It is not a rule of law rather than a rule of prudence. A confession of an accused can form the basis of his conviction only if it is found to be true and voluntary. For the purpose of ascertaining truth or otherwise of the confession it is necessary to examine the other evidence on record and the circumstances appearing therefrom in order to arrive at a conclusion as to the truth or otherwise of the confessional statement and in order to do so the court would have to see if other evidence on record corroborates the confession. So the decision in the case of Ali Kibria as to the necessity of corroborations has no inherent difference with the Supreme Court’s decision reported in 29 DLR (SC) 271.

24. We propose to discuss the fact relating to the voluntariness and the truth of confession at a later stage when we deal with the evidence of the recording magistrate and the investigating officer. At this stage we propose to discuss the evidence of the PWs in order to find out whether the evidence on record and facts and circumstances established by the evidence proved the case of the prosecution beyond reasonable doubt and whether these afford corroborations to the confession of accused Munir that he had killed his wife Rima. The evidence of PW 2 Kohinur Nizam, mother of the deceased, PW 3 Abul Farah and PW 6 Laila Parvin Hossain proved that in the month of November, 1988 there was a proposal for the marriage of accused Munir Hossain with Sharmin Rima and during the end of that month arrangement was made for seeing the proposed bride and the bridgroom in the house of PW 6 Laila Parvin Hossain
where Munir along with his parents and others came and Rima along with her mother PW 2 and Mama PW 10 came there. Both the parties accepted the proposal and their evidence show that no date was fixed in November when proposal was accepted by both the sides but on the proposal made by the parents of Munir on 11th December, 1988, the marriage was solemnised at about mid night on that date which was followed by “Rusmat” on 31.12.1988 and “Walima” on 2.1.89. After the marriage Rima used to live with her husband at his Dhanmondi residence and used to occasionally visit the house of her mother PW 2 Kohinur Nizam. The evidence of PW 2 shows that when Rima visited her in February, 1989 she noticed marks of darkness on the eyes of Rima and on enquiry Rima did not reply. This statement of PW 2 has been construed by the learned Sessions judge as an indication of unhappy conjugal life of Munir and Rima. Mr. Malek, learned advocate appearing for accused Munir, has contended that the inference drawn by the learned sessions judge from the aforesaid statements is erroneous in as much as the marks of darkness in the eyes of a newly married female may be due to various causes more common cause being sleeplessness at night. The alleged sleeplessness may also be the result of unhappy relationship between the husband and wife. Accused Munir stated in judicial confession that after one month of the marriage he realised that Rima was not a wife of his choice or liking. This statement of Munir coupled with the notice of darkness in the eyes of Rima by her mother indicated that the relationship of Munir and his wife was not happy. Munir again started meeting his paramour Khuku at Lalmatia House as before. The relationship between accused Munir and his wife took a worse turn on the night of 29.3.1989 when Rima found marks of lipstick on the collar of the shirt of Munir.

25. PW 6 Laila Parvin Hossain stated that in the morning of 30.3.89 Rima rang her up from house of Dr. Mehrun Nessa and requested her to go there and accordingly she went there. After she reached there Rima told her that she noticed marks of lipstick on the collar of shirt of Munir and when she protested Munir beat her. PW 6 stated that she protested to the parents of Munir about beating of Rima by Munir but they remained silent and assured to look into the matter. It is in the evidence of PW 6 that in the evening of that day Rima came to her house and informed that her mother in law Dr. Mehrun Nessa rebuked her for reporting to her about beating by Munir and PW 6 protested to Dr. Mehrun Nessa over telephone. After some time Dr. Mehrun Nissa came to the house of PW 6 and by persuasion took Rima to the Dhanmondi residence.

26. The evidence of PW 6 corroborates confessional statement of munir where he stated that on one night Rima noticed marks of lipstick on the collar of his shirt in the Dhanmondi residence and that Rima made a row over it with him and a result which gave three kicks on the back of Rima and decided to divorce her. The situation took further bad turn when Rima found out on 2.4.89 the
existence of the Lalmatia house which was hired by accused Munir Hossain as Managing Director of National Trading House with effect from 1.7.88 from its owner Mustafur Rahman, son of PW 41 under a lease agreement Ext. 44 and learnt about love and illicit sexual relationship of Munir with Khuku. Deceased Rima reported the discovery of Lalmatia house and existence of Munir’s paramour Khuku to her mother PW 2 on the same night. PW 2 stated that on 2.4.89 Rima learnt about that Lalmatia House from Ali Ahmed, a karmachari of Munir’s garment factory and immediately she rushed to that Lalmati house by a car of her maternal uncle PW 10 driven by driver PW 9 Mosharraf Hossain. On reaching that house Rima asked about the house from its Darwan Asgor who told her that accused Munir took Bhara of that house and that some time before accused Munir went out by the jeep with a women named Hosne Ara Khuku. On hearing this Rima returned to her father-in-law’s house at Dhanmondi and reported this to her parents in law and Nanad and finding no response Rima returned to her mother’s house narrated the matter to her and wept throughout the night. Accused Munir also admitted this fact in his written statement where he stated that on 2.4.89 Rima found out the existence of Lalmatia house as well as the existence of his paramour Khuku and that on returning to his Dhanmondi house she started weeping and alleged that he had cheated her and that on that very day Rima left for her mother’s house at Eskaton by telling Munir that she would not come back to his house again. The evidence of PW 3 Abul Farah shows that on 2.4.89 he rang up accused Munir to his office but Munir expressed his inability to go there as that was the day of this great disaster. He was suffering from mental restlessness and was contemplating to divorce his wife on that day for which all papers had already been made ready. PW 3 however, requested Munir not to finalise the divorce without further discussing the matter with him. It further appears from the written statement that Munir, after considering the matter deeply decided to disclose everything to Rima and accordingly asked Rima over telephone on that night and asked her to come to his house and Rima told that she would come on the following day and that Munir again talked to Rima on the following morning and sent the transport for bringing her to his Dhanmondi house and she came at about 10.00 am on 3.4.89.

27. The evidence of PW 3 Abul Farah shows that in the evening of 3.4.89 Munir accompanied by his wife, Sharmin Rima went to his house, expressed repentance for giving trouble to Rima in various ways and assured that he would never do so in future. On that day PW 3 for the first time hard from Rima that Munir had love with a woman named Khuku who was kept by Munir in a hired house at Lalmatia and that due to this disclosure Munir felt unhappy and embarrassed. As Munir had already expressed his repentance PW 3 requested Rima not to mention any more about Khuku. On the point of
expression of repentance by Munir PW 2 Kohinoor Nizam stated in her
deposition that in the evening of 4.4.89 Munir and Rima came to her house and
stayed there for about an hour. During that period Munir sought forgiveness
and blessings from PW 2 and expressed repentance by admitting that he had
maltreated Rima though she was a good girl. In his written statement munir
stated that his wife Rima after hearing him forgave him for his past conduct
and they both resolved to lead a happy married life. In the written statement
Munir confirmed the evidence of PWs 2 and 3 about his repentance for his
past conduct and seeking forgiveness and “doa” from PW 2. This was followed
by encounter between Rima and Khuku on 5.4.89 at 5/5.30 PM in the garment
factory of Munir in his presence. PW 2 Kohinoor Nizam stated in her evidence
that at the time of face to face encounter at the garment factory Rima told
Khuku “words in Bengali language”.

Munir and Rima came to the house of PW 2 and stayed there at night when
Rima disclosed here talk with Khuku as quoted above. In reply to the cross
examination on behalf of accused Khuku PW 2 denied her suggestion that the
story of discovery of Lalmatia house on 2.4.89 and face to face talk between
Rima and Khuku on 5.4.89 were not true. But Munir did not challenge the
evidence of PW 2 on this point. He rather admitted about the encounter between
Rima and Khuku in his presence in his confessional statement as well as in the
written statement.

28. The threat of accused Khuku at the time of encounter at the garment factory
as stated in the confessional statement has been corroborated by the evidence
of PW 2 and the written statement of accused Munir himself.

29. After the encounter at the garments factory on 5.4.89 between Rima and
Khuku, the latter (Hosne Ara Jafar) got herself admitted at Samarita Nursing
Home, Green Road, Dhaka on that very day at 11.30 PM. The evidence of PW
4 Dr. Syed Ahmed, Medical Officer, Samarita Nursing Home, shows that the
patient Hosne Ara Jafar complained that she was suffering from family trouble,
insomnia and took Pethedrin injection before she came to the Nursing Home.
PW 4 after examining the patient, prescribed necessary medicines as it appears
from the treatment file Ext. 11. Ext. 9 is patient Admission Register and Ext.
10 is the relevant entry no. 493/89 therein relating to the admission and discharge
of Hosne Ara Jafar written by PW 62 Syed Abdul Mannan, Administrative
officer of the Nursing home. It appears from Ext. 10 that Khuku was discharged
on request from the nursing home at 10 AM on 6.4.89 i.e. on the following day
of her admission it is evident even to naked eyes that 7.4.89 was first noted as
the date of discharge but the date was subsequently made 6.4.89 by over writing
and interpolation. In cross examination PW 4 admitted this fact but could not
say who changed the date of discharge. PW 62 who wrote the entry Ext. 11,
stated that the patient was discharged on 6.4.89 at 10.00 AM, but the prosecution did not obtain any explanation from him as to why, under what circumstances and who made the over writing and interpolation. PW 62 did not say that through mistake he first wrote the date of discharge as 7.4.89 but subsequently corrected it by writing figure “6” over the figure “7”. This change of date of discharge appears to be highly suspicious and in the absence of any explanation on the side of the prosecution, we are inclined to believe that the discharge was purposely changed from 7.4.89 to 6.4.89 for an oblique motive.

30. The other prosecution witness from the Samarita Nursing Home is its Darwan PW 8 Md. Hanif, whose period of duty was said to be from 8 AM to 8 PM. He stated that on 6.4.89 at 11 AM while he was on duty at the gate of the Samarita Nursing Home, one female patient came out from the Nursing home and asked him to call a rickshaw for her. He accordingly called a rickshaw and at about that time a sky blue coloured jeep came there and a man got down from the jeep and went to the female patient who was weeping standing there. He further stated that the man then consoled the patient by saying “words in Bengali”.

Thereafter the man left by his jeep and the female patient left by the rickshaw. He identified in dock Munir and Khuku as the man and the female patient. In cross examination PW 8 stated that the jeep came after 2/3 minutes of his bringing the rickshaw and the jeep was parked 20/30 yards to the east of the gate of the Nursing home. It is not understood why Khuku was standing inside the gate even after a rickshaw was brought for her as asked for in cross examination PW 8 stated that the talk between Khuku and Munir took place 5/7 minutes inside the gate and he noticed nothing unusual in their talk. It seems highly improbable that a Darwan on duty at the gate would hear and meticulously remember the language and the subject matter of the talk between a man and woman which took place at some distance and would be in a position to reproduce the same to the police after more than a month. This evidence does not inspire any confidence and we are inclined to discard his evidence which is nothing but a concoction.

31. PW 8 did not tell about this meeting and talk between Munir and Khuku to the police or anybody else till the investigating officer came to the nursing home and found him out and examined him on 11.5.89 and his statement was recorded by the magistrate PW 49 on 17.5.89.

32. Mr. Abdul Mafek, the learned advocate appearing for the condemned prisoner Munir Hossain, questioned as to how the police could know that PW 8 and other PWs namely PWs 11, 14, 22, 31, 32, 33, 34 and 45 who did not disclose their knowledge of the incriminating facts of this case to anybody would come to examine them under section 161 of the Code of Criminal
Procedure or to take them to the magistrate for recording their statements under section 164 of the Code. He has submitted that the evidence of all such witness should be discarded as got up and and procured witnesses.

33. The learned attorney general has submitted that the investigating officer might have got some clue or information from some undisclosed source that those witnesses were acquainted with the facts and circumstances of the case and that no objection could be taken about the credibility of those witnesses when the defence had not cross examined the investigating officer on that point and that in the circumstances the prosecution was under no legal obligation to disclose such source unless the defence directed their cross examination on that point and wanted to know the source. The admission of the learned attorney general seems to be of substance and the defence could take no objection on that score.

34. Mr. A. Malek has next contended that the evidence of PW 8 and other prosecution witnesses who were examined by the investigating officer long after the occurrence must be left out of consideration. In support of his contention he has referred to the decision in the case of Monowarullah & Ors. Vs. State reported in 40 DLR 443 in which a Division Bench of this court after referring to the decision of the Appellate Division in the case of Moslimuddin and others vs. State reported in 1987 BLD (AD) 1 held that the recording of the statement of witnesses under section 161 of the CrPC after a long lapse of time casts doubt upon the prosecution case. In the Appellate Division’s case referred to above an eye witness to the occurrence was examined and his statement was recorded under section 161, CrPC after a lapse of 34 days from the date of occurrence and it was held that the Appellate Court rightly disbelieved the said eye witness to the occurrence who were expected to disclose without delay their knowledge of the person whom they had seen to commit the crime and the principle enunciated in those cases have no application in the present case where the witnesses concerned were not eye witnesses and had no personal interest in the matter.

35. After the encounter on 5.4.89 at garments factory Munir and Rima went to the residence of PW 2 and stayed there at night. They left the Eskaton house of PW 2 at 10 am on 6.4.89 and again came back there at 4.00 pm with full preparation for going to Chittagong. They left for Chittagong at 7.30 pm by the Pajero jeep of Munir.

36. The evidences of PWs 13 to 18 and 35 who are all employees of Hotel Saikat of Chittagong, show that Munir and his wife Rima reached Chittagong in the morning of 7.4.89 and stayed in that hotel till they left for Dhaka at about 9/10 pm on 8.4.89. During their stay at Chittagong they had several telephone calls to Dhaka in the house of PW 2 Kohinoor Nizam, Munir’s
mother Dr. Meherun Nessa and one call to PW 3 Abul Farah. PW 3 Abul Farah stated in his deposition that on 8.4.89 at about 11 am Rima rang him up at his office from the counter of hotel Saikat and informed him about Munir’s ill treatment, abuse and beating her over Khuku’s affairs and also about want of money for meeting the hotel bills. PW 3 asked acquitted accused Mostaque, manager of Munir to send money but the manager expressed his inability to do so without order of his employer Munir. In cross examination PW 3 stated that he did not inform Rima’s mother about Munir’s beating Rima while at Chittagong and her asking for money over telephone. Mostaque, who was in the dock at the time of evidence of PW 3 did not challenge the evidence of PW 3 that he asked him to send money to Munir at Chittagong. The evidence of PW 3 which virtually remained unshaken leads us to an irresistible conclusion that Munir did not spare Rima even during their short stay at Chittagong and this fact amply demonstrated that the alleged expression of repentance by Munir to his wife Rima, his mother-in-law PW 2 and PW 3 Abul Farah on 3rd and 4th April 1989 and his assurance of good conduct and leaving Khuku for good were mere pretension resorted to for the purpose of bringing Rima to Chittagong for her eventual murder. The evidence on record do not show that during their stay at Chittagong Munir at any time went out of the hotel with Rima. Rather it has been elicited in cross examination from PW 14 an employee of hotel Saikat, that on 8.4.89 he saw the lady (i.e. Rima) to go out of the hotel by a rickshaw. It sounds a bit unusual that Rima would go out alone by a rickshaw leaving Munir in the hotel but such an event could arise only in the case of disagreement and strained relationship between Rima and Munir.

37. There is no dispute that Munir and his wife Rima left the hotel Saikat on the night of 8.4.89 between 9.00 and 10.00 PM. It is admitted and also evident from the evidence of PW 23 and 24 the documents proved by them that Munir’s Pajero jeep crossed the Daudkandi and Meghna Ferry Ghat between 1 and 1.30 AM on 9.4.89 on their way to Dhaka. It is further admitted that Munir and his wife Rima were in the said Pajero jeep which safely reached up to the village Mizmizi and there the occurrence took place.

38. There is no living person except Munir who can give us an account as to how the said occurrence took place which resulted in the murder of Rima. Munir himself gave two different versions of the occurrence one in his confessional statement Ext. 50 and another in his written statement. These two versions of Munir about the occurrence are so different that one cannot be reconciled with the other and one of the versions must be untrue. After the occurrence Munir alone reached Badar hotel at Sutrapur leaving the dead body of Rima at the place of occurrence which is by the side of Mouchak Sarak of village Mizmizi about 100 yards to the south of Bishwa road. After the occurrence the Pajero jeep of munir was found abandoned at a place to the
south of Saidabad bus terminal and on receipt of information about the jeep PW 56 Delwar Hossain, traffic inspector brought the jeep to Demra police station with the help of a wrecker. According to the prosecution allegations, Munir went to the Hotel Badar from Saidabad and on the way he met PW 32 ay Dhupkhola field at about 4.00 am. PW 32 Rokeya Begum is a sweeper of the Municipal Corporation. She stated that on 2nd Ramadan 1989 at about 4.00 am she along with her son PW 33 Nuruzzal Hossain were cleaning the drain of Dhupkola field when she found a man wearing a lungi and sando ganji came near her and asked for shelter. On seeing the man they got frightened and she along with her son started going back to the residence but that man followed them, entered their hut and took his seat on their bed. PW 32 further stated that she asked the man as to why she would give shelter and what was his name and he replied that his name is Munir and that he had come here after murdering his wife. At this PW 32 asked the man to go out of the room. When the latter asked where he would go and in reply PW 32 showed him the nearby hotel Badar. It has been elicited in cross examination that out of fear PW 32 did not disclose this to anybody and that she did not meet any police. She was not examined by the investigating officer and it appears from the order sheet that Mr. Rafiquzzaman Magistrate recorded her statement under section 164, CrPC on 17.4.89. and corroborated the evidence of his mother in all relevant particulars including the confession of Munir that he had murdered his wife.

39. PW 36 Abdul Jalil is a former boy of Hotel Badar. He stated that on 9.4.89 at about 5.00 am when he came out of the bath room of the sweepers colony he found that a gentleman was going out of a room of the Sweeper colony and that man requested to take him to Badar hotel. He took Munir to Badar hotel and woke up Darwan PW 37 Ali Hossain from sleep and asked for a room. PW 37 allotted room no. 203 to Munir who paid Take 60/- as rent. PW 36 Abdul Jalil took Munir to his allotted room and while he was coming out Munir told him that he was in trouble and that he had murdered his wife. PW 36 asked Munir to sleep without uttering such incoherent words. In his cross examination PW 36 stated that he was an employee of Dhaka Municipal Corporation since 12.6.89 and if this was so it becomes improbable that PW 36 would live in the colony at 17/2 Walter Road at the time of occurrence. PW 36’s taking Munir to hotel Badar may not raise any suspicion as he was a former boy of the said hotel.

40. PW 37, Ali Hossain the Darwan of hotel Badar, corroborating the evidence of PW 36, stated that in his presence Munir, who was allotted room no. 203, told Jalil that he had murdered his wife. The investigating officer examined PW 37 on 22.4.89 and before that the magistrate PW 48 recorded the statement of PW 37 under section 164 of the Code Of Criminal Procedure on 16.4.89. In the statement recorded under section 164 ,CrPC . Hossain neither named PW
36 Abdul jalil nor stated about the alleged extra judicial confession of Munir that he had murdered his wife. PW 37 denied the defence suggestion that some people brought Munir to the hotel in an unconscious state and by themselves paying money got him admitted in the hotel. The evidence of PWs 32, 33, 36 and 37 as discussed above proved that within few hours of the occurrence Munir confessed before them that he had murdered his wife. The evidence about the extra judicial confession from the mouths of PWs 32, 33, 36 and 37 who appear to be unbiased, not known to Munir from before, not to speak of being inimical to him and in respect of them something is brought out which might tend to indicate that they might have a motive for attributing an untruthful statement to Munir. In this circumstances we are inclined to believe their evidence as to the extra judicial confession made before them by Munir. Their evidence corroborates the confessional statement of Munir wherein he stated that he confessed to PWs 32, 33, 36 and 37 that he had murdered his wife.

41. The next important witness in this case is PW 38 Rameshwar Das, the manager of Hotel Badar. His evidence in chief was not all challenged in cross-examination by any of the accused persons. He stated that he came to the hotel at 3.30 pm on 9.4.89 and within 10/15 minutes the hotel boy PW 39 Shafiq informed him that the boarder at room no. 203 was showing unusual behavior. He went to that room no. 203 and found the door open and the boarder loitering and shouting ‘murder’ ‘murder’. On his query the boarder only shouted ‘murder’ ‘murder’. PW 38 came back to the counter asking the boy Shafique to keep a watch on that boarder. After 10/15 minutes Shafique cried out by saying that the man was hanging himself. After this PW 38 sent the hotel boy Kashem to Sutrapur Thana and himself went to that room and found through the open window that the boarder of that room was tying up his neck with the hotel bed sheet with the hook of the fan and that the police along with other people who assembled there broke open the door and brought down that man from the hanging position and thereafter sent him to Mitford hospital. That man was identified in the dock as accused Munir. The evidence of PW 38 demonstrated the falsity of the case made out by accused Munir in his written statement that the miscreants abducted his wife Rima from Bishwa Road near the place of occurrence after causing injury on his thigh, took control of his Pajero jeep made him unconscious by pushing needle and brought in him unconscious state to hotel Badar. If Munir was unconscious when he was brought to the hotel, the employees would not have accepted such a boarder but would have directed the persons carrying him to take him to a doctor or hospital. The evidence of PW 38 shows that the door of the room no. 203 was open when he went there immediately after 3.30 pm and found Munir shouting ‘murder’, ‘murder’. When the door was open and Munir was under no restraint
he would have rushed to the nearby Sutrapur police station to inform the police about the alleged abduction of his wife from Mizmizi and bringing him to Hotel Badar by miscreants in unconscious state or he would have rushed to his mother in law to inform his near and dear ones about the occurrence. Accused Munir, without doing any of the acts which were natural for him continued shouting murder murder and thereafter made an attempt to commit suicide.

The evidence of PW 38 finds support from the defence suggestion made to the investigating officer PW 66 that Munir shouted ‘murder ‘murder’ in the hotel and finding no response from any quarter he made an attempt to commit suicide. After Munir was taken to the Mitford hospital he could telephonically contact his mother but Munir did not make any such attempt to contact his mother in law through the doctor of the Mitford hospital. It transpires from the confessional statement that Dr. Mehrerun Nessa, in fac, came to the hospital as asked for by Munir but neither Munir nor his mother informed about the alleged abduction and whereabouts of Rima to PW 2 or any other relation of deceased Rima. The fact that Rima was with Munir till arrival at the place of occurrence before the alleged abduction or murder and that Munir made no attempt to inform the incident to police, relations and friends and his shouting ‘murder’ ‘murder’ and attempt to commit suicide are all confirmatory of the culpable conduct by accused Munir. The alleged abduction of Rima and the manner of occurrence as stated by Munir in his written statement appear to be an after thought and a fiction of imagination pure and simple. The defence suggestion put to PWs that Khuku with the help of Din Mohammad and Salim got Rima murdered is not borne out by any evidence and circumstances and this appears to be an absurd story. The defence of the accused was against the weight of evidence and the established circumstances.

42. Sutrapur PS case no. 14 dated 9.4.89 u/s 309 of the Penal Code was started against Munir for his attempt to commit suicide. Munir was shifted to Rajarbag police hospital on 10.4.89 when he was shown arrested in connection with this murder case being Siddhirganj PS case no.2 (4) 89 u/s 302 of the Penal Code.

43. Mr. Abdul Malek, learned advocate for accused Munir, has made a grievance and argued that mere tendering of PW 39 Md. Shafiq a boy of Hotel Badar and PW 46 Salahuddin a witness in the seizure list Ext. 37 had prejudiced the accused in as much as they could not be cross examined in the absence of any evidence in examination in chief and, as such, adverse presumption u/s 114(g) of the Evidence Act would arise against the prosecution on the footing that these witnesses have been withheld by the prosecution. In support of his contention he has referred to the decision in the case of Sadeppa Gireppa Mutgi and others vs. Emperor reported in AIR 1942 Bombay 37 in which it has been observed that the practice of tendering for cross-examination should only be
adopted in cases of witnesses of secondary importance and where the prosecution have already got sufficient evidence on a particular point and do not want to waste time but at the same time do not want to deprive the accused of the right of cross examination of such witnesses they tender him for cross examination. The process of tendering a witness for cross-examination certainly should not be employed in the case of an important eyewitness. He has next referred to the decision in the case of Serajullah vs. State reported in PLD 1964 (Dhaka) 420 in which a Division Bench of the then Dhaka High Court observed that as a rule of prudence material witness should not be merely tendered but should be asked by the prosecution to give evidence. Tendering should be confined to witness of secondary importance only. If the witness is important, the prosecution should call him and examine him in chief and should not tender him. When sufficient evidence has already been led the tendering of a witness will not be treated as withholding of such witness unless it is from oblique motive. In the instant case the tendering of PW 39 Shafiq who call PW 38 to room no. 203 of hotel Badar is of the significance in as much as the evidence of PW 38 has not at all been challenged by way of cross examination where he stated that Shafiq called him to room no. 203 of hotel Badar where he went and found the door open and the boarder ‘Munir loitering and shouting ‘murder’ ‘murder’. Since the evidence of PW 38 has not been challenged the further examination in chief of PW 39 was wholly unnecessary.

44. Now coming to the recovery of incriminating articles indicating that Munir was the murderer of his wife, it may be stated that the then investigating officer, CID Inspector Haider Ali took Munir to the place of occurrence on 12.4.89 and from there the investigating officer took him to a place one kilometer to the west of the place of occurrence and recovered from the side of ditch to the west of Hossain Villa of Sanarpur of village Mizmizi a trouser Ext. LV and an underwear Ext. LVI under the seizure list Ex. 37 in the presence of PW 28 Siddique Hossain and PW 46 Salahuddin who was tendered for cross examination. Both the seized clothes were stained with blood and mud and there was a light mark in the trouser near about the right leg portion. Accused Munir also signed the seizure list by making an endorsement found in my presence’. This shows that Munir not only pointed out the lace from where these stained trouser and underwear were recovered but these were also found in his presence. Munir showed the place where he threw the trouser and underwear after the murder to the police while he was in their custody but this is admissible in evidence u/s 27 of the Evidence Act as that led to the discovery of Munir’s blood and mud stained trouser and underwear. In cross examination seizure list witness PW 28 Siddique Hossain stated that at the time of seizure on 12.4.89 he did not notice any mark of injury on the person of Munir. Munir did not disclaim the ownership of the seized trouser and the underwear. The
seizure of these clothes of Munir from the placed pointed out by him corroborated his confessional statement that the seized trouser was in his wearing at the time of murdering Rima. This recovery of Munir’s trouser and underwear stained with blood from the place pointed out by him and in his presence unerringly indicated that Munir committed the murder of his wife and that the seized trouser and underwear were in his wearing at the time of inflicting of injuries on the person of Rima which resulted in her murder.

45. Mr. Malek referred to the evidence of PW 45 the post mortem doctor in cross examination where he stated that in order to cause injury on the left lobe of the liver the blade of the knife should be at least 3 inches but the blade of the seized knife Ext. LIV being on 2 ½ inches, this cannot be the weapon with which Rima was murdered. The force or the velocity of the blow may make some difference and the injury may reach more than the length of the blade. Furthermore, in the case of a slim person with a small belly, the lobe of the liver may be located at a place within 2 ½ inches. The knife Ext. LIV which was seized under seizure list Ext. 36 was the knife by which Munir murdered his wife and all controversy over it has been set at rest by Munir himself by stating in his confessional statement that it was the knife with which he had murdered Rima.

46. PW 25 Mostafizur Rahman Belal, a boy aged 14 years, alleged to have got this knife on 13.4.89 when he along with Masud went to a tank to the north of Bishwa road to catch fish. He did not disclose about this knife to his companion Masud and concealed it in the fold of his lungi and brought it home. In his evidence PW 25 stated that on 22.4.89 at about 4.30 PM while he was cutting mango with that knife, his father PW 26, Din Mohammad saw the knife and asked him from where he got it. PW 25 told his father that he got it from the tank on 13.4.89 whereupon PW 26 took the knife from him and showed the same to Abdus Sobhan, Aziz and others and discussed about it. As per their discussion, PWs 25, 26 and 27 went to Demra PS and handed over the knife which was seized by Darogo PW 52 in presence of PWs 26, 27 and one Azizul Haq on 23.4.89.

47. Accused Munir did not dispute that the knife Ext. LIV belonged to him. He rather asserted that this knife was inside its cover Ext. LX which was kept inside his almirah at his Dhanmondi residence. The contention of accused Munir is that though the knife was recovered along with the cover from his Dhanmondi residence on 13.4.89 the cover only was shown as a seized article in item no. 6 of the seizure list and the knife was subsequently shown in another seizure list marked Ext. 36. The seizure under the seizure list was made in presence of PW 31 Katu Miah and one Mahmudul Huq, an inmate of the house of Munir. Dr. Abul Kashem, the father of accused Munir, was present at the
time of seizure of the articles under seizure list Ext. 42 and signed the seizure list with date. If the knife Ext. LIV was inside its cover Ex. LX at the time of the seizure neither Dr. Abul Kashem nor the other seizure list witness Mahmudul Huq, an inmate of the house of Munir, would have signed the seizure list without any protest when in item no. 6 it was stated that only empty box of the Victorinox Knife was recovered and seized.

48. Mr. Abdul Malek learned advocate for the accused Munir has submitted that the provision of section 103 of CrPC having not been complied with by calling at least two respectable inhabitants of the locality at the time of search and recovery of articles under seizure list Ext. 42, the evidence regarding the recovery of only the empty box of Victorinox knife Ext. LX should be left out of consideration and in support of his contention he has referred to the decision in the case of Panchu alias Paigam Ali vs. State reported in 26 DLR 297 where it has been held as under:

“The failure to comply with the provisions of section 103 leave the evidence in an unsatisfactory condition, so that there is reasonable doubt as to whether the offending articles were really in the possession of the accused, the conviction ought not to be sustained.”

He has next cited another decision of this court in the case of Daud Ali vs. State reported in 27 DLR 155 wherein it has been held:

“In the absence of any compelling or substantial reason the provision of section 103 of the Code of Criminal Procedure must be complied with while conducting a search.”

These cases arose out of recovery of unauthorized arms leading to prosecution for the offence punishable under the Arms Act.

49. As against this Mr. Amriul Kabir Chowdhury, the learned Deputy Attorney General, referred to the decision in the case of Mujibur Rahman and others vs. State reported in 39 DLR 437 in which it has been held that:

“The procedure laid down in section 103 of the Code of Criminal Procedure is not required to be followed at the time of seizure of alamats by investigating officer. Any person present at the time of seizing alamats can be made witness to the seizure list.”

In view of the position that there is no other separate provision for search and seizure of alamats during investigation other than section 103 of the Code, we find it difficult to accept as correct the proposition aldi dwon in the case of Mujibur Rahman referred to above and we are of the view that in the absence of compelling reason the provision of section 103 must be complied with in conducting, search and seizure during investigation, and in case of failure to
comply with the provision of section 103 the prosecution must offer plausible satisfactory explanation in order to convince the court that no prejudice has been caused to the accused because of the absence of the respectable persons of the locality. The provision of section 103 of the Code is meant to safeguard against the planting of incriminating material or removal of any such material at the time of seizure. In the instant case before us the defence has suggested that the knife which was inside the box of the knife was removed and shown in another seizure list though it was seized along with box of the said knife. The presence of Mahmudul Haq who is an inmate of the house of accused Munir, and Dr. Abul Kashem, the father of accused Munir were sufficient safeguard against removal of the knife and they would not have allowed removal of the knife and signed the seizure list if the knife was actually inside the box of the knife. Though respectable neighbouring witnesses were not called at the time of recovery and seizure of different articles from the Dhanmondi house of Munir and consequent non compliance of section 103 of CrPC no prejudice has been caused to the accused Munir as alleged removal of the knife was impossible because of the presence of Dr. Abdul Kashem and seizure list witness Mahmudul Haq. In the circumstances the lack of compliance with the provision of section 103 cannot raise any suspicion that only the empty box (item 6) was seized under the seizure list Ext. 42 and the knife was not inside. Consequently this will not render the seizure under seizure list Ext. 43 invalid in the facts and circumstances of the present case.

50. The leather cover with the description “Made in USA” Ext. LIII found by Habibur Rahman from near the place of occurrence was seized under seizure list Ext. 43 on 23.4.89 in presence of PW 20 and two others has no relevancy in as much as this was not the cover of the knife with which the murder was committed.

The seizure of the empty box of the knife with writings on its as Victorinox, the original Swiss Army Officer Knife from the Dhanmndi residence of accused Munir and the recovery of the knife with inscription reading as “Victorinox Switzerland Stainless Lotfrei” from a spot near the place of occurrence indicated beyond doubt that Munir at the time of going to Chittagong took that knife with him for the purpose evidently to use it for murder if required. This circumstance is incompatible with the innocence of accused Munir.

51. PW 46 is the witness to the seizure list Ext. 37 under which Munir’s trouser and underwear were seized from a place pointed out by him. The recovery and the seizure of these articles have been satisfactorily proved by other seizure list witness PW 28 Siddique Hossain who is a disinterested witness and further examination in chief of PW 46 would have meant mere duplication and was not necessary for the prosecution. The defence if they wanted to elicit
anything from PW 46 could do so by cross examining him and for this purpose he was produced and tendered by the prosecution. PW 39 was tendered as the defence did not at all challenge the evidence of PW 38 who stated about the report made to him by PW 39. Similarly, the examination of PW 46 was unnecessary in view of examination of the other seizure list witness PW 28. Hence the tendering of these witnesses cannot attract the provision of Section 114(g) of the Evidence Act to draw adverse presumption that if examined in chief they would not have supported the prosecution case. In consideration of the facts of the instant case, we are of the view that tendering of these witnesses and some other witnesses in this case were not done with any oblique motive and, as such, no adverse presumption can be drawn against the prosecution on that score.

52. The inculpatory facts furnished by the circumstances appearing from the evidence as discussed above are incompatible with the innocence of accused Munir and incapable of explanation upon any other reasonable hypothesis than that of his guilt. These circumstances clearly pointed to the conclusion that accused Munir was the murderer of his wife deceased Rima.

53. The next incriminating material has been furnished by accused Munir himself when he made a judicial confession which had been recorded on 27.4.89 under section 164 of the CrPC by PW55 Mr. R.K. Das Metropolitan magistrate Dhaka. PW 55 stated in his examination in chief that accused Munir Hossain was sent to him on 27.4.89 at 3.45 pm for recording his confessional statement u/s 164 CrPC. He allowed him two hours time for reflection and then put questions to him which he was required to do under the law. He had explained to accused Munir that he was not bound to make any confession and that if he does not make a confession it may be used against him and after obtaining the answer to these questions and other such questions mentioned in paragraph no.6 of the prescribed form for recording of the confessional statement, the magistrate was satisfied that the confession was voluntarily made and he appended a memorandum to that effect as required under sub section (3) of section 164 of CrPC. The confessional statement of Munir, as we have already indicated before has been corroborated by the evidence of PWs in all material particulars. In the circumstances, the confessional statement Ext. 50 of accused Munir can be the sole basis for his conviction for the offence under section 302 of the Penal Code if it is found that the confession was voluntary and true.

54. Mr. A. Malek has referred to the evidence of the magistrate PW 55 who admitted in his cross examination that he did not ask accused Munir as to where he was from 11.4.89 to 27.4.89 i.e. till he was produced before him for recording of his confession. On examination of the confessional statement we find that the magistrate ascertained this fact from the accused and noted the
same under paragraph 2 of the confessional statement and that Munir stated that he was taken to CID Bangladesh Dhaka on 12.4.89 and from there he was sent to the court on 27.4.89. The mistaken statement in cross examination was inadvertently made by the magistrate presumably because he did not look into the confessional statement before replying to the questions put to him in cross examination.

55. The instruction contained in paragraph 2 of the prescribed form recording the confessional statement is based on certain circular and its non compliance does not vitiate the confession as there is no legal requirement u/s 164 of the Code to ascertain the period during which the confession accused was under police custody. Such instruction is merely directory in nature and its non compliance does not vitiate the confession. In this connection reference may be made to the case of *Syed Sharifuddin Pirzada vs. Shahabat Khan* reported in PLD 1972 (SC) 363 relied on by Mr. Amirul Kabir Chowdhury, the learned Deputy Attorney General, where it has been held that such direction in criminal circular was directory in nature and its irregularity does not vitiate the confession.

56. Mr. Malek has referred to the statement of the magistrate in cross examination to the effect that before recording the confession he did not inform accused Munir that he would not be remanded to the police custody after the recording of confession and had contended that the failure of the magistrate to give such assurance to the confessing accused vitiated the confession. In this connection, he has referred to the decision in the case of *State vs. Ali Hossain* reported in 43 DLR 524 in which it was observed as under:

“In fact it is a practice that after recording the confession the accused person should be sent to the judicial custody and he would be informed before hand that he shall not be sent back to the police custody even if he does not make confession and if the accused is sent back to the police custody after recording the confession, in such a case obviously that voluntary nature of the confession stands vitiated”.

57. The fact of that case is absolutely different from the instant case before us in as much as though no assurance was given to the confessing accused that he would not be sent to the police custody after recording of the confession, the magistrate in fact remanded him to the jail custody after recording of his confession. There is no requirement under the law to give such assurance of the confessing accused unless the confession accused at the time of recording the confession or on a previous occasion made complaint to the magistrate about any inducement, promise or coercion by the police. In this connection, Mr. Amirul Kabir Chowdhury, the learned Deputy Attorney General has referred to a decision in the case of *Dipak Kumar Sarkar vs. State* reported in 1988
BLD(AD) 109 in which their lordships of the Appellate Division observed as under which is a complete answer of the contention of Mr. Malek.

“The only objection as to the confession raised before us is, that the magistrate before recording the confession did not inform the appellant that he would not be remanded to police custody even if he did not make any confession. There is no requirement under the law to inform the accused as above. Of course if the magistrate has any reason to believe that the accused is apprehensive of the police or that the police might have tortured or prevailed upon him during custody, he may assure him by telling him as aforesaid. But that is not to say that if it were not said (in a particular case) the voluntariness of the confession would be in doubt”.

In view of the principle laid down by the Appellate Division the non-assurance the accused Munir that he would not be sent back to the police custody after recording of his confession had not affected the voluntariness of the confession, particularly when there is no material before the recording magistrate from which he could have reason to believe that the accused was apprehensive of the police.

58. Mr. Malek then contended that a prolonged detention of accused Munir in the custody of CID for 16 days before recording of confession would militate against the voluntariness of the confession. In support of the contention he has referred to the decisions in the case of Rustam Ali & ors. Vs. State reported in 1989 BLD (HCD) 477, in the case of Natu vs. Uttar Pradesh reported in PLD 1956 (Supreme Court of India) 186 and in the case of Haji Year Mohammad vs. Rahim Din & Ors. Reported in DLR (WP) 58. In the case of Rustam Ali, the police arrested accused Giasuddin and took him to the Thana on 19.1.82 at 7.30 hours and he was produced before the magistrate on 21.1.82 on which date his confessional statement was recorded. From 19.1.82 to 21.1.82 he was in police custody though the law provides that such accused could be produced within 24 hours of his arrest. In that case the accused was kept in police custody without any order of the Magistrate under sub section (2) of section 167 of the Code of Criminal Procedure and consequently, it was held that the unauthorized detention for three days preceding the recording of confession indicated the involuntary nature of the confession. The facts of the other two cases referred to above do not show that the accused was kept in police custody under the order of remand passed by the magistrate under Section 167(2) of the Code of Criminal procedure, and, as such, the facts of those cases are different from the facts of the present case and consequently, the principle laid down in those cases can have no bearing in the present case before us. In the present case accused Munir was kept in the custody of the CID under orders of remand passed by the magistrate.
59. It will appear from the cross examination of PW 55 and the order sheet of the magistrate that accused Munir was given in police remand for six days by an order dated 11.4.89 which expired on 17.4.89 but he was produced before the court on 18.4.89 i.e. one day after expiry of the period of remand. Then by an order dated 18.4.89 the court allowed further police remand for five days which expired on 23.4.89 but after the expiry of the period accused Munir was produced in court on 24.4.89 and then by an order dated 24.4.89 the court allowed further remand for three days which ended on 27.4.89 on which date accused Munir was produced before the Magistrate and his confessional statement was recorded by PW 55. The delay of one day on two earlier occasions after the expiry of police remand, according to the learned Deputy attorney General Mr. Amirul Kabir Chowdhury, was due to mistake in calculation of the date by the investigating officer. This lapse on the part of the prosecution itself, in our view cannot indicate involuntariness of the confession as accused Munir did not complain to the magistrate of any inducement, threat or promise from any person in authority when he was produced before the magistrate on 18.4.89 and 24.4.89 or on the date he was produced for recording his confession. In the case falling under section 167 of the Code of Criminal Procedure a magistrate can order police remand for a period at the most of 15 days in the whole and the magistrate in this case did not exceed that period by his 3 successive orders of police remand.

60. It would appear from the evidence of the recording magistrate PW 55 that the confession of accused Munir was recorded beyond court hours i.e. from 6.00 pm to 9.00 pm. Mr. Malek has contended that the recording of the confession beyond the prescribed court hours vitiated the confession. We are unable to accept this contention in as much as accused Munir was produced before the magistrate at 3.45 pm and after giving two hours time for reflection, he started recording the confession at 6.00 PM which was completed at 9.00 PM. Where the accused is produced for recording confession immediately preceding the time for termination of the court hours, the magistrate is left with no other alternative but to record the confession after the court hours. There was no illegality in recording judicial confession after the court hours as there was satisfactory and plausible explanation for doing so and accordingly we find that the objection of Mr. Malek had no merit.

61. In the petition for retraction of confession accused Munir did not dispute that he made confessional statement before the magistrate. What Munir stated in the petition was that he was forced to make confession as a result of inducement and torture of the police. But at the time of cross examination of PW 55, the recording magistrate PW 66 the investigating officer and in the written statement accused Munir sought to make out a different case that he did not at all make any confession before the magistrate who copied the
confessional statement from the draft supplied by the investigating officer PW 66 and he was forced to put in his signatures thereon under threat and fear of the police. These two versions of the accused Munir, one in the petition for retraction and another in the written statement being absolutely contradictory no reliance can be placed on the allegations of the accused Munir on that score which appear to be an afterthought invented to avoid the confession made by him. We are not inclined to believe that the magistrate of this country has gone so low that a magistrate of first class would agree to copy from the draft supplied by the investigating officer a confessional statement of an accused charged with the offence of murder and would forcibly obtain the signatures of the accused in order to secure his conviction in a murder case. The material facts narrated in the confessional statement of accused Munir, particularly the commission of murder of Rima by him, have been satisfactorily corroborated in all material particulars by the evidence of the PWs and the circumstances appearing therefrom. In the facts and circumstances and discussions above, we are of the view that the confession made by accused Munir are voluntary and true and though it was retracted, the learned sessions judge rightly relied on the confessional statement of Munir for his conviction for the offence under section 302 of the Penal Code.

62. Mr. Serajul Huq, the learned advocate appearing for accused Munir has submitted that the learned sessions judge has not examined accused Munir in accordance with the provisions of section 342 of the Code of Criminal procedure and he has drawn attention that the learned sessions judge did not point to accused Munir the incriminating evidence that his trouser and underwear with marks of blood and mud recovered from the place pointed out by him and as such the accused Munir could not offer his explanation in respect of these seized articles. Accused Munir is a highly educated person and he was although present in court when the evidence relating to recovery of his trouser and underwear (Exhibits LV and LVI) from the place pointed out by him was adduced and cross examination was made on his behalf. It was not even challenged on behalf of accused Munir that the seized trouser and the underwear belonged to him. In the circumstances the omission to state about the recovery and seizure of the trouser and the underwear of Munir at the time of his examination under section 342 of the Code had not prejudiced Munir and consequently the trial was not vitiated warranting an order of retrial as suggested by Mr. Serajul Haq.

63. In consideration of the confessional statement Ext. 50 of accused Munir recorded by PW 55 the extra judicial confession made by accused Munir before PWs 32, 36 and 37 on the very date of occurrence, the recovery of his trouser and underwear from the place pointed out by him and in his presence and the recovery of the knife Ext. LIV vis a vis recovery of empty box of that knife
Ext. LX from his house unerringly proved beyond reasonable doubt that accused Munir committed the murder by intentionally causing death of his wife Sharmin Rima and we therefore find him guilty of the charge of the offence punishable under section 302 of the Penal Code leveled against him.

64. Mr. Gaziul Huq, the learned advocate appearing for the other condemned prisoner Hosne Ara Khuku, has submitted that there is no legal evidence on record to prove that Khuku instigated Munir to commit the murder of Rima and that the utterance of Khuku at the time of the alleged encounter between Khuku and Rima on 5.4.89 as deposed to by PW 2 even if it is believed in its entirety, cannot constitute an abetment for murder for which Khuku has been charged. He has further submitted that accused Khuku could not be convicted for the offence under sections 302/109 of the penal Code for her alleged illicit sexual relationship with Munir, Selim or any other person. Accused Hosne Ara Khuku did not inflict any injury on the person of deceased Rima or in any way participate in the criminal act by being present at the scene of the occurrence, she allegedly instigated accused Munir to commit the murder of his wife Rima. The prosecution relied on the evidence of PW 2 Kohinoor Nizam who stated that her deceased daughter Rima reported to her that on 5.4.89 there was an encounter between her and Khuku in presence of accused Munir in his garment factory when Khuku threatened Rima by saying that she would see who wins. In the confessional statement as well as in his written statement Munir confirmed that Khuku made such utterance in his presence. The statements of Munir in the confessional statement and his defence sought to be made out in his written statement cannot be treated as evidence against Khuku but these can only lend assurance to the evidence of PW 2. The language used in the purported threat by accused Khuku as quoted before, in the circumstances of this case, is capable of conveying more than one meaning. This piece of evidence according to prosecution indicates an instigation by Khuku to Munir for murder of his wife Rima. In view of the undisputed fact and the evidence on record that Munir was contemplating to divorce Rima from before and particularly on and from 2.4.89 the purported threat may as well indicate the resolve of Khuku to arrange the divorce f Rima by Munir and thereby to win the battle as against Rima. If any particular evidence is capable of conveying more than one meaning, one favouring the prosecution case and the other supporting the defence plea, the meaning which is favorable to the accused should be accepted. The evidence of PW 2 and the circumstances as stated in this case cannot be construed as an instigation to Munir by Khuku to murder his wife Rima and thereby to constitute the offence of abetment. The other evidence led by the prosecution to prove instigation by Khuku is PW 8, the Darwan of the Samarita Nursing Home whose evidence has already been disbelieved by us as a tutored and procured witness.
65. Mr. Amriul Kabir Chowdhury, the learned Deputy Attorney General, found difficulty in supporting the finding of the learned sessions judge that the purported threat and utterances of accused Khuku at the time of encounter at the garment factory on 5.4.89 constitute instigation for murder or sufficient to establish the charge of abetment of the offence of murder. We have already noticed that Khuku is an aged married lady having no regard for morality and that she had illicit sexual relationship with Munir and continued that relationship even after the marriage of Munir with Rima. Notwithstanding the highly condemnable character of Khuku we are unable to find that she abetted accused Munir in murdering his wife Rima. A criminal trial is not an enquiry into the conduct of an accused for any purpose other than to determine whether he/she is guilty of the offence charged. In the circumstances accused Khuku is entitled to the benefit of doubt and we accordingly find that she is not guilty of the offence punishable under sections 302/109 of the Penal Code.

66. As to sentence of death imposed upon accused Munir, the learned Attorney General has contended that the sentence of death was proper and appropriate since the murder of Sharmin Rima by her husband accused Munir Hossain was premeditated and cold blooded and in support of his contention he has referred to a decision of the Indian Supreme Court in the case of Mohindar Singh vs. Delhi Administration reported in (1973) Vol. I Supreme Court cases 498 in which their lordships confirmed the sentence of death as it was a premeditated and cold blooded murder of a defenseless person.

67. Mr. Serajul Haq, the learned Advocate appearing for accused Munir on the other hand has contended that the murder of his wife Rima by accused Munir being the result of bitter matrimonial relationship should be awarded the sentence of imprisonment for life instead of sentence of death as imposed by the learned sessions judge. In support of his contention he has relied on a decision of the Appellate Division in the case of Nowsher Ali Sikdar vs. State reported in 39 DLR (AD) 194 in which their lordships of the appellate Division have commuted the sentence of death to transportation for life and observed as under:

“Section 302, which punishes 'murder' does not specify in which case death sentence should be given and in which case transportation for life to be awarded, but leaves the matter to the discretion of the court. Every case should be considered in the facts and circumstances of that case only. In view of Ext. 9 there is no hesitation in saying that bitter matrimonial relationship played a part in this nefarious situation and while inflicting sentence such relationships cannot be overlooked”.

The facts of the present case are different from the Appellate Division’s case referred to above. In the present case the life of Rima was not taken away due
to the usual strained matrimonial relationship of the husband the wife but the murder was committed by the husband to remove the obstacle in the way of his continuing illicit relationship with women of bad character including that of accused Khuku. The only crime of Rima was that she resisted improper overtures of her husband and his paramour and attempted to maintain the marriage tie notwithstanding her knowledge of the past heinous conduct of her husband. Munir took the revenge and murdered her. If Munir had no desire to take revenge he could even remove the obstacles created by the presence of Rima by divorcing her and paying the dowry money amount to Taka four lakh only.

68. Mr. Serajul Haq, then referred to the case of Rajendra Prasad vs. State of Uttar Pradesh reported in (1979) 3 Supreme Court cases 646 in which it has been observed that one test for imposition of death sentences to find out whether the murderer offers a traumatic threat to the survival of social order. The facts of the case before the Indian Supreme Court were different from the facts and circumstances of the present case before us. The killing f the wife by the husband in order to facilitate his illicit relationship with women of bad character cannot but be treated as a great threat to the survival of the society in the context of socio-religious condition of this country. The murder of Sharmin Rima was premeditated, cold blooded and gruesome which was carried out with deliberate and persistent ferocity and the only sentence to be passed in such circumstances is one of death. Hence we find that the learned sessions judge has rightly sentenced accused Munir Hossain @ Suruj to death.

69. The learned sessions judge by his impugned judgment ordered for confiscation of the Pajero jeep of accused Munir, delivery of the articles of the deceased Sharmin Rima to her mother and destruction of Khuku’s seized diary and photo album, etc. by burning in accordance with the provision of section 517 CrPC. This part of the order not having been challenged as illegal at the time of hearing, we leave this portion of the order undisturbed.

70. Before parting with this case, we are inclined to refer to an observation of the learned Sessions judge concerned Dr. Meherun Nessa, mother of the condemned prisoner Munir Hossain to the effect that she was the root of everything beginning from the marriage of Munir with Rima at 12 midnight on 11.12.88 to the murder of Rima at Mouchak Sarak of village Mizmizi which in our view is unwarranted, in as much, as such finding is absolutely unnecessary for the purpose of the disposal of the case and also because Dr. Meherun Nessa was neither an accused nor a witness. The said observation of the learned sessions judge about Dr. Meherun Nessa is therefore, disapproved.

71. In the result, the reference is accepted in part, so far as it relates to Munir Hossain @ Suruj and the order of his conviction for the offence punishable
under section 302 of the Penal Code and the sentence of death imposed upon by him by the learned sessions judge is hereby confirmed.

72. The two appeals being Criminal Appeal no. 404 of 1990 and Jail Appeal no 416 (A) of 1990 filed by accused Munir are dismissed.

73. The reference so far as it relates to accused Hosne Ara Khuku is rejected and her appeals being Criminal Appeal No. 405 of 1990 and Jail Appeal no. 416(A) of 1990 are allowed. The impugned order of her conviction and sentence of death for the offence punishable under sections 302/109 of the Penal Code is set aside and she is acquitted of the charge leveled against her. She be set at liberty forthwith if not wanted in any other connection.

74. Let a copy of this judgment be forwarded to the learned Sessions judge Dhaka for necessary action in accordance with law.
Munir Hossain Saruj
ATM Afzal J
Mustafa Kamal J Accused petitioner
Latifur Rahman
Vs.
State ... Respondent

Appellate Division
(Criminal)

Judge
Shahabuddin Ahmed
CJ M.H. Rahman

Date of Judgment 20th June 1993

Constitution of Bangladesh, 1972

Article 105

Judgment

ATM Afzal J: This is an application for review of the judgment and order dated 25 November, 1992 dismissing Criminal Petition for Leave to Appeal No. 89 of 1992 filed by the condemned accused petitioner.

The said leave petition was from judgment and order dated 5 July, 1992 passed by a Division Bench of the High Court Division, Dhaka accepting (in the impugned judgment erroneously written as ‘rejecting’) the Reference, Death Reference No. 7 of 1990, under section 374 of the Code of Criminal Procedure (so far as it relates to the petitioner), further dismissing his appeals, Criminal Appeal No. 404 of 1990 and Jail Appeal No. 416 of 1990, and confirming the order of conviction under section 302 of the Penal Code and the sentence of death there under passed by the Sessions Judge, Dhaka on 21.5.1990 in Sessions Case no. 137 of 1989.

The accused petitioner was called upon to answer a charge under section 302 Penal Code on the allegation that he had deliberately killed his newly married wife Sharmin alias Rima by striking her repeatedly with sharp cutting weapon etc. on way back to Dhaka from Chittagong in the midnight following 8.4.1989 in a field in village Mizmizi at a little distance to the South of the highway (Bishwa Road) within PS Siddhirganj, District Narayanganj. It is not necessary to set out the facts of the case here, which are to be found fully in the impugned judgment.

Mr. Serajul Huq, learned Advocate, who did not appear at the leave stage, now submitted in support of the prayer for review that the ten circumstances relied
upon by the High Court Division and noticed in the impugned judgment, do not inescapably lead to the conclusion of guilt of the accused petitioner. Rather, each one of them is capable of an explanation consistent with the theory of his innocence and incompatible with the theory of guilt. Secondly, he submitted that the extra-judicial confession allegedly made by the accused-petitioner to PWs 32, 33, 36 and 37 suffers from patent absurdity, internal marks of falsehood and bear the imprint of machination by the Police. Thirdly, he submitted that the so called Judicial Confession recorded after 16 days in Police custody, the accused-petitioner having been taken on remand thrice was a doubtful document and ought to have been rejected from consideration. Then he submitted that the trial Court’s omission to draw the attention of the accused-petitioner to some of the most incriminating circumstances, namely, recovery of the blood-stained trouser and underwear, extra-judicial Confession made to PWs. 36 and 37 and utterance of ‘murder’, ‘murder’ by the accused petitioner in presence of PW 38 in course of examination under section 342 CrPC caused great prejudice to the accused and calls for a retrial from that stage.

Lastly, Mr. Huq submitted that in any view of the matter the sentence of death was not warranted in the facts of the case as the offence was neither premeditated nor committed with “persistent ferocity” as found by the High Court Division.

It was also argued on a broad spectrum that with the development of human rights Jurisprudence and escalation of constitutional protection to sublime levels, the trend all over the world has been to restrict the imposition of death sentence to a very narrow category of cases. Relying on the modern reformist theory of punishment as opposed to retributive justice, it was submitted that the accused-petitioner was not a professional killer and given a chance he might redeem himself. Every saint has a past and every sinner a future. This axiom, it was urged, is a vote against death and hope for ‘life’. For this argument on sentence reliance was placed heavily on the judgment of Krishna Iyer J on Rajendra Prasad vs. State of UP AIR 1979 (SC) 916 which, inter alia reads:

“We must always have the brooding thought that there is a divinity in every man and that none is beyond redemption. But death penalty, still on our Code, is the last step in a narrow category where, within a reasonable spell, the murderer is not likely to be cured and tends to murder others, even within the prison or immediately on release, if left alive – a king cobra which, by chronic habit, knows only to sting to death unless defanged if possible. The patience of society must be tempered by the prudence of social security and that is the limited justification for deprivation of fundamental rights by extinguishment of the whole human being. The extreme penalty can be invoked only in extreme situation”.
This new argument based on penological advances for commutation of the sentence of death was supplemented by Mr. Rafique-ul-Huq, learned Advocate, in the dying moments of the hearing of this petition with reference to some more authorities, particularly the ruling of the United States Supreme Court in Furman vs. Georgia (408, US 238, 33 L ED 2d 346) where Marshal J representing the majority view stated that the death penalty violated the Eighth Amendment because it was excessive and unnecessary punishment and because it was morally unacceptable to the people of the United States. He also referred to Gregg vs. Georgia (1976) (428 US 153, 49 L ED 2d 859) in which the Supreme Court upheld the revised statutes of a number of States which contained new procedure for capital punishment. This ruling permitted the States to re-establish the death penalty according to guidelines which were intended to eliminate unfairness in death sentencing.

After Mr. Serajul Huq had concluded his submission Mr. Rafique-ulHuq, learned Advocate, sought permission to raise a constitutional point which was allowed. He sought to argue that the accused petitioner was entitled to a hearing of his appeal as of right under the Constitution and, as such the dismissal of the leave petition in limine was not justified. He drew our attention to Article 103(2)(b) of the Constitution, which inter alia, provides that an appeal to the Appellate Division from a Judgment or sentence of the High Court Division shall lie as of right where the High Court Division “(b) has sentenced a person to death or to (imprisonment) for life” and the interpretation given thereto in the cases of, Md. Rafique vs. State (1963) 15 DLR (SC) 219 = PLD 1963 (SC) 226, Rashid Ahmed vs. State (1969) 21 DLR (SC) 297 = PLD 1969 (SC) 362 and Moyna Mia vs. State (1975) 27 DLR (AD) 120. Mr. Huq conceded that the interpretation which has held the field for last 30 years that is, from the time of Md. Rafique’s case is against him in that an appeal as of right does not lie to this court when High Court Division confirms a sentence of death in any case submitted under section 374 of the CrPC. He however, submitted that the minority opinion of Hamoodur Rahman CJ in the subsequent case of Rashid Ahmed which supports his contention deserves a fresh look because this court was never called upon to give a decision on the point. Mr. Huq referred to the “anxiety” of Hamoodur Rahman CJ, which was felt by this court in Moyna Mia’s case but the point was not required to be decided in that case as it was observed that “the framers of our Constitution have, however, relieved us of that anxiety by extending the right of appeal to a case of confirmation of a sentence of death by making express provision in the Constitution to that effect.”

It may be pointed out here that in our original Constitution appeal as of right was provided specifically in case of confirmation of a sentence of death by the High Court Division which has since been amended by substituting present sub-clause (b) of clause (2) of Article 103 by the Second Proclamation Order.
No. IV of 1978. In Moyna Mia’s case 27 DLR (AD) 120, this court has clearly followed the majority view taken in Rashid Ahmed’s case 21, DLR (SC) 297. In other words, the minority view of Hamoodur Rahman CJ did not find favour. In view of the said decision coupled with the fact that appeal as of right in case of confirmation of a sentence of death by the High Court Division having been deleted by the aforesaid amendment there does not seem to be much room for argument in deciding the question raised.

But we shall refrain from doing so on account of a more important principle and that is as to the limitation of a proceeding in review. The petitioner never filed an appeal as of right under Article 103(2)(b) but filed a petition for leave to appeal under Article 103(3) and, we think, rightly. During the long argument advanced at the leave stage it was never urged that it should be treated as an appeal as of right. Therefore, the point as now canvassed cannot be treated as an error apparent on the face of the record for which alone a review lies in a Criminal proceeding. Then again, although leave was not granted, we allowed complete latitude to the learned Counsel for the petitioner Mr. Abdul Malek to make his submissions fully in view of the gravity of the sentence and he did argue for days together like in an appeal and we elaborately examined the evidence and other facts and circumstances on record. In retrospect we have no hesitation to declare that our decision would not have been in any way different had we heard the matter upon granting leave or treating it as an appeal as of right.

For the same reason as to limitation of a review proceeding the submissions made by Mr. Serajul Huq including that on the ground of sentence cannot be entertained now. In Mahbubur Rahman vs. Mujibur Rahman, 37 DLR (AD) 145, it has been laid down that a judgment pronounced by this Court is normally final and should not be readily disturbed or interfered with by resorting to the exercise of the power of review except in the manner provided by law. It is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a re-hearing and a fresh decision of the case. to allow the submissions as have now been made will plainly amount to a rehearing of the leave petition which is not permissible. Krishna Iyer J. in a similar case for review after refusal of special leave, observed in Sow Chandra Kanta vs. Sheik Habib, AIR 1975 (SC) 1500 “that a review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition through different counsel of old and overruled arguments, a second trip over ineffectually covered grounds or minor mistakes of inconsequential import are obviously insufficient. “Even so, in our anxiety to ensure that the accused petitioner may not have any cause for grievance we have considered the submissions on merit and found no justification for review
of the impugned judgment. All the submissions have already been considered in the said judgment except those as to omission of certain matters during examination under section 342 CrPC and some new grounds for commutation of the sentence of death. None of these was specifically argued at the hearing of the leave petition.

It will be seen that the point of omission under Section 342 CrPC was raised in the High Court Division and the learned Judges held that “accused Munir is a highly educated person and he was although present in court when the evidence relating to recovery of his trouser and underwear (exhibits LV and LV1) from the place pointed out by him was adduced and cross examination was made on his behalf. It was not even challenged on behalf of accused Munir that the seized trouser and the underwear belonged to him. In the circumstances the omission to state about this recovery and seizure of the trouser and the underwear of Munir at the time of his examination under section 342 of the Code had not prejudiced Munir and consequently the trial was not vitiated warranting an order of retrial as suggested by Mr. Serajul Huq. “We fully approve of the view taken by the High Court Division. It is true that confession made to PWs 36 and 37 and utterance of ‘murder’ ‘murder’ were not brought to the notice of the accused specifically but they were immaterial because of the other overwhelming evidence he was called upon to answer. Further his attention was specifically drawn to his confession made before PWs 32 and 33 and it was his own case that he cried out ‘murder’ ‘murder’ inside Badar Hotel (vide cross examination of PW 66). So there was no question of any prejudice to the accused.

As to the new grounds for commutation of the sentence the controversy regarding abolition of death sentence or restricting it to a narrower confine by interpretative reasoning cannot be gone into in this proceeding for review for reasons already indicated. It will be seen that a strong dissent was recorded by AP Sen J to the view of K Iyer J in Rajendra Prasad’s case on which reliance was placed by the learned Advocate for the petitioner, Sen J. says:

“I, therefore, take it that the opinion of my learned colleague that imposition of a death sentence in a case outside the categories indicated would be constitutionally invalid, is merely an expression of his personal views. As judges were are not concerned with the morale or ethics of punishment. It is but our duty to administer the law as it is and not to say what it should be. It is not the intention of this Court to curtail the scope of the death sentence under section 302 by a process of judicial construction inspired by our personal views. The question whether the scope of the death sentence should be curtailed or not, is one for the Parliament to decide. The matter is essentially of political expediency and, as such, it is the concern of statesmen and, therefore, properly the domain of the legislature, not the judiciary.”
Similarly, Rehnquist J. representing the minority opinion in Furman V Georgia stated that the most expansive reading of the leading constitutional cases did not remotely suggest that the Supreme Court had been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws which were based upon notions of policy or morality suddenly found unacceptable by a majority of the Supreme Court.

The exercise of discretion in the matter of awarding death sentence by our Court appears to be quite acceptable as the record shows that as of today there are only 85 death sentence cases pending in the High Court Division for disposal. A report of the Amnesty International, United States of America: The Death Penalty and Juvenile Offenders (October, 1991) shows that as of 1 July 1991 there were more than 2,400 prisoners under sentence of death in 34 states including 31 who were juveniles at the time of their crime. One hundred and forty eight prisoners were executed between 1977 (when the first post Furman execution was carried out) and 1 July, 1991.

The objection as to the sentence of death in the present case as raised at the leave stage was altogether on a different ground which has been answered in the impugned judgment. The reasons given by the trial Court and the High Court Division for infliction of death sentence enormity of crime cruel conduct of accused petitioner and absence of extenuating circumstances are in our opinion, sufficient to justify the sentence under the law and the Constitution we have found no signs of penitence even at any stage. There is no valid ground for review.

The review petition is dismissed. Stay granted by this Court. 30.11.1992 is vacated.
Abdul Motleb Howlader .......Petitioner

Vs.

State ................. Respondent*

The Bangladesh Law Chronicles

Volume VI 2001

Reports of the Decisions of the Appellate division of the Supreme Court of Bangladesh

Appellate Division
(Criminal)

Judgment
BB Roy Choudhury J
M Amin Choudhury J

August 24th 2000

Nari – o – Shishu Nirjatan Daman (Bishes Bidhan) Ain (XVIII of 1995)

Section 10 (1)
Evidence Act (1 of 1872)

Sections 8 and 106

Death of wife while in the custody of husband – its effect – when the wife men with her death while she was in the custody of her husband it is the husband who has to explain how his wife met with her death.

In the absence of any explanation coming from his side it seems none other than the husband was responsible for causing the death in question. The prosecution has succeeded in proving that, deceased Niru was found dead in the house of her husband with marks of injuries by the testimonies of PW 2, sole ocular witness other PWs and circumstantial evidence. According to defence wife was forcibly kept in the house of the husband on the date of occurrence after assaulting her by the relations of his wife which has been disbelieved by the courts below. The husband saw his wife in injured condition but he neither took any step for her treatment nor did he inform any of the co-villagers of the incident rather he allowed his wife to die without any treatment and even after her death he did not inform any of the co-villagers or reported to the police which was very near from his house. In view of the fact that the husband has failed to prove under what circumstances his wife was murdered, it conclusively proves that it is he and he alone has committed the murder as the conduct of the husband coupled with the defence version of the case and facts and circumstance involved manifestly indicate that the husband has failed to discharge his onus.

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When the prosecution has succeeded in proving the demand of dowry and the death caused owing to non-fulfilment of the said demand, no lesser sentence excepting the sentence of death can be awarded. It also appears from the evidence of the doctor that deceased Niru was carrying a foetus of two months and a half indicating two murders have been committed by the condemned prisoner out of sheer greed of dowry, has no right to live in this world as he has committed cold blooded murder of a simple village girl just because she and her parents had failed to meet his illegal demands.………(12 – 13)

State vs. Kalu Bapari, 43DLR 249 and Shamsuddin Vs. State, 45 DLR 587 rel.
Sharifuddin Chaklader Advocate on record for petitioner.
Not Represented – Respondent.

Judgment

1. Mahmudul Amin Choudhury J: This criminal petition from jail is against judgment and order dated 22 – 06 -1999 passed by a division Bench of the High Court Division in Death Reference No. 10 of 1996 which was heard along with Jail appeal no. 925 of 1996. The high court division accepted the reference made under section 374 of the code of criminal procedure and confirmed the sentence of death imposed upon the petition and rejected his appeal.

2. The short fact leading to this petition is that one Nirala Begum @ Niru was married to condemned – prisoner Motleb Howlader and they lived as husband and wife for two year prior to the date of occurrence. This condemned prisoner was serving in Chittagong but he subsequently lost his job and thereafter he started giving pressure upon his wife Nirala Begum @ Niru for a dowry of Taka 1,00,00.00 so that he may go abroad but the father of Niru was man he failed to meet the demand and at this condemned prisoner started assaulting his wife Niru on this matter several ‘salish’ were held but without any effective result. It is also the case of the prosecution that on 28 – 12 – 1995 one Shamsher Pahlawan Chachato Bhaira of the informant Md Altaf Howlader reported to the informant that condemned prisoner along with others were found beating said Niru who was almost dead. On hearing this news the informant who is the brother in law of Niru along with others went to the house of the father of Niru for informing him of this happening but he was not found as he went to Dhaka. Thereafter they went to the house of the condemned prisoner Motleb Howlader and found him and his relations removing valuables from the hut and Niru was lying dead on a ‘Chowki’ with marks of assault on her person. They also found blood coming out through her nostrils. They then spent then night and were waiting for the father of Niru on the following day information report with Mirjagar police station. Thereafter the police came to the house of the condemned – prisoner held inquest over the dead body of Niru and then sent
the same to the morgue for post mortem examination and after completion of investigation submitted charge sheet again this condemned prisoner. This condemned prisoner was then placed on trail before Niru – o – Shishu Nirjatan Daman Bishesh Adalat Patuakhali in Nari – o Shishu Nirjatan Daman Bishesh Case No. 16 of 1996.

3. Before the trial court a charge under section 10 (1) of Nari – o- Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995 was framed against this condemned prisoner to which he pleaded not guilty and claimed to be tried. Before the trial court the prosecution to prove charge produced and examined 11 witnesses and thereafter the condemned prisoner was examined under section 324 of the CrPC and then a defence witness was examined. The learned Adalat then by his judgment dated 10 – 07 – 1996 found this condemned prisoner guilty of the charge levelled against him and he convicted and sentenced him as aforesaid. The trial Court then sent the case record to the high court division under section 374 of the code of criminal procedure for condemned prisoner also preferred jail appeal no. 925 1996. The high court division accepted by judgment dated 22 – 06 – 1999. The condemned prisoner then sent this petition for leave to appeal to this Division from jail.

4. Before the trial Court it appears that the defence tried to establish that deceased Niru from before her marriage with the condemned prisoner had illicit connection with her another brother in law Salam and she continued to maintain that even after her marriage to which the condemned prisoner objected to and there were some ‘Salish’ over the matter and then on the date of occurrence the relations of Niru after assaulting her ,forcibly kept her in the house condemned prisoner which defence case has been disbelieved both by trail court and by the high court division.

5. In such a case the prosecution first establish that Nirala Begum @ Niru has been murdered while she was in custody of her husband the condemned prisoner. That Niru was married to this condemned prisoner is an admitted fact. To prove murder of Niru the prosecution examined PW 1 Md Altaf Howlader, PW 2 Shamsher Ali Pahlawan PW 5 Most. Ayesha Begum Pw 6 Sirajuddin Khan PW 10 Dr. Jasimuddin Khan. PW 11 Investigation officer KM Daud Ali. From the evidence of PW 11 it appears that on receipt of the first information report he want to the house of this condemned prisoner on 29 – 12- 1995 at about 16: 30 hours where he founds the dead body of Nirala Begum @ Niru over a ‘chowki’ which was identified by her elder sister and he held inquest over the same and then sent the dead body to the morgue for post mortem examination through Constable no. 265 Harun – ar – Rashid. Prosecution examined Dr. Jasimuddin Khan as PW 10 who deposed that the dead body of one Niru wife of Motleb Howlader was handed over and identified
to him by Constable No. 265 Md Harun – Ar – Rashid on 30 – 12 – 1995 and he held post mortem examination over the dead body. He found nine ecchymotic injuries of different sizes on different of the body. He also found on dissection extensive ecchymosis and vessation of blood and a 2 ½ months old foetus in the uterus indicating that the deceased was carrying a baby. PW 10 opined that the death was due to shock and haemorrhage as a result of the injuries he found which were ante mortem and homicidal in nature. During cross examination this witness stated that he found no ligature mark in the hands or on the legs or on wrist joint. From the evidence of PWs 10 and 11 it is proved clear that the dead body of Niru was recovered from the house of the condemned prisoner ad alleged by the prosecution and that she has been murdered. The death of deceased due to the injuries found by PW 10 has not been challenged. The trial court as well as the high court division rightly found that Nirala begun @ Niru has been murdered and there is nothing to interfere with this finding.

6. To prove the complicity of this condemned prisoner in the commission of murder the prosecution examined PW 2 Shamsher Ali Pahlawan who is a lone eyewitness of the occurrence. He deposed that he knew Nirala Begum alias Niru and this condemned prisoner from before and on 28-12-1995 he saw this condemned-prisoner along with others assaulting deceased because her father failed to meet the demand of dowry of Taka 1,00,000.00. He further deposed that he saw the condemned-prisoner assaulting deceased with the blunt side of a dao. Previous to the date of occurrence the deceased sent an information to this witness through a beggar with a request to visit her and accordingly he went there and saw the beating and he requested the condemned-prisoner and others to stop the same. The deceased also informed him at the time that on previous day also she was beaten over the demand of dowry. This PW 2 thereafter went to the house of PW 1 and informed him and his wife of this assault. This witness further deposed that at about 7-00/8-00 P.M. of that night he along with others went to the house of the condemned-prisoner and saw Niru lying dead on a ‘Chowki’. PWs 1 and 5 also went with PW2 and they spent the night there. This witness further deposed that 7 days before the occurrence he helda ‘salish’ over the dowry matter and at his instance the condemned-prisoner took back his wife. He further deposed that 2 ‘Salish’ were held over the matter but disregarding these the condemned-prisoner assaulted the deceased. This witness was thoroughly cross-examined by the defence. He denied the suggestion that Niru had illicit relationship with Salam from before her marriage with the condemned-prisoner and when she went to her father’s house she was assaulted by her relations who then kept her at the house of this condemned-prisoner by force and thereafter gave the news of death to her father and for saving them this case has been concocted.
7. Before the trial Court the prosecution in all produced and examined 11 witnesses and of them PW 1 Md Altaf Howlader is the informant. The prosecution produced and tendered for cross-examination PWs 3, 4, 7 and 9 which the defence declined. The prosecution then examined PW 5 Most. Ayesha Begum mother of the deceased and she also deposed that this condemned-prisoner demanded dowry of Taka 1,00,000.00 from them for going abroad which demand they failed to mete. PW 5 deposed that on getting news of assault from PW 2 she along with other went to the house of the condemned-prisoner and saw Niru lying dead with marks of injuries on her person. She further deposed that her husband PW 6 was in Dhaka at that time. She further deposed that 2/3 ‘salish’ were held over the demand of dowry. This witness was thoroughly cross-examined by the defence but nothing was found to disbelieve her evidence.

8. PW 6 Sirajuddin Khan is the father the deceased. He also corroborated the evidence of PW 5 on the demand of dowry. He further deposed that on 21-12-1995 the condemned-prisoner along with Shamsher came to his house and he promised not torture Niru again and took her back.

9. The prosecution also examined the informant as PW 1 who is sister’s husband of the deceased and he deposed that there was demand of dowry by this condemned-prisoner but his father-in-law failed to meet the demand as he was a poor mand and thereafter the condemned-prisoner started assaulting the deceased. This witness further deposed that there were about 2/3 ‘salish’ over dowry and the last ‘salish’ was held 7 days before the date of occurrence and he was the ‘salishder’ and there the condemned-prisoner agreed not to assault the deceased any further. He further deposed that on 28-12-1995 PW 2 came to his house after sun set and informed him that Niru was almost done to death by the condemned-prisoner and others. On getting this information this witness along with his wife and PW 2 went to his father-in-law’s house and reported that matter to his mother-in-law, uncle-in-law and other and they went to the place of occurrence house and found the deceased lying dead with marks of injuries and blood was coming out of the nostrils. PW 2 reported to him and others the assault of the deceased by this condemned-prisoner. This witness was thoroughly cross-examined by the defence but there is nothing to disbelieve his evidence. He denied the defence suggestion that as the deceased had illicit relationship with Salam she was assaulted at her father’s house and then kept her at the house of the condemned-prisoner forcibly.

10. These are the witnesses examined from the side of the prosecution to prove that this condemned-prisoner, over the demand of dowry of Taka 1,00,000.00 committed the murder of the deceased.

11. Before the trial Court the defence examined Moulovi Mohammad Musa as DW 1 who was an Imam of Shaheria Jame Masjid. He deposed that
on 28-12-1995 he led ‘Jenaja’ prayer of one Shah Alam at about 4.00 P.M. after ‘asar’ prayer where this condemned-prisoner was present. During cross-examination he admitted that he is the Imam of Mosque which is at a distance of about 20/25 cubits from the house of the condemned-prisoner. No other witness was examined from the side of the defence.

12. It appears that in this case excepting PW 2 there is no other eye witness of the occurrence. The prosecution has succeeded in proving that deceased Niru was found dead in the house of this condemned prisoner while she was in his custody. In this case besides the oral evidence the prosecution also relied upon the circumstantial evidence. Admittedly Niru died at the house of this condemned-prisoner her husband and naturally there can not be any eye witness of the occurrence from the side of her father nor some one from the house of the condemned-prisoner would deposite in support of the murder or on the factum of assault by this prisoner upon the deceased. In such a situation the prosecution had no other alternative but to rely on the circumstantial evidence. In such circumstances when the wife met with her death while she was in the custody of her husband it is he who is to explain how she met with her death. The defence tried to impress that she was assaulted at her mother’s house by her relations who thereafter kept her forcibly at the house of this condemned-prisoner but none of the prosecution witnesses or even DW 1 has admitted this. No other defence witness was examined to prove this defence witness was examined to prove this defence she was kept in the house of the condemned-prisoner on the date of occurrence which he stated in his statement recorded under section 342 of the Code of Criminal Procedure. He also stated that he was his wife in injured condition. But he took no step for her treatment or inform any of the co-villager of the incident. It appears that he allowed his wife to die and even after her death he has not informed any of the co-villager or reported the matter to the police which is admittedly at a distance of 3 kilometers from his house. None of the inmates of the house also informed the police or took any medical help for saving the life of the deceased and her unborn child. Though the defence suggested that she was assaulted by the prosecution witnesses but no evidence was led in support of this suggestion. The witnesses produced by the condemned-prisoner also is silent as to the circumstances leading to the death of the deceased. The suggestion it appears is a suggestion for suggestion’s sake.

13. It is well settled that ordinarily an accused has no obligation to account for the death for which he is placed on trial. The murder having taken place while the condemned-prisoner was living with his wife in the same house he was under an obligation to explain how his wife had met with her death. In the absence of any explanation coming from his side it seems none other than the husband was responsible for causing death in question. This is a proposition
that has been propounded in the case of State vs. Kalu Bepari reported in 43 DLR 249 in which one of us (Bimalendu Bikash Roy Choudhury, J) was a party. The same view has been expressed in the case of Shamsuddin Vs State reported as 45 DLR 587 wherein one of us (Mahmudul Amin Choudhury, J) was a party. From these two decisions it can be concluded that when wife was murdered while in custody of her husband the natural presumption will be that her husband is responsible for her death. In view of these decisions and in view of the fact that the condemned-prisoner failed to prove under what circumstances his wife was murdered conclusively proved that it is he and he alone has committed the murder. Though the accused faintly tried to suggest that his wife was assaulted by his in-laws who kept the deceased with him but that suggestion was boldly denied by all the prosecution witnesses. The conduct of the condemned-prisoner coupled with the defence version of the case and facts and circumstance involved indicate that the condemned-prisoner failed to discharge his onus. The trial Court as well as the High Court Division thoroughly considered the facts and circumstances of the case and the evidence on record and rightly found this condemned-prisoner guilty of the charge leveled against him. The High Court Division it appears took great pains in considering the factual and legal aspects of the matter and refused to interfere in the matter and correctly accepted the Reference. It also considered the provision of section 10(1) of Nari-o-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995 and found that when the prosecution has succeeded in proving the demand of dowry and the death due to the non-fulfilment of the demand no lesser sentence excepting the sentence of death can be given which has been accordingly awarded. We have considered the evidence of the prosecution witnesses and it is found that they uniformly deposed that Taka 1,00,000.00 was demanded as dowry and subsequently due to non-fulfilment of this demand the deceased while in custody of the husband the condemned-prisoner, was done to death. It appears from the evidence of PW 10 Dr. Jasimuddin Khan that not only the deceased Niru was murdered but she was carrying a foetus of 2.1/2 month which indicate that two murders have been committed. In such a situation considering the fact and circumstances of the case we hold that the trial Court rightly awarded the sentence of death which has been correct confirmed by the High Court Division. Such person who caused death of two lives out sheer greed has no right to live in this world. He has committed cold blooded murder of simple village girl just because she and her parents failed to meet his illegal demands. In such a situation we are of the view that the trial Court as well as the High Court Division has not committed any wrong and illegality in passing the sentence of death and confirming the same. There is no merit in the petition.

14. The petition is accordingly dismissed. Let a copy of this judgment to sent immediately to the Senior Superintendent Jessore Central Jail and to Nari-o-Shishu Nirjatan Daman (Bishesh Bidhan) Adalat Patuakhali for information.
Illas Hussain (Md).........petitioner
Vs.
State .......Respondent

Appellate Division
(Criminal )

Judgement
M Amin Choudhary CJ
M Reza Choudhury J
Md Gholam Rabbani J
Md Ruhul Amin J
Md Fazlul Karim J

Evidence Act (1of 1872)
December 1st, 20012

Section 5
When a wife met with an unnatural death while in custody of the husband and also while in his house the husband is to explain under what circumstance the wife met with her death ..........(4)

Shaukat Ali Khan, Senior Advocate instructed by Mr. Md Nawab Ali, Advocate on Record for the Petitioner.

Not represented – the respondent.

Judgment

Mahmudul Amin Choudhury CJ: This petition for leave to appeal is against judgment and order dated 21st January, 1998 passed by a division bench of the High court division in criminal Appeal No. 850 of 1992 dismissing the appeal and affirming the order or conviction and sentence passed by the learned sessions judge, Sherpur in sessions case No. 11 of 1991 where in the petitioner was found guilty of the charge under section 302 of the penal code and sentenced to suffer imprisonment for life.

2. The short fact leading to this petition is that on 6/10/1999 one Dainus Ali lodged an unnatural death in the Sherpur police station alleging that in the morning he got information that his daughter Sabila Hussain wife of the convict petitioner has been attacked with diarrhoea and on getting the information he along with his son started for the house of the convict petitioner but on way he got information that his daughter committed suicide by hanging. At the same time he also got information that on the previous night his son in law who is the petitioner hereafter committing murder got the dead body of Sabila Hanged with a Mango tree for concealing the evidence. On getting this report the
Police took up inquiry and visited the house of the convict inquest over the dead body and sent the same to the morgue for postmortem examination on report a regular case was started by SI Rabiul Islam when it was found that the death was homicidal in nature. Thereafter, the police took up investigation of the case and on completion of the same submitted charge sheet against the petitioner. The petitioner was found absconding. Thereafter a charge was framed against the petitioner in his absence but subsequently he was arrested and a fresh charge was framed which was read over to the petitioner to which he pleaded not guilty and claimed to be tried. Before the trial court only three witnesses have been examined and they are the informant and Investigation officer, SI of police Rabiul Islam, Samed brother of the deceased and Dr. Ahamad Ali Akon who held the postmortem examination over the dead body of deceased Sabila Khatun. The trial court thereafter on consideration of the evidence on record convicted and sentenced the petitioner as aforesaid. Against that order of conviction and sentence the petitioner preferred criminal Appeal No, 850 of 1992 before the high court division where by judgment dated 21st January, 1998 the appeal was dismissed.

3. Mr. Shaukat Ali Khan learned counsel appearing on behalf of the petitioner at the very outset submit that before the trial court only three witnesses have been examined of whom two are formal witnesses and the other one is the brother of the deceased who is admittedly not an eye witness of the occurrence. He submits that there is no evidence that the deceased was living with her husband petitioner which was not approachable by others and there is no probable circumstance explaining the cause of death of the wife. It is submitted that he trial court merely on the ground that the deceased was with the petitioner on the fateful night convicted and sentenced the petitioner which has been wrongly upheld by the high court division. It is submitted that the high court division ought to have considered that suspicion however strong cannot be a ground to find guilt of an accused.

4. We have gone through the available materials. There is no denial of the fact that on the night following on 5-10-1989 deceased Sabila Khatun died and form the evidence of PW 3 Dr. Ahmed Ali Akon it appears that the death was the result of strangulation and the doctor also found some injuries on the person of the deceased and the doctor opined that the injuries he found were ante mortem and homicidal in nature. PW 3 was straight in his answer when he stated that the death was due to strangulation and it was not a case of suicide by hanging. Form the available materials it appears that on the fateful night the deceased was with her husband petitioner and while in custody of her husband she met with her death. It appears from the available materials that immediately after the occurrence the petitioner absconded and he remanded absconding for a long time and afterwards he was arrested by the police and
produced before the learned sessions judge who earlier framed charge and then after production of the appellant a fresh charge was framed which was read over to the petitioner. The petitioner as well as the inmates of the house never informed the police on the alleged suicide by the deceased but the petitioner who is the husband absconded form his house. It is well settled that when a wife met with an unnatural death while in custody of the husband and also while his house the husband is to explain under what circumstance the wife met with her death. Here in the present case excepting three witnesses the prosecution failed to produce any other witness and admittedly the appellant and the informant liced at different places. So it was not possible for them to produced the neighboring people to prove that the deceased was assaulted and then strangulated. But the facts and circumstances particularly the evidence of PW 3 and the conduct of the petitioner clearly indicate that the deceased was murdered while she was in the custody of her husband at his house and the petitioner failed to show under what circumstances she died and in such circumstances natural presumption is that he has committed the murder. The law on the point has been well settled by this division in various decisions. The trial court as well as the high court division it appears considered every aspect of the matter, particularly the legal position and the conduct of the petitioner and rightly found the petitioner guilty of the offence alleged. In that view of the matter we find no force in the submission made by the learned advocate for the petitioner.

There is, therefore, no merit in this petition and the same is accordingly dismissed.
State.........Petitioner
Vs.
Kalu Bepari.........Opposite Party

High Court Division
(Criminal Revisional Jurisdiction)

Judgment
Bimalendu Bikash Roy
Choudhury J. and Md.
Mozammel Hoque J.

Evidence Act (I of 1872)

Section 3
Murder of wife – explanation of the accused – Ordinarily an accused has no obligation on account for the death for which he is placed on trial. The murder having taken place while the condemned prisoner was living with his wife in the same house he was under an obligation to explain how his wife had met with her death. In the absence of any explanation coming from his side it seems some other than the husband was responsible for causing death in question.

Code of Criminal Procedure (V of 1898) Section 164
The Magistrate while recording the proceeding did not record any questions and answers. But he made real endeavour for coming the conclusion that the statement was voluntary. The omission to record questions and answers ……..

Considered as fatal defects when confession was made duly though not recorded duly for want of prescribed form. Facts stated in the confessional statement appear to be consistent with the evidence of PWs. In that view, the confessional statement is true as well.

M Shamsul Alam, Deputy Attorney General with Obaidur Rahman Mostafa, Assistant and General MA Rouf, Advocate – For the State.

AKM Zahirul Iluq. Advocate – for the absconding prisoner.

State Vs. Kaludepari

Judgment
Bimalendu Bikash Roy Choudhary J: This reference has been made by the learned sessions judge, Bakerganj under section 374 of the code of Criminal
Procedure for confirmation of the sentence of death passed on accused Kalu Bepari under section 302 of the Penal code.

2. The condemned prisoner is alleged to have killed his wife, Mumtaj Begum.

3. As the prosecution gradually developed in course of the investigation it will be convenient to set out the facts leading to the prosecution of the condemned prisoner in chronological order.

4. On 2/12/85 at about 6 AM: Dhalu Bepari, the elder brother of the condemned prisoner went to the house of the Anwer Hossain of village Patihar Upazila Agailjhara and informed him that his daughter Mumtaj Begum had died. On receipt of the news Anwar Hossain went to his son-in-laws house in Dhakkin Shiripasha and found the dead body of Mumtaj Begum with injuries on her neck and blood coming out through the nose. He also saw that the condemned prisoner and his relations had already dug a grave for her burial. At this he became suspicious about the death of his daughter and asked the inmates of the house on the point but they made no reply and so he went to the police station at Agalijhara forbidding them to bury the dead body. There he gave a written information of the aforesaid facts. ASI of Police Abdus Sobhan who was attached to Agailjhara PS registered UD Case. No. 19 of 1985 dated 2/12/85 thereupon and left for the place of occurrence village. On arrival there the Assistant Sub-Inspector of police held inquest on the dead body of the deceased and sent the same to Barisal morgue for post mortem examination.

5. After receipt of the post mortem report to the effect that the victim had been done to death by strangulation the Inspector of Police M Zaman who was then the Officer-in-charge of the police station himself lodged a First Information Report on 3/1/86 at 8:15 PM and took up the investigation. He secured the arrest of the condemned prisoner. The condemned prisoner made a confessional statement on 18/1/85 before the upazila magistrate, Agalijhara.

6. After the completion of the investigation the said Inspector of police submitted charge sheet under section 302 of the penal code against the condemned prisoner. The condemned prisoner was eventually placed on trial before the learned sessions judge, Bakerganj. He however escaped form police custody on 3/6/86 while he was being brought to attend the court for hearing under section 265 B of the code of Criminal Procedure. As his presence could not be secured thereafter he was tried in absentia under section 339 B (2) of the code of criminal procedure being represented by a lawyer engaged by the state.

7. At the trial prosecution examined 8 witness and tendered two namely, PW 7 and PW 8, while the defense examined none.
The defense was a plea of innocence. The learned sessions judge upon consideration of the evidence found that the prosecution had been able to prove its case beyond all reasonable doubt and accordingly convicted and sentenced the condemned prisoner as aforesaid.

8. The condemned prisoner does not appear to have surrendered to the due process of justice after his ascendance and preferred any appeal against his conviction and sentence. In a reference for confirmation where the condemned prisoner is not engaged in setting the judicial order at naught this Court irrespective of whether the convict has submitted to the due process of justice or not is under an obligation under sections 375 and 376 of the code of Criminal Procedure to satisfy itself that the conviction of the condemned prisoner is justified on the evidence and that the sentence of death in the circumstance of the case is the only appropriate sentence. In doing so it may confirm the sentence of pass any other sentence or pass any other sentence warranted by law or may even annul the conviction or order a fresh trial.

9. The learned Deputy Attorney – General has appeared in support of the reference while the condemned prisoner is represent by Mr. AKM Zahirul Huq, the learned Advocate engaged by the state on its behalf.

10. The learned Deputy Attorney – General has taken us through the judgment pronounced by the learned sessions judge tighter with the entire evidence on record. It is urged by him that the evidence on record is sufficient to sustain the conviction of the condemned prisoner under section 302 of the penal code. Mr. Huq on the other hand, contends that there is no legal evidence to involve the condemned prisoner with the murder of Mumtaj Begum. He further submits that the learned sessions judge by relying on the confessional statement Ext. I convicted the condemned prisoner without noticing that the same was neither voluntary not true.

11. In order to appreciate the points raised by the learned counsels it is necessary to state the facts narrated by the witnesses adduced in the case.

12. PW 1 KM. Jafrul Amin was the Upazila Magistrate at Agailion 18 / 1 / 86. He deposed that police reduced the condemned prisoner for recording his confessional statement. He further said that he observed all the legal formalities gave the condemned prisoner time to reflect and then recorded of his confessional statement. He also said that he read over the statement to the condemned prisoner who put his signature there on admitting that it had been correctly recorded. He proved the statement Ext. 1. According to him to be voluntary and true. In cross-examination he stated that as there was no printed form for recording the confessional statement under section 164 of the criminal procedure code available at Agailjhara Court, he recorded the same in plain
paper. He also said that the condemned prisoner was first produced before him on 16.01.1986 and then police took him on remand for three days and thereafter he was produced again on 18/11/86 on which date the confessional statement of the condemned prisoner was recorded.

13. PW 2 Dr. Rabiul Alam was the Upazila Health and Family Planning officer, Barisal, Sadar on 3.12.85. In his testimony he said that the conducted the post mortem examination on the dead body of Momtaj Begum, the wife of the condemned prisoner and found on abrasion on the left cheek measuring 1” x ½”, another abrasion in front of the neck measuring 1 ½” x 1 and swelling on the face and left parietal region and on dissection he found swelling on the left parietal region, that skull and vertebral column were intact and healthy, brain and meninges congested though intact, the larynx pharynx intact but heavily congested. He further said that on dissection of face and scalp, ante mortem blood due to extra vaxation of blood surrounding the tissues caused by heavy blunt weapon was found and that on dissection of the neck ante mortem blood clot surrounding the tissue due to extra vaxation of blood and ante mortem blood clot was found inside the trachit caused by compression and that the pleura, pericardium, lungs, esophagus, stomach and liver were found congested. In his opinion the death was due to asphyxia caused by strangulation which was ante mortem and homicidal in nature. In cross-examination he denied the defense suggestion that at the time of post mortem examination the dead body was decomposed. On a query by the defense he further stated that there may be hemorrhage in the brain due to blood pressure, but it shall not come out by the nose or mouth.

14. PW 3 was police constable No. 345 Md. Ali Hossain who escorted the dead body to the morgue and identified it before the Medical Officer.

15. PW 5 Anwar Hossain was the father of the deceased Momtaj Begum. In his evidence he said that his daughter was married to Kalam @ Kalu Bepari of village Shihipasha 7/8 years ago on 2.12.85. One Dhalu Bepari went to his house early in the morning and informed him that his daughter had died and therefore he went to the house of his son-in-law at village Shihipasha and found the dead body of Momtaj Begum lying inside the house covered with a wrapper. He further said that he saw blood coming through her nose and also injury marks on her head, nose and sides of the face. He further deposed that he also found that the condemned prisoner and his relations had already dug the grave and were preparing to bury the dead body and they told him that his daughter died of sudden pain in the chest. It was further told by him that on seeing the injury marks and blood he became suspicious and forbade them not to bury his daughter without informing the police. He also said that the drew the attention of all present there to the injuries on the dead body and then went
to Agailjhara police station and filed a petition marked Ext. 2 whereupon the ASI PW 6 accompanied by him came to the place of occurrence and held inquest on the dead body of Momtaj Begum on his identification and then sent it to Barisal for post mortem examination. He further stated that on receipt of the post mortem report the officer-in-charge of the Police Station filed ejaher suo motu and took up investigation. In cross examination he said that Momtaj Begum and two issued by the condemned prisoner. The younger on being only 20 days old on the of occurrence. He also said that he saw on long injury and many other injuries on the head. He could not remember if the eyes of his daughter were closed or opened but stated that tongue was bitten by teeth.

16. PW 6 Abdul sobhan was the Assistant Sub-Inspector of Police attached to Agailjhara Police Station at the relevant time. He said that on 2.12.85 on receipt of a written information from PW 5 he registered UD Case No. 19 of 1985 and then went to Dakkin Shihipasha and held inquest on the dead body of Momtaj Begum on the identification of her father and sent the dead body to Barisal morgue for post mortem examination. It was stated by him that at the time of the inquest he found injury marks on the left cheek and two sides of neck and blood was going through the nose.

17. PW Mujibur Rahman happened to be a member of Saila Union Parishad under which Dhakkin Shihipasha village is situated. He said that in the morning on 2.12.85 he went to the house of the condemned prisoner and saw his wife’s dead body lying inside the hut with injuries on her neck and blood in the nose. An ASI of police reached there while he was present. He further said that he attested the inquest report.

18. PW 10 Inspector of Police MF Zaman was posted as officer-in-charge of Agailjhara police station at the relevant time. His evidence is to the following effect: On 2.12.85 during his absence from the Police Station PW 6 recorded UD Case No. 19/85 and went to the place of occurrence at Dhakkin Shihipasha, held inquest and sent the dead body of Momtaj Begum for the post mortem examination. On receipt of the post mortem examination report to the effect that it was a case of murder he himself lodged the FIR Ext. 3 and took up investigation of the case During investigation he visited the place of occurrence, prepared sketch map Ext. 4 with its index. He had a secret information that he condemned prisoner killed his wife and accordingly he arrested and forwarded him to the Upazila Magistrate Court with a prayer for recording his confessional statement under section 164 of the Code of Criminal Procedure and it was recorded by the Upaszila Magistrate, Agailjhara. He examined witnesses, record the statements under section 161 CrPC and on finding that a prima facie case had bee made out, submitted charge sheet against the condemned prisoner under section 302 of the Penal Code. In cross-examination he said
that the final report of the UD case was submitted by PW 6 Abdus Sobhan on 14.3.86 while he lodged the suo motu F.I.R on 3/1/86 and received the secret information on 15.1.86.

19. These are all the oral evidence on record. Amongst the documentary evidence the prosecution proved the confessional statement of the condemned prisoner. Ext. 1, the relevant statement of the condemned prisoner reads thus:

20. Analyzing the evidence set out above it appears that the prosecution has satisfactorily proved that the victim Mimtaj Begum died as a result of strangulation on the date, time and the place as alleged by the prosecution. Such evidence has been furnished by almost all the witnesses including PW 2 the doctor who conducted the post mortem examination on the person of the deceased. Death, in his opinion, was due to asphyxia caused by strangulation which was ante mortem and homicidal in nature. We, therefore, find that the victim Mimtaj Begum was done to death by strangulation as alleged by the prosecution.

21. As to the responsibility for causing the murder there is no direct evidence of the occurrence. The prosecution sought to prove the charge on certain circumstantial facts as well as the confessional statement of the condemned prisoner marked Ext. 1. Admittedly the condemned prisoner and the victim Mimtaj Begum were husband and wife. The evidence of PWs 5 & 9 discloses that both were in the house at the relevant time. The death of the wife being caused by strangulation as already found by us, it was quite natural for the husband to send information to the Police Station. The condemned prisoner did not make any effort in that regard. On the order hand, it appears from the evidence of PW 5 that when the father-in-law went to his house in the following morning on the occurrence he to a false plea that the victim had died of sudden pain in the chest. It further transpires from the evidence of PW 5 that the condemned prisoner and relations were hurriedly preparing for the burial of the victim and for that purpose had already dug the grave. Ordinarily an accused has no obligation to account for the death for which he is placed on trial. The murder having taken place while the condemned prisoner was living with his wife in the same house he was under an obligation to explain how his wife had met with her death. In the absence of any explanation coming from his side it seems none other than the husband was responsible for causing the death of Mimtaj Begum.

22. In addition to the said circumstantial facts three is the confessional statement of the condemned prisoner marked Ext. 1. The statement has been quoted in extenso earlier. It was recorded by PW 1 Mr. KM Zafrul Amin who was the Upazila Magistrate at Agailjhora at the relevant time. The confessional statement appears to have bee made in plain sheet of paper without using the
prescribed form. The learned Magistrate stated that he recorded the statement in plain paper as there was no printed form available in the Court. He further stated that he observed all the legal formalities in recording the statement under section 164 of the Code of Criminal Procedure and gave the maker of the statement 3 (three) hours time to reflect. It also transpires from Ext. 1 that the maker of the statement was placed in charge of a peon in his chamber and there was no police. There is a further statement recorded by the learned Magistrate that he explained to the confessing person that he was not bound to make the confession and if he does so that may be used against him. This PW also said that the confessional statement appeared to him to be voluntary and true and he read it over to the condemned prisoner who put his signature admitting that it had been correctly recorded. For about 5 months after the confession the condemned prisoner appeared in court several times but he made no complaint that the confession was obtained by torture. No suggestion was also offered from the side of the defense that it was not voluntary. It, however, appears that the learned Magistrate while recording the confession did not record the questions and answers. We have carefully perused the confessional statement. We are satisfied that the learned Magistrate made real endeavors for coming to the conclusion that the statement was voluntary. In the circumstances the omission to record the questions and answers cannot be considered as fatal defects especially when we were satisfied that the confession has been made duly though it was not recorded duly. For want of the prescribed form we are, therefore, of the view that the confessional statement is a voluntary one. In the confessional statement the condemned prisoner appears to have made a clean breast of the story detailing the part played by him. The facts stated in the confessional statement appear to be consistent with the facts proved by the evidence of the PWs aforesaid. In that view of the matter the confessional statement is found to be true as well. Regard being had to the facts and circumstances of the case and the evidence discussed above together with the confessional statement Ext. 1 We, therefore, find that the prosecution has been able to prove the charge against the condemned prisoner beyond all reasonable doubt and so he has been rightly convicted.

23. An argument was made on behalf of the condemned prisoner that the offence cannot be termed as murder as it was committed in a fit of anger and without premeditation and so it would come under the 4th exception of section 300 of the Penal Code. We are unable to accept the plea. There was no such grave provocation as to make the accused deprived of power of self-control. We, therefore, find that the condemned prisoner is liable under section 302 of the Penal Code.

24. As to the sentence the learned Advocate for the condemned prisoner submits that there was no premeditation for the murder and the condemned prisoner
has two minor children and so the sentence of death should be committed. Regard being had to the facts and circumstances of the case we are of the view that the sentence of life imprisonment will meet the ends of justice.

In the result the Reference is rejected and the conviction of the condemned prisoner under section 302 of the Penal Code is upheld but the sentence of death is altered to life imprisonment.
Appellants: Hem Chand
Vs.
Respondent: State of Haryana

In The Supreme Court of India
Criminal Appeal No. 690 of 1994,
(Arising out of S.L.P. (Cri.) No. 2846 of 1991)

Hon’ble Judges
P.B. Sawant, G.N. Ray and K. Jayachandra Reddy, JJ.

Decided On: 06.10.1994

Acts/Rules/Orders
Indian Penal Code, 1860 - Sections 201, 302 and 304B; Indian Evidence Act, 1872 - Section 113-B

Case Note
Criminal – dowry death - Sections 201, 302 and 304B of Indian Penal Code, 1860 and Section 113-B of Indian Evidence Act, 1872 – wife of accused died unnatural death due to strangulation – died otherwise than in normal circumstances within seven years of her marriage – presumption under Section 113-B as to dowry death – before her death she was subjected to cruelty in connection with demand of dowry – conviction passed against appellant confirmed - Apex Court reduced sentence of life imprisonment to 10 years.

Order
K. Jayachandra Reddy, J.

1. Leave granted.

2. S.L.P. (Crl.) No. 2846/91 was filed by the sole accused in the case against the judgment of High Court of Punjab and Haryana confirming the conviction of the appellant under Sections 304-B and 498-A, I.F.C. and the sentence of imprisonment for life and two years respectively awarded thereunder by the trial court. The S.L.P. was dismissed by this Court at the notice stage on 16-9-91. As against the same Review Petition (Crl.) No. 452/92 was filed. This Court issued notice and the Review Petition was listed for hearing on 18-3-94 but by mistake it was dismissed without hearing either party. Therefore Cr.M.P. No. 1753/94 has been filed to recall the order dismissing the Review Petition. Accordingly the order dated 8-3-94 dismissing the Review Petition is recalled and it is taken on file. After hearing the respective counsel we allowed the Review Petition and restored the S.L.P.

3. The appellant Hem Chand married the deceased Saroj Hala on 24-5-1982. She stayed for two months in the matrimonial home and returned to her parents

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house and told them that the accused was wanting more dowry in the form of a television and a fridge. Her father gave Rs. 6000/- and sent her back to her matrimonial home. The accused again demanded another sum of Rs. 25,000/- for purchasing a plot. On 13-11-1984 the accused took his wife and left her in her parents house thereby making them understand that the deceased could get back to the matrimonial home at Hissar with Rs. 25,000/- and not otherwise. The appellant after undergoing one year’s course in connection with his service look his wife hack. On 20-5-1987 the deceased, however, went to her father and told him that her husband was wanting Rs. 25,000/-. She came back to her husband with Rs. 15,000/- with a promise that the balance would be remitted by her father soon. On 16-6-1987 at about 11.15 A.M. the deceased died of strangulation that is to say that she died otherwise than in normal circumstances within seven years of her marriage. The father, after coming to know that the dead body of the deceased had been brought to Village Lakhan Majra, reached there. Thereafter he lodged a complaint with the police that his daughter was murdered by the accused because of dowry. The police registered the crime, held the inquest over the dead body and sen! the same for post-mortem. As the dead body was 'highly decomposed, the Doctors referred the same to the Head of the Department of Forensic Medicine, Medical College, Rohtak. Dr. Datbir Singh, Demonstrator, Department of Forensic Medicine examined the body and found a ligature mark around the neck: and on dissection of the ligature mark he found that ecchymosis were present trachea was congested and was containing bloody fluid. He also found a contusion over the chin. The Doctor also found several other contusions on the hands, axilla and other parts of the body. He opined that the death was due to strangulation. After completion the investigation, the charge-sheet was laid.

4. The plea of the accused was one of denial and he stated that when he returned from his office in the evening and entered the room, HP found the deceased hanging from the hook in the ceiling. He got confused and with the help of the people he took the dead body to his native village Lakhan Majra and that he also informed the police.

5. The trial court having examined the evidence of the material witnesses held that this is a case of strangulation and therefore the death was unnatural and that there was demand for dowry and there was cruelty on the part of the accused and accordingly convicted him under Sections 304-B and 498-A, I.P.C. However, the trial court awarded sentence of imprisonment for life for the offence punishable under S. 304-B, I.P.C. On appeal the High Court having examined the evidence agreed with the conclusions reached by the trial court and dismissed the appeal and the extreme punishment of imprisonment for life under Section 304-B, I.P.C. was confirmed.
6. In this appeal, the same contentions have been put forward. We find only from the second set of medical evidence that it is a case of strangulation. However, for the purpose of this case, it should be accepted that it was an unnatural death. The plea set up by the accused that he found the dead body hanging thereby suggesting that it could be a case of suicide committed by the deceased for unknown reasons is, under the circumstances, wholly unacceptable. Though the case rests on circumstantial evidence, the presumption, under Section 113-B of the Evidence Act has (rightly been drawn and the appellant is convicted under S. 304-B, I.P.C. Having given our careful consideration we agree with the findings of the courts below.

7. Now coming to the question of sentence, it can be seen that Section 304-B, I.P.C. lays down that “Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.” The point for consideration is whether the extreme punishment of imprisonment for life is warranted in the instant case. A reading of Section 304-B, I.P.C. would show that when a question arises whether a person has committed the offence of dowry death of a woman what all that is necessary is it should be shown that soon before her unnatural death, which took place within seven years of the marriage, the deceased had been subjected, by such person, to cruelty or harassment for or in connection with demand for dowry, if that is shown then the court shall presume that such a person has caused the dowry death. It can therefore be seen that irrespective of the fact whether such person is directly responsible for the death of the deceased or not by virtue of the presumption, he is deemed to have committed the dowry death if there were such cruelty or harassment and that if the unnatural death has occurred within seven years from the date of marriage. Likewise there is a presumption under S. 113-B of the Evidence Act as to the dowry death. It lays down that the court shall presume that the person who has subjected the deceased wife to cruelty before her death shall presume to have caused the dowry death if it is shown that before her death, such woman had been subjected, by the accused, to cruelty or harassment in connection with any demand for dowry. Practically this is the presumption that has been incorporated in Section 304-B, I.P.C. also. It can therefore be seen that irrespective of the fact whether the accused has any direct connection with the death or not, he shall be presumed to have committed the dowry death provided the other requirements mentioned above “are satisfied. In the instant case no doubt the prosecution has proved that the deceased died an unnatural death namely due to strangulation, but there is no direct evidence connecting the accused. It is also important to note in this context that there is no charge under Section 302, I.P.C. The trial court also noted that there were two sets of medical evidence on the file in respect of the death of the deceased. Dr. Usha Rani, P.W. 6 and Dr. Indu Lalit, P.W. 7
Domestic Violence
gave one opinion. According to them no injury was found on the dead body and that the same was highly decomposed. On the other hand, Dr. Datbir Singh, P.W. 13 who also examined the dead body and gave his opinion, deposed that he noticed some injuries at the time of re-post mortem examination. Therefore at the most it can be said that the prosecution proved that it was an unnatural death in which case also Section 304, I.P.C. would be attracted. But this aspect has certainly to be taken into consideration in balancing the sentence to be awarded to the accused. As a matter of fact, the trial court only found that the death was unnatural and the aspect of cruelty has been established and therefore the offences punishable under Sections 304-B and 201, I.P.C. have been established. The High Court in a very short judgment concluded that it was fully proved that the death of the deceased in her matrimonial home was a dowry death otherwise than in normal circumstances as a result of cruelty meted out to her and therefore an offence under S. 304-B, I.P.C. was made out. Coming to the sentence the High Court pointed out that the accused-appellant was a police employee and instead of checking the crime he himself indulged therein and precipitated in it and that bride killing cases are on the increase and therefore a serious view has to be taken. As mentioned above Section 304-B, I.P.C. only raises presumption and lays down that minimum sentence should be seven years but it may extend to imprisonment for life. Therefore awarding extreme punishment of imprisonment for life should be in rare cases and not in every case.

8. Hence, we are of the view that a sentence of 10 years R.I. would meet the ends of justice: We, accordingly while confirming the conviction of the appellant under S. 304B, I.P.C, reduce the sentence of imprisonment for life to 10 years’ R.I. The other conviction and sentence passed against the appellant are, however, confirmed. In the result, the appeal is dismissed subject to the above modification of sentence.

Appellants: Dr. G.M. Natarajan  
Vs.  
Respondent: State of others

In the High Court of Madras  
Cri. R.C. Nos. 502 and Cri. R.P. No. 494 of 1992

Equivalent Citation: 1995CriLJ2728

Hon’ble Judge  
Rengasamy, J.

Decided: on 22.02.1995

Counsels
For Appellant/Petitioner/Plaintiff: P.K. Rajagopal, Adv.
For Respondents/Defendant: P. Govindarajan, Govt. Adv. and P. Sengottian, Adv. for Mr. S. Uthiraswamy

Acts/Rules/Orders
Indian Penal Code, 1860 - Sections 304, 304B and 498A; Criminal Procedure Code, 1973 - Section 174; Indian Evidence Act - Section 113B

Case Note
Criminal – dowry death – Sections 304, 304B and 498A of Indian Penal Code, 1860 – deceased married to first accused/first respondent – due to harassment for dowry deceased lodged complaint in police station – it is true that even without any injuries on body of women she can be harassed – burden of proof wrongly shifted upon prosecution inspite of evidence on record for harassment – it is open to High Court in revision to set side Order of acquittal even at instance of private parties but it should be exercised in exceptional cases like glaring defect in procedure or manifest error on point of law – revision allowed.

Order
1. This revision is directed against the order of acquittal passed by the learned Assistant Sessions Judge, Udumalpet, Coimbatore District, in S.C. No. 122 of 1990 for the alleged offence under Section 4 of the Dowry Prohibition Act and also under Sections 498-A and 304-B, Indian Penal Code.

2. The case of the prosecution before the trial Court is as follows:
Deceased Velumani was married to the first accused/first respondent herein on 3-6-1984. Though 20 sovereigns of gold jewels and other articles were provided to her at the time of the marriage, her husband and mother-in-law the
second accused/second respondent, were harassing her to get some more jewels and also to get a Moped from her parents. Due to this harassment, the deceased Volumani lodged a complaint against her husband and mother-in-law on 3-9-1985 in Peelamedu Police Station. The Sub-Inspector of Police P.W. 16 inquired the complaint. As both parties agreed to settle the matter between themselves, he recorded the statement of compromise Ex. P. 8 from them and closed the case. Even after that, the harassment continued and on 25-9-1988, deceased Velumani jumped into the well with her six months old child. P.W. 2 who got into the well, with the assistance of some others, was able to save only the child but Velumani drowned and her body alone was taken out of the next day. Message was sent to P.Ws. 1 and 4, the brothers of Velumani, and her parents the death of Velumani. P.W. 1 on learning from the neighbours that his sister Velumani was harassed and beaten on that morning and was driven to commit suicide, he lodged a complaint with the Deputy Superintendent of Police, Pollachi, who directed for investigation. As it was a suspicious death, the complaint was registered under Section 174 Code of Criminal Procedure and P.W. 18, the Executive Magistrate (Tahsildar) held the inquest and submitted the report Exs. P-11 and P.W. 19, the Deputy Superintendent of Police, took up the investigation and filed the charge-sheet against these respondents. The learned Assistant Sessions Judge, considering the evidence of the witnesses on the prosecution side, has found that the prosecution has not brought home the guilt of the accused and therefore acquitted the accused. Challenging this order of the learned Assistant Sessions Judge, P.W. 1 has come forward with this private revision.

3. The learned counsel appearing for the revision petitioner Mr. P. K. Rajagopal submitted that the learned Assistant Sessions Judge, without understanding the purport of Sections 304-B, I.P.C. and 113-B of the Evidence Act, has shifted the burden of proof upon the prosecution in this case, though it is shown by the prosecution by abundant evidence that the deceased was subjected to cruelty and harassment for dowry and therefore the Court should have presumed in this case that the death of Velumani was due to the harassment by the accused unless the accused was able to prove that death was on account of some other reasons and therefore in this case, there is patent error in the order of the learned Assistant Sessions Judge, leading to the miscarriage of justice.

4. The fact that the death of Velumani was only by suicide is not disputed by the accused also. The evidence is clear from P.Ws. 2, 3, 6, 7 and 9, who are residing adjacent to the house of the accused, have stated that the second accused shouted that Velumani had jumped into the well and therefore P.W. 2 got into the well to rescue her with the help of a rope. Another important fact is that the six months old child of Velumani also was floating on the surface of the water. It is clear from the evidence that deceased Velumani along with her child in
arms, jumped into the well not only to end her life but also not to allow her child to live in this world. Only on account of such a frustration in her life or with a feeling that she should not live any more time and also not to leave her child in her absence, she seems to have jumped into the well with her child. Therefore, it is a suicide on the part of Velumani. The striking miracle is that the six months old child, which was floating on the surface of the water, has been rescued by P.W. 2 but unfortunately Velumani had drowned and her body alone could be taken out.

5. When it is brought out that the deceased Velumani had committed suicide and that too within 7 years after her marriage, certainly Section 113-B of the Evidence Act and 304-B, I.P.C. will be attracted if the death was due to dowry demand. If it is shown from the evidence that the deceased was subject to harassment and cruelty in connection with any demand for dowry, then undoubtedly, the Court has to presume that the death was due to the harassment for dowry. But the learned counsel for the respondents Mr. Sengottian argued that the mere allegation or evidence from the interested witnesses to the effect that the accused persons were demanding dowry is not sufficient to apply Section 113-B, of the Evidence Act and according to the learned counsel, such harassment or cruelty must have been seen before the death and secondly, the evidence for such harassment of dowry must be unassailable and only in such cases Section 113-B of the Evidence Act and 304-B, I.P.C., could be invoked for throwing burden upon the accused persons that the death was for some other reasons. The learned counsel Mr. Sengottian contended that in a private revision, the evidence cannot be reassessed and the only question to be seen is whether there is any patent error in the finding leading to the miscarriage of justice or otherwise, the order of the Court below cannot be interfered with.

6. It is true that the evidence cannot be reassessed at this stage. But the question raised in this case by the learned counsel for the revision petitioner is that the burden of proof has been wrongly shifted upon the prosecution in spite of Sections 304-B, I.P.C. and 113-B of Evidence Act as the prosecution has shown that there was dowry harassment and therefore, the shifting of burden wrongly upon the prosecution itself is a patent error on account of which the acquittal of the accused is a miscarriage of justice. Sections 304-B, I.P.C. and 113-B of the Evidence Act relating to the presumption as to the dowry death require the proof that there was cruelty or harassment of the woman soon before her death. But the learned counsel for the respondents 2 and 3 Mr. Sengottian would contend that the Proof adduced in this case for the harassment is only from the close relations of the deceased and the enemies of the respondents 2 and 3 and therefore that part of the evidence cannot be taken to satisfy the requirements of Section 113-B of the Evidence Act which requires the harassment soon before the death of the victim.
7. As the burden of proof is the main controversy in this revision, it has become inevitable to refer to the evidence in this case to find out whether the requirement of Sections 304, I.P.C. and 113-B of the evidence Act has been complied with. In this connection, there is the written complaint of the deceased Velumani herself under Ex. P-7 on 3-9-1985, that is nearly one year after her marriage for harassment. In this complaint Ex. P. 7, addressed to the Peelamedu Police, she has alleged that after her marriage, she was beaten by her husband to get 13 sovereigns of her jewels to discharge the debts of her husband’s family, that thereafter her husband and mother-in-law drove her from the house with a direction that she should come out with a Moped for the use of her husband, that while she was living with her parents for five months, she was taken back by her husband saying that her mother-in-law was unwell, that again they were harassing her demanding money, that sometime later, her husband told her that they could have a separate residence leaving her in-law’s house and they lived separately in Ranganathapuram where once again her husband was harassing her to get Moped and that the four sovereigns of her jewels were also sold by him, that he purchased, the Moped only by selling her jewels and thereafter on the direction of her husband, they joined the house of her in-laws where her mother-in-law insisted for 10 more sovereigns, otherwise not to enter into the house and therefore, she was forced to come to her parents’ house. She has further stated, in this complaint that her mother-in-law was arranging for a second marriage to get dowry for her son and she should be saved from her husband and mother-in-law. Certainly, this complaint of the deceased herself to the police reveals the dowry harassment by her husband and mother-in-law, the second accused. But somehow, P.W. 6, the Sub-Inspector of Police of Peelamedu has stated in his evidence that when he enquired both parties, they agreed to settle and compromise the matter between themselves and therefore on their joint statement Ex. P. 8 he did not take further action. It is true that this complaint was given in 1985 whereas the death of Velumani by suicide had occurred on 25-9-1988 and therefore Ex. P. 7 will not satisfy the requirement of Section 113-B of the Evidence Act as harassment of demanding dowry must have been soon before the death.

8. The learned counsel for the petitioner Mr. P. K. Rajagopal referred to the evidence of P.Ws. 1 and 4, who are the brothers of the deceased, P.W. 5, the person who was interested in the family of both sides, and also P.Ws. 2, 3 and 6 to 9 the residents adjoining the house of the accused and according to the learned counsel, their evidence establish the truth of harassment of the deceased. P.Ws. 2 and 4, who are the brothers of the deceased Velumani have spoken in their evidence the stay of Velumani in their house as she was driven out from her husband’s house with the direction to bring jewels and cash. They have also spoken that only on 17-8-1986, her mother died on account of the mental
anguish due to miserable life of her daughter Velumani as she was driven out often to bring cash and money. It is the evidence of P.W. 4 that even when the accused came to attend obsequies of his mother, the second accused directed Velumani to come home with the jewel otherwise not to come. P.W. 1 has spoken that after a week of the mother’s abseque, as his sister Velumani wanted to join her husband, he requested his friend Raghupathy to take her to her husband’s house and persuade the accused for a peaceful life with his sister. Anyhow, the evidence disclose that only a few days before the death of Velumani, she was taken to her husband’s house. For the reason that P.Ws. 1 and 4 are brothers of the deceased, their evidence cannot be rejected as unbelievable. In Vasantha v. State of Maharashtra 1987 Cri LJ 901, the Bombay High Court held that when the cruelty against a married woman has been spoken by the near relations of the deceased, their evidence cannot be disbelieved as the sufferings of the deceased would be known to her nearest and dearest relations.

9. In addition to their evidence, P.Ws. 2, 5, 6, 8 and 9 also have stated that the deceased Velumani was not having a harmonious life in her husband’s house. P.W. 2 is the neighbour residing in front of the house of these accused P.W. 2 has stated that the second accused used to frequently quarrel with the deceased and about 1 or 2 months prior to her death when once he questioned, the deceased for the quarrel, she told that her husband and mother-in-law were harassing her to get dowry from her brothers. According to him even on the date of occurrence, just one hour prior to the death, there was shouting and noise of quarrel he heard and his brother’s wife informed him that second accused was shouting that Velumani had fell into the well and therefore he ran to rescue her. P.W. 5 is the resident of Avarampilayam, the place of residence of the brothers of the deceased and he has also stated that the family of P.W. 1 is very close to him and deceased Velumani some time after her marriage returned complaining that her husband and in-laws were harassing her claiming some more jewels. He has also stated about the advice he gave to the deceased. P.W. 6 who is the sister of P.W. 2 has spoken about the quarrel in the house of the accused at about 8.00 a.m. on the occurrence date, followed by the deceased Velumani jumping into the well. She has also spoken that the accused were frequently quarrelling with the deceased. P.W. 8 is the father of P.W. 2, who is residing opposite to the house of the accused and he also would State that on the date of the occurrence at about 7.30 p.m. when he went to the backyard to pass urine, he heard the whimpering voice of Velumani begging not to beat her. According to him as this was a frequent occurrence from the house of the accused, he did not mind it but when he returned back from his land about 9.00 a.m., he heard that Velumani had jumped into the well. P.W. 9 is also a resident on the south east of the house of accused persons. She also corroborated the
testimony of P.W. 8 by saying that the heard the cry of Velumani requesting not to beat her and as it was a domestic quarrel between the husband, and wife, she was not serious about it, but subsequently she came to know that Velumani had jumped into the well and the child alone was rescued from the well. It is no doubt true that P.W. 2, P.W. 6 and P.W. 8 belong to the same family and it was suggested that as P.W. 2 competed with second accused for taking lease of a land, which he could not get, there was enmity between the family of P.W. 2 and the accused. P.W. 9 is the member of another family. Anyhow, there is sufficient oral evidence in this case to show that the deceased was harassed before her death demanding articles from her parent’s house. In the addition to the oral testimony, the documents placed before the Court also mention about the harassment. In Ex. P-1 complaint itself, P.W. 1 has mentioned that his sister was harassed for dowry. Ex. C-1 is the report sent by the Sub-Collector, Pollachi, to the Collector, Coimbatore, with regard to this incident and he refers to the inquest report of Tahsildar, who conducted the inquest on 26-9-1988, and in Ex. C-1, the extract of the inquest report is given to the fact that the deceased was harassed in the family of the husband demanding articles from her. Ex. P. 11 is the report of Tahsildar, who was examined as P.W. 18 in this case and in his report also he has mentioned the statement of the person before him with regard to the harassment of the deceased demanding articles. Therefore, when the harassment has been stated in the complaint and also before the Enquiry Officer and also at the time of the inquest, it cannot be easily ignored and the evidence of the neighbours with regard to this aspect also cannot be foregotton. Therefore, it cannot be stated that in this case, it is not shown that the deceased was subjected to cruelty and harassment by her husband and mother-in-law demanding dowry before her death. When this initial burden is discharged by the prosecution, then the burden is shifted to the accused to show that it was not a dowry death but the suicide was for any other reason. In Gurditta Singh v. State of Rajasthan, 1992 Cri LJ 309, it is held that the ingredients for the offence under Section 304-B, Indian Penal Code to be proved are (1) un-natural death of a woman within 7 years after her marriage, (2) she being subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand of dowry. It also reads that the initial burden of proof is upon the prosecution, and when this has been done by the prosecution, then the presumption under Section 113-B of the Evidence Act would arise. In Babaji Charana Barik v. State, 1994 Cri LJ 1684, the Orissa High Court has listed out the four ingredients for the offence under Section 304-B Indian Penal Code, and they are (1) the death of a women under unnatural circumstances, (2) such death within 7 years of the marriage, (3) she must have been subjected to cruelty or harassment by her husband or relative of her husband and (4) such cruelty or harassment was in connection with the demand of dowry. In this case, the un-natural death by suicide within 7 years from the
The date of marriage is an admitted fact. The witnesses and the documents referred to above show that there was harassment in connection with the demand of dowry. Therefore, naturally the presumption under Section 113-B of the Act has to be drawn unless this is repudiated by the accused.

10. The learned counsel appearing for the petitioner would submit, that in this case the accused have not even suggested to the prosecution witnesses that death was due to any other cause and the only suggestion to the eye-witnesses is that they were not speaking the truth and when the reason for the death, according to the accused, was not even suggested by the witnesses, it goes beyond doubt that the death was only on account of the harassment of the deceased. I feel that I need not go into that aspect in this case, as I am inclined to remand this matter for the reason that the learned Assistant Sessions Judge, throwing the burden upon the prosecution has commented that the prosecution has not proved the case. In the end of paragraph 20 of the judgment, the learned Assistant Sessions Judge observed that from the evidence, the prosecution has not proved beyond doubt that the deceased was harassed for dowry and the death was on account of this harassment. Again in paragraph 24 also, the learned Assistant Sessions Judge, has concluded that from the evidence of P.Ws. 1 to 9, 12, 18, 19 and also from Ex. P. 5 and P. 7, the prosecution did not establish the offence alleged against the accused and therefore, they are entitled to be acquitted. The learned counsel for the petitioner refers to certain observations of the learned Judge and he has mentioned that the prosecution has not proved the injuries on the deceased to prove the harassment and that though there is allegation about the father-in-law of the deceased, he has not been prosecuted and therefore the prosecution case cannot be true. It is true that even without any injuries on the body of a woman she can be harassed. Anyhow, as the burden of proof has been wrongly shifted upon the prosecution, in spite of the evidence for harassment, I find that there is manifest error committed by the lower Court on the point of law in this case. It is true that in Akalu Ahir v. Ramdeo Ram, MANU/SC/0076/1973, it has been held that in a revision against acquittal by a private complaint, the High Court cannot re-appraise the evidence for itself as if it is acting as a Court of Appeal. In Chinnasamy v. State of Andhra Pradesh, MANU/SC/0133/1962, the apex Court has held that it is open to the High Court in revision to set aside the order of acquittal even at the instance of private parties though the State might not have thought it fit to appeal, but this jurisdiction should be exercised by the High Court only in exceptional cases when there is some glaring defect in the procedure or there is a manifest error on the point of law and consequently there has been a flagrant miscarriage of justice. As mentioned above, the shifting of burden upon the prosecution is a patent mistake in this case in spite of the abundant evidence for the harassment of the deceased.

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11. The learned counsel Mr. K. Sengottian, appearing for the respondents 2 and 3, contended that as the occurrence was in 1988, now this case may not be remitted back for re-trial. When the conclusion has been arrived at by wrong approach by the lower Court, it has become, inevitable to remand the matter. In Ayodhya v. Ram Sumer Singh, MANU/SC/0116/1981, the apex Court has held that when the sessions Judge acquitted the accused by ignoring the probative value of the First Information Report and reliable testimony of eyewitnesses and without considering material evidence on record, and the judgment was full of faulty reasoning, the re-trial ordered by the High Court setting aside the acquittal is perfectly justified. Therefore, I feel that this is a fit case in which the revisional Court should not interfere.

12. In view of the foregoing reasons, the order of acquittal passed by the learned Assistant Sessions Judge, Udumalpet, Coimbatore District, is set aside and the matter is remanded back for fresh trial of the case according to law. The respondents accused shall appear before the learned Assistant Sessions Judge on 4th April, 95. The revision is allowed.

13. Revision allowed.
Appellants: Pawan Kumar & Ors.

Vs.

Respondent: State of Haryana

In the supreme Court of India

Crl. A. No. 604 of 1991

Hon'bles Judge

M.M. Punchhi, CJI. and A.P. Misra, J.

Decided On: 09.02.1998

Acts/Rules/Orders

Dowry Prohibition Act, 1961 - Section 2; Indian Penal Code, 1860 - Sections 107, 304-B(1), 306, and 498-A; Criminal Law (Second Amendment) Act, 1983; Indian Evidence Act, 1872 - Section 113-B

Case Referred

Bengal Immunity Co. Ltd. v. State of Bihar & Ors. [AIR 1955 SC 661]

Case Note

Criminal – benefit of doubt – Sections 304B (1) and 306 of Indian Penal Code, 1860 – appeal against conviction of three appellants for offences under Sections 304B and 306 – deceased was subjected to cruelty before her death by 1st appellant-husband - no convincing evidence led that deceased subjected to cruelty by 2nd and 3rd appellants – evidence confined to 1st appellant-husband and not against 2nd and 3rd appellants – 2nd and 3rd appellants should be given benefit of doubt – held, conviction of 1st appellant maintained and convictions and sentences of 2nd and 3rd appellants set aside.

HELD See paras 2, 23 and 24.

Order

A.P. Misra, J.

1. For more than a century, inspite of tall words of respect for women, there has been an onslaught on their liberties through ‘bride burning’ and ‘dowry deaths’. This has caused anxiety to the legislators, judiciary and law enforcing agencies, who have attempted to resurrect them from this social choke. There have been series of legislations in this regard, without much effect. This led to the passing of Dowry Prohibition Act in 1961. Inspite of this, large number of ‘brides burning’ and dowry deaths continued. To meet this, stringent measures were brought in the Indian Penal Code and the Evidence Act through amendments. It seems, sections of society are still boldly pursuing this chronic action to fulfill their greedy desires. Inspite of stringent legislations, such persons
Domestic Violence

are still indulging in these unlawful activities, not because of any shortcomings in law but under the protective principle of criminal jurisprudence of benefit of doubt. Often, innocent persons are also trapped or brought in with ulterior motives. This places an arduous duty on the Court to separate such individuals from the offenders. Hence the Courts have to deal such cases with circumspection, sift through the evidence with caution, scrutinise the circumstances with utmost care. The present matter is one such where similar questions have been raised, including questions of interpretation of the stringent law.

2. The three appellants were convicted for offence under Sections 306, 498-A and 304-B IPC. Appellant No. 1 is the deceased’s husband, No. 2 the father-in-law and No. 3 the mother-in-law respectively. The trial court convicted and sentenced appellant No. 1 for offence under Section 304-B for 10 years and a fine of Rs. 500, under Section 306 for 7 years and a fine of Rs. 200 and under Section 498-A for 2 years and a fine of Rs. 200. Appellant Nos. 2 and 3 were convicted and sentenced under Section 304-B for 7 years with a fine of Rs. 500/-, under Section 306 for 7 years with a fine of Rs. 200 and under Section 498-A IPC for 2 years with a fine of Rs. 200/-. The sentences were ordered to run concurrently. The High Court maintained the convictions but reduced the sentence from 10 years to 7 years so far appellant No. 1 is concerned.

The brief facts of the case are:

Urmil (deceased) and appellant No. 1 were married on 29th May, 1985. Appellant No. 1 was working at Lucknow and had later shifted to Sonepat (Haryana). According to the prosecution case, within a few days of the marriage Urmil returned home and complained regarding demands of dowry for a refrigerator, scooter etc. by appellants. These demands were reiterated on subsequent visits. On account of non-fulfilment of these demands, the deceased was allegedly tortured and harassed. These alleged actions ultimately contributed towards a suicidal death. It is not in dispute that she died of burn injuries on 18th May, 1987.

3. In April 1987, Tara Chand, maternal uncle of the deceased died. Urmil (deceased) and Appellant No. 1 went to Shahdara (Delhi) to offer condolences. From there, Appellant No. 1 returned and Urmil went to her sister’s place in Delhi. On 17th May, 1987, when Appellant No. 1 went to the deceased’s sister’s place to bring Urmil (the deceased) back to Sonepat, some quarrel took place between them. Regardless, Appellant No. 1 brought back the deceased to Sonepat. The very next day i.e. on the 18th May, 1987. according to the appellants, at 9.30 a.m. Joginder Pal, (neighbour of the appellant) came to appellant No. 2 and informed him that smoke was coming out from the room on the first floor of the house. When they reached there, they found Urmil
lying dead on the floor with bum injuries. The room was full of smoke. Later, the parents of the deceased arrived and a post mortem examination was conducted on the body of the deceased. The doctor found that the cause of death was shock and asphyxia as a result of severe burns which were ante-mortem and were sufficient to cause death in the ordinary course of life.

4. Learned counsel for the appellants vehemently argued with vehemence that even if all the evidence on record was taken into consideration, no offence could be made out. No clear finding of suicide had been recorded and in any case essential ingredients of Section 304-B of IPC were lacking. The evidence against appellants No. 2&3 was flimsy and in any case their conviction could not be sustained. Further, there was no evidence that soon before her death, the deceased was subjected to cruelty or harassment for or in connection with any demand of dowry. There was neither any demand of dowry nor was there any agreement at the time of marriage, which is an essential ingredient to constitute an offence under dowry death in terms of definition of ‘dowry’ as given under Section 2 of the Dowry Prohibition Act, 1961 (hereinafter referred to as ‘the 1961 Act’). Unless there is an agreement for dowry, at the time of marriage or in connection with marriage, it would not qualify to be a dowry within such definition, hence no offence under Section 304-B I.P.C. Merely expressing the grouse of asking for fridge or TV would not by itself constitute to be a dowry within the said definition in the absence of any agreement. Further, before applying the demand clause under Section 304-B the evidence has to be within the scope of criminal jurisprudence, i.e. to prove guilt beyond all reasonable doubt. It cannot be based merely on suspicion, conjectures and surmises.

5. Let us see Section 304-B I.P.C. The ingredients necessary for the application of Section 304-B are :-

(a) When the death of a woman is caused by any burns or bodily injury, or
(b) occurs otherwise than under normal circumstances.
(c) and the aforesaid two facts spring within 7 years of girl’s marriage.
(d) and soon before her death, she was subjected to cruelty or harassment by her husband or his relative.
(e) this is in connection with the demand of dowry.

6. If these conditions exist, it would constitute a dowry death; and the husband and/or his relatives shall be deemed to have caused her death. In the present case, it is not in dispute that the deceased Urmil died of burn injuries, that she died otherwise than under normal circumstances and that the death was within a period of 7 years of marriage. The only consideration has to be whether she was subjected to any cruelty or harassment by the appellants soon before her
death and whether the same was for or in connection with any demand of dowry. In support of prosecution case, Smt. Misro Devi, mother of the deceased, PW-4 Trishala Devi, sister of the deceased, PW-5 Prem Chand Jain, father of the deceased, PW-6 Ram Gopal, brother-in-law of the deceased, husband of PW-5,PW-7 were examined. On perusal of the evidence of PW-4 we find that the mother of the deceased deposed that within four days following the marriage, her daughter deceased Urmil came back to her and told her that her parents-in-law and husband were subjecting her to taunts for not bringing a scooter and refrigerator as dowry at the time of marriage. She somehow pacified her daughter to return. Urmil came back after two months and again told her mother that her husband and in-laws were continuously taunting her daily, maltreating her and calling her ugly for not bringing the aforesaid goods as dowry. Admittedly, these taunts were uttered in view of the lesser dowry brought by her. Even after giving birth to a son, when she came back she again narrated the continued maltreatment poured on her by the accused. She also deposed that Urmil wrote some letters from Sonepat to her at Calcutta and Hansi, but after going through them she tore them up. Her letters also referred to the same maltreatment and torture. Similarly, PW-6, the father of the deceased also referred to the similar complaints made to him by Urmil. He also deposed that she used to tell him that her husband and in-laws were maltreating and harassing her on account of not meeting the demand of a scooter and a fridge. The father again expressed his inability to meet this demand. Hence her father sent her back after pacifying her. Similar is the deposition of PW-5, the sister of the deceased and PW-7, the brother-in-law of the deceased.

7. The afore referred to evidence, according to the learned counsel for the appellant, may merely be an expression of the desire to acquire a fridge, scooter etc. and that by itself cannot be construed as an offence as this would not come within the definition of ‘dowry’ under Section 2 of the Dowry Prohibition Act, 1961 read with Section 304-B and 498 I.P.C. It is necessary to refer the afore referred provisions.

Section 2 of the Dowry Prohibition Act, 1961 defines ‘dowry’ as under:-

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

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dowry or mehr in the case of persons to whom the Muslim Personal Law (Shariat) applies.
Section 304-B(1) with Explanation of IPC is as also quoted.

“304-B Dowry death - (i) where the death of a woman is caused by any bums or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative or her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death” and such husband or relative shall be deemed to have caused her death.

Explanation - For the purposes of this sub-section, “dowry” shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

Section 498-A is also quoted hereunder:

“498-A Husband or relative of husband of a woman subjecting her to cruelty - whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation - For the purposes of this section, “cruelty” means-

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

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

8. The aforesaid 1961 Act was enacted to provide an effective check to dowry deaths which were continuing despite the then prevailing laws. The object of the Bill was to prohibit the evil practice of giving and taking of dowry. This objective was not achieved hence drastic amendments were brought in by amending various provisions of the said Act and the related provisions under the Indian Penal Code and the Evidence Act. Earlier, the definition of ‘dowry’ which was limited to the time at or before the marriage was extended to the period even after the marriage by means of Act 43 of 1986 w.e.f. November 19, 1986. Similarly, Section 304-B was introduced by means of the same amending Act and Section 498-A was introduced by Criminal Law (Second Amendment) Act, 1983 (Act 46 of 1983). Various other amendments were brought in bringing more stringent provisions in the aforesaid 1961 Act in order to stem the onslaught on the life of a married woman.

9. It is true, as argued by learned counsel for the appellants, that in criminal jurisprudence benefit of doubt is extendable to the accused. But that benefit of
doubt would arise in the context of the application of penal law and in the facts and circumstances of a case. The concept of benefit of doubt has an important role to play but within the confines of the stringency of laws. Since the cause of death to a married woman was to occur not in normal circumstances but as a ‘dowry death’ for which the evidence was not so easily available, as it is mostly confined to within four walls of a house, namely husband’s house, where all likely accused reside. Hence the aforesaid amendments brought in the concept of deemed ‘dowry death’ by the husband or the relatives, as the case may be. This deeming clause has a role to play and cannot be taken lightly and ignored to shield an accused, otherwise the very purpose of the amendment will be lost. Of course, the prosecution has to prove the ultimate essential ingredients beyond all reasonable doubt after raising the initial presumption of ‘deemed dowry death’.

10. Explanation to Section 304-B refers to dowry “as having the same meaning as in Section 2 of the 1961 Act”, the question is - what is the periphery of the dowry as defined therein? The argument is, there has to be an agreement at the time of the marriage in view of the words ‘agreed to be given’ occurring therein and in the absence of any such evidence it would not constitute to be a dowry. It is noticeable, as this definition by amendment includes not only the period before and at the marriage but also a period subsequent to the marriage.

11. When words in statute are referable to more than one meaning, the established rule of construction is found in Heydon’s case (1584) 76 E.R. 639 also approved by this Court in Bengal Immunity Co. Ltd. v. State of Bihar and Ors., MANU/SC/0083/1955. The rule is to consider four aspects while construing an Act:

(a) what was the law prior to the law which is sought to be interpreted;
(b) what was the mischief or defect for which new law is made;
(c) what is the remedy the law now provides; and
(d) what is the reason of the remedy.

The Court must adopt that construction which, “suppresses the mischief and advances the remedy.”

12. Applying this principle, it is clear that the earlier law was not sufficient to check dowry deaths hence aforesaid stringent provisions were brought in, so that persons committing such inhuman crimes on married women should not escape, as evidence of a direct nature is not readily available except of the circumstantial kind. Hence it is that interpretation which suppresses the mischief, subserves the objective and advances the remedy, which would be acceptable. Objective is that men committing such crimes should not escape punishment. Hence stringent provisions were brought in by shifting the burden onto the
accused by bringing in the deemed clause. As aforesaid, the definition of ‘dowry’ was amended with effect from 19th November, 1986, to include a period even after the marriage.

13. The offence alleged against appellants is under Section 304-B IPC which makes ‘demand of dowry’ itself punishable. Demand neither conceives nor would conceive of any agreement If for convicting any offender, agreement for dowry is to be proved, hardly any offenders would come under the clutches of law. When Section 304-B refers to ‘Demand of dowry’, it refers to the demand of property or valuable security as referred to in the definition of ‘dowry’ under 1961 Act. It was argued on behalf of the appellants that mere demand of scooter or fridge would not be a demand for dowry. We find from the evidence on record that within a few days after the marriage, the deceased was tortured, maltreated and harassed for not bringing the aforesaid articles in marriage. Hence the demand is in connection with marriage. The argument that there is no demand of dowry, in the present case, has no force. In cases of dowry deaths and suicides, circumstantial evidence plays an important role and inferences can be drawn on the basis of such evidence. That could be either direct or indirect. It is significant that Section 4 of the 1961 Act, was also amended by means of Act 63 of 1984, under which it is an offence to demand dowry directly or indirectly from the parents or other relatives or guardian of a bride. The word ‘agreement’ referred to in Section 2 has to be inferred on the facts and circumstances of each case. The Interpretation that the appellant seeks, that conviction can only be if there is agreement for dowry, is misconceived. This would be contrary to the mandate and object of the Act. “Dowry” definition is to be interpreted with the other provisions of the Act including Section 3, which refers to giving or taking dowry and Section 4 which deals with penalty for demanding dowry, under the 1961 Act and the Indian Penal Code. This makes it clear that even demand of dowry on other ingredients being satisfied is punishable. This leads to the inference, when persistent demands for TV and scooter are made from the bride after marriage or from her parents, it would constitute to be in connection with the marriage and it would be a case of demand of dowry within the meaning of Section 304-B IPC. It is not always necessary that there be any agreement for dowry.

14. Reverting to the present case, the evidences of the aforesaid PWs are very clear. After few days of the marriage, there was demand of scooter and fridge, which when not being met lead to repetitive taunts and maltreatment. Such demands cannot be said to be not in connection with the marriage. Hence the evidence qualifies to be demand for dowry in connection with the marriage and in the circumstances of the case constitutes to be a case falling within the definition of ‘dowry’ under Section 2 of 1961 Act and Section 304-B IPC.
15. The next question is, whether there was any cruelty or harassment by the deceased’s husband or any relative and that too was it soon before her death. The argument put in is that neither there is any physical injury nor any evidence of cruelty from any neighbours or other independent persons; hence there is no cruelty or harassment, in our considered opinion, cruelty or harassment need not be physical. Even mental torture in a given case would be a case of cruelty and harassment within the meaning of Section 304-B and 498-A IPC. Explanation (a) to Section 498-A itself refers to both mental and physical cruelty. In view of Explanation (a) the argument is, before it constitutes to be a cruelty there has to be wilful conduct. Again wilful conduct means, conduct wilfully done; this may be inferred by direct or indirect evidence which could be construed to be such. We find, in the present case, on account of not satisfying the demand of the aforesaid goods, right from the next day, she was repeatedly taunted, maltreated and mentally tortured by being called ugly etc. A girl dreams of great days ahead with hope and aspiration when entering into a marriage and if from the very next day the husband starts taunting for not bringing dowry and calling her ugly, there cannot be greater mental torture, harassment or cruelty for any bride. There was a quarrel a day before her death. This by itself, in our considered opinion, would constitute to be a wilful act to be a cruelty both within the meaning of Section 498-A and Section 304-B IPC.

16. The argument, that there is no evidence of any cruelty or harassment soon before her death, is also not correct. We find both from the evidence of her sister, Trachala Devi PW-5 and her brother-in-law, Ram Gopal PW-7, that the deceased on 14th May, 1987 came to Shahdara (Delhi) to mourn the death of her maternal uncle and by evening on the same day instead of returning to her husband’s place came to her sister’s house. She remained there for few days. Both deposed that she told them that her husband was maltreating her in view of dowry demand and that not being satisfied was harassing her. When on 17th May, 1987 the husband came to take her back, she was reluctant but Trishala Devi brought her down and sent her with her husband. She went with the husband but with the last painful words that “it would be difficult now to see her face in the future”. On the very next day, on 18th May, one day after she arrived at her husband’s place, the unfortunate death of Urmil took place. She died admittedly on account of total burn of her body. Admittedly the incident of quarrel as deposed was only a day before her death. There is direct evidence that on 17th May itself, there was quarrel at the house of her sister with the deceased and her husband. The quarrel between the deceased and her husband was tried to be explained as some other quarrel which should not constitute to be a quarrel in connection with the dowry or demand of dowry in connection with the marriage. We find that Section 8-A of the aforesaid 1961 Act which came into force w.e.f. 2nd October, 1985 for taking or abetting any dowry, the burden to
explain is placed on such person against whom the allegation of committing an
offence is made. Similarly, under Explanation to Section 113-B of the Indian
Evidence Act, which was also brought in by the aforesaid Act No. 43 of 1986,
there is presumption that such death is on account of dowry death. Thus the
burden, if at all, was on the accused to prove otherwise.

17. The aforesaid evidence would, on the facts and circumstances of the case,
bring to an inescapable conclusion that the aforesaid quarrel referred to by
PWs 5 & 7 a day before actual death of the deceased, cumulatively with other
evidence constitute to be cruelty and harassment in connection with marriage
and that too at her own sister’s place which has direct co-relation with the
preceding evidence of repeated demand of dowry, to be a case covered both
tinder Section 304-B and 498-A IPC. However, it was open to the accused to
prove otherwise or dispel by means of evidence to destroy that deeming clause.
But we find he has not been able to do so. Such burden is placed on the accused
with a purpose. Evidence also concludes harassment to the deceased within
the meaning of Section 498-A Explanation (b), as she was repeatedly coerced
for not meeting the demands leading to her mental torture and agony which
ultimately led her to commit suicide.

18. In the present case, we find that both the courts below found that inspite of
thorough cross-examination, there is no deviation on this issue. In fact, it has
been pointed out by the learned counsel for the respondent that on the question
of cruelty and torture, there is no cross-examination though there is some on
other points. The courts below have rightly believed the testimonies of the
PWs and we do not find that there is anything for us to deviate from the same.
On the other hand, the evidence of the defence is of perfunctory nature, not
enough to dispel the burden cast.

19. A faint submission was also made that it would not be a case of abetment
of suicide under Section 306 IPC. Reference to Section 107 IPC was also
made where abetment should fall under any of the three heads. Reliance is
placed on the first head. We find that the first head provides “instigates any
person to do that thing”. There is no doubt in the present case there is repeated
demand from the husband’s side from the girl and her parents for the various
articles as aforesaid and on failure, the girl was tortured, harassed by words
and deeds, amounting to cruelty. As we have held above and one day before
the fateful day, the husband saturated the mental agony and cruelty by quarrelling
with the wife (deceased) even at her sister’s place, leaving no option which led
the deceased to commit suicide. This mental state is further clear by the
following words which she spoke to her sister, “it would be difficult now to see
her face in the future”. In our opinion all this would constitute to be an act
which would be an abetment for the commission of the suicide by the girl. The
husband, in the present case, has not led any cogent evidence or brought any circumstance to dislodge the aforesaid inference. Of course benefit of doubt to the accused would be available provided there is supportive evidence on the record. Hence for creating doubt or granting benefit of doubt, the evidence has to be such which may lead to such doubt. We do not find that present is a case where any benefit of doubt results at least against the husband. There is direct evidence, as stated by the aforesaid witnesses PWs 5 & 7 that soon before her death she was subjected to cruelty by the husband. However, we find in so far appellant Nos. 2 & 3, father-in-law and the mother-in-law, are concerned, the evidence is of a general nature. No convincing evidence has been led that the deceased was subjected to cruelty by appellant Nos. 2 & 3. Before holding that appellant Nos. 2 & 3 had committed the offence, it had to be found that they are responsible for subjecting her to cruelty or harassment, soon before her death. We find in this case evidence is only confined to the husband and not against appellant Nos. 2 & 3. Hence on the evidence on record, so far as appellant Nos. 2 & 3 are concerned, we extend to them the benefit of doubt and acquit them.

20. Hence for the aforesaid reasons, we partly allow the appeal. Convictions and sentences of appellant No. 1 are maintained but the convictions and sentences of the appellant Nos. 2 & 3 are set aside. Accordingly, appellant No. 1, namely Pawan Kumar is sentenced to 7 years' rigorous imprisonment with a fine of Rs. 500, in default of payment of fine for further rigorous imprisonment for 6 months under Section 304-B IPC, 4 years' rigorous imprisonment and to pay a fine of Rs 200, in default of payment of fine further rigorous imprisonment for 3 months, under Section 306 IPC and sentence for 2 years’ rigorous imprisonment and to pay fine for Rs. 200, and in default of payment of fine further rigorous imprisonment for three months, under Section 498-A IPC. All the sentences would run concurrently. The other appellants, namely appellants Nos. 2 & 3 are hereby acquitted. They are on bail. They need not surrender, to their bail bonds. Their bail bonds are hereby discharged.

21. The appeal is allowed in part.
Appellants: Sanaboina Satyanarayana
Vs.
Respondent: Government of Andhra Pradesh and Ors.

In the Supreme Court of India
Criminal Appeal No. 1227 of 2002

Hon’ble Judges
Doraiswamy Raju and H.K. Sema, JJ.

Decided On: 29.07.2003

Counsels
For Appellant/Petitioner/Plaintiff: Ananga Bhattacharya, Adv. for P.S.N.& Co.
For Respondents/Defendant: Guntur Prabhakar and T. Anamika, Advs.

Acts/Rules/Orders
Indian Penal Code - Sections 55, 201, 302, 354, 376, 379, 411 and 498A;
Constitution of India - Articles 14 and 161; Narcotic Drugs and Psychotropic Substances Act; Scheduled Castes and Scheduled Tribes (Prevention of atrocities) Act; Explosive Substances Act; Indian Explosive Substances Act; Indian Explosive Act; Indian Arms Act; Criminal Procedure Code (CrPC) - Section 433; Dowry Prohibition Act

Prior History
From the Judgment and Order dated 11.7.2000 of the Andhra Pradesh High Court in W.P. No. 4441 of 2000

Mentioned IN

Disposition
Appeal dismissed

Case Note
Criminal – Indian Penal Code – Section 302, 498A, 201 – Remission of sentence – State Govt. passed an order called Remission of Sentence subject to certain conditions – Remission granted in respect of only a specified class of convicts and that to certain conditions specified in the Govt. order – Remission is a concession and no one has any vested right in the remission – Remission is matter of policy of the State Govt. – State Govt. has the power to decide what classes of persons or categories of offenders the remission would be granted – Classification of the convicts is just, reasonable and necessitate in the larger interest of society and greater public interest – Appeal dismissed
1. The above appeal has been filed against the judgment and order dated 11.07.2000 in Writ Petition No. 4441 of 2000 by a Division Bench of the High Court of Andhra Pradesh dismissing the writ petition along with some other writ petitions also which came to be disposed of by a common judgment. The claim of the petitioner Sanabolina Nelabala Chandrudu in the writ petition filed before the High Court was that the convict, by name, Sri Sanabolina Satyanarayana, (the appellant now before this Court), the brother of the writ petitioner therein, was tried by the learned Additional Sessions Judge, West Godavari Division at Eluru along with four others for the offence punishable under Section 302, 498-A and 201 IPC in Sessions Case No. 4 of 1990, that after completion of the trial, the learned Additional Sessions Judge convicted the brother of the writ petitioner who stood charged as accused No. 1 under Section 302 IPC and sentenced him to undergo imprisonment for life. He was also said to have been convicted under Section 498-A IPC and sentenced to undergo three years’ rigorous imprisonment, in addition to the payment of Rs. 1,000/- as fine in default of which to suffer a further six months’ rigorous imprisonment. Conviction under Section 201 IPC was also made for which he has been sentenced to undergo four years’ rigorous imprisonment in addition to the payment of Rs. 1,000/- as fine and in default to suffer six months’ rigorous imprisonment. An appeal filed before the High Court, being Criminal Appeal No. 200 of 1992 was also dismissed on 04.05.1993. The convict was said to have been taken into custody on 25.02.1992 and is undergoing imprisonment.

2. While so, it appears that the Governor of the first respondent - State has passed GOMs. No. 18 HOME (PRISONERS-C) DEPARTMENT dated 25.01.2000 in exercise of the powers conferred under Article 161 of the Constitution of India remitting the un-expired residue of sentence as on 26.01.2000, of the various categories of prisoners in the State who have been convicted by Civil Courts of Criminal Jurisdiction for offences against laws relating to a matter to which the Executive power of the State extends, subject to the conditions specified in paras (2) and (3) of the said Government order. The said order came to be passed on the occasion of the 50th Anniversary of India becoming a Republic. The relevant part of the Government order which needs reference for appreciating the grievance of the appellant is as hereunder:-

“a) All convicted prisoners sentenced to imprisonment for life who have undergone an actual sentence of 7 years and a total sentence of 10 years (including remission) as on 26.01.2000.

[(b) and (c) omitted as not relevant for the purposes of the case].
2. (Omitted as not relevant for the present case)

3. The remission of sentence ordered in para 1 above shall not apply to the following categories of prisoners, namely:-

(i) Prisoners convicted and sentenced by Courts situated outside the State of A.P.

(ii) Prisoners convicted of offences against laws relating to a matter to which the Executive Power of the Union extends.

(iii) Prisoners convicted under Narcotic Drugs and Psychotropic Substances Act, the Scheduled Castes and Scheduled Tribes (Prevention of atrocities) Act, Explosive Substances Act, Indian Explosive Substances Act, Indian Explosive Act and Indian Arms Act, while being sentenced to imprisonment for life.

(iv) Prisoners convicted for crimes against women such as Section 376 and 351 IPC while being sentenced to imprisonment for life.

(v) Prisoners convicted for the offences of theft, robbery, dacoity and receiving stolen property (i.e. Section 173 to 411 IPC) while being sentenced to imprisonment for life.

(vi) Prisoners who have overstayed on Parole/Furlough for cumulative periods in excess of 10 years and,

(vii) Prisoners who have escaped while undergoing the sentence.

As indicated earlier, it makes it explicit that the remission order is subject to the conditions specified in paras (2) and (3) above, and therefore subject to the stipulation contained in item (iv) of Para-3.

3. The grievance espoused before the High Court was that the appellant-convict was entitled to the benefit of the said Government order and as long as his conviction was not for a crime against women under Section 376 and 354 IPC, the benefit of the Government orders could not be denied to the convict. It appears to have been also urged before the High Court that the discrimination made in this regard against convicts for crimes against women suffers the wise of Article 14 of the Constitution of India and, therefore, the Government order has to be read de-hors the said restriction so as to extend the benefit of the remission granted thereunder to the appellant also. The High Court rejected such a plea urged on behalf of the appellant as well as the others observing that the power under Article 161 being purely a discretionary one it is for the Governor to grant remission confined to certain categories of offenders/convicts only and that there was no discrimination involved in the same. As far the other issue relating to the construction of category (iv) of Para-3, it was observed, all offences/crimes against women are disabled from claiming the benefit of
remission under the orders in question and not merely those convicted under Section 376 and 354 IPC.

4. When the matter came up before the Court on 24.07.2003, Mr. S. Muralidhar, learned counsel appeared and made detailed submissions on behalf of the appellant reiterating the same grounds as were urged before the High Court. As the matter was about to be concluded, it was brought to our notice that the Government seem to have also passed a subsequent order and that if any benefit is given under the said Government order, it may enure to the advantage of the claim made in this appeal. At that stage, the matter was adjourned to enable the learned counsel appearing for the respondent-State to produce the subsequent orders said to have been passed by the Government. A copy of GOMs. No. 17 HOME (PRISONS-B-2) DEPARTMENT dated 17.01.2003 has been made available and it is seen from the said Government order that the same was not in exercise of powers under Article 161 but under Section 433 Cr.P.C. and Section 55 IPC and that several provisions of the IPC other than those which were already illustrated in the earlier order of the Governor relating to crimes against women including the conviction under the Dowry Prohibition Act have been specified to be the class of convicts who cannot avail of the benefit of remission. The learned counsel appearing for the appellant today would contend that the G.O. Is of a subsequent date and may not stand in the way of the benefits which are claimed to have accrued to the appellant who has been convicted and undergoing imprisonment, in terms of the earlier order of the Governor dated 25.01.2000. As on the earlier date of hearing as well as today, the learned counsel for the appellant tried to contend that there is no rhyme or reason in making a further classification among the entire class of convicts forming a larger group, based on offences or crime against women and those falling under the other category, apart from contending that the stipulation contained in para 3-(iv) of the earlier order, noticed supra, does not, by its very terms deny or disentitle a convict under Section 498-A IPC, to the benefits of remission granted under the earlier Government order.

The learned counsel appearing for the respondent-State, while adopting the reasoning of the High Court contended that the exception carved out for denying the benefit of remission in respect of convicts of crime against women is a valid one, well merited and justifiable in public interest and the same is not justiciable. It was also urged that the remission itself is a benefit and concession sought to be granted to a few class of persons and being a matter of policy, the State cannot be compelled to accord remission to all category of convicts, even against the evolved policy of the State and no discrimination which suffer the vice of Article 14 of the Constitution of India, could be said to be involved in such classification and the High Court was right in rejecting the claim on behalf of the appellant.

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5. We have carefully considered the submission of the learned counsel appearing on either side. In our view, the rejection of the plea on behalf of the appellant by the High Court was well merited and supported by sound reasons. As pointed out earlier, the remission to be granted was in respect of only a specified class of convicts and that too “subject to the conditions” specified in the very Government order. Consequently, the claim for remission cannot be made or countenanced de-hors the specific conditions subject to which only it has been accorded and in as much as the grant as well as the conditions formed a compendious single common pattern or scheme of concession by way of remission, pregnated with a policy designed in public interest and the safety and interests of the society, either the remission could be availed of only subject to the conditions stipulated or the entirety of the scheme fails as a whole, and there is no scope for judicial modification or modulating the same so as to extend the concession in excess of the very objective of the -maker of the order which seems to have been guided by considerations of State policy. In such class or category of orders, there is no justification for any addition or subtraction to facilitate enlargement of the scope and applicability of the order beyond what was specifically intended in the order itself.

6. Clause (iv) of paragraph 3 of the Government order dated 25.01.2000 specifically stated that prisoners convicted for “crimes against women such as Section 376 and 354 IPC while being sentenced to imprisonment for life”’, will fall outside the scheme for remission granted under the said G.O. When the clause noticed above, in the later portion referred to two of the provisions of the IPC, after the words “such as” it was more by way of illustration of the excepted category of offences relating to crimes against women in general and not with an intention to be exhaustive of the same and to merely confine the words “crimes against women” to only those convicts for crime against women under Section 376 and 354 IPC . Acceptance of any such plea would amount to not only doing violence to the language of the order of the Governor but also rewriting the same and that too in utter disregard of the very intention, a laudable one in larger and greater public interest. When keeping into consideration the societal needs and dictates of the gruesome events happening in large scale all over the State, a conscious decision has been taken by the policy maker to keep out a class of anti socials from availing the benefit of the remission, courts cannot by stretching the language confer an undeserved benefit upon the class of convicts, who, in our view also have not only been designedly but deservingy were kept out of the scheme for according the benefit of remission.

7. The plea of discrimination needs mention only to be rejected. The remission proposed in commemoration of the 50 years of Indian Republic itself is a boon
and concession to which no one had any vested right. As to what classes of persons or category of offenders to whom the remission has to be extended is a matter of policy particularly when it is also a constituent power conferred upon the constitutional functionary and Head of the State Government, larger area of latitude is to be conceded in favour of such authority to decide upon the frame and limits of its exercise under Article 161 itself. The Constitution of India itself has chosen to countenance the claims of women for favourable treatment and acknowledge the fact that sex is a sound classification. The issue in question being one pertaining purely to the area policy and political philosophy of the State, the Courts except in the rarest of rare cases, cannot be called upon to adjudicate on the desirability or wisdom of such decisions. It is no exaggeration to place on record that instances of violence against women and children particularly female, such as rape, dowry deaths, domestic violence, bride burning, molestation, brazen, ill treatment of horror, vulgarity and indecency are not only rampant but on phenomenal increase casting a shadow of shame on the society, the culture and Governance in this country and it seems that cruelty to women and problems of battered wives have become ironically almost a world wide phenomenon. Such a situation deserves a social treatment in the hands of the State. Consequently, the classification in this regard to keep away convicts for crimes against women from the benefits of remission under the order dated 25.01.2000 cannot be said to violate any reasonable principle or concept of law so as to call for its condemnation in exercise of the powers of judicial review. The classification therefore sounds just, reasonable, proper and necessitated in the larger interests of society and greater public interest and consequently cannot by any stretch of imagination be branded to be invidious to attract the vice of Article 14 of the Constitution of India. A careful scrutiny of the various excepted class of convicts only show that the real object is to ensure that those who prey on the community and violate fundamental values of mankind, society and national interest should not get undeserved benefit.

8. Consequently, we see no merit whatsoever in the appeal and the same, therefore, fails and shall stand dismissed.
Appellants : Smt Shanti and Anr.
Vs.
Respondent : State of Haryana

In the Supreme Court of India

Criminal Appeal No. 368 of 1990

Hon’ble Judges
S.R. Pandian and K. Jayachandra Reddy, JJ.

Decided On: 13.11.1990

Counsels

Acts/Rules/Orders
Indian Penal Code, 1860 - Sections 304B and 498A; Evidence Act, 1872 - Section 113B

Prior History
From the Judgment and Order dated February 1, 1990 of the Punjab and Haryana High Court in Crl. A. 703 D.B. of 1988

Case Note
Criminal – dowry death - Section 304-B of Indian Penal Code, 1860 and Section 113-B of Evidence Act, 1872 – appeal challenging conviction under Section 304-B – prosecution established beyond all reasonable doubt that appellants treated deceased with cruelty – case squarely came within meaning of ‘cruelty’ which is essential under Section 304-B and that such cruelty was for demand for dowry – deceased died within seven years of her marriage – essentials of Section 304-B satisfied – evidence of PW.1, PW.2 and PW3 further made it clear that they were not even soon informed about death of deceased and appellants hurriedly cremated dead body – presumption under Section 113-B gets attracted – no material to indicate even remotely that it was case of natural death – prosecution has established that appellants committed offence punishable under Section 304-B beyond all reasonable doubt – conviction confirmed.

HELD See paras 2, 5 and 7.
Judgment

K. Jayachandra Reddy, J.

1. This is a case of dowry death. The deceased by name of Smt. Kailash was the daughter of Hari Bhagwan, P.W. 1 of Jonala. She was married to one Sat Pal of Mundaliya Village about 9 kilometres away from Jonala. The marriage took place on 18th April, 1987. Sat Pal, (he husband at the relevant time was serving in the Army. His father namely the father-in-law of deceased was employed in Railways. Accused No. 1 Smt. Shanti is the mother of Sat Pal, and the mother-in-law of the deceased. The other appellant Smt. Krishna, wife of the brother of Sat Pal was another inmate. After marriage the deceased was living in her matrimonial home with accused Nos. 1 and 2, the two appellants herein. It is alleged that these two women were harassing the deceased all the while after the marriage for not bringing Scooter and Television as part of the dowry and she was treated cruelly. The marriage of one Munni, a cousin of the deceased was fixed for 30th April, 1988. Her brother went to Mundaliya village twice for bringing the deceased but the accused only taunted him and sent him away without sending the deceased. Ultimately, P.W. 1, the father himself went to the home of his daughter, the deceased on 25th April, 1988. The two appellants misbehaved with him saying that if he was fond of his daughter he ought to have arranged Scooter and Television as part of the dowry and he was insulted and pushed out of the house. On 26th April, 1988 at about 11 P.M. P.W. 1 came to know that the deceased had been murdered and was cremated by the two ladies with the help of another three persons. A report was given and the police could recover only bones and ashes. After investigation, the charge-sheet was laid.

2. The Additional Sessions Judge, who tried all the five accused convicted the appellants under Section 304-B I.P.C. and sentenced each of them to life imprisonment and under Section 201 I.P.C, sentenced them to undergo imprisonment for one year and to pay a fine of Rs. 2,000 each and also under Section 498-A I.P.C. to two years rigorous imprisonment and to pay a fine of Rs. 3,000. The sentences were directed to run concurrently. The other accused were acquitted.

These two appellants preferred an appeal to the High court and the same was dismissed. The High Court, however, set aside the conviction under Section 498-A I.P.C. The present appeal, pursuant to the leave granted by this Court, has been preferred against the judgment of the High Court.

3. Mr. Lalit, learned counsel for the appellants submitted that there is no direct evidence in this case and that all the ingredients of an offence under Section 304-B I.P.C. are not made out. According to him, it is not conclusively proved that the two appellants subjected the deceased to cruelty or harassment and the
very fact that the High Court has acquitted the appellants of the offence punishable under Section 498-A would itself indicate that the prosecution case regarding cruelty is not accepted and consequently the death cannot be one of “dowry death”. On merits, he submitted that in the absence of clear proof of the cause of death one cannot presume that the death occurred in unnatural circumstances.

4. Section 304B I.P.C. reads as follows:

“304B. Dowry death-(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death.

Explanation—For the purposes of this sub-section, “dowry” shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961.

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.”

This Section was inserted by the Dowry Prohibition (Amendment) Act, 1986 with a view to combat the increasing menace of dowry deaths. It lays down that where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before the death of the woman she was subjected to cruelty or harassment by her husband or his relations for or in connection with any demand for dowry, such death shall be called “dowry death” and the husband or relatives shall be deemed to have caused her death and shall be punishable with imprisonment for a minimum of seven years but which may extend to life imprisonment. As per the explanation to the Section, the “dowry” for the purposes of this Section shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 which defines “dowry” as follows:

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

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.”

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Keeping in view the object, a new Section 113-B was introduced in the Evidence Act to raise a presumption as to dowry death. It reads as under:

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

Explanation—For the purposes of this section, “dowry death” shall have the same meaning as in Section 304B of the Indian Penal Code.”

One another provision which is relevant in this context is Section 498-A I.P.C. which reads as under:

“498-A. Husband or relative of husband of a woman subjecting her to cruelty—Whoever being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation—For the purposes of this section, “cruelty” means—

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

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

A careful analysis of Section 304B shows that this Section has the following essentials:

“(1) The death of a woman should be caused by burns or bodily injury or otherwise than under normal circumstances;

(2) Such death should have occurred within seven years of her marriage;

(3) She must have been subjected to cruelty or harassment by her husband or any relative of her husband;

(4) Such cruelty or harassment should be for or in connection with demand for dowry.”

Section 113B of the Evidence Act lays down that if soon before the death such woman has been subjected to cruelty or harassment for or in connection with any demand for dowry, then the Court shall presume that such person has committed the dowry death. The meaning of “cruelty” for the purposes of
these Sections has to be gathered from the language as found in Section 498-A and as per that Section “cruelty” means “any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life etc. or harassment to coerce her or any other person related to her to meet any unlawful demand for any property or valuable security or is in account of failure by her or any person related to her to meet such demand.” As per the definition of “dowry” any property or valuable security given or agreed to be given either at or before or any time after the marriage, comes within the meaning of “dowry”. With this background of the provisions of law we shall examine the facts in the instant case.

5. Both the courts below have held that the two appellants did not send the deceased to her parent’s house and drove out the brother as well as the father of the deceased complaining that scooter and television have not been given as dowry. We have carefully examined this part of the prosecution case and we are satisfied that the prosecution has established beyond all reasonable doubt that the appellants treated the deceased cruelly and the same squarely comes within the meaning of “cruelty” which is an essential under Section 304-B and that such cruelty was for demand for dowry. It is an admitted fact that death occurred within seven years of the marriage. Therefore three essentials are satisfied. Now we shall see whether the other essential namely whether the death occurred otherwise than under normal circumstances is also established? From the evidence of P.W. I, the father, PW.2 the brother, and P.W. 3 the mother, it is clear that they were not even informed soon about the death and that the appellants hurriedly cremated the dead body. Under these circumstances, the presumption under Section 113B is attracted. The accused examined defence witnesses to rebut the presumption and to show that the deceased suffered heart-attack. We have examined the evidence of D. Ws 2 and 3 and we agree with the courts below that this theory of natural death cannot be accepted at all. No material was placed to show that the deceased suffered any such attack previously. If it was natural death, there was no need for the appellants to act in such unnatural manner and cremate the body in groat and unholy haste without even informing the parents. Because of this cremation no postmortem could be conducted and the actual cause of death could not be established clearly. There is absolutely no material to indicate even remotely that it was a case of natural death. It is nobody’s case that it was accidental death. In the result it was an unnatural death; either homicidal or suicidal. But even assuming that it is a case of suicide even then it would be death which had occurred in unnatural circumstances. Even in such a case, Section 304-B is attracted and this position is not disputed. Therefore, the prosecution was established that the appellants have committed an offence punishable under Section 304B beyond all reasonable doubt.
6. Now we shall consider the question as to whether the acquittal of the appellants of the offence punishable under Section 498-A makes any difference. The submission of the learned counsel is that the acquittal under Section 498-A I.P.C. would lead to the effect that the cruelty on the part of the accused is not established. We see no force in this submission. The High Court only held that Section 304B and Section 498-A I.P.C. are mutually exclusive and that when once the cruelty envisaged in Section 498-A I.P.C. culminates in dowry death of the victim, Section 304B alone is attracted and in that view of the matter the appellants were acquitted under Section 498-A I.P.C. It can therefore be seen that the High Court did not hold that the prosecution has not established cruelty on the part of the appellants but on the other hand the High Court considered the entire evidence and held that the element of cruelty which is also an essential of Section 304B I.P.C. has been established. Therefore the mere acquittal of the appellants under Section 498-A I.P.C. in these circumstances makes no difference for the purpose of this case. However, we want to point out that this view of the High Court is not correct and Sections 304B and 498-A cannot be held to be mutually exclusive. These provisions deal with two distinct offences. It is true that “cruelty” is a common essential to both the Sections and that has to be proved. The Explanation to Section 498-A Rives the meaning of “cruelty”. In Section 304B there is no such explanation about the meaning of “cruelty” but having regard to the common background to these offences we have to take that the meaning of “cruelty or harassment” will be the same as we find in the explanation to Section 498-A under which “cruelty” by itself amounts to an offence and is punishable. Under Section 304B as already noted, it is the “dowry death” that is punishable and such death should have occurred within seven years of the marriage. No such period is mentioned in Section 498-A and the husband or his relative would be liable for subjecting the woman to “cruelty” any time after the marriage. Further it must also be borne in mind that a person charged and acquitted under Section 304B can be convicted under Section 498-A without charge being there, if such a case is made out. But from the point of view of practice and procedure and to avoid technical detects it is necessary in such cases to frame charges under both the Sections and if the case is established they can be convicted under both the Sections but no separate sentence need be awarded under Section 498-A in view of the substantive sentence being awarded for the major offence under Section 304B.

7. These are all the submissions and we do not find merit in any of them. Therefore, we confirm the convictions.

8. Now coming to the sentences, accused No. 2, the wife of the husband’s brother is a young lady of 20 years at the time of the trial. As already mentioned, there is no evidence as to the cause of death but as discussed above, the cruelty
on the part of these two appellants is established but in bringing about the death, there is no evidence as to the actual part played by accused No. 2. Further both the appellants are women. Under these circumstances, a minimum sentence of seven years’ rigorous imprisonment would serve the ends of justice. Accordingly the convictions are confirmed but the sentence of imprisonment for life under Section 304B I.P.C. of each of the accused appellant is set aside and instead each of them is sentenced to undergo seven years’ rigorous imprisonment. The appeal is disposed of accordingly.
Appellants: State of Rajasthan
Vs.
Respondent: Hat Singh and Ors.

In The Supreme Court of India
Fact Highlight
Case Note Highlight

Criminal Appeal Nos. 671-678 of 1987
Decided On: 08.01.2003

Hon’ble Judges
R.C. Lahoti and Brijesh Kumar, JJ.

Counsels
For Appellant/Petitioner/Plaintiff: B.D. Sharma, Narottam Vyas and S.N. Tewari, Adv.

Acts/Rules/Orders
Rajasthan Sati (Prevention) Ordinance, 1987 - Sections 5, 6, 6(1), 6(2), 6(3) and 19; Rajasthan Sati (Prevention) Act, 1987 - Section 1(3); Criminal Procedure Code (CrPC), 1973 - Sections 221(1), 221(2), 300 and 482; Constitution of India - Articles 20(2), 25 and 26; General Clauses Act, 1897 - Section 26; Indian Penal Code - Sections 71, 201, 330, 348 and 409; Insurance Act - Section 105; Prevention of Corruption Act, 1947 - Section 5(2)

Cases Referred

Prior History

Disposition
Appeal allowed
Citing Reference
**   Relied On   **
Maqbul Hussain v. State of Bombay  **
State of Bombay v. S.L. Apte and Anr  **
Om Prakash Gupta v. State of U.P   **
The State of Madhya Pradesh v. Veereshwar Rao **
Roshan Lal and Ors. v. State of Punjab **

Case Note
Section 5, 6 and 19 of the Rajasthan Sati (Prevention) Ordinance, 1987 – Article 20 of the Constitution of India – Prevention and punishment for sati and glorification of sati – Whether section 5 and section 6 are overlapping and violative of Article 20(2) of the Constitution - Offence under the two sections are distinct offences - Section 5 makes the commission of an act an offence whereas section 6 is preventive in nature and makes provisions for punishing contravention of prohibitory order so as to make prevention effective - Same set of facts may give rise to an offence punishable under section 5 and section 6 both – There is nothing unconstitutional or illegal about it – Judgement of the High Court set aside and the Trial Court directed to conclude proceedings as expeditiously as possible.

Judgment
R.C. Lahoti, J.
1. The Rajasthan Satî (Prevention) Ordinance 1987 was promulgated by the Governor of Rajasthan on 01.10.1987. The following Sections of the Ordinance are relevant for our purpose and hence are extracted and reproduced hereunder:-

2(b). “glorification”, in relation to Satî, includes, among other things, the observance of any ceremony or the taking out of a possession in connection with the Satî or the creation of a trust or the collection of funds or the construction of a temple with a view to perpetuating the honour of, or to preserve the memory of the person committing Satî.

2(c). Satî means the burning or burying alive of any widow along with the body of her deceased husband or with any article object or thing associated with the husband, irrespective of whether such burring is voluntary on the part of the widow or otherwise.

5. Punishment for glorification of Satî Whoever does any act for the glorification of Satî shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine which shall not be less than five thousand rupees but which may extend to thirty thousand rupees. Power of Collector and District Magistrate to prevent offences.
relating to Sati

6. Power to prohibit certain acts—(1) Where the collector and District Magistrate is of the opinion that Sati is being or is about to be committed in any area, he may, by order, prohibit the doing of any act towards the commission of Sati in such areas and for such period as may be specified in the order.

(2) The Collector and District Magistrate may also, by order, prohibit the glorification in any manner of the commission of sati by any person in any area or areas specified in the Order.

(3) Whoever contravenes any order made under Sub-section (1) or Sub-section (2) shall, if such contravention is not punishable under any other provisions of this Ordinance, be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine which shall not be less than five thousand rupees but which may extend to thirty thousand rupees.

19. Removal of doubts—For the removal of doubts, it is hereby declared that nothing in this Ordinance shall affect any temple constructed for the glorification of Sati and in existence immediately before the commencement of this Ordinance or the continuance of any ceremonies in such temple in connection with such Sati.

2. The Ordinance was replaced by the Rajasthan Sati (Prevention) Act 1987 which received the assent of the President on 26th November, 1987, Sub-section (3) of Section 1 provides that it shall be deemed to have come into force on 1st October, 1987. The relevant provisions of the Act with which we are concerned remain the same as they were in the Ordinance excepting that the word ‘Act’ has been replaced for the word ‘Ordinance’ wherever it occurs.

3. In exercise of the powers conferred by Section 6(2) of the Ordinance the Collector and District Magistrate, Jaipur issued the following order on 6th October, 1987:—

“In exercise of powers vested in me vide Section 6(2) of the Rajasthan Sati (Prevention) Ordinance, 1987. I. J.N. Gaur, Collector & District Magistrate, District: Jaipur, Jaipur do hereby prohibit with immediate effect the glorification of the commission of Sati in any manner in District Jaipur, by any person or Association of persons.

Issued on the 6th day of October 1987 under my hand and seal of my office.

(J.N. Gaur)

(Collectors & District Magistrate)

Jaipur”
4. The Ordinance does not require the order of the Collector issued Under Section 6(2) of the Ordinance to be published in the official gazette so as to be effective. Undisputedly, the order was not published in the official gazette. The manner in which the order was publicized can best be demonstrated by quoting from the judgment of the High Court:-

311.....the Collector’s order dated 06.10.1987 relating to Rajasthan Sati (Prevention) Ordinance, 1987 had been sent in the form of a press note for publication in local newspapers on 07.10.1987. This news was published in Rajasthan Patrika, Rastra Doot, Nav Bharat Times, Nav Jyoti and some other newspapers on 07.10.1987. In addition to this, the news was broadcast by the Jaipur Station of All India Radio on 07.10.1987. That the Collector’s order dated 06.10.1987 was broadcast by Jaipur Station of All India Radio on 07.10.1987 in Hindi at 7.10 PM and 8.05 in Rajasthan by Smt. Ujjwala and Shri Ved Vyas respectively is stated in a letter produced on 06.11.1987.

5. Three incidents took place leading to the registration of three offences pursuant to the FIRs recorded and registered at local police stations. On 08.10.1987, a mass rally was organised which, according to the prosecution, contravened the prohibitory order issued by the Collector. FIR No. 270/87 was registered at Police Station Moti Doongri, Jaipur Under Section 6(3) of the Ordinance in which Section 5 was also added later. On 20.10.1987, Hindi Dharam Raksha Samiti, Kotputli Branch, contravened the prohibitory order of the Collector at Kotputli. FIR No. 238/87 was registered at Police Station Kotputli. On 28.10.1987, Dharam Raksha Samiti demonstrated against the Ordinance and thereby contravened the Collector’s prohibitory order. In that regard FIR No. 451/87 was registered on 30.10.1987 at Police Station Manakchow. Several accused persons were arrested and investigation commenced. Some of the persons filed petitions from jail which were treated by the High Court as petitions seeking the writ of Habeas Corpus. A few petitions were filed Under Section 482 CrPC seeking quashing of the prosecution. All these petitions were taken up for consolidated hearing. Challenge was laid to the vires of the several provisions of the Ordinance and the Division Bench of the High Court was persuaded to examine the constitutional validity thereof, later replaced by and included in the Act. The cases before the Division Bench were argued from very many angles. For our purpose, it would suffice to sum up the following relevant findings:-

(1) Barring Section 19, the Ordinance and the Act are perfectly legal and constitutional.

(2) Section 19 of the Ordinance and the Act are unconstitutional and declared void and struck down.
(3) The Ordinance and the Act are not violative of the freedom of religion under Articles 25 and 26 of the Constitution.

(4) The prohibitory order issued by the Collector on 06.10.1987 was not duly published. If the prohibitory order would have been published in the Official Gazette, it would have amounted to publication. However, the Ordinance or the Act does not insist on such publication. It could have been published in a manner other than by way of publication in the Official Gazette. The evidence that has been produced before the High Court goes to show that although radio bulletins broadcast and newspapers carried news about some prohibitory order having been issued by the Collector, the fact remains that the prohibitory order of the Collector was not as such published in any of the newspapers nor read out in the news bulletins. Therefore, the prohibitory order cannot be said to have been promulgated. In the opinion of the High Court, in the absence of the prohibitory order dated 06.10.1987 having been published in accordance with law, the same could not have been enforced and no one could be prosecuted for the alleged defiance or violation of the prohibitory order issued by the Collector.

6. Yet another important finding arrived at by the High Court is that the provisions of Sections 5 & 6 are overlapping. Both the provisions aim at declaring glorification of Sati as an offence making the same punishable with imprisonment. Once a prohibitory order has been issued Under Section 6(2), the provisions of Section 5 merge into the provisions of Section 6 and thereafter a person can be held liable for commission of an offence only by reference to Sub-section (3) of Section 6 as having contravened an order made either under Sub-section (1) or Sub-section (2). Inasmuch as, in the opinion of the High Court the prohibitory order of the Collector was not published in accordance with law, the prosecution Under Section 6(3) was not maintainable, and therefore, could not be proceeded with. All the prosecutions were, therefore, directed to be quashed.

7. Before this Court none of the parties has made any submissions regarding the constitutional validity of Section 19 of the Act and, therefore, we are not called upon to express any opinion thereon. The only submission made before this court on behalf of the appellant State was that the High Court was not right in forming an opinion that Sections 5 and 6 are overlapping and, therefore, once a prohibitory order has been made by the Collector under Sub-section (1) or (2) of Section 6, then Section 5 ceases to apply. We find force in the submission of the learned counsel for the State.

8. Article 20(2) of the Constitution provides that no person shall be prosecuted and punished for the same offence more than once. To attract applicability of Article 20(2) there must be a second prosecution and punishment for the same
offence for which the accused has been prosecuted and punished previously. A subsequent trial or a prosecution and punishment are not barred if the ingredients of the two offences are distinct.

9. The rule against double jeopardy is stated in the maxim nemo debet bis vexari pro una et eadem causa. It is a significant basic rule of Criminal Law that no man shall be put in jeopardy twice for one and the same offence. The rule provides foundation for the pleas of autrefois acquit and autrefois convict. The manifestation of this rule is to be found contained in Section 26 of the General Clauses Act, 1897. Section 300 of the Code of Criminal Procedure, 1973 and Section 71 of the Indian Penal Code. Section 26 of the General Clauses Act provides—“Where an act or omission constitutes an offence under two or more enactments then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence (emphasis supplied).” Section 300 of the CrPC provides, inter alia - “A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Sub-section (1) of Section 221 or for which he might have been convicted under Sub-section (2) thereof (emphasis supplied).” Both the provisions employ the expression “same offence”.

10. Section 71 of IPC provides—

11. “Where anything which is an offence is made-up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such is offences, unless it be so expressly provided.

12. Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

13. where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined a different offence,

14. the offender shall not be punished with a more severe punishment than the Court which tries him could award for one of such offence.

15. The leading Indian authority in which the rule against double jeopardy came to be dealt with the interpreted by reference to Article 20(2) of the Constitution is the Constitution Bench decision in Maqbul Hussain v. State of Bombay MANU/SC/0062/1953. If the offences are distinct, there is no question
of the rule as to double jeopardy being extended and applied. In *State of Bombay v. S.L. Apte and Anr., MANU/SC/0077/1960*, the Constitution Bench held that the trial and conviction of the accused Under Section 409 IPC did not bar the trial and conviction for an offence Under Section 105 of Insurance Act because the two were distinct offences constituted or made up of different ingredients though the allegations in the two complaints made against the accused may be substantially the same. In *Om Prakash Gupta v. State of UP, MANU/SC/0130/1957* and *The State of Madhya Pradesh v. Veereshwar Rao MANU/SC/0102/1957*, it was held that prosecution and conviction or acquittal Under Section 409 of IPC do not debar the accused being tried on a charge Under Section 5(2) of the Prevention of Corruption Act, 1947 because the two offences are not identical in sense, import and content. In *Roshan Lal and Ors. v. State of Punjab MANU/SC/0089/1964*, the accused had caused disappearance of the evidence of two offences Under Section 330 and 348 IPC and, therefore, he was alleged to have committed two separate Under Section 201 IPC. It was held that neither Section 71 IPC nor Section 26 of the General Clauses Act came to the rescue of the accused and the accused was liable to be convicted for two sets of offences Under Section 201 IPC though it would be appropriate not to pass two separate sentences.

16. The offences Under Section 5, Under Section 6(1) r/w Section 6(3) and Section 6(2) r/w Section 6(3) are three distinct offences. They are not the same offences. This is clear from a bare reading of Sections 5 and 6. While Section 5 makes the commission of an act an offence and punishes the same; the provisions of Section 6 are preventive in nature and make provisions for punishing contravention of prohibitory order so as to make the prevention effective. Commission of sati may or may not have taken place and may not actually take place (after the issuance of prohibitory order), yet the prohibitory order under Sub-section (1) or (2) of Section 6 can be issued. Section 5 punishes “any act for the glorification of Sati”. The words ‘glorification’ and ‘sati’ are both defined in the Act. What is prohibited by the Collector and District Magistrate Under Section 6(1) is “any act towards the commission of Sati” subject to his forming an opinion that Sati is being committed or is about to be committed. The prohibition is against abetment of Sati or doing of any act, which would aid or facilitate the commission of Sati. On such prohibitory order being promulgated, its contravention would be punishable Under Section 6(3) without regard to the fact whether Sati is committed or not and whether such act amounts or glorification of Sati or not. Under Section 6(2), the Collector and District Magistrate may prohibit “the glorification in any manner” of the commission of Sati. The expression ‘the glorification in any manner’ carries a wider connotation than the expression ‘the glorification of sati’ as employed in Section 5. In case of prosecution Under Section 6(2) r/w Section 6(3), what
would be punishable is such defiance or contravention of the order of the Collector and District Magistrate, as has the effect of the glorification in any manner of the commission of Sati. In distinction therewith, it is the actual doing of an act for the glorification of Sati which is made punishable Under Section 5. The Legislature in its wisdom thought fit to enact Section 5, worded very widely, contemplating cognizance post happening and also enact Section 6 which aims at prevention in anticipation of happening. The object sought to be achieved by enacting Section 6 is to empower the Collector and District Magistrate to take preventive action by prohibiting certain acts and enable cognizance being taken and prosecution being launched even before commission of sati or glorification of sati has actually taken place. Thus the sense, import and content of the offence Under Section 5 are different from the one under Section 6(3).

17. The gist of the offence Under Section 5 is the commission of an act, which amounts to glorification of Sati. It is the commission of act by itself which is made punishable on account of the same having been declared and defined as an offence by Section 5 of the Ordinance/Act. The gist of the offence Under Section 6 of the Ordinance/Act is the contravention of the prohibitory order issued by the Collector and District Magistrate. Section 5 punishes the glorification of Sati. Section 6 punishes the contravention of prohibitory order issued by the Collector and District Magistrate, which is a punishment for the defiance of the lawful authority of the State to enforce law and order in the society. What is punished under Section 5 is the criminal intention for glorification of sati, what is punishable Under Section 6 is the criminal intention to violate or defy the prohibitory order issued by the lawful authority. We do not agree with the High Court that the ingredients of the offences contemplated by Section 5 and Section 6(3) are the same or that they necessarily and in all cases overlap or that prosecution and punishment for the offences Under Sections 5 and 6(3) — both are violative of Article 20(2) of the Constitution or of the rule against double jeopardy.

18. We are, therefore, of the opinion that in a given case, same set of facts may given rise to an offence punishable Under Section 5 and Section 6(3) both. There is nothing unconstitutional or illegal about it. So also an act which is alleged to be an offence Under Section 6(3) of the Act and if for any reason prosecution Under Section 6(3) does not end in conviction, if the ingredients of offence under Section 5 are made out, may still be liable to be punished Under Section 5 of the Act. We, therefore, do not agree with the High Court to the extent to which it has been held that once a prohibitory order under Sub-section (1) or (2) has been issued, then a criminal act done after the promulgation of the prohibitory order can be punished only under Section 6(3) and in spite of prosecution Under Section 6(3) failing, on the same set of facts the person
proceeded against cannot be held punishable Under Section 5 of the Act although the ingredients of Section 5 are fully made out.

19. The appeal is allowed. The judgment of the High Court is set aside. The prosecution shall proceed against the accused persons consistently with the observations made hereinabove. In view of the delay which has already taken place. It is directed that the trial Court shall give precedence to the present case and try to conclude the proceedings as expeditiously as possible preferably within a period of six months from the date of first appearance of the accused persons before it pursuant to this order.
Bachhi Bista, a resident of Bhaise Pati of Lalitpur District .......... Petitioner
Vs.
Kabindra Bahadur Bista and Others, residents of the address as mentioned above ..... .... Defendants

Supreme Court
Nepal Law Reporter, 2034 (1977),
Pack No. 16, Previous Page No. 138, Current Page No. 142

Division Bench
Judge
The Hon’ble Justice Prakash Bahadur KC
The Hon’ble Justice Bishwa Nath Upadhyay

Decision No. 1052
Civil Miscellaneous No. 41 of the year 2033 (1976)
Date of Judgment: Magh 10, 2034 (1977)

Subject: Claim for maintenance after declaring the defendant as her husband

In response to a petition filed by Bachhi Bista (The petitioner) to His Majesty, the King requesting for a revision of the verdict given by the Central Regional Court, His Majesty the King issued an order for a revision of that case by the Supreme Court and to intimate the petitioner about that order. As the letter communicating that order of Shrawan 6, 2033 (1976) was received from the Special Petition Department of His Majesty the King, and as the Division Bench, pursuant to that Royal order, instructed on Shrawan 18, 2033 (1977) that the case be registered in the miscellaneous Diary in order to proceed in accordance with that Royal order, and the case file be called and summons issued to the petitioner to be present in the Court within seven days (Excluding the time to be consumed enroute) and that the case file be presented for consideration before the Division Bench as per the Rules, this case was presented before the Division Bench for review.

2. The facts of the case can be briefly described as follows: the petitioner Bachhi Bista and Kabindra Bahadur Bista, son of Sher Bahadur Bista, a resident of Saibu Bhaise Pati Village Panchayat, Ward No. 4, frequently used to call on each other. During the course of their meetings, although they were not married to each other, they had sexual intercourse on the first occasion with mutual consent near a ‘pipal’ tree in a ‘pati’ (Small public shade) located between their parents’ houses. Thereafter sexual intercourse between them took place often at that very same place. When the petitioner found that her menstruation
had stopped since the month of Falgun, 2024 (1967) she went to the defendant’s father and informed him about it. He, in turn, refused to allow her to stay at his house pleading that his son was not at home. As a result of the pregnancy caused by the semen of Kabindra Bahadur, a daughter was born to her on Manshir 1, 2025 (1968). When she requested her father-in-law Sher Bahadur to give her delivery expenses as well as maintenance, he refused to oblige. She also gave an application to the local Panchayat which tried to persuade her father-in-law, who however, did not budge. Then she submitted a petition to His Majesty the King, and rented a room in the house of Gore Thapa of the same village to stay in. She had taken a loan of Rs. 400, and she claimed in her statement before the Court for a reimbursement of that money as well as an additional Rs. 799.63 spent on goods for daily consumption since Poush 3, 2024 (1967) till date.

3. The defendant Sher Bahadur Bista, in his statement before the court, stated that his son had gone to India, and had there been sexual intercourse between them since Mar 1, 2024 (1967) resulting in her pregnancy, the matter should have been decided in the presence of his son. But as she did not do so, now when his son was not present at home he could not say whether or not he had caused the pregnancy. He further denied that her parents had approached him at his house. He also contended that the law made it obligatory to give food and clothes to a married wife but it did not, however, oblige one to give food and clothes to a wife who had been kept secretly, and so the claim of the plaintiff was false.

4. In his rejoinder presented before the court, Kabindra Bahadur, another defendant, pleaded that under a scholarship granted by His Majesty’s Government he had been admitted to Shree Nagar Regional Engineering College of Kashmir, India, on August 14, 1967 (i.e. Shrawan 30, 2024) and had been staying at that college ever since. The same was also clear from a letter certified by Mr. Jethyu Khan, the Dean of Students Welfare, and a copy of that letter was produced before the court. He further stated that as he had not kept the petitioner as his wife and neither had he had any sexual intercourse with her, he was not obliged to give her any maintenance.

5. In her counter statement before the Court, the petitioner pleaded that she had given birth to a daughter conceived with the semen of Kabindra Bahadur. Had it not been the result of sexual intercourse with Kabindra Bahadur he should have specifically pointed out the person to whom it belonged. Since she used to have sexual intercourse with Kabindra Bahadur since 2024 (1967) and as only after her conception Kabindra Bahadur had gone to India on Falgun 25, 2024 (1967) his rejoinder was false. She further claimed that as Kabindra Bahadur was her husband he should be declared as such.
6. In his counter statement before the Court, Sher Bahadur refuted the charge of the petitioner and maintained that as Kabindra Bahadur had gone to India during the time of the alleged copulation the statement of the plaintiff was false.

7. Disposing the case on Shrawan 32, 2030 (1973), the Lalitpur District Court observed that since the petitioner Bachhi Bista had, in her petition submitted before His Majesty the King, contended that in the month of Manshir in 2024 (1967), when her father happened to be out of the house, she had had sexual intercourse for the first time with the defendant Kabindra Bahadur, whereas in her statement given before the Court while identifying her earlier petition she had maintained that sexual intercourse between them had taken place in the month of Manshir, 2024 (1967) at a place near the “pipal” tree situated between the houses of the petitioner and the defendant, there appeared to be an obvious difference in the place(s) of the occurrence of sexual intercourse as mentioned in the petition submitted to His Majesty the King and as claimed in her statement given before the Court. As for the plea of the defendant about his being in the Engineering College Hostel in Kashmir, India at the time of the alleged first sexual intercourse and which had been attested by the copy of the certificate issued by that institution, both the petitioner in her statement before the court and the counsel appearing on her behalf had contended that a document prepared after the filing of the case could not be treated as evidence. On the other hand the counsel for the defendant argued that as the certificate belonged to the Shree Nagar Regional Engineering college and as it had been issued by the Dean of the College certifying the presence of the defendant Kabindra Bahadur Bista at the hostel of the College, such a document issued by an institution could not be described as one prepared after the filing of the case. As for the submission made on the petitioner’s behalf that if the daughter born to the petitioner was not the defendant’s, he could not even show who her father was, and as a case regarding the claim for declaring somebody as someone’s husband is a criminal case, the onus of proof is on the plaintiff to prove the charge against the defendant beyond all reasonable doubt; whereas it is suffice for the defendant to plead not guilty to the charge. Therefore, only because the defendant could not point out who the father of the girl child was - born to the plaintiff, it is not sufficient just to claim that she belonged to the defendant. Also, there was no uniformity - rather there was much inconsistency between the statement of the petitioner and the testimony given by her witnesses, since some of her witnesses had claimed to have seen the plaintiff and the defendant moving about together since the year 2023 (1966) whereas some others had claimed to have seen them going together to visit holy and other places since the month of Falgun or Chaitra of the year 2024 (1967). Besides, the defendant Kabindra Bahadur’s witnesses had testified that he, after having gone to a
foreign country to study in the year 2024 (1967), had returned home only in the month of Magh in the year 2029 (1972). In view of all the evidences collected in the case file, the claim of the petitioner to declare the defendant Kabindra Bahadur Bista as her husband could not be sustained.

8. Disposing the appeal filed by the petitioner on Kartik 3, 2032 (1975), a Division Bench of the Central Regional Court held that the “Sarjamin muchulka” (Public reconnaissance document) enclosed with the case file stated that those persons had seen the appellant Bachhi Bista and the defendant Kabindra Bahadur only moving together. There was no evidence at all to prove that a relationship of husband and wife existed between them. As the appellant had contended for the declaration to the effect that the defendant Kabindra Bahadur was her husband, she should have substantiated her claim with some concrete proof. However, that contention could not be substantiated by the testimony given by the witnesses produced by the petitioner. The learned counsels appearing on behalf of the defendants had put forward the certificate given by the Regional Engineering College of Kashmir as the main proof. It could not be proved that the defendant Kabindra Bahadur was present at his birth place during the time of the alleged sexual intercourse in the month of Manshir in the year 2024 (1967). The appellant Bachhi Bista also could not give any evidence regarding the presence of any special sign on the interior sexual organ of the defendant. Nor could she point out any such special sign even on the day when the case had been submitted before the Bench for hearing, when she was asked to do so. In the present context, it was therefore not possible to declare her as the wife of Kabindra Bahadur Bista and thus the decision of Lalitpur District Court was justified.

9. The apex Court had to decide whether or not the decision of the Central Regional Court upholding the decision of Lalitpur District was justified.

10. Appearing on behalf of the petitioner, learned advocate Thakur Prasad Kharel pleaded that there was no obvious reason for any animosity between the petitioner and the defendant Kabindra Bahadur, and his father Sher Bahadur did not mention in his statement that Kabindra Bahadur had gone out since Shrawan 30, 2024 (1967); they were persons belonging to the same village and the same neighborhoods; the witnesses had described how they used to move together in each other’s company; the defendant could not point out as to who the person responsible for the pregnancy of Bachhi Bista was; and had she not been his wife he should have sued her for defamation and for slandering his character, which he had not. For those reasons, the learned counsel argued, the pregnancy of Bachhi Bista belonged to none other than the defendant Kabindra Bahadur.
11. Appearing on behalf of the defendants, learned advocate Hora Prasad Joshi argued that there was inconsistency regarding the place of the first occurrence of sexual intercourse as mentioned in the statement of the petitioner and in the petition submitted to His Majesty the King. Kabindra Bahadur was present in Kashmir during the alleged month of Manshir which the petitioner had pointed out. As the Dean of Students Welfare had also issued a certificate in that regard, the pregnancy could not be treated as one caused by the defendant Kabindra Bahadur. So the learned advocate prayed for upholding the decision given by the Central Regional Court. Another learned advocate of the defendants Mr. Krishna Prasad Ghimire contended that the offence of sexual intercourse had been described separately in the statement of the petitioner and the petition submitted by her to His Majesty the King. There were only four witnesses besides the opinion of the people recorded on the spot (‘sarjamin’) put forward as evidence. The testimony given by the witnesses and the statement of the petitioner were inconsistent. Additionally, since the petitioner had failed to produce any evidence to substantiate her charge, her claim was obviously false, and therefore, the defendant ought to be cleared of the charge.

12. Disposing the case, the apex court observed that the petitioner Bachhi Bista had claimed that as she had given birth to a daughter as a result of her sexual intercourse with the defendant Kabindra Bahadur, she must be provided with maintenance after declaring her his wife. The main contention of the defendant Kabindra Bahadur centered round the point that in the alleged month of Manshir, 2024 (1967) when the petitioner was said to have had the sexual intercourse with him, he was not at his home in the village; rather he was staying at that time for study at Shree Nagar Regional Engineering College in the state of Kashmir in India. So as he had neither kept her as his wife nor had he had any sexual intercourse with her, he was not obligated to provide her with maintenance. The Lower Court and the Central Regional Court seemed to have decided against the petitioner on the basis of the fact that there was a difference with regard to the place where sexual intercourse had allegedly taken place for the first time as described in her statement before the Court and in the petition submitted to His Majesty the King. The petitioner could not point out any special sign on the private sexual organ of the defendant. There were inconsistencies in the testimonial statements of the witnesses of the petitioner as some of them had pointed out the year 2023 (1966) while others had pointed out the year as 2024 (1967) as the time when they had seen them moving together in company. The defendant Kabindra Bahadur had also presented a certificate issued by the Dean of Students Welfare certifying that in the month of Manshir, 2024 (1967) he was not present in his home/village; rather he was studying in Kashmir, and his witnesses had also testified to that matter.
13. The apex court observed that it would be appropriate first to discuss the above-mentioned pointes raised in those verdicts. It had been argued that there is an inconsistency with regard to the place where sexual intercourse took place for the first time, as was reflected by the various statements of the petitioner. However, a close study of the matters mentioned in that regard in the first statement of the petitioner and in the petition submitted by her to His Majesty the King revealed no inconsistency. In her petition submitted to His Majesty the King it had been only specifically mentioned that while her father was not present at the house the defendant had come to her house and persuaded her to live together as husband and wife as they belonged to the same caste. Nowhere had it been said that sexual intercourse also took place at the same time inside the house. It could not be presumed that sexual intercourse could not have taken place outside the house after having the dialogue inside the house. Moreover, even if it was conceded that there was inconsistency in regard to the place of first sexual intercourse in the statement of the petitioner, it could not be presumed only from that matter that there had been no sexual intercourse at all between the petitioner and the defendant. In fact, the main issue to be decided in the present case is whether or not there had been sexual intercourse between the petitioner and the defendant resulting in the birth of a girl child. It could not be reasonable to reach any conclusion by arguing as if the main question to be decided in this case was where sexual intercourse had taken place for the first time. If it is established by the evidences collected in the case file that there had been sexual intercourse between the petitioner and the defendant resulting in the birth of a girl child, no matter whatsoever might be the version of the petitioner in regard to the place of the first sexual intercourse, that could not in any way adversely affect the justification of the main plea of the petitioner.

14. So far as the question of an inconsistency in the versions of the petitioner and her witnesses was concerned, as some of the witnesses of the petitioner had stated that they had seen the petitioner and the defendant Kabindra Bahadur moving together in company in the year 2023 (1966) whereas some others had pointed out that time as the year 2024 (1967), it had been held that there was no uniformity among the various versions of the witnesses of the petitioner. However, such a view is not reasonable. The witnesses had testified that the two used to move together in one another’s company. It was not necessary that everyone would see such a couple who always used to move together at the same time or date or in the same month or year. If those different people told the Court about their joint movement when they happened to have seen them together at different time slots, how could that introduce inconsistency in the statements of the witnesses? The petitioner had mentioned in her statement that her first sexual intercourse with Kabindra Bahadur had taken place in the
month of Manshir, 2024 (1967) preceded by frequent meetings with him. From that it appeared that the statement of the petitioner about their meetings taking place even earlier than the month of Manshir, 2024 (1967) was also not at variance with the witnesses’ versions.

15. It had been also argued against the petitioner that she had failed to point out any special sign present on the private sexual organ of the defendant such a plea seemed to be extremely unique. How far it would be reasonable and feasible to comment that any two persons performing a sexual intercourse must have seen all the signs present on each other’s private sexual organs? In fact, that logic was far-fetched and appeared completely distanced from feasibility. It was not at all fair to maintain that the act of sexual intercourse would be treated to have taken place only if one could point out the special sign present on the other’s private sexual organ and could not be so held if one failed to point out such a special sign.

16. The defendant Kabindra Bahadur had pleaded in his rejoinder that he was in Kashmir in the month of Manshir, 2024 (1967) and submitted a certificate to the effect dated July 18, 1972 issued by a person named Z. Khan, the Dean of Students Welfare of Kashmir, in support of his plea. In that letter it has been mentioned that the defendant Kabindra Bahadur was admitted to Shree Nagar Regional Engineering College on August 14, 1967 (accordingly, Shrawan 30, 2024) and had remained at that very place till 1972.

17. The witnesses of the defendant, namely, Shambhu Bahdur, Bishnu Bahadur and Basudev, had testified that the defendant had gone to Kashmir in Shrawan, 2024 (1967) for study and returned only in the year 2029 (1972). On the basis of the aforesaid certificate and the testimony of the witnesses the District Court and the Central Regional Court, presuming that the statement of the defendant was substantiated, had given a verdict concluding that Kabindra Bahadur had not been present in the village during the month of Manshir, 2024 (1967). But that plea of the defendant stood refuted by the specific testimony of the witnesses of the petitioner, namely, Krishna Bahadur, Ganga Bahadur, Arjun Bahadur, Kaman Singh etc., that in the month of Manshir, 2024 (1967) the defendant Kabindra Bahadur was present in the village and they had seen him often moving together with the petitioner Bachhi Bista as well as travelling together with her to holy places. The fact that the defendant Kabindra Bahadur was present in his home/village in the month of Manshir, 2024 (1967) was also substantiated by the statement of his father Sher Bahadur before the Court in which he could not take that plea and had rather argued that if the pregnancy had been caused by the act of sexual intercourse performed by his son since Manshir 1, 2024 (1967) it should have been sorted out in the presence of his son while he was present there. The apex court argued that had Kabindra Bahadur not been present
in his home/village in that month of Manshir, his father defendant Sher Bahadur
should have taken that defence in his very first statement before the Court. But
he did not do so. Rather, his plea that that controversy should have been settled
when his son was himself present there proved that in the month of Manshir
Kabindra Bahadur was present in his home/village and there seemed no reason
for such a statement to have been made if it had been otherwise. It appeared
from his statement to that effect that only afterwards both the father and the
son had conspired to obtain a certificate from the above-mentioned Dean of
Students Welfare, and the defendant, in his statement given on Falgun 18, had
tried to present a defence plea along the lines of the rejoinder presented by
Kabindra Bahadur. In fact, that certificate from the defence side could not be
treated as evidence. It could not be directly accepted as evidence without
ascertaining as to whether or not the person issuing that certificate was in reality
the Dean; whether he had given that certificate or not, and whether he had the
authority to issue such a certificate or not. In addition, it was also not proper to
jump to the conclusion that the above-mentioned matter was true until the
person described as the Dean did not appear before the Court as a witness to
testify in regard to that matter and the petitioner had had an opportunity to
cross-examine him. In such a circumstance it did not seem proper that the
Lalitpur District Court and the Central Regional Court gave it evidentiary value.
As far as the testimony of some witnesses of the defendant like Sambhu Bahadur
and others was concerned, one could not easily accept their statements that
Kabindra Bahadur, who had gone to the state of Kashmir in neighbouring India
to study, had returned to his home/village after five or six years, having
completed his studies. It is a common practice for students who go to study in
that neighbouring country visit home during the longer vacations. Nowhere is
it clear as to what the extraordinary reason was that, as an exception, the
defendant Kabindra Bahadur during his five or six years’ continuous stay in
Kashmir did not come to his home/village even once. Therefore, from the
aforementioned facts it is not proved that the defendant Kabindra Bahadur
was not present in his home/village in the month of Manshir, 2024 (1967). On
the contrary it was established that he was, in fact, present in his home/village
in the aforesaid month of Manshir.

18. Then the learned justices further deliberated upon the question as to whether
or not sexual intercourse had taken place between the petitioner and the
defendant Kabindra Bahadur, as claimed by the former. No direct evidence
could be generally found to prove that sexual intercourse had taken place.
Sexual intercourse between a consenting young man and woman was not
performed in full view of the common people. For that reason, generally no
eyewitness could be found to substantiate such an act. Therefore, it is required
to depend on the conduct of the concerned parties and other circumstantial
evidence to ascertain the fact regarding an alleged act of sexual intercourse. Viewed from this angle, in the present case both the petitioner Bachhi Bista and the defendant Kabindra Bahadur, being persons of the same village and the same neighbourhood, appeared to be situated in a position of acquaintance and easy contact with each other. It also appeared from the testimony of the witnesses that there had been close intimacy between them. Krishna Bahadur, Ganga Bahadur, Arjun Bahadur and Kaman Singh had stated that they had seen the two of them often moving together in each other’s company and visiting holy places together. It is not a normal practice in our villages to find two young persons of marriageable age who did not have any family relations, often moving together. From such conduct of the petitioner and the defendant Kabindra Bahadur, which was contradictory to the social values of the rural community, it appeared that the two were attracted to each other. It was not unusual that sexual intercourse might have taken place between them depending on favourable conditions between the petitioner and the defendant Kabindra Bahadur who were attracted to each other and had spent a considerable length of time in each other’s company. There appeared no reason as to why, if there had been no sexual intercourse between them, the petitioner should have charged that the daughter was born as a result of her sexual intercourse with the defendant Kabindra Bahadur. It is generally not found in our society that a woman would move about declaring that she had had sexual intercourse with some male person. If a lady declared that she had performed sexual intercourse with some male person, either that matter would be true or that lady, being herself a characterless woman, would be making such a declaration motivated by some vested interest. However, in the present case it did not appear from any angle that the petitioner Bachhi Bista was motivated by any nefarious interests to trap the defendant Kabindra Bahadur. Also, nobody had claimed that the petitioner was a woman of bad character. Taking into overall consideration factors like the age of the petitioner and the defendant Kabindra Bahadur, the possibility of their proximity, the testimony of the witnesses who had seen them moving about together, the absence of any motive for the petitioner to falsely implicate the defendant and a lack of any allegation against the integrity of the character of the petitioner, the allegation of the petitioner that there had been sexual intercourse with the defendant Kabindra Bahadur seemed to be true. Since it appeared that there had been frequent sexual intercourse between the petitioner and the defendant Kabindra Bahadur it must be presumed that the daughter born from the womb of the petitioner in the month of Manshir, 2025 (1968) was a result of the sexual intercourse of the petitioner with the defendant Kabindra Bahadur. As the question of fatherhood was always dependent on presumption, so long as it was not proved otherwise the version of the mother in that regard ought to be treated as true. The version of the
petitioner Bachhi Bista in that connection had to be accepted as the truth in the context of the above-mentioned matters. Thus as it appeared that there had been frequent sexual intercourse between the petitioner and the defendant Kabindra Bahadur with an intention of both of them living together as husband and wife and resulting in the birth of a daughter, the apex court declared the petitioner Bachhi Bista as the wife of the defendant Kabindra Bahadur and also allowed her to get maintenance from the defendant as per her claim in the petition. The apex court also voided the impugned decisions of Lalitpur District Court and the Central Regional Court as they were found to be erroneous.

(The verdict was written by the Hon’ble Justice Bishwa Nath Upadhyay with the concurrence of Hon’ble Justice Prakash Bahadur K.C.)
Subject: Law inconsistent to the Constitution be declared invalid and *ultra vires* pursuant to Article 88(1) of the Constitution of the Kingdom of Nepal, 2047 (1990).

On behalf of the Forum for Women, Law and Development, Thapathali, ward No. 11 of Kathmandu Municipal Corporation and on her own, Advocate Meera Dhungana, 33, a resident of the same .......... Writ Petitioner.

Vs

His Majesty’s Government, Ministry of Law, Justice and Parliamentary Affairs, Singhdurbar ..................... 1

His Majesty’s Government, Cabinet Secretariat, Singhdurbar.........1

The House of Representatives, Singhdurbar, Kathmandu..........1

The National Assembly..............................................................1

.................................................................................................Respondents

The Supreme Court

Special Bench

Judge
Hon’ble Justice Mr. Laxman Prasad Aryal
Hon’ble Justice Mr. Kedarnath Upadhyaya
Hon’ble Justice Mr. Krishna Kumar Barma

Writ No. 55 of the year 2058 BS (2001-2002)

Date of Judgment: Thursday, the 19\textsuperscript{th} of Baisakh of the year 2059

Facts in brief of and the order made in the writ petition filed at this court pursuant to Article 88(1) of the Constitution of the Kingdom of Nepal, 1990 are as follows:

Whereas, a writ petition has been filed challenging the Constitutional validity of No. 1 of Chapter on Rape in the Country Code stating that Part 3, Article 11 of the Constitution of the Kingdom of Nepal, 2047 has guaranteed the right to equality and the aforesaid equal protection of law to all citizens of Nepal. The preamble to the Constitution has expressed a commitment to the protection of human rights and the rule of law. The Right to equality is one of the basic premises of any democratic country and the backbone of the rule of law. If any legal provision creates an advantage for one and a disadvantage for the other between the same sex on the basis of social status or any other reason, and if such legal provision creates any inferiority feelings, then such legal provision is nothing but unequal. Not only the Constitution of the Kingdom of Nepal, but international instruments like the Universal Declaration of Human Rights, 1948;

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the International Covenant on Civil and Political Rights, 1966; the International
Covenant on Economic, Social and Cultural Rights, 1966; the UN Convention
on the Elimination of All Forms of Discrimination against Women, 1979 also
provide that all human beings are equal and everyone possesses the inherent
right to equal protection, that no person shall be unreasonably discriminated
against, that the legal provisions depriving, discriminating, excluding and
restricting economic, social, cultural, civil rights and human rights and
fundamental freedoms of women be eliminated through the medium of
Constitutional and legal measures, and that no laws shall be enacted causing or
intending to cause discrimination; and Nepal has ratified or acceded to those
international treaties and conventions without any reservation and has also
accepted the responsibilities arising out of those basic instruments of human
rights. Section 9(1) of the Nepal Treaty Act, 1991 has categorically provided
that in case a provision of a treaty to which Nepal is a party is inconsistent with
any provision of a law in force, the provision of the law in force shall, to the
extent of such inconsistency, be invalid for the purpose of the treaty and the
provision of such treaty shall prevail as a municipal law of Nepal;

 Whereas, the petitioner also states that the Constitution of the Kingdom of
Nepal, 1990 is the fundamental law of the land. No other laws may be enacted
or enforced in contravention to principles, values and spirit of the fundamental
law. In addition to this, Nepal has become a party to the aforementioned
instruments;

 Whereas, the petitioner further states that despite these aforementioned
provisions, No. 1 of the Chapter on Rape in the Country Code 1963 has defined
rape as the act of having sexual intercourse with a girl, widow or another’s
wife not having attained the age of sixteen years with or without her consent in
whatsoever manner, or having attained the age of sixteen years without her
consent in whatsoever manner either by exerting threat, pressure or coercion
or with undue influence. However, the act of having sexual intercourse with
one’s own wife by the husband without her consent has not been included in
the definition of rape;

 Whereas, the petitioner further states that Article 11 of the Constitution of
Kingdom of Nepal, 1990 has guaranteed all citizens equal protection of the
law and equality before the law, and Article 12(1) has guaranteed the right to
individual liberty. Similarly, Article 1 of the Convention on the Elimination of
All Forms of Discrimination Against Women (CEDAW) has defined the term
‘discrimination’. The definition not only includes direct discrimination but
also the law or practice that has the purpose or effect of causing discrimination
or of depriving one of equal treatment. This Convention has not only holds the
state responsible for violence or a violation of women’s right by public
institutions or in the public sphere, but also for such acts committed in private spheres. In the course of the Beijing Plus Five Review Process held to review the progress made after the Beijing Conference (On women), marital rape has been recognised as one of the forms of violence against women, and a commitment has been made to ban it;

Whereas, the petitioner continues in the petition that rape is a physical relationship against one’s will. Consent is a fundamental basis for sexual intercourse or contact. However, a provision contained in No. 1 of the Chapter on Rape has violated the women’s right to equality and the right to decide, which have been secured under various international instruments like the International Covenant on Civil and Political Rights, 1966 and the Convention on the Elimination of All Forms of Discrimination against Women. Whereas, the petitioner has also stated that the rationales that criminal law should not be applied to family relations and that it ruins a married life are baseless ones. It is simply because in a married life when violence is present in sexual relationship, there is no meaning and value of such relations. Thus, the petitioner has requested that as No. 1 of the Chapter on Rape is inconsistent with the right to equality guaranteed under the Constitution of the Kingdom of Nepal, 1990 and also with the Convention on the Elimination of All Forms of Discrimination against Women and other international human rights instruments, the impugned provision is void pursuant to Article 1(1) of the Constitution of the Kingdom of Nepal, 1990, and therefore, the impugned provision be declared *ultra vires* under Article 88(1) of the Constitution;

Whereas, an order was issued by a single Bench of this court on 2058-4-17 (Aug 1, 2001) requiring the respondents to submit in writing as to why an order should not be issued as requested by the petitioner;

Whereas, separate written replies with the same content of responses have been received from the House of Representatives and the National Assembly stating that the petitioner could not have shown and established as to why the House of Representatives and the National Assembly have been made respondents as well as the relevance of making them respondents, and thus, the petition is liable to be quashed as the subject-matter would be cleared from the written replies of other respondents;

Whereas, the Ministry of Law, Justice and Parliamentary Affairs stated in its written reply that the said provision of the current law has been enacted because it is not in conformity with the Hindu religion, traditions and values that a husband may rape his own wife exercising threats, fear, pressures and duress - unlike what has been contended by the writ-petitioner. With the change of time, state parties to various international instruments have been expressed a positive commitment to equal rights to women and in the course of changing
laws in accordance with the provisions of international instruments, new laws have been enacted or are being enacted in Nepal. Thus, the process of a timely change of laws is in progress. As the said provision is, from the viewpoint of equality, equally effective even in the present context, there is no need for a repeal or an amendment. On the basis of the above, No. 1 of the Chapter on Rape, the Country Code, is not inconsistent with the Constitution of the Kingdom of Nepal, 1990, the Convention on the Elimination of All Forms of Discrimination against Women and other international instruments relating to women’s human rights, and therefore, the writ petition is liable to be quashed;

Whereas, the Cabinet Secretariat has, in its written reply, contended that No. 1 of the Chapter on Rape, the Country Code, has criminalised the act of having sexual intercourse by force with any woman, and has afforded protection to women by punishing any third person committing the offence of rape as defined or deemed by the law with any woman other than his wife. Since it is against the Hindu religion, traditions and values that a husband may rape his wife by exercising threat, fear, pressure and force, unlike what has been contended by the petitioner, the current law contains the said provision. Moreover, the petitioner has not been able to establish what action or proceeding of the Secretariat has violated the right of the petitioner, and the Secretariat has been made respondent without any basis, the writ petition is liable to be quashed;

Whereas, in respect to the rule the writ petition has been referred to this bench. Advocates Sapana Pradhan Malla and Raju Chapagain pleaded on behalf of the writ petitioner stating that No. 1 of the Chapter on Rape has not criminalised the rape of a wife committed by her husband using force, threat, fear and duress and has provided immunity to offenders. Various international human rights instruments have recognised that marital rape is not only a form of violence against women but a serious violation of women’s human rights as well. Being a party to those international instruments, Nepal is under a duty to abide by the obligations arising from such instruments. The classification of the law that an act committed upon an unmarried girl is an offence while the same act committed upon a married woman is not, is not a reasonable one. The said provision in the Chapter on Rape is against the right to equality guaranteed under Article 11 and the right to privacy guaranteed under Article 22 of the Constitution of the Kingdom of Nepal, 1990, and in contravention to the right to equality guaranteed under various international treaties and conventions. Therefore, the impugned provision of No. 1 Chapter on Rape is inconsistent with Article 1 of the Constitution; it should be declared invalid and ultra vires pursuant to Article 88 of the Constitution;

Whereas, on behalf of the respondent His Majesty’s Government, The learned Deputy Attorney General Narendra Kumar Shrestha and the learned Joint
Attorney General Narendra Prasad Pathak pleaded that the Constitution has guaranteed right to equality only amongst equals. However, married and unmarried women cannot be treated alike. The social position and family responsibilities of married women are far different and separate from those of unmarried women. The said legal provision has been made on the recognition that marriage itself is permanent consent expressed to have sexual relations. Thus, the provision of the said No. 1 of the Chapter on Rape cannot be applicable equally with respect to women in a nuptial relationship and those not in such a relationship. Writ jurisdiction may not be entertained on the basis of a hunch or hypothesis as no victim has filed a case. In case any man causes pain or suffering to his wife against her will, such action may be the basis for divorce, and a separate provision of remedy—the offence of battery and punishment—has been included under the Chapter on Battery. It is a matter to be determined by legislature as to what kind of acts committed by a person or a group of persons in a society need to be criminalised, and what type of punishment is to be imposed. It is not in conformity with the Hindu religion and traditions to say that consent is required to have sexual relations with one’s own wife. While changing a legal provision that has prevailed since time immemorial, the repercussions on society and its execution have to be taken into consideration. The legislature enacts and reviews laws as per the need of the times and public opinion. However, a court does not make law in the same manner as a legislature. Unlike what has been claimed by the petitioner, No. 1 of the Chapter on Rape does not contain gender discriminatory provision; rather, it merely defines the offences of rape. Thus, as the said provision is not inconsistent with the Constitution, the writ petition is liable to be quashed;

Whereas, upon the study of the documents collected in the case-files and having listened to the points raised during the pleadings by the legal practitioners appearing on both sides, the main contention of the petitioner is that as No. 1 of the Chapter on Rape, of the Country Code, contains “other’s wife having her husband alive”, the provision has excluded and made immune the rape of one’s own wife, from the definition of rape. The said provision is in contravention of the right to equality guaranteed under Article 11 of the Constitution of the Kingdom of Nepal, 1990 and various international human rights instruments to which Nepal is a party. So No. 1 of the Chapter on Rape be declared invalid and ultra vires pursuant to Articles 1 and 88(1) of the Constitution of the Kingdom of Nepal, 1990. The respondents have, in their written replies, contended that provision of No. 1 of Chapter on Rape has been enacted as it is against Hindu traditions and values to presume that a husband commits rape of his own wife, so the said provision is not contrary to the right to equality guaranteed under the Constitution and the international instruments relating to women’s human rights to which Nepal is a party. Upon evaluating
and analysing the points raised in the writ petition and in the written replies, decisions have to be rendered with respect to the following questions:-

(a) Whether or not the petitioner has locus standi to file the writ petition?

(b) Whether the issues raised by the petitioner need a concrete case filed by aggrieved wife or a question as to whether or not marital rape constitutes the offence of rape may be decided under public interest litigation?

(c) Whether or not marital rape committed upon a wife is an offence of the nature of getting immunity under No. 1 of the Chapter on Rape of the Country Code?

(d) Whether or not other appropriate orders need to be issued?

With regard to the first question as whether or not the petitioner has locus standi to file the petition, the writ petitioner has contended that as No. 1 of the Chapter on Rape, the Country Code contains, “other’s wife having her husband alive”, and these words have allowed a husband to commit rape upon his wife, the said provision is inconsistent with the right to equality guaranteed under Article 11 of the Constitution of the Kingdom of Nepal, 1990. The writ petition has been filed under Article 88(1) of the Constitution and under Article 88 of the Constitution, and two types of issues of public interest or concern may be filed at this court through the writ jurisdiction – the issue of any law being inconsistent with the Constitution or an undue restriction having been made on fundamental rights under Article 88(1) and the issue of any interpretation or settlement of any legal question of public interest or concern under Article 88(2) of the Constitution.

A review of Article 88(1) of the Constitution clearly shows that under Article 88(1) of the Constitution, any Nepali citizen may file a petition with the Supreme Court requesting the court to nullify the law or that a part thereof that is inconsistent with the Constitution be declared invalid. In this connection, this court has, in Bharatmani Jangam vs Parliament Secretariat (Writ No. 4195 of 2056, Date of order 2057-7-16 corresponding to ….) interpreted that even though Article 88(1) is related to the subject of public interest, it is not aimed against an executive act; rather, it is aimed at the test of the Constitutionality of a legislative act. In the observance of Constitutional duties, any Nepali citizen is entitled to file a petition at the Supreme Court invoking Article 88(1), thus, unlike Article 88(2), there needs no meaningful relation of the petitioner to file a petition for the issue of public interest. Similarly, Article 88(2) has provided extraordinary jurisdiction to this court to issue the necessary and appropriate order to settle disputes arising out of any Constitutional or legal questions. This provision is related to the right to seek Constitutional remedy on the issues of public interest or concern against decisions and proceeding carried out by the executive. A principle has been laid down in Radheshyam Adhikari v.
Cabinet Secretariat (NKP 2048 p. 810) that in getting such a remedy, there shall be meaningful relation and substantial interest of the petitioner with the concerned subject matter of public interest. Similarly, this principle under Article 88(2) has been followed later in so many cases, and the extent of public interest has been further widened and extended. It has been held in Chudanath Bhattarai v. Public Service Commission (NKP 2054, p. 360) that the person seeking remedy under Article 88(2) must relate the issue to the interest or concerns of a community or people in general rather than to his/her personal interest or concerns. A similar order has been issued by a full bench of this court in Bharatmani Gautam v. Ministry of Finance and others (Ri.Pu.E.No.138, dated 2057-12-21 corresponding to ……). These legal principles have been laid down by the Supreme Court in such cases, which are related to public interest or concerns in whatsoever manner.

Whereas, the origin of the concept of public interest or concern is found to be developed as a liberalisation of the rigid concept of locus standi. If the traditional concept and judicial practice that only the person who is entitled to can file a case is applied even on the matters of public interest or concern, the petition easily gets quashed and consequently it becomes easy to convert public property into private property, and ultimately it will encourage those who have an advantage in abusing the judicial process. Therefore, in matters of public interest or concern, the principle that only the person who is entitled to can file a case cannot be applied as in the matters of private affairs. Thus, primarily, it has to be examined that whether or not the issue raised by the petitioner is a matter of public interest or concern? Or whether the petitioner has filed this writ petition merely for the purpose of attainment of personal interests in the name of public interest or concern?

Whereas, this writ petition has been filed under Article 88(1) raising human rights, interests and concern of women who are under the category of wives. There is no doubt that the petitioner is Nepali citizen. It cannot be said that the petitioner has no locus standi to file this writ petition as there is a Constitutional provision in Article 88(1) and interpretations thereon that any Nepali citizen may file a writ petition to settle any legal and Constitutional question;

Whereas, while considering the next question as to whether the issues raised herein need to be raised only in a concrete case, or whether it can be settled through this petition under the subject-matter or public interest or concern, some analyses need to be made about the nature and characteristics of issues of public interest. An issue of public interest or concern is not of an adverse nature, and the interest or concern of one person is not adverse to the interest or concern of another person as it necessarily happens in the matters of private interest or concern; rather, the issue of public interest or concern involves such
Domestic Violence

interest or concern protection or promotion, which is a common duty of both –
the petitioner and the respondent. Even judges need to be committed more to
protecting and promoting public interest than to being fully impartial in the
cases involving private parties. Upholding public interest or concern by judges
is delivering appropriate justice in the cases of such nature. In a case involving
public interest or concern, the petitioner, respondent and judges all have the
same objective – that is to meet and serve the spirit of mutual cooperation
rather than that of an adversary nature, and of mutual co-action than that of
competition between parties. In such cases, no party is a winner or a loser, as
all win. Whether the writ is issued or quashed, in both situations, public interest
is protected. It is the basic characteristic of a dispute involving public interest
or concern. The absence of other procedural complications and the speedy
settlement of disputes are other characteristics.

Whereas, public interest for which remedy are available under Article 88(1)
and (2) of the Constitution is different from the public interest that may be
established under legal remedy of an ordinary nature as referred to in No. 10
of the Chapter on Court Proceedings of the Country Code. The former is related
to the extraordinary jurisdiction for the test of Constitutional validity of a law
or any part thereof. It is not appropriate to think that such issue can be settled
only through ordinary remedy as the District Court and the Appellate Court do
not have jurisdiction under Article 88 of the Constitution. Thus, it cannot be
said that the case for the remedy sought by the petitioner has to be brought in
an ordinary course of treatment, and the issue raised by the petitioner is one
that can be settled under the extraordinary jurisdiction of the Supreme Court
as referred to in Article 88(1) of the Constitution;

Whereas, while going through the main issue of the petition as to whether or
not No. 1 of the Chapter on Rape allows a husband to rape his wife, it is
relevant to discuss in brief the definition and nature of rape before settling
these questions;

Whereas, rape is one of the major offences amongst the criminal offences of a
grave nature. Rape is an inhuman act violating women’s human rights, and the
act directly causes a serious impact on individual liberty and the right to the
self-determination of the victim. Not only does it cause an adverse impact on
the physical, mental, family and spiritual life of the victim, it also adversely
affects the self-respect and existence of women. This offence is not only against
the victim but also against society as a whole. Murder destroys the physical
being of a person but the offence of rape destroys the physical, mental and
spiritual position of the victim. Thus, it is a heinous crime. The law of every
country has treated rape as one of the gravest criminal offences, and has provided
for punishment accordingly. In Nepal as well, the Country Code, 2020 (1963)
has treated rape as one of the gravest criminal offences. Rape is a most serious
offence. It is evident from the provision made in No. 8 of the Chapter on Rape,
which provides the right to a self-defence of chastity that no offence would be
committed if the culprit of rape is killed within an hour of the time of the
commission of the rape. It is one of the heinous forms of all offences. It violates
all rights of a woman related to living with dignity. Rape also adversely the
self-respect and the personality of the victimised woman;

Whereas, the main element of rape is the use of force, threats and duress. It is
called rape because force is used while it is committed. Forcible sexual
intercourse by exercising force is inhuman, uncivilised and an animal-like act.
From the conceptual viewpoint of rape, it is the worst form of criminal offence
under the category of domestic violence against women. For the commission
of a criminal offence, there needs to be a guilty mind (mens rea) and such
actions (actus reus), that actually commit the offence. In rape, the act is forcibly
and intentionally committed by the will of one person but against the will of
another person irrespective of an unwillingness by or a denial by the other
person. Unlike consensual sexual intercourse in which both persons have a
willingness for the intercourse, rape involves the use of force, threats, duress,
and fear by the rapist. Therefore, in every civilised, humane, and well-cultured
society, rape is considered a heinous criminal offence without exception;

Whereas, rape being a heinous criminal offence and since it has categorically
not been made immune by law, an interpretation of No. 1 of the Chapter on
Rape has to be made in context of international law including international
treaties, instruments, and principles of law;

Whereas, women are also human beings. As long as women remain human
beings, they are also entitled to all rights that a human being is entitled for
being a human being. Article 1 of the Universal Declaration of Human Rights,
1948 has declared the right of every human being to live with self-respect.
Similarly, all members of a human family are entitled to be equal before the
law and to an equal protection of the law without discrimination. Article 4
provides that no selfdom or servitude shall be accepted. The International
Covenant on Civil and Political Rights, 1966, under its Article 1, provides that
all people shall have the right to self-determination, and Article 8(1) has
provided that no one shall be subjected to slavery and servitude. These rights of
self respect, self-determination and independent existence are inseparably and
inalienably available to a human person, and thus, women are also entitled to
these rights. There seems no distinction in the exercise of such rights before
and after the marriage of women;

Whereas, a marriage does not intend to turn women into slaves. Thus, women
do not lose human rights because of marriage. So long as a person lives as a
human being he/she is entitled to exercise those inborn and natural human rights. To say that the husband can rape his wife after marriage is to deny independent existence, the right to live with self-respect and the right to self-determination. Any act which results in the non-existence of women, adversely affects the self-respect of women, infringes upon the right of women to independent decision making, or which makes women slaves or an object or property is not compatible in the context of the modern world; rather, it is a stone-age thought;

Whereas, to forcibly compel women to use an organ of her body against her will is a serious violation of her right to live with dignity, her right to self-determination and it is an abuse of her human rights as well. The Constitution has guaranteed the right to privacy. Therefore, in the light of those international instruments on human rights, it cannot be said that marital rape is permissible. Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), defines the term ‘discrimination against women’ as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, culture, civil or any other field.” Similarly, Article 6 of CEDAW has provided the right against the trafficking of women and the exploitation of prostitution of women. Article 2 of the United Nations Declaration on the Elimination of Violence against Women, 1993 (General Assembly Resolution No. 48/104) has inter alia, included marital rape as a form of violence against women. Similarly, the Fourth World Women Conference held in Beijing in 1995 has also included marital rape as a form of violence against women, and has stated that marital rape is violation of women’s human rights. Section 103C of the Beijing Platform for Action has included marital rape under domestic violence against women and has urged for the necessary laws to be made on it;

Whereas, section 9 of the Nepal Treaty Act, 1991 has categorically provided that the aforesaid treaties and international instruments to which Nepal is a party have to be accepted as laws of Nepal. In case the provisions of such treaties and instruments to which Nepal is a party are inconsistent with the provisions of the Law of Nepal, the former provisions prevail. Thus, the position of such treaties and instruments are higher. Such treaties and instruments relating to human rights are important documents of the modern age. National laws have to be framed according to those instruments and such laws have to be interpreted accordingly. In this background, while defining the offence of rape, the Constitutional norms and provisions of international instruments have to be taken into account; Whereas, in this context, it is relevant to cite some of
the judgments. In Regina v. R. (1992), the House of Lords in England has held that marriage is not an implied consent for rape, and has convicted the husband. In Peoples v. Liberta (1984), the court of Appeal of New York has held that there is no justification of the distinction between rape and marital rape, and that marriage is not a license to the husband to rape his wife, and the court has declared a New York law that exempted marital rape from being an offence, unconstitutional. Interpretations given in those cases are related to and significant in the context of the present case;

Whereas, a discussion on the history of our family law and criminal law and reforms brought from time to time is relevant in this context. The Preamble of the Country Code, 1963, which has been enacted to settle family disputes and to convict and punish criminal offences, provides that as people’s behavior could not be regulated only by religions, and literatures, the code has been enacted to punish all, whether belonging to higher or lower classes, on an equal basis. This shows that the aim of the law is to punish all culprits rather than continue of traditional practice of discrimination. Religious beliefs and traditions did not restrict polygamy, but now the law has made it punishable. There has been a sea-change in the classical thought that a marriage once entered into continues for ever and the law has provided that the relationship may be divorced subject to its provisions. The law has provided for the seeking of alimony from the husband in order to live separately from him. The law has eliminated the practice of untouchability and other forms of social discrimination and exclusion. The law has regulated marriage – child marriage is prohibited and no marriage without consent is recognised. The law has not allowed a man to have more than one wife, and has eliminated the provision for a partition of partial property. In matters of crimes as well, the Constitution has envisaged the right to equality, and other laws including the Country Code have been amended accordingly. Many discriminatory provisions contained in the Chapter on Rape have been amended. The age of women referred to in No. 1 of the said Chapter has been changed from time to time. However, the term “other’s wife whose husband is living” stated in No. 1 of the said Chapter and inserted by an amendment of 1992 BS (1935 AD) continues. There has been a sea-change in the social, economical and cultural backgrounds during the Rana regime of the said time. It is quite natural to bring about timely changes in laws with the changes in social, economical and cultural backgrounds;

Whereas, bringing timely changes in laws is to proceed towards globalisation with the concept of universal values and traditions. The main basis of globalisation is reciprocal international relations, and the values and traditions determined by treaties and conventions. It is in this context that laws are being made at the national level according to the provisions of international treaties and instruments to which Nepal is a party. A Bill has been introduced in order
to bring changes in the Prevention of Trafficking in Human Beings Act, 1986 in harmony with the recently adopted SAARC Convention on Prevention of Trafficking in Women and Girls. The Country Code (Eleventh Amendment) Bill has been passed to enforce the principle of substantive equality under the CEDAW and the Bill against domestic violence has also been adopted. In this way, the term “other’s wife whose husband is living” referred to in No. 1 of the Chapter on Rape has to be interpreted in the context of a recognition of the said principles at the national and international levels;

Whereas, murder or attempt to murder, battery, defamation or verbal abuse of one’s own wife are criminal offences made punishable, it cannot be said or taken to mean that though No. 1 of the Chapter on Rape that criminalises rape as a heinous criminal offence, has made immune from punishment any person committing such an offence. If an act is an offence by its very nature, it is unreasonable to say that it is not a offence merely because of a difference in the person committing the act. It will yield discriminatory results if we interpret that an act committed upon any other woman is an offence but is not so if committed upon one’s own wife. There is no justification in differentiating between women who are wives and other women. Such a discriminatory practice is against the provisions of the Convention on the Elimination of All Forms of Discrimination against Women and the letter and spirit of Articles 11(1), (2) and (3) of the Constitution of the Kingdom of Nepal. No law can be interpreted against the provisions of the Constitution and treaties and international instruments to which Nepal is a party. Therefore, to exempt an offence of rape committed upon one’s wife by the husband is against recognised principles of justice. An offence is deemed to be committed because it is committed, and not because there is difference in the status or the position of the person committing that offence. There may be a difference in the degree of punishment but there cannot be immunity from punishment. The law itself has regarded consent as a basis of marital relationship and a marriage cannot be solemnised in the absence of such consent. In a similar way, mutual consent is compulsorily required to have sexual intercourse between a husband and wife after marriage. Sexual intercourse with the use of force and without consent is regarded as the offence of rape;

Whereas, it has been contended in the written replies that it is beyond the imagination that a husband could commits rape upon his wife, and surely, so long as there is love and good faith between husband and wife, a situation of rape cannot arise. It is the normal state of affairs. However, sometimes the reality of life becomes different from the normal state. Where a wife is treated as an object or property or a means of entertainment and exploitation, her personal health and her needs are ignored in an irrational and inhuman manner and in that situation, an unnatural and brutal act of rape of wife is committed.
Such situation may be the rarest of the rare. Therefore, it is imperative in a married life to discourage the brutal act of rape. If marital rape is punishable, a pure, healthy and clean atmosphere will be created in society in places of disorder and imbalance. In our country, the law has prohibited child marriage long ago, but this social evil is still in practice. If marital rape is made punishable, it would help eliminate this social evil as well;

Whereas, the learned government advocate appearing on behalf of the respondents pleaded that it is not in conformity with the Hindu religion and tradition to say that consent is required to have sexual intercourse with one’s own wife. The Hindu religion and its literature stress on purity, cleanliness and behaviour of good faith in conjugal life, and it cannot be said that the Hindu religion and traditions exempt the heinous act of a rape of a wife. Sexual intercourse in conjugal life is a normal course of behaviour, which must be based on consent. No religion may ever take it as lawful because the aim of a good religion is not to hate or cause loss to any one. Thus, the pleading of the learned government attorney appearing on behalf of the respondent cannot be accepted;

Whereas, from the viewpoint of a literal interpretation theory of legal interpretation as well, No. 1 of the Chapter on Rape, the Country Code, does not categorically exclude marital rape from the definition of rape. A proviso clause of a law must be clear, categorical and without doubt. A law cannot be said to have proviso from a definition based on a presumption against the basic tenet and elements of rape. If an odd sense comes out from an interpretation of a law, its meaning should be found from constructive interpretation. Even the literal interpretation of the words “other’s wife whose husband is living” which appears in No. 1 of the Chapter on Rape does not mean that no rape shall be committed upon one’s own wife. In those words, the word “others” come before “no man whose husband is living”. The word has not been used as an exception but as an adjective to the words woman whose husband is living, and the word gives a symbolic meaning. Such use of words cannot be taken as a proviso. Having analysed the content of No. 1 of the Chapter on Rape, it seems to have criminalised rape, and it does not seem to have classified it as having excluded one’s wife by way of a proviso. Therefore, as per the structure of the said law and the causes explained above, there seems to be no justification or reasonable cause to treat marital rape as an exception;

In the light of the discussions made in the foregoing pages and the spirit of the right to equality guaranteed in the Constitution, various international human rights instruments ratified by Nepal, and the changing norms and values in criminal law with the pace of time, it is appropriate, reasonable and contextual to define marital rape too as a criminal offence. It cannot be said that any man
who commits the heinous and inhuman crime of rape upon a woman may be immune from criminal law simply because he is her husband. Such husband has to be liable to the punishment for the offence he has committed;

Now, therefore, as marital rape found to have been immune under the provisions of the Chapter on Rape, it can not be regarded, as contended by the writ petitioner, that the impugned definition of rape is inconsistent to the Constitution. Thus, the writ petition is hereby quashed. It is also hereby decided that as a punishable offence, there is a difference in the consequences of the rape committed by a third person and by a husband and clause no. 8 of the Chapter on Rape has kept in mind only the consequences of rape committed by a third person, there is a situation of gap of legal provisions following the rape of one’s own wife – such as providing immediate relief by allowing to live separate from or to divorce the relationship with the rapist husband; prescribing the degree of offence in rape committed in the circumstance of child marriage; therefore, a directive order has been issued in the name of one of the respondents, the Ministry of Law, Justice and Parliamentary Affairs, to introduce a Bill for bringing necessary amendments with regard to the said gaps and for making complete legal provisions for justifiable and appropriate solution in an integrated manner with regard to marital rape taking into account the special situation of marital relationship and position of the husband. Do pass the information of this order to the respondents through the Attorney General and handover the case-file as per Rules.

Sd
Justice

We concur with the above opinion.

Sd.
Justice

Sd.
Justice
Sapana Pradhan Malla and Others, on behalf of Pro-Public, having its office at Thapathali, ward no 11 of Kathmandu Metropolitan City……. 1 Petitioner
Vs
Ministry of Law, Justice and Parliamentary Affairs…………………1 Respondent
His Majesty’s Government, Cabinet Secretariat…………………..1
National Council, Simhadarvar, Kathmandu…………………………1
House of Representative, Simhadarvar, Kathmandu……………….1

Supreme Court
Special Bench
Judge
Hon Justice Ohm Bhakta Shrestha
Hon Justice Mohan Prasad Sharma
Hon Justice Kedarnath Upadhayay
Hon Justice Krishna Jung Rayamajhi
Hon Justice Narendra Bahadur Neupane

Date of Issuance: Thursday, Srawan 3, 2053 of Bikram Sambat (corresponding to July 17, 1996)

The facts of this case which has been filed under Art 88(1) of the Constitution of the Kingdom of Nepal are as follows:

In the petition, the petitioners inter alia stated; “Art 11 of the Constitution of the Kingdom of Nepal proscribes discrimination on the basis of sex. Section 2 of the Chapter “Of Bestiality” of the Muluki Ain provides that if anyone indulges in sex with a beast, he will be punished with imprisonment for up to six months or a fine up to Rs 200. But Section 3 of the same chapter provides that if a woman indulges in sex with a beast she will be punished with imprisonment for up to one year or a fine up to Rs 500. Thus, section 2 and 3 discriminated between a man and a woman for the same crime (regarding bestiality). Similarly, Section 8 of the chapter “Of Marriage” of Muluki Ain provides that if a widow or a woman under nuptial bond is married again by lying that she is an unmarried woman, the main culprit and the woman who is over 16 years who has consented
to such a marriage shall be punished with imprisonment for up to one year or a
fine up to Rs 500 or both and in case of a married woman, if the husband [of
the second marriage] does not consent to such a marriage, the marriage shall
be quashed. But where a widower or a married man re-maries by stating
wrongly that he was unmarried, the law does not provide for any punishment.
As Art 11 looks down upon such discriminations and as any such conflicting
law, pursuant to Art 1 and 131 of the Constitution is null and void, we pray that
the provisions be declared *ultra vires*”

The Special Bench of this court ordered the respondents to submit a written
reply and in the order it said if no reply is submitted within the stipulated time
the case be submitted for hearing.

In its written reply, the Ministry of Law, Justice and Parliamentary Affairs
*inter alia* stated; “The petitioner has not been able to categorically state as to
what action of this Ministry is against the Constitution. With regard to the
contention of the petitioners, they have also not been able to establish the
relation of this Ministry to their claim. As the law gets enacted by Parliament
and no objective gets served by making this Ministry a respondent, the writ
petition should be quashed.”

The Cabinet Secretariat in its written reply *inter alia* said; “Enactment
amendment and repealing of laws does not fall within the jurisdiction of this
Secretariat. As it is a matter to be considered by concerned institution there is
no ground for making this Secretariat a respondent. Hence, the writ petition
should be quashed.”

In this writ petition learned advocates Mr Prakash Mani Sharma and Ms. Sapana
Pradhan Malla, appearing on behalf of the petitioner, while making oral
submission argued that the Art 11 of the Constitution had guaranteed a right to
equality according to which all the citizens were equal in the eye of law and no
one was to be denied equal protection of law. The state was not allowed to
discriminate citizens on the basis of religion, race, sex, and caste. Nepal had
acedced to and ratified the UN Convention on Elimination of all Forms of
Discrimination against Women, and pursuant to section 9 (1) of the Nepal
Treaty Act 1991 the provision of the treaty would apply as the law of the land.
The Convention prohibits discrimination between men and women. But even
after so many years of the promulgation of the Constitution, discriminatory
provisions existed in different laws. The provisions of laws mentioned in the
writ petition are against Art 11 of the Constitution and hence should be declared
*ultra vires*.

Similarly, learned government counsel Mr. Balaram K.C., appearing on behalf
of the Cabinet Secretariat, in his submission argued that the provisions of laws
mentioned by the writ petitioner could not be said to be against Art 11 of the Constitution of Nepal. If these provisions were to be considered as being against the Constitution, all social transactions would come to a standstill. As women and men are different by nature, legal provisions are made differently. Therefore, such provisions cannot be construed as being against the Constitution. The writ petition should be dismissed.

In this writ petition the petitioners argue that Section 2 and 3 of the Chapter “Of Bestiality” of the Muluki Ain discriminated men and women for the purpose of punishment. Section 2 provided that if any man indulged in sex with a beast, he would be punished with imprisonment for up to six months or a fine up to Rs 200 and Section 3 of the same chapter provided that if a woman indulged in sex with a beast, she would be punished with imprisonment for up to one year or a fine up to Rs 500. Similarly, Section 8 of the chapter “Of Marriage” of Muluki Ain provided that if a widow or a woman under nuptial bond was married again by misleading that she was an unmarried woman, the person responsible for the misrepresentation and the woman who is over 16 years and had consented to such a marriage would be punished with imprisonment for up to one year or a fine up to Rs 500 or both and in cases where the married does not take her husband’s consent to such a marriage, the marriage would be quashed. But where a widower or a married man re-married by wrongly stating that he was unmarried, the law did not provide for any punishment. They argue that as Art 11 of the Constitution rejected such discriminations, any such conflicting law pursuant to Art 1 and 88(1) of the Constitution should be declared ultra vires and order should be issued to that effect.

In Chanda Bajracharya v Ministry of Law, Justice and Parliamentary Affairs (Writ no 2816 of the year 2051), the petitioner had filed a writ petition praying for an order of certiorari for declaring ultra vires provisions of different chapters of the Muluki Ain which she said were against the right to equality including Section 2 and 3 of the Chapter “Of Bestiality”. The present petitioner has also raised the question of constitutionality of the same. Today, in that case this Bench has issued a directive order to His Majesty’s government calling it to introduce legislation in Parliament after making a holistic study of various aspects of society and following consultation with individuals, entities, organizations, institutions, sociologists and lawyer related to the issue. The questions raised by the petitioner above, are of the nature on which legislation needed to be introduced by following the same process. In this case a directive order is hereby issued to His Majesty’s government calling it to introduce appropriate legislation in Parliament within two years of the receipt of this order.
order. Let His Majesty’s Government be informed of this order and let the file of this case be transferred to the record section as per the rules.

Om Bhakta Shrestha J.

We concur,
Mohan Prasad Sharma J.
Kedarnath Upadhyaya J
Krishnajung Rayamajhi J
Narendra Bahadur Neupane J
Resident of Kathmandu District, Kathmandu Municipality, Ward No. 33, Annapurna Rana………………………………
Applicant
Vs
Resident of the same place, four including Gorakh Shamsher JB Rana……………………………….Respondent
Writ No. 2187 of the year 2053 BS

Supreme Court
Division Bench
Judge
Mr. Arabindranath Acharya
Mr. Rajendraraj Nakhya
Subject: Certiorari
Date of order: 2055/2/25/2 BS

The applicant of this alimony law suit of Annapurna Rana, who is the plaintiff of the case has been asked to get her vagina and womb examined. The defendant of the law suit had stated in the rejoinder itself that plaintiff Annapurna Rana was married to Mukul RS Tadagi in Nainital and that a daughter by the name of Duhi Laxmi Singh Tadagi was born to her and the name of the husband along with the child with the record from G.P Panth Nainital hospital has been referred to. When it has been clearly mentioned that the applicant Annapurna Rana has been married to the specified person and that the names of the husband and the child have been specifically mentioned, the utility of examining the vagina and womb of the same Annapurna Rana is not clear, and the question immediately arises as to what is the necessity of such a virginity test while the analysis and evaluation of the proof of such marriage clearly requires priority. In the given circumstances, the court needs to consider as to why it was called upon to collect the proof of such an insignificant virginity test.

It cannot be ascertained from the test of a woman’s vagina and womb that the woman is definitely married. Being a virgin and being married are two different situations. This is the legal angle as well. It cannot be presumed on the basis of loss of virginity that the woman is married. A woman as per her age might establish sexual relations with a man anywhere, anytime. This is a simple thing in the present day world. When sexual relation can be established this way, a child can be born voluntarily or involuntarily by way of pregnancy. This is also natural. In the given context, it needs to be primarily considered
whether or not a meaningful result can be achieved through the virginity test. The test of vagina and womb is a relevant proof as per clause 3 of Evidence Act 2031 BS. However, even if such evidence is a relevant proof, if in the given circumstances it is considered to be one, which is detrimental to the moral standards, it is obviously wise not to go in for such evidence. Even if we have a look at the changing social context, it is a matter of a private affair to keep the virginity in tact or establish sexual relations with the people of one’s choice. While some resort to having these sorts of affairs openly, others may opt them to be a secret. This kind of sexual relation will not make any special change in the legal status of a woman. Some women may go in for establishing sexual relations first and then go in for legally establishing themselves as spouses only after the birth of a child. If we move a step forward from this, the situation is that the society now has to recognize the people, who establish sexual relations and move around as spouses, and yet live independently without tying the matrimonial knot, so much so that the situation now is as such that if a boy friend and a girl friend move around by way of deriving all kinds of pleasures and even if a child is born out of their relationship, the boy and the girl can not be taken to have entered into matrimonial relationship. In addition to this, as per our social system, if the wedding is not traditionally solemnized with the consent of the parents, the establishment of sexual relations between a girl and a boy leading to eventually giving birth to a child cannot be construed as a marriage between such two people. Until and unless there is a concrete basis that a marriage has been solemnized as per traditions or that the marriage has been simply solemnized without following any custom or tradition or that the marriage is solemnized with registration in accordance with law, it is not possible to pronounce positively that the marriage between such girl and boy was solemnized. As the present society emphasizes on personal liberty, pre-marital sex alone cannot establish marriage and the situation does not arise for the parents to say that their responsibility in relation to their children in such cases is over. On the other hand, the provision of section 7 of the chapter on Partition of the “National Code “ which that a child born from a woman without the certainty of paternity will be entitled to the mother’s property must have been made taking into consideration the fact that pre-marital sexual relations leading to child birth could be established. The question of legitimacy of a child or his paternity could be raised in the case of a child who is born of an unmarried mother, but as there is a separate process or basis in relation to such issue, there is no need for further discussion on this topic.

As the right to privacy is established in accordance with Article 22, the court order leading to examination of private parts without the consent of the concerned will lead to depriving the concerned person of the right to privacy.
There can really be no difference for such person between the court ordering
for examination and encroachment by any other person.

In this light, the order for the examination of vagina and womb of Annapurna
Rana through a gynecologist amounts to contempt of the inviolable right to
privacy conferred by the Article 22 of the Constitution of the Kingdom of
Nepal 1990, and will go against the spirit of the Constitution.

From the side of the applicant; Learned Senior Advocate, Mr. Sarbagya Ratna
Tuladhar, Learned Advocate, Ms. Pushpa Bhusal, Learned Advocate, Mr. Agni
Kharel and Learned Advocate Mr. Hari Krishna Karki.

From the side of the Respondents: Learned Advocate Shyam Krishna
Kharel From the side of the court (Amicus Curie): Learned Senior Government
Advocate, Mr. Balaram KC

Order

Justice Arabindanath Acharya: The Summary and verdict of the writ submitted
under Article 23/88 of the Constitution of the Kingdom of Nepal, 1990 are as
follows:

2. “The Respondents Ambika Rajya Laxmi Rana and Gorakh Shamsher Rana
are my (applicant’s) mother and elder brother respectively. While I, the
applicant was in India for studies, the respondents resorted to partitioning the
property on 2046/9/13 BS without segregating the property for me (unmarried
daughter) to eke out a living for me and for my marriage.

I have registered cases including an alimony lawsuit against the aforesaid act
at the Kathmandu District Court. In a rejoinder in the said lawsuit, the
respondents had accused me of being married and demanded for the examination
of my vagina and womb. The defendant, Kathmandu District Court decided in
accordance with the said demand on 2052/10/19 BS that I, the plaintiff, should
be present in person and should be sent to Indra Rajya Laxmi Paropakar
Maternity Hospital and that my vagina, womb and other necessary parts of my
body should be examined by at least three gynecologists, and was asked to
submit a report on the basis of the examination on whether or not the plaintiff
had any issues (births).

3. I am submitting an application to the Appellate Court, Patan, for the
annulment of the said order of the Kathmandu District Court. In accordance
with section 17 of chapter on Court Procedure of National Code, as order of
the court dated 2053/1/27 BS to proceed as per law has deprived me of my
fundamental right conferred by the constitution.”

4. The application of Annapurna Rana stating while Article 22 of the
constitution of the Kingdom of Nepal, 1990 secures the right to privacy in
relation to every citizen’s body, place of residence, property, written communication and secrecy of information can not be encroached until otherwise specified by law, the defendant’s order on the basis of a provision, which is not explained or specified by law has not only violated the applicant’s personal liberty but also has made efforts to make a private life public without paying any heed to the Constitutional provisions, which has violated the provisions of Article 11, 12 of the Constitution of the Kingdom of Nepal, and, therefore, the request for issuing an order or memo in accordance with Article 23 and 88 (1) (2) of the Constitution of the Kingdom of Nepal to revoke the order issued by the defendant and to bar them from issuing such orders has been made.

5. On 2053/6/17/5 BS the single bench passed an interim order to the defendant asking what had happened in relation to this and why should not the order as per the demand of the applicant be issued and also to send a notice to the opponents seeking a written reply within 15 days. The case was to be reviewed on submission of the written report, and an order of injunction was passed not to carry out or cause to carry out the order of the Kathmandu District Court for the examination of the applicant’s vagina and womb including other parts of her body.

6. While the writ applicant has filed a petition in this court for the annulment of the document and for obtaining alimony, the defendants have alleged that the applicant had married at her own will and has also given birth to a daughter. As the petitioner was the mother of one child, there would have been a physical change on her body and that her vagina & womb should be examined to ascertain the same was the rejoinder filed by the Defendants on the basis of which the order was issued to find out by ways of examining her vagina, womb, and other necessary parts of her body to ascertain whether or not the complainant lady had given birth to children and to submit the report accordingly. When the petitioner filed an application as per Section 17 of Chapter on Court Procedure to the Patan Appellate court against the order, the court ordered to proceed in accordance with the law and thus held that the the order of the Kathmandu District Court was as per law – the written reply of the Kathmandu District court seeking annulment of the writ petition.

7. Explanation for remarks in relation to application under Section 17 of the Court Procedure was demanded and the report in relation to the same was submitted to the division bench on 2053/1/27 BS on the basis of which this court had ordered to proceed as per law as the report for explanation of remarks was submitted, and, therefore the plea of the applicant is invalid. Therefore, here is the written reply of Patan Appellate Court for the annulment of the application.
8. The applicant had filed a law suit pertaining to annulment of document relating to alimony and also of forgery in the Kathmandu district court and as the applicant was married to an Indian citizen called I.S. Tadagi and as she had given birth to a daughter and as there was a physical change in her, the fact would be revealed on the examination of her marital status by gynecologists. The order was given on the receipt of the rejoinder for the applicant’s physical examination through the concerned specialists to prove the relevant facts in accordance with Evidence Act 2031 BS. It cannot be argued that the right to privacy has been encroached when evidence is sought in the context of legal proceedings and if physical examination is prohibited in judicial actions, a situation of anarchy may be created. The law cannot specify in each case as to where it needs to go in for establishing and where it does not. It cannot be argued that the order to examine the applicant’s body has encroached upon the applicant’s body. The physical examination will establish the facts. As the applicant has entered into the realm of writ in order to conceal the facts, the writ petition should be annulled is the joint written reply of Ambika Rajya Laxmi Rana and Gorakh Shamsher Rana.

9. On 2054/1/13 BS, the court passed an order stating that the interim order of the single bench of this court dated 2053/6/17/5 BS would be valid till the issues raised by the writ petitioner were not settled.

10. On the study of the writ, which has been presented for hearing by way of submitting the same in the daily cause list in accordance with the rules along with the file documents, and the pleas of the learned advocates present on behalf of the applicant, learned senior advocate Mr. Sarbagya Ratna Tuladhar, learned advocate, Ms. Pushpa Bhusal, learned advocate, Mr. Hari Krishna Karki that the privacy may be encroached only if there is an obvious provision in law and that if there is no clear – cut provision in law, the evidence that encroach upon the constitutionally protected rights can not be sought for. The law that restricts the right to privacy has not been formulated. A court can find out the relevant evidence in accordance with the Evidence Act, the order to examine the privy parts of the petitioner in an alimony case cannot be regarded as relevant. It can not be imagined that sexual intercourse alone is the evidence of marriage. Even in the criminal cases, the victim is physically examined with the victim’s permission; the physical examination in an alimony case can not be contextual. The situation is such that, the fact whether or not the applicant was a joint member of the defendants can be established through other evidences including goods acceptance vouchers. When there is a controversy in relation to property between the two sides, the state conferred right to privacy of one party can not be encroached to protect the property of the other party. The sensitive acts like examining the private parts of a woman or resorting to virginity test are not practiced even in the international community. A court can not
issue such orders in appreciation of the international norms and values. Learned Advocate Mr. Shyam Prasad Kharel present from the side of respondents said that the lower courts can not be ordered in the course of its hearing to accept or not to accept the essential evidences. The concerned judge has to establish whether or not any evidence is relevant to a particular case. This court can not hold whether or not any evidence was relevant. The applicant of the writ petition has not taken the plea that my body will be encroached in the process of physical examination. Saying that the situation to evoke Article 22 which protects the right to privacy had not arisen, he pleaded that the writ petition should be annulled. The learned Senior Government Advocate, Mr. Bala Ram KC who was present with the permission of the bench in the capacity of amicus curiae said that the right to privacy has been incorporated in the United Nations’ Charter for the proper protection of human rights under the right to liberty, and that the same is a significant aspect of the same, and that the right to privacy can not be encroached except in accordance with the same and that the human body could not be encroached; and now it is required to give judgment accordingly whether or not the writ as per the demand of the applicant should be issued.

11. The date for the judgment has been fixed for today and while considering the judgment, it is observed that while filing a law suit including that for alimony at the Kathmandu District Court, the Kathmandu District Court ordered for the examination of my vagina and womb on 2052/10/19 BS and as the Appellate Court, Patan upheld the said order, it has encroached upon my right to privacy conferred by Article 22 of the Constitution of the Kingdom of Nepal, 1990 - the principal claim that the said order be revoked through the writ of certiorari. The order was issued as the proof was required in the series of processes of the case to find out whether or not the applicant had given birth to any children, which is why the District Court had ordered for physical examination, and the plea that the aforesaid order should not be quashed is observed.

12. From the proceedings of the presented writ application, when it is observed that the order of the district court taken in appeal in accordance with Section 17 of the chapter of the Court Procedure was upheld by the Patan Appellate Court, this court does not normally go into the details of the same case, yet this court needs to look into the details keeping in view the seriousness of the issue as the applicant has entered through the extraordinary jurisdiction of this court by way of claim that the right to privacy conferred by the Constitution has been encroached. In this connection, in the process of finding evidence of the case, the proofs submitted earlier along with the lawsuit and the rejoinder may become significant. In addition, in relation to the demand for a proof that a particular issue be understood from a particular place or else it may be examined through a particular specialist, the opinion report received after the necessary
investigation would make special evidence in such cases. The Court needs to think from the holistic angle in such cases because the findings in a particular case may have a different impact on the case. In the given context, first of all it is remarkable while critically analyzing the presented writ petition and the subject matter incorporated in it that it would not affect the judgment of the main case, nor it can be said that it would be interference with the initial court in its process of finding evidences. Therefore, it is relevant to analyze and criticize the propriety of this kind of evidence in principle.

13. As expressed in the present writ petition, the same applicant Annapurna Rana, and the same opponent Ambika Rajya Laxmi Rana, the plaintiff and the defendant respectively in an alimony law suit in the Kathmandu District court, the opponent defendant had demanded through a rejoinder that the plaintiff Annapurna while studying at Nainital of India had married one Mukul RS Tadagi, had given birth to a daughter by the name of Duhi Laxmi Singh Tadagi and that she was not a virgin and that if her vagina and womb were examined through gynecologist, it would be proved, and hence the demand for the examination was put forth when the virginity test of the applicant Annapurna Rana was demanded in the alimony law suit. The Kathmandu District Court in accordance with the said demand ordered on 2052/10/19 BS for the examination of the vagina and womb of plaintiff Annapurna Rana through three gynecologists from Indra Rajya Laxmi Devi Maternity Home and also to submit a report on whether or not she had given birth to any child, and the said order was upheld by the Patan Appellate Court on 2053/1/27 BS and the order was issued accordingly.

14. If it is to be considered generally, the demand in the lawsuit to go in for the proof may not be objectionable, but the serious issue involved here is the virginity test of a woman, which is a sensitive subject and this might lead to public concern and it might also affect on the social status and other issues of the concerned person. That is why the court needs to exercise enormous restraint while issuing orders in such sensitive cases. The complete nature of the case needs to be considered before giving any kind of order. The other issue, which is worth considering in the context in the alimony lawsuit is that the plaintiff in the lawsuit has been ordered for getting her vagina and womb examined through the rejoinder and that the respondent has claimed that the plaintiff Annapurna Rana was married to Mukul RS Tadagi of Nainital in India and that she had given birth to a daughter called Duhi Laxmi Singh Tadagi, which has been claimed together with the revelation of the names of the husband and daughter along with the records of G.P. Panth Nainital Hospital. In this way, when it is mentioned that applicant Annapurna Rana has been married to a particular person along with furnishing of the details of the names of the husband and daughter, the question easily arises as to why the vagina and womb of the same
Domestic Violence

Annapurna Rana should be tested and what is the utility of the virginity test whereas the question of marriage and the birth of the child automatically finds priority in analysis and evaluation.

In the given circumstances, it would be prudent on the part of the court to consider as to why the court should waste time to find out the proof through the virginity test when the issue involved is not of significance. That is why, it is observed that instead of looking into the evidence in the concerned case right at the initial stage, the order for the examination of the vagina and womb of the applicant through gynecologists was issued solely on the basis of the demand for such test by the respondent, which is not appropriate. There also exists the tradition that while a court issues orders for evidence, it issues such orders in relation to evidence at one go, and it is essential to follow such traditions in other general conditions. However, when the sensitive situation is felt in a particular case, there can be no obstructions to order for the immediately relevant evidence keeping in view the distinct (separate) opinion in the case to be carried out at a later stage. And in the given lawsuit, as the evidence as demanded by the defendant was to be obtained from India, it is probable that the emphasis was laid on the examination of the plaintiff’s vagina and womb on the basis of the assumption that it was easy and an accessible alternative, but rather than such assumption of the condition, it should be viewed through the angle of propriety, meaning, it is not appropriate to order for a particular evidence on the basis of comfort for and demand by a particular party especially in the present case, which involves a special subject matter.

15. Also, it can not be said with certainty that the woman concerned is married simply on the basis of the test of her vagina and womb. The condition of virginity not remaining in tact and that of being married are two different conditions, and this is so legally as well. To imagine that the loss of virginity leads to being married is a wrong perception; a woman might resort to having sex with any man at any point of time. This is an ordinary matter these days. When there can be sex in the said manner, there could be issues by a way of voluntary or involuntary pregnancy, which is also ordinary these days. The point to be considered here is the probability of a meaningful result of the virginity test in this situation. The test of vagina and womb is also relevant evidence in accordance with clause 3 of Evidence Act, 2031 BS. However, just because particular evidence is relevant, it cannot be evoked if it encroaches upon the moral standards set in the society. If we look at the changing social context, to maintain virginity in tact or freely go in for establishing sexual relationship with the people of choice is a matter of private affair. Some people may opt to go in for establishing such relations secretly while others may choose to openly go in for the same. The establishment of sexual relations does not bring definite
change in a woman’s legal status. Some may opt to legally get married after 
the establishment of sexual relations and even after the birth of a child. If we 
move a step forward for analysis, we cannot say that a woman is a married 
woman even if she stays with a man for years as if they were spouses and 
seems from any other angle that they are spouses. It cannot be ascertained that 
they are spouses when they stay together but behave mutually independently, 
till they tie the matrimonial knot. While the situation is such that the society 
needs to recognize this kind of a situation, it can not automatically be said that 
a girl friend is married to a boy friend just on the basis that they wander around 
together, derive all kinds of pleasures and have given birth to a child. In the 
given context, it cannot be determined that a woman has been married to a man 
without factual basic proof that they were in actuality married in accordance 
with established traditions or that they were married in a simple manner without 
performing any traditional rites or that they were married by registering as per 
law. As the modern society is keeping pace with modernism in every sector 
and as the present society lays emphasis on personal liberty, the foundation of 
pre-marital sex alone cannot establish marriage and this situation will not imply 
that the responsibility of the parents towards their daughter has been over. On 
the other hand, Section 7 of the chapter of “share partition” of the National 
Code which provides for claim of the children, whose father is not known, on 
the mother’s property must have been incorporated keeping in view the reality 
that a woman could bear children through pre-marital sex without marriage 
and the question of legitimacy of a child or paternity of children born of 
unmarried mothers may rise. However, as separate process and basis can be 
established on the issue of legitimacy of a child, there is no need for further 
explanation on this.

16. In relation to the plea of the learned advocate from the opponent side, Mr. 
Shyam Prasad Kharel that since the supreme court had already given order in 
an earlier case for the examination of a man’s penis, it would amount to 
discrimination if the applicant’s vagina and womb can not be examined only 
on the basis that the applicant is a woman. Equality can be established between 
a man and a woman in some aspects. But, the question involved here is the 
type, which is of special significance to a woman. It might not be of much 
significance in the case of a man to go in for the examination of his penis as it 
might evoke special evidence under the special circumstances whereas the 
questions relating to a woman’s purity of manners, social reaction etc., all 
come up together in the process of examining her vagina and womb. This 
cannot ever be kept in an equal footing.

17. On the analysis of all the facts mentioned above, it is of no utility to go in 
for the examination of a woman’s vagina and womb to establish the marital
status of a woman rather it is relevant to establish evidence showing whether or not she was married as per established norms, and if she was married, with whom, where and when was she married and as there is a solution on the basis of evidence so obtained in the case, the judgment in this writ petition is based only on the propriety of the examination of the applicant’s vagina and womb and on its logicality, rationality, and relevance as per law.

18. Besides, the opinion on the aforesaid matters the significant issue raised for judgment on the writ petition is that the order for the examination of the applicant’s vagina and womb has encroached on her right to privacy conferred by Article 22 of the Constitution of the Kingdom of Nepal, 1990 and that the learned advocates pleading for the applicant, Pushpa Bhusal, Hari Krishna Karki and Agni Kharel have pleaded that this right to privacy should be protected. Article 22 of the Constitution of the Kingdom of Nepal makes a clear provision that the privacy of any person in relation to his/her body, place of residence, property, communication documents, is not encroached except as specified by law. It cannot be said that the right to privacy of any person is not encroached if a person’s body has to be examined without his/her consent. In addition to this, it is observed that she would be deprived of the right conferred on her by Article 22 if a private organ of a woman like vagina has to be examined without her consent. The advocates pleading for the applicant had also raised the issue that there was no protection of the right to privacy in the earlier constitution of 2019 BS but as the right to privacy has been specially provisioned in the Constitution of the Kingdom of Nepal, 1990, the order for getting the vagina and womb of the applicant Annapurna Rana examined is contrary to the provisions of the Constitution. As the said Article 22 has the provision ‘except as specified by law’ the need to formulate law to regulate the right to privacy also arises. As such no law has been formulated in the present context; no one can be deprived from fully enjoying such right to privacy. The learned advocate representing the opponent, Mr Shyam Prasad Kharel has pleaded that the right to privacy of the applicant is not being encroached publicly by examining her body, it is only in the controversy raised in the process of case that she is ordered for examination through concerned specialist. Therefore, Article 22 of the Constitution of the Kingdom of Nepal, 1990 cannot be attracted in this case. Nevertheless, as there is an obvious provision through Article 22 for right to privacy, which cannot be encroached upon, notwithstanding the court order, it would amount to clearly depriving her of the right to privacy. There can be no difference for the concerned person between the examination by the court and encroachment by any other person. Thus, the order for the examination of the vagina and womb of applicant Annapurna Rana through gynecologists is observed to be contemptuous of the inviolable right to privacy conferred by Article 22 of the Constitution of the Kingdom of Nepal, 1990 and
would be against it.

19. Therefore, whereas it was expedient to issue such order keeping in view the complexities of the circumstances, the Kathmandu District Court and the Appellate court, Patan are observed not to pay attention towards the same. It is a big challenge for a woman to go in for the virginity test, and, it might also affect her entire future and it could lead to any unforeseen consequences. Also, while keeping into account the fact that the form of the alimony lawsuit could be instantly disrupted, it can not be said that the order of the Kathmandu District Court and the Appellate Court, Patan for the examination of the applicant’s vagina and womb are reasonable, and as such, the order of the Kathmandu district court dated 2052/10/19 BS asking for the examination of applicant Annapurna Rana’s vagina and womb through gynaecologists and the submission of the subsequent report, and the order of the Appellate Court, Patan dated 2053/1/27 BS upholding such order is nullified by this order of certiorari. Documents are to be submitted as per rules.

Justice
Arabindanath Acharya

I concur with the aforesaid opinion.

Justice
Rajendra Raj Nakhuwa
Chandrasena  
Vs.  
Attorney-General

Court of Appal  
Judge  
Gunasekera, J. (P/CA),  
J. A. N. De Silva, J.  

CA 108/95  

HC Galle 1525  
April 1, 3, 4 and 29, 1997.  
May 6, 1997.  

J. A. N. De Silva, J. 

The accused-appellant was indicted on two counts. The first count was with having committed murder by causing the death of one Augustinuge Susannona, his mother-in-law on the 12th of November, 1987, an offence punishable under section 296 of the Penal Code. 

The second count was that in the course of the same transaction that he caused grievous hurt to his wife Meewaralage Chitra an offence punishable under section 316 of the Penal Code. 

The trial was by a Jury and after the conclusion of the case on 13.10.1995 by an unanimous verdict the accused was found guilty on both counts. On the first count he was sentenced to death. On the second count a sentence of 3 years was imposed and in addition to a fine of Rs. 1,000. 

The prosecution case was that the appellant married Meewaralage Chitra in the year 1975 and was having three children by that marriage. There had been displeasure between the two parties. As there was financial difficulties the wife had gone to the Middle-East for employment. She had been remitting monies from there and the husband had failed to account for them and as a result she had stopped sending money. Thereafter the accused has written several letters threatening her that he would deal with her when she returns. After the expiry of the contract of employment the wife had returned to the Island without informing the husband and had been living with her parent at Ratnapura. Having come to know of the wife’s arrival the appellant had proceeded to Ratnapura and had persuaded the wife to return with him. Thereafter both of them had lived together for about two weeks and when the appellant assaulted her with a door bar she has left him and gone back to her parents and initiated action in Magistrate’s Court to claim maintenance from the appellant who was a field Officer in the Forest Department.
On the day of the incident at about 7.30 in the morning she had been going with her mother Susannona to the Magistrate’s Court for the maintenance case and the accused had accosted them near the main bus stand, Galle and in a threatening manner had asked the where they were going. Thereafter the appellant had suggested that there should be a settlement and as the wife and the mother-in-law refused, took a barber’s razor from his pocket and started attacking the wife. The wife had fallen on the ground with injuries. In order to prevent the appellant attacking the daughter further the mother had fallen on the daughter. Thereafter he had cut her neck with the razor. When he was doing this a Police Officer who happened to pass that place had seen this and rushed to the scene and having wrested the razor from the accused had taken him to the Police Station. Later the injured had been taken to the hospital by the Police where the mother-in-law was found to be dead on admission.

For the prosecution several witnesses had given evidence. Chitra the wife of the accused described the incident and the circumstances under which the attack took place. Police Officer Ananda has stated as to how he saw the appellant cutting the throat of Susannona. Professor Niriella who conducted the Post-mortem examination supported the evidence of these two witnesses who stated that the injuries were caused with a razor. According to the Professor there had been injuries on the neck, right shoulder and right hand of the deceased. The cut injury on the upper part of the neck had been 19 cm long. The wound was deepest at the centre and the depth had been gradually less towards the right side. The thyroid cartilage, windpipe and the blood vessel were completely severed. There had been a cut wound on the back of the right shoulder and three more cut injuries on the right hand. The cause of death had been due to severe bleeding resulting form a complete severance of the blood vessels in the neck. Dr. Selvaratnam who had examined Chitra had stated that he found six cut injuries on her and out of them 4 injuries were grievous injuries. Some injuries have caused a disfiguration of the face too.

Apart from these witnesses, an investigating officer and a son of the deceased who identified the body had given evidence for the prosecution.

The accused-appellant had given evidence on oath. According to him, he married Chitra after a ten-year-old love affair and is the father of three children. Due to the interference of the in-laws there were problems in the family. He always wanted to reconcile with the wife and live a harmonious life. On the day of the incident he came to attend courts. When he came to Galle town he saw his wife and mother-in-law going towards the Fort.

He went behind them and pleaded with the wife to come back with him for the sake of the children. The wife refused to come and the mother-in-law scolded him in filth and attacked him with her umbrella. The wife was laughing and
when the mother-in-law assaulted him she to joined her. As this happened in a public place he felt ashamed and lost his self-control and waived the barber’s razor with which he used to shave. He also stated that he did not realize that he was doing something wrong till he saw blood in his hands. Thereafter he was walking towards the Police Station when a person carrying some files held him by his hand and he gave the razor to him.

The Counsel for the appellant submitted that the learned trial judge misdirected the Jury on the law with regard to exception one to Section 294 of the Penal Code relating to grave and sudden provocation. He drew the attention of Court to pages 141 to 151 of the summing up where the learned trial judge has invited the Jury to consider provocation. The learned trial judge had stated to consider whether the retaliatory act is in proportionate to the provocation offered. The learned counsel submitted that this is not the correct position of law in Sri Lanka. In support of this contention he relied on the following authorities. *King V. Kirigoris*, K.D. J. Perera, V. King, *Regina v. Piyasena* and *Punchibanda V. Queen*.

The Additional Solicitor General who appeared for the State admitted that the law relating to Exception 1 to section 294 in the Code was settled in *K.D. J. Perera’s Case* which was decided the Privy Council. In that case the conclusion reached by the Privy Council was a consideration of the method and degree of the retaliation necessarily integral to assessment of the gravity of the provocation. Additional Solicitor-General submitted that the resulting position of the Privy Council decision in *K.D.J. Perera’s case* is that the provocation is not held to be grave in the absence of appropriate corroboration between the provocation and retaliatory gestures. He also point that the relation between the act of provocation and the retaliatory act is not a distinct or separate element but is an aspect of the gravity. In the circumstances, the Additional Solicitor General submitted that the learned trial Judge’s directions to the Jury in this case were correct. We are inclined to agree with the learned Advocate Solicitor–General on this point and hold that the learned trial Judge had properly and adequately directed the Jury on the question of provocation.

It is to be noted that in this case when the wife Chitra was giving evidence it had been suggested to her by the defence that it was she who abused the appellant and offered the provocation. The appellant in his evidence stated that it was the mother-in-law who provoked him to act in this manner.

According to the evidence the deceased and Chitra were walking towards the Court house when the appellant suddenly appeared and accosted them. The question is whether the plea of provocation can be availed of by an accused in
mitigation of offence of murder under the first proviso, if the provocation was itself sought by the accused; according to the evidence the appellant is the one who started the abuse and he was also armed with the barber’s razor which he used immediately. However, the learned trial judge had invited the jury to consider the plea of provocation as the accused had raised it in his evidence. We are of the view that the Jury had properly considered and rejected that plea. In our view this is not a fit case to interfere with the finding of the Jury. This appeal is dismissed and the conviction and sentence is affirmed.

Gunasekera, J. (P/CA)
I agree.
Appeal dismissed.
Domestic Violence
Landmark Judgments on Violence Against Women and Children from South Asia

Annex
Relevant Provisions of Laws

Bangladesh

Code of Criminal Procedure 1898:

Section 149
Every police officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence. Therefore in such cases, the police should be prepared to shed its reluctance to be concerned with what is happening within the four walls of a household or what is happening between a husband and wife. Rather, it is their statutory duty to prevent the commission of such offences by intervening effectively.

At the same time, it is also important that they act within the parameters laid down by law, in absolute good faith and with transparency. A good strategy in this regard will be to enlist the cooperation of active women’s organizations and social workers in the police effort.

The Penal Code, 1860

Section 319 (Hurt)
Whoever causes the bodily pain, disease or infirmity to any person is said to cause hurt.

Section 320 (Grievous Hurt)

First, Emasculation.
Secondly, Permanent privation of sight of either eye.
Thirdly, Permanent privation of either ear.
Fourthly, Privation of any member or joint.
Fifthly, Destruction or permanent impairing of the powers of any member or joint.
Sixthly, Permanent disfiguration of head or face.
Seventhly, Fracture or dislocation of bone or tooth.
Eighthly, Any hurt which endangers life or which cause suffer to during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Section 323 Punishment for voluntarily causing hurt
Whoever, except in the case provided for by section 334, voluntarily causes hurt shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand (taka) or with both.

Section 324 Voluntarily causing hurt by dangerous weapons or means.
Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison of any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 325 Punishment for voluntarily causing grievous hurt
Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 326 Voluntarily causing grievous hurt by dangerous weapons or means
Whoever, except in the case provided for by section 335, vulnerary causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to case death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any exclusive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive in to the blood, or by means of any animal, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 375
Recognizes rape as a crime and define this crime in five ways. A man commits rape if he has sexual intercourse with a woman under circumstances falling under any of the five following description:
Firstly Against her will.
Secondly Without her consent.
Thirdly With her consent, when her consent has been obtained by putting her in fear of death or of hurt.
Fourthly With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to who she is or believes herself to be lawfully married.
Fifthly With or without her consent, when she is under fourteen years of age.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.

The Constitution of the People's Republic of Bangladesh, 1972

Article 27 Equality before law

All citizens are equal before the law and are entitled to equal protection of law.

Article 28 Discrimination on grounds of religion, etc

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.
(2) Women shall have equal rights with men in all spheres of the State and of public life.
(3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.
(4) Nothing in this article shall prevent the State from making special provision in favor of women or children or for the advancement or any backward section of citizens.

Article 31 Right to protection of law

No action detrimental to the life, liberty, body, reputation and or property of any person shall be taken except in accordance with the law. (Shamim, I., 2001, p.18)

Article 32

No person shall be deprived of life or personal liberty save in accordance with law
The Dowry Prohibition Act, 1980

Section 2 Definition
In this Act, unless there is anything repugnant in the subject or context, “dowry means any property or valuable security given or agreed to be given either directly or indirectly:
(a) By one party to a marriage to the other party to the marriage; or
(b) By the parents of either party to a marriage or by any other person to either party to the marriage or to any other person;”

Section 3 Penalty for giving or taking dowry
If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment which may extend to five thousand taka, or with both.

Section 4 Penalty for Demanding dowry
If any person, after the commencement of this Act, demands, directly or indirectly, from the parents or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment which may extend to five years and shall not less than one year, or with fine, or with both.

(Shamim, I., 2001, p.23)

Section 6
Dowry not only includes money etc., agreed to be paid before or at the time of the marriage but also money etc., demanded afresh after the marriage for continuing the marriage already solemnised. So any valuable property which includes money, demanded by the husband or his relations from the wife or her relations afresh after the marriage is dowry within the meaning of Section 6 of the Ordinance

Women and Children Repression Prevention Act, 2000

Section 4
(1) Penalty for commencing any offence with any substance of burning etc. Whoever commits or attempts to commit death of any person with burning, or corrosive or poisonous substance shall be punished with death or imprisonment for life and shall also be liable to fine up to Taka one lac.
(2) Whoever injures any child or women with burning or corrosive or poisonous substance causing damage of the victim’s eye sight, hearing power or deform or damages any part of the body.
   a) For loss of eye sight or hearing power or face disfiguration or breast or sexual part, deformation or damage, shall be punished with either or rigorous imprisonment for life term and shall also be liable to fine up to Taka one lac.
b) Disfiguring or damaging any other part of body or hurt to any part of body shall be punished with rigorous imprisonment for minimum 7 years up to a maximum of 14 years and shall also be liable to fine up to Taka 50,000.

(1) Whoever throws burning or corrosive or poisonous substance or tries to throw, to any child or woman, even for that act, if there was no physical, mental or otherwise loss of the child or woman shall be punished with rigorous imprisonment for minimum 3 years up to maximum 7 years and shall also be liable to fine up to Taka 50,000. (Shamim, I., 2001, p.40)

Section 5 Punishment for Trafficking in Women

1) Whoever brings from abroad or sends or traffics abroad, or buys or sells, or lets to hire or otherwise disposes of any women with the intention of using that women in prostitution or using for elicit intercourse or for any unlawful or immoral purpose, or for such a purpose keeps a woman in his possession, care or custody shall be punished with death sentence or life imprisonment of maximum 20 years but minimum 10 years and in addition be liable to a monetary fine.

2) If any women is sold, hired or disposed in any way to a prostitute or to any person who keeps or manages a brothel then the person who has disposed of her in that way, unless proven otherwise will be thought to have sold or disposed of the woman for prostitution shall be punished according to above sub-section (1).

3) Whoever keeps or manages a brothel buys or hires or gets in their possession by any other way or keeps in their custody any woman, then unless proved otherwise, will be thought to have brought, hired or kept in their possession for use in prostitution shall be punishable in accordance with the above sub-section (1). (Shamim, I., 2001, p.34)

Section 7 Punishment for Kidnapping and Abduction of Women and Children

Whoever kidnap or abducts any woman and child except with the intention of using them for any unlawful purpose mentioned in section-5 shall be punished with life imprisonment or rigorous imprisonment for at least fourteen years and shall also, in addition to that, be liable to monetary fine. (Shamim, I., 2001, p.34)

Section 9 Punishment for rape and rape related death

(1) If a man commits rape upon a woman or a child shall be punishable with death sentence and shall also, in addition to that, be liable to monetary fine.
Explanation: If any man commits rape upon a woman of above fourteen years of age beyond marital relationship without her consent by using threat or with consent by means of fraud; on the other hand, if any man commits rape upon a woman of under fourteen years of age with or without her consent, then it would have been considered that he has raped the woman.

(2) Whoever in committing rape or in his subsequent activities after rape causes death to the woman or child shall be punishable with death sentence or life imprisonment and shall also, in addition to that, be liable to monetary fine but not less than one lakh taka.

(3) When more than one person in a group commits rape, causes death to a woman or child or causes injury to her, each of them shall be punishable with death sentence or life imprisonment and shall also, in addition to that, be liable to monetary fine but not less than one lakh taka.

(4) If any woman or child by any person:
   (a) Is raped causing death or hurt in attempting to commit rape shall be punishable with life imprisonment and shall also, in addition to that, be liable to monetary fine.
   (b) Whoever attempts to commit rape upon a woman or child shall be punishable with imprisonment for a term of at least ten years but not less than five years and shall also, in addition to that, be liable to monetary fine.

(5) If a woman is being raped under police custody, then the persons under whose custody rape has been taken place, the person or persons who were responsible of caring for the rape victim, he or each of them, if it is not proved otherwise, shall be punishable with imprisonment for a term of at least ten years but not less than five years and shall also, in addition to that, be liable to monetary fine but not less than ten thousand taka.

Section 10 Punishment for sexual oppression etc:

(1) Any man who touches the sexual organ or any part of the body of a woman or child with any part of his body or substance, illegally with intent to fulfill his sexual lust be considered as sexual oppression and for this that man shall be punished with minimum rigorous imprisonment for three years and shall also be liable to fine;

(2) Any man who illegally outrages the modesty of a woman or poses indecent gesture with object to fulfill his sexual lust be termed as sexual harassment and shall be punished with minimum rigorous imprisonment for two years up to maximum 7 years and shall also be liable to fine.
Section 11 Punishment for causing death to have dowry etc.
If any husband of a woman, or his father, mother, guardian, relatives or any other person causes the death of the woman or tries to cause death or causes hurt to her or tries to hurt her, then those husband, father in law, mother in law, guardian, relatives or persons.

a) Shall be punished with death for causing death or life term imprisonment for trying to causing death and in both the cases, shall also be liable to fine.

b) Causing hurt, shall be punished with rigorous imprisonment for life term and for trying to cause hurt, be punished with rigorous imprisonment for minimum five years to a maximum 14 years and in both cases, shall also be liable to fine.

India
Constitution
Chapter V. The High Courts in the States
(1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without-

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been
made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.]

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

**Fundamental Rights**

**Right to Equality**

14. *Equality before law*

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

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.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

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

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]

**Right to Freedom**

19. *Protection of certain rights regarding freedom of speech, etc.*

(1) All citizens shall have the right-
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
(g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,-

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise].

21. Protection of life and personal liberty
No person shall be deprived of his life or personal liberty except according to procedure established by law.

Right to Constitutional Remedies
32. Remedies for enforcement of rights conferred by this Part
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of
(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constition.

Directive Principles of State Policy
38. State to secure a social order for the promotion of welfare of the people
(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

Indian Penal Code
302. Punishment for murder
Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine

304B. Dowry death
(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death.
Explanation- For the purpose of this sub-section, “dowry” shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.]

351. Assault

Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation- Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.

Illustrations

(a) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z, A has committed an assault.

(b) A begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z.

(c) A takes up a stick, saying to Z, “I will give you a beating”. Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault

354. Assault or criminal force to woman with intent to outrage her modesty

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

375. Rape

A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First Against her will.

Secondly Without her consent.
Thirdly With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly With or without her consent, when she is under sixteen years of age.

Explanation- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

State Amendment

Union Territory of Manipur:

(a) in clause sixthly, for the word “sixteen” substitute the word “fourteen”; and

(b) in the Exception, for- the word “fifteen” substitute the word “thirteen”.

[vide Act 30 of 1950.]

376. Punishment for rape

(1) Whoever, except in the cases provided for by subsection (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever

(a) being a police officer commits rape-
(i) within the limits of the police station to which he is appointed; or
(ii) in the premises of any station house whether or not situated in the
police station to which he is appointed; or
(iii) on a woman in his custody or in the custody of a police officer
subordinate to him; or
(b) being, a public servant, takes advantage of his official position and commits
rape on a woman in his custody as such public servant or in the custody of
a public servant subordinate to him; or
(c) being on the management or on the staff of a jail, remand home or other
place of custody established by or under any law for the time being in
force or of a woman’s or children’s institution takes advantage of his official
position and commits rape on any inmate of such jail, remand home, place
or institution; or
(d) being, on the management or on the staff of a hospital, takes advantage of
his official position and commits rape on a woman in that hospital; or
(e) commits rape on a woman knowing her to be pregnant; or
(f) commits rape on a woman when she is under twelve years of age; or
(g) commits gang rape,
shall be punished with rigorous imprisonment for a term which shall not be
less than ten years but which may be for life and shall also be liable to fine:
Provided that the court may, for adequate and special reasons to be mentioned
in the judgement, impose a sentence of imprisonment of either description for
a term of less than ten years.
Explanation 1- Where a woman is raped by one or more in a group of persons
acting in furtherance of their common intention, each of the persons shall be
deemed to have committed gang rape within the meaning of this sub-section.
Explanation 2- “Women’s or children’s institution” means an institution,
whether called an orphanage or a home for neglected woman or children or a
widows’ home or by any other name, which is established and maintained for
the reception and care of woman or children.
Explanation 3-“Hospital” means the precincts of the hospital and includes the
precincts of any institution for the reception and treatment of persons during
convalescence or of persons requiring, medical attention or rehabilitation.
]376A. Intercourse by a man with his wife during separation
Whoever has sexual intercourse with his own wife, who is living separately
from him under a decree of separation or under any custom or usage without
her consent shall be punished with imprisonment of either description for a
term which may extend to two years and shall also be liable to fine.]
376B. Intercourse by public servant with woman in his custody

Whoever, being a public servant, takes advantage of his official position and induces or seduces, any woman, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

376C. Intercourse by superintendent of jail, remand home, etc

Whoever, being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman’s or children’s institution takes advantage of his official position and induces or seduces any female inmate of such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation 1- “Superintendent” in relation to jail, remand home or other place of custody or a women’s or- children’s institution includes a person holding any other office in such jail, remand home, place or institution by virtue of which he can exercise any authority or control over its inmates.

Explanation 2- The expression “women’s or children’s institution” shall have the same meaning as in Explanation 2 to sub-section (2) of section 376.

376D. Intercourse by any member of the management or staff of a hospital with any woman in that hospital

Whoever, being on the management of a hospital or hem. on the staff of a hospital takes advantage of his position and has sexual intercourse with any woman in that hospital, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation- The expression “hospital” shall have the same meaning as in Explanation 3 to sub-section (2) of section 376.

498A. Husband or relative of husband of a woman subjecting her to cruelty

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation- For the purpose of this section, “cruelty” means-

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.]

**Indian Evidence Act**

**113B. Presumption as to dowry death**

When the question is whether a person has committed the dowry death of a women and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry; the court shall presume that such person had caused the dowry death.

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

**Immoral Trafficking (Prevention) Act, 1956**

17 (2) when the person is produced before the appropriate Magistrate under sub-section (5) of Section 15 or the Magistrate under sub-section (2) of Section 16, he shall, after giving her an opportunity of being heard, cause an inquiry to be made as to the correctness of the information received under sub-section (1) of Section 16, the age, character and antecedents of the person and the suitability of her parents, guardian or husband for taking charge of her and the nature of the influence which the conditions in her home are likely to have on her if she is sent home, and, for this purpose, he may direct a Probation Officer appointed under the Probation of Offenders Act, 1958, to inquire into the above circumstances and into the personality of the person and the prospects of her rehabilitation.

**Juvenile Justice (Care and Protection of Children) Act, 2000**

(d) “child in need of care and protection” means a child-

(i) who is found without any home or settled place or abode and without any ostensible means of subsistence,

(ii) who resides with a person (whether a guardian of the child or not) and such person-

(a) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or

(b) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person

(iii) who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases having no one to support or look after,
(iv) who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child.
(v) who does not have parent and no one is willing to take care of or whose parent have abandoned him or who is missing and run away child and whose parent cannot be found after reasonable injury,
(vi) who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal act,
(vii) who is found vulnerable and is likely to be inducted into drug abuse or trafficking,
(viii) who is being or is likely to be abused for unconscionable gains,
(ix) who is victim of any armed conflict, civil commotion or natural calamity;

**Rajasthan Sati (Prevention) Act, 1987**

5. Punishment For Glorification of Sati

Whoever does any act for the glorification of sati shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine which shall not be less than five thousand rupees but which may extend to thirty thousand rupees.

Powers of Collector or District Magistrate to Prevent Offences Relating to sati

6. Power to Prohibit Certain Acts:

(1) Where the Collector or the District Magistrate is of the opinion that sati or any abetment thereof is being or is about to be committed, he may, by order, prohibit the doing of any act towards the commission of sati by any person in any area or areas specified in the order.

(2) The Collector or the District Magistrate may also, by order, prohibit the glorification in any manner of sati by any person in any area or areas specified in the order.

(3) Whoever contravenes any order made under sub-section (1) or sub-section (2) shall, if such contravention is not punishable under any other provision of this Act, be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine which shall not be less than five thousand rupees but which may extend to thirty thousand rupees.
Nepal

Constitution

Article 1
Constitution as the Fundamental law (1) This Constitution is the fundamental law of Nepal and all laws inconsistent with it shall, to the extent of such inconsistency, be void.

Fundamental Rights

Right to Equality

Article 11
(1) All Citizen shall be equal before the law. No person shall be denied the equal protection of the laws.

(2) No discrimination shall be made against any citizen in the application of general laws on grounds of religion, race, sex, caste, and tribe or ideological conviction of any of these.

(3) The State shall not discriminate citizen among citizen on grounds of religion, race, sex, caste, tribe or ideological conviction or any of these:

Provided that special provisions may be made by law for the protection and advancement of the interests of women, children, the aged or those who are physically or mentally incapacitated or those who belong to a class which is economically, socially or educationally backward.

Right to Freedom

Articles 12
(1) No person shall be deprived of his personal liberty save in accordance with law, and no law shall be made which provides for capital punishment.

(2) (a) All citizens shall have right to freedom of opinion and expression

(2) (d) all citizens shall have right to freedom to move throughout the kingdom and reside in any part thereof.

Right to Privacy

Article 22
Except as provided by law, the privacy of the person, house, property document, correspondence or information of anyone is inviolable.

Right to Constitutional Remedy

Article 23
The right to proceed in the manner set forth in Article 88 for the enforcement of the rights conferred by this Part is guaranteed.
Jurisdiction of the Supreme Court

Article 88

(1) Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground, and extra-ordinary power shall rest with the Supreme Court to declare that law as void either ab initio or from the date of its decision if it appears that the law in question is inconsistent with the constitution.

Article 88

(2) The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute. For these purposes, the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate order and writs including the writs of habeas corpus, mandamus, certiorari, Prohibition and quo warrant:-

Provided that –

(a) the Supreme Court shall not be deemed to have power under this clause to interfere with the proceedings and decisions of the Military Court except on the ground of absence of jurisdiction or on the ground that a proceeding has been initiated against, or punishment given to, a non-military person for an act other than an offence relating to any Army.

(b) Except on the ground of absence of jurisdiction, the Supreme Court shall not interfere under this clause with the proceedings and decisions of Parliament concerning penalties imposed by virtue of its Privileges.

Article 126 Ratification of, Accession to, Acceptance of or Approval of Treaty or Agreement:

(1) The ratification of, accession to, acceptance of or approval of treaties or agreements to which the kingdom of Nepal or His Majesty’s Government is to become a party shall be as determined by law.

Existing Laws to Remain in Operation

Article 131 all laws in force at the commencement of this Constitution shall remain in operation until repealed or amended. Provided that laws inconsistent with this Constitution shall, to the extent of
inconsistency, ipso facto cease to operate one year after the commencement of this Constitution.

B. Ordinary Laws- National Code

Chapter of the Rape

Section 1
In the case of girls who are unmarried, or married or are widows and are under the age of 16 sexual intercourse with or without her consent or in any other manner whatsoever is rape and in the case of those whose age is above 16 sexual intercourse without consent or in any other manner whatsoever, that is to say forcefully or by threat or intimidation or by immoral influence, is rape

Section 3
In case (any person) commits rape a girl who is below the age of 10 he shall be imprisoned for 10 to 15 years, in case he does so with a woman who is 16 and above 16 years of age he shall be imprisoned 5 to 7 years and in case he does so with a girl who is the age of 10 and below the age of 16 he shall be imprisoned 7 to 10 years.

Section 4
In case any person, knowing full will that rape is being committed, accompanies (the guilty person) catches hold (of the woman), and assists in the commission of the rape, he shall be imprisoned for three year. In case a girl who is below 16 years of age is involved, such punishment shall be doubled.

Section 8
To preserve her chastity by making as escape and is in real danger of being deflowered or losing her modesty she can use any weapon or a stick or a stone, before or after yielding to the sexual intercourse. And if she could not control her anger, she on the spot or while chasing the culprit can use a weapon, a stick, and a stone and as a result if the culprit happened to die she shall be free from the accusation of murder. However, if she kills him after an hour has elapsed she shall be punished up to Rs. 5000 fine or 10 years imprisonment

Section 10
If any person (man) raped to any woman, victim must be given half of the property of the accused as compensation with confiscating of the whole property of the accused. Such victim also can get property from her previous husband as per rule.

Section 10 (a)
During the investigation of rape case, statements of victim should be taken only by female police. If the concerned police station does not have any women police, the police should take the statement in the presence of a female social worker.
Chapter of the Bestiality

Section 2
In case any person commits sexual intercourse with a cow, he shall be imprisoned for one year; and in case he does so with other female animals, he shall be imprisoned for a term six months, or fined with an amount not exceeding NRs. 200.

Section 3
In case any woman commits sexual intercourse with any animal, she shall be imprisoned for a term not exceeding one year or fined with an amount not exceeding NRs. 500.

Chapter of the Share Partition

Section 1
Any sub-division of property to be effected after the commencement of this Section shall be effected among the father, mother, husband, wife, sons, and daughters individually, subject to the other Sections of this law.

Section 1 A
Notwithstanding anything contained in Section 1A of this law, there shall be no need to sub-divide property in the name of a married daughter.

Section 7
In case children begotten of a woman who has no particular man as her husband cannot trace their father, they shall be entitled to sub-divide only their mother’s property.

Section 16
Notwithstanding anything contained in the other Sections of this law, in case any daughter who has already obtained her share in (ancestral property) gets married, the property left after being utilized by her shall accrue to the heirs belonging to her parental home.

Section 18
In case there are coparceners who have not separated their household expenses and are living in an undivided family, the additional joint income obtained from their joint property, or from their joint agricultural, industrial, or commercial enterprise, and the liabilities incurred according to Section 8 of the law on Monetary Transaction, shall be apportioned among all the coparceners. in case, besides such income, and coparcener has made any personal income through his knowledge, skills, or efforts, or has received any gift or donation from any person on a personal basis, or any property as a legacy or according to Section 5 of the Law on the Inheritance Rights of Women, such income or property shall be regarded as the personal income or property of the coparcener who earns or acquires it, He may do anything
he likes with such income or property, and need not share it with the other
copearncers.

Section 29
In case, within a period of three years after sub-division of property, any
movable and immovable asset included in any person’s share is proved to
belong to another, or in case it is proved to belong to another person on the
basis of a complaint filed within such three-year period, the person in whose
share (such asset) is included is entitled to have it exchanged or compensated
by all the copearncers in equal proportions.

Chapter of the Inheritance

Section 1
The nearest agnate relative within seven generations is known as a hakwala,
(agnate relatives) beyond seven generations are termed kinsmen. For the purpose
of differentiating between hakwalas as near and distant, so long as the deceased
person whose property is to be inherited has agnate relatives’ extant, hakwalas
belonging to other branches of the deceased person’s ancestor’s family shall
not be regarded as near hakwalas.

Section 2
No escheat property reverting under the other Sections of this law shall revert
to any other person until the deceased person’s husband, wife, son, unmarried
daughter, son’s son or son’s daughter is alive. In case the deceased person’s
son is not alive but the daughter-in-law is alive, she shall be entitled to the
property like the son. In case there is none of such persons, married daughters,
and in case no married daughter is alive, her sons or unmarried daughters, are
not alive, the property shall revert to the heirs according to law.

Section 3
In case the husband, wife, son, unmarried daughter, and grandson or unmarried
grand-daughter on the son’s side do not look after and maintain their father,
mother, mother-in-law, father-in-law, or grand father or grand mother who are
living separately, but the married daughters or son-in-law, or their sons and
unmarried daughters do so, the married daughters, or son-in-law, or their son
or unmarried daughter who are so looking after such father, other shall be
father-in-law, grand father or grand – mother shall be entitled to inherit their
escheat property. Other heirs shall not be entitled to inherit such property.

Section 6
In case parents who have a number of children through one or more wives sub-
divide their property among all of their wives, sons, unmarried daughters,
daughters-in-law and themselves according to law, and then join their share
with that of any wife, son, unmarried daughter or daughter-in-law, and live
together, and in case such parents die, their property shall be inherited only by
such wives, sons unmarried daughters and daughters-in-law as are living together. If any will has been executed, it shall be complied with.

Section 7
In case any person’s husband, wives, sons, unmarried daughters, or the son’s son or unmarried daughters who are living separately had not looked after and maintain him, and this was being done by any brother or sister born of the same father, the concerned brother or sister shall be entitled to the escheat property of the brother or sister whom he/she had been looking after and maintaining in this manner. Other heirs shall have no claim to such property.

Section 9
In case any person has several sons and unmarried daughters from the same wife, and in case his property has been sub-divided according to law among other sons and unmarried daughters who then start living separately. and in case he was living with one son, unmarried daughter and daughter-in-law, and, because the latter did not look after him, leaves them, and, together with his share of his property and Jiuni, starts living with another son and daughter-in-law and subsequently dies, (such property and Jiuni) shall accrue to (the son, unmarried daughter and daughter-in-law) with whom he later started living. But if he has not taken away his share and Jiuni and only lived with them for a few days for any reason, then, in the event of his death, the hakwala, the son, unmarried daughter and daughter-in-law and with whom he later started living, shall not be entitled to inherit (such share and Jiuni).

Section 10
In case (any person) has several sons and unmarried daughters from the same wife, and after property has been sub-divided among them according to law, the parents are living alone, separately, or with any of the sons or unmarried daughters then, in the event of the death of the husband, his share and Jiuni shall accrue to the wife.

In case the wife dies, her share and Jiuni shall accrue to her husband. In case a wife who has obtained her share and was living separately dies, her property shall accrue to her son or unmarried daughter if any, or else to her husband. If neither is extant, it shall accrue to her step-son and step-daughter.

Section 11
Notwithstanding anything contained in the other Sections of this law, in case the deceased person had been looked after and maintained not by his nearest heir but by any other person, the person who had done so shall be entitled to the entire movable property and only half of the immovable property of the deceased person. The other half of the immovable property shall accrue to the heirs according to law.
Section 12
In case any brother or unmarried younger sister has obtained his/ her share of the property and is living separately and other brothers or unmarried younger sister are living in the same undivided family, and in case any one of the latter dies, his / her property shall not accrue to the brother or unmarried sister who is living separately, but to such brothers and unmarried younger sister as are living together, even if they were born of a different mother.

In case they have been meeting household expenses from out of their own sub-divided property according to their respective shares even when living jointly, or in the case of property accruing from the death of any brother or unmarried younger sister from among several brothers or unmarried younger sisters living separately, only brothers be entitled to the inheritance, not brothers or unmarried younger sisters born of a different mother.

Section 12 A
Notwithstanding anything contained elsewhere in this law, in case an unmarried daughter who has inherited the escheat property marries, the property left after being utilized by her shall accrue to the heirs on the mother side.

5. Chapter of the Marriage

Section 8
In case a married or divorced woman or widow is remarried to another person under the false pretense that she is unmarried, or in case a married, widowed or divorced man is remarried to another person under the false pretense that he is unmarried, the marriage shall be nullified if the person who has married by being so misled does not consent to it. The persons who have attained maturity from among the persons contracting or arranging the marriage shall be punished with a fine not exceeding NRs.10,000, and the amount of fine shall be handed over to the person who has been so misled.

Trafficking in Person (Control and Punishment) Act 2043 (1986)

Section 4
In case any person engages in any of the following acts, he shall be deemed to have conducted traffic in human beings

Section 4  (a) to sell human beings with human beings
Section 4  (b) to take away any person abroad with intent of sale.
Section 4  (c) to compel any woman to take to prostitution through allurement or enticement, deceit, threats, intimidation, pressures or otherwise.
Section 4  (d) to hatch a conspiracy for committing any of the acts mentioned in the foregoing clauses, or to assist in or abet such acts, or attempt to engage therein.
Section 8
(1) Any person who is convicted of trafficking in human beings shall be sentenced to imprisonment for a term ranging from ten to twenty years.
(2) Any person who is convicted of taking people outside of the kingdom of Nepal with the intent of sale shall be imprisoned for a term ranging from five to ten years.
(3) Any person who is convicted of compelling any woman to take to prostitution through allurement or enticement, deceit, threat, intimidation or pressure or otherwise shall be imprisoned for a term ranging from ten to fifteen years.
(4) Any person who is convicted of hatching a conspiracy for conducting traffic in human beings, or assisting in such act, or abetting any person to engage in such acts, or attempting to do so, shall be imprisoned for a term not exceeding five years.
(5) In case any person has been sold and purchased, the amount paid by the purchaser shall be forfeited and the purchaser shall be punished with a fine equal to such amount, in addition to the term of imprisonment prescribed in Sub-section (1)

The Children Act 1991
Right to mention the name of mother and maternal grandfather
Section 10
In cases where a Child is required under a law to mention the names of his father and grandfather in connection with official proceedings or in practice, the Child may, until the whereabouts of his father are known, mention the names of his mother and maternal grandfather. In the case of a Child either of whose parents is not traced, if the person or organization Child shall have the right not to mention the names of his father, mother or grandfather.

Enforcement of rights
Section 20
(1) For the enforcement of the rights set out in this Chapter, every person shall have the right to file a petition on behalf of the Child to a District Court of the district where the Child is residing. On receipt of such petition, the Concerned Court may, upon inquiry into the matter, enforce the right by issuing the appropriate order direction or writ.

Punishment
Section 53
(1) In case any person commits any offence in contravention to Section 13,17,18 or abets others to commit such offence or attempts to do so, he shall be punished with a fine up to three thousand rupees or with imprisonment for a term, which may extend to three months or with both.
(2) In case any person commits any offence in contravention to Section 14 or
abets others to commit such offence or attempts to do so, he shall be
punished with a fine up to ten thousand rupees or with imprisonment for
a term which may extend to five years also shall be seized from the person
selling the child and in case such amount could not be realized, he shall
be punished with imprisonment for a term which may extend to two years
more in addition.

(3) In case any person commits any offence in contravention to Section 7 or
15 he shall be punished with a fine up to thousand rupees or with
imprisonment for a term, which may extend to one year or with both. In
case of torture and cruel treatment he shall be made liable to pay year or
with both. In case of torture and cruel treatment he shall be made liable to
pay a reasonable amount of compensation to the Child.

Provided that, in matters relating to the prohibition on maintaining direct contact
or living by the Child in pursuance of the proviso clause of sub- section (1) of
Section 8, such action may be initiated or an order may be issued only on the
basis of petition of the parent (s) of the concerned Child.

Limitation

Section 54
Complaints shall be filed within one year from the date of offence committed,
which is punishable under this Act.

Appeal

Section 56
Person who is not satisfied with the decision made by the Juvenile Court or
District Court pursuant to Section 55 may file an appeal to the Appellate Court
within thirty five days of such decision made thereto.

Labor Act, 2048 (1991)

Section 5(2) of the Labor Act, 2048 (1991)
Women and minors could be employed for work, except in some otherwise
specified circumstances, generally from 6 o’clock in the morning till 6 o’clock
in the evening.

Section 5(3)
With mutual consent between employee and employer, women could be also
engaged in work at par with men after making appropriate arrangements.

Section 8
Any change in the ownership of the Factory shall not be deemed to have affected
on the terms and conditions of service of the workers and employees of the
factory.
Section 27 (h)
Factory has to arrange for separate modern toilets for men and women workers or employees at their convenient places.

Section 60
Any party not satisfied with any punishment awarded under this Chapter may file an appeal within thirty five days from the date of such punishment or receipt of order in the following manner:
   a) Order of His Majesty Government or Labor Branch
   b) In the case of first proceeding and decision of Labor Court
   c) Made order and rendered punishment by the Manager or any other representatives or Labor office.

Labor (Procedure) Rules 1993 – Rule 4
Women may be employed in enterprises from 6:00 PM to 6:00 only through consent of such women worker.

Public (offences and Punishment) Act 2027 (1970)

Section 2
The Act defined as public offence the acts like breach of peace or vulgar display at a public place by uttering vulgar words or speech or giving vulgar hints, publishing or printing vulgar language or displaying or distributing or selling such vulgar publications in public places, assaulting and insulting female class in a public place, indulging in arbitrary behavior in public place, intimidating or abusing or harassing any person through telephone, Email or any other means or medium with an intention of intimidating or threatening or harassing or insulting and commit molest and insult women at public place are public offence.

Nepal Treaty Act 2047 (1990)

Section 9
In the event of inconsistency between any matter contained in any treaty to which the Kingdom of Nepal or His Majesty’s Government was a party and the prevalent law, the prevalent law would be unacceptable to the purpose of that particular treaty to the extent of such inconsistency, and the provision of the treaty would prevail as Nepal law.

Section 9 (2)
Requiring the state to introduce appropriate amendments in the relevant laws or to make appropriate law for, carrying out the obligations arising from international treaties or Convention.
Sri Lanka

Code of Criminal Procedure

Section 256

(1) In the case of any offence triable exclusively by the High Court the Magistrate inquiring into the offence may, after having obtained the Attorney-General’s authority so to do, or the Attorney-General himself may, with the view of obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence under inquiry, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence and to every other person concerned whether as principal or abettor in the commission thereof.

Constitution

Article 111

(1) The highest Court of First Instance exercising criminal jurisdiction and created by law shall be called and known as “The High Court of the Republic of Sri Lanka” and shall exercise such jurisdiction and powers as Parliament may by law vest or ordain.

(2) The Judges of the High Court shall be appointed by the President of the Republic by warrant under his hand and be removable and be subject to disciplinary control by the President on the recommendation of the Judicial Service Commission established under this chapter.

Article 120

The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution:

Provided that-

(a) in the case of a Bill described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83;

(b) where the Cabinet of Ministers certifies that a Bill, which is described in its long title as being for the amendment of any provisions of the Constitution, or for the repeal and replacement of the Constitution, is intended to be passed with the special majority required by Article 83 and submitted to the People by Referendum, the Supreme Court shall have and exercise no jurisdiction in respect of such Bill;
(c) where the Cabinet of Ministers certifies that a Bill which is not described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, is intended to be passed with the special majority required by Article 84, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at the Referendum by virtue of the provisions of Article 83 or whether such Bill is required to comply with paragraphs (1) and (2) of Article 82; or

(d) where the Cabinet of Ministers certifies that any provision of any Bill which is not described in its long title as being for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution is intended to be passed with the special majority required by Article 84, the only question which the Supreme Court may determine is whether any other provision of such Bill requires to be passed with the special majority required by Article 84 or whether any provision of such Bill requires the approval by the People at a Referendum by virtue the provisions of Article 83 or whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82.

Article 138

(1) The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance, tribunal or other institution and sole and exclusively cognizance, by way of appeal, revision and restitutio in integrum of all causes, suits, actions, prosecutions, matters and things of which such Court of First Instance, tribunal or other institution may have taken cognizance; Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

(2) The Court of Appeal shall also have and exercise all such powers and jurisdiction, appellate and original, as Parliament may by law vest or ordain.

Penal Code

Section 102

Whoever abets any offence shall, if the act abetted is committed ion consequence of the abatement, and no express provision is made by this Code of the punishment of such abetment, be punished with the punishment provided for the offence.
Explanation — An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Illustrations

(a) A offers a bribe to B, a public officer, as a reward for showing A some favor in the exercise of B’s official functions. B accepts the bribe. A has abetted the offence defined in Section 158.

(b) A instigates B to give false evidence. B, in consequence of the instigation commits that offence. A is guilty of abetting that offence, and is liable to the same punishment as B.

(c) A and B conspire to poison Z. A, in pursuance of the conspiracy, procures the poison and delivers it to B, in order that he may administer it to Z. B, in pursuance of the conspiracy, administers the poison to Z in A’s absence and thereby causes Z’s death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.

Section 296
Whoever commits murder shall be punished with death.

Section 357
Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 364
(1) Whoever commits rape shall, except, in the cases provided for in subsections (2) and (3), be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with fine, and shall in addition be ordered to pay compensation of an amount determined by court, to the person in respect of whom the offence was committed for the injuries caused to such person.

(2) Whoever—

(a) being a public officer or person in a position of authority, takes advantage of his official position and commits rape on a woman in his official custody or wrongfully restrain and commits rape on a woman;

(b) being on the management, or on the staff of a remand home or other place of custody, established by or under law, or of a woman’s or
children’s institution, takes advantage of his position and commits rape on any woman inmate of such remand home, place of custody or institution;

(c) being on the management or staff of a hospital, takes advantage of his position and commits rape on a woman in that hospital;

(d) commits rape on a woman knowing her to be pregnant;

(e) commits rape on a woman under eighteen years of age;

(f) commits rape on a woman who is mentally or physically disabled;

(g) commits gang rape

shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall in addition be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person;

Provided however, that where the offence is committed in respect of a person under sixteen years of age, the court may, where the offender is a person under eighteen years of age and the intercourse has been with the consent of the person, impose a sentence of imprisonment for a term less than ten years.

Explanation 1 - Where the offence of rape is committed by one or more persons in a group of persons, each person in such group committing or abetting the commission of such offence is deemed to have committed gang rape.

Explanation 2 - “women’s or children’s institution” means an institution for the reception and care of women or children, howsoever described.

Explanation 3 - “hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.

(3) Whoever commits rape on a woman under sixteen years of age and the woman stands towards the man in any of the degrees of relationships enumerated in section 364A shall on conviction be punished with rigorous imprisonment, for a term not less than fifteen years and not exceeding twenty years and with fine.

(4) Where any person fails to pay the compensation he is ordered to pay under subsection (1) or subsection (2), he shall in addition to the imprisonment imposed on him under subsection (1) or subsection (2) be punished with a further term of imprisonment of either description for a term which may extend up to two years.
Section 364A

(1) Whoever has sexual intercourse with another, who stands towards him in any of the following enumerated degrees of relationship, that is to say—
(a) either party is directly descended from the other or is the adoptive parent, adoptive grand parent, adopted child or adopted grand child of the other; or
(b) the female, is the sister of the male, either by the full or the half blood or by adoption, or is the daughter of his brother or of his sister, by the full or the half blood or by adoption, or is a descendant from either of them, or is the daughter of his wife by another father, or is his son’s or grandson’s or father’s or grandfather’s widow; or
(c) the male, is the brother of the female either by the full or the half blood or by adoption, or is the son of her brother or sister by the full or the half blood or by adoption or is a descendant from either of them, or is the son of her husband by another mother, or is her deceased daughter’s or grand daughter’s or mother’s or grandmother’s husband commits the offence of ‘incest’

(2) the offence of incest shall not be affected or negated by reason of the existence of any defect in the legality of any relationship given in this section, such as absence of valid marriage or adoption

(3) Whoever—
(a) commits incest, shall be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with fine;
(b) attempts to commit incest shall be punished with imprisonment of either description for a term which may extend to two years.
(c) No prosecution shall be commenced for an offence under this section except with the written sanction of the Attorney-General.
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