THE
INDIAN LAW REPORTS
ALLAHABAD SERIES

CONTAINING ALL A.F.R. DECISIONS OF THE
HIGH COURT OF JUDICATURE AT ALLAHABAD

2022 - VOL. VIII
(AUGUST)

PAGES 1 TO 1112

PUBLISHED UNDER THE AUTHORITY OF THE GOVERNMENT OF UTTAR PRADESH
COMPOSED AT INDIAN LAW REPORTER SECTION, HIGH COURT, ALLAHABAD.

INDIAN LAW REPORTING COUNCIL

ALLAHABAD SERIES

****

PRESIDENT

HON'BLE THE CHIEF JUSTICE RAJESH BINDAL

******

COUNCIL

HON'BLE MR. JUSTICE SAUMITRA DAYAL SINGH

HON'BLE MR. JUSTICE JAYANT BANERJI

****

EDITORIAL PANEL

SENIOR LAW REPORTERS

1. MR. VINAY SARAN, SENIOR ADVOCATE
2. MR. SAMIR SHARMA, SENIOR ADVOCATE

JUNIOR LAW REPORTERS

1. MR. ANOOP BARANWAL, ADVOCATE
2. MR. SHESHADRI TRIVEDI, ADVOCATE
3. MS. PRIYA AGRAWAL, ADVOCATE
4. MR. ASHUTOSH MANI TRIPATHI, ADVOCATE
5. MS. NOOR SABA BEGUM, ADVOCATE
6. MR. SAROJ GIRI, ADVOCATE
7. MS. MANISHA CHATURVEDI, ADVOCATE
8. MR. ARVIND KUMAR GOSWAMI, ADVOCATE
9. MS. ABHILASHA SINGH, ADVOCATE

****

JUDGES PRESENT

Chief Justice: Hon'ble Mr. Justice Rajesh Bindal	
Patna Judges:	
1. Hon'ble Mr. Justice Pritinker Diwaker	33. Hon'ble Mr. Justice Ajit Kumar
2. Hon'ble Mr. Justice Manoj Misra	34. Hon'ble Mr. Justice Rajnish Kumar
3. Hon'ble Mr. Justice Ramesh Sinha (Sr. Judge Ltv.)	35. Hon'ble Mr. Justice Abdul Moin
4. Hon'ble Mrs. Justice Sunita Agarwal	36. Hon'ble Mr. Justice Dinesh Kumar Singh
5. Hon'ble Mr. Justice Devendra Kumar Upadhyaya	37. Hon'ble Mr. Justice Rajeev Misra
6. Hon'ble Mr. Justice Rakesh Srivastava	38. Hon'ble Mr. Justice Vivek Kumar Singh
7. Hon'ble Mr. Justice Surya Prakash Kesarwani	39. Hon'ble Mr. Justice Ajay Bhanot
8. Hon'ble Mr. Justice Manoj Kumar Gupta	40. Hon'ble Mr. Justice Neeraj Tiwari
9. Hon'ble Mr. Justice Anjani Kumar Mishra	41. Hon'ble Mr. Justice Prakash Padia
10. Hon'ble Dr. Justice Kaushal Jayendra Thaker	42. Hon'ble Mr. Justice Alok Mathur
11. Hon'ble Mr. Justice Mahesh Chandra Tripathi	43. Hon'ble Mr. Justice Pankaj Bhatia
12. Hon'ble Mr. Justice Suneet Kumar	44. Hon'ble Mr. Justice Sauraih Lavania
13. Hon'ble Mr. Justice Vivek Kumar Birla	45. Hon'ble Mr. Justice Vivek Varma
14. Hon'ble Mr. Justice Atiaur Rahman Masoodi	46. Hon'ble Mr. Justice Sanjay Kumar Singh
15. Hon'ble Mr. Justice Ashwani Kumar Mishra	47. Hon'ble Mr. Justice Piyush Agrawal
16. Hon'ble Mr. Justice Rajan Roy	48. Hon'ble Mr. Justice Sauraih Shyam Shamshery
17. Hon'ble Mr. Justice Arvind Kumar Mishra-I	49. Hon'ble Mr. Justice Jaspreet Singh
18. Hon'ble Mr. Justice Om Prakash-VII	50. Hon'ble Mr. Justice Rajeev Singh
19. Hon'ble Mr. Justice Siddhartha Varma	51. Hon'ble Mrs. Justice Manju Rani Chauhan
20. Hon'ble Mrs. Justice Sangeeta Chandra	52. Hon'ble Mr. Justice Karunesh Singh Pawar
21. Hon'ble Mr. Justice Vivek Chaudhary	53. Hon'ble Dr. Justice Yogendra Kumar Srivastava
22. Hon'ble Mr. Justice Saumitra Dayal Singh	54. Hon'ble Mr. Justice Manish Mathur
23. Hon'ble Mr. Justice Rajiv Joshi	55. Hon'ble Mr. Justice Rohit Ranjan Agarwal
24. Hon'ble Mr. Justice Rahul Chaturvedi	56. Hon'ble Mr. Justice Rajendra Kumar-IV
25. Hon'ble Mr. Justice Satil Kumar Rai	57. Hon'ble Mr. Justice Mohd Faiz Alam Khan
26. Hon'ble Mr. Justice Jayant Banerji	58. Hon'ble Mr. Justice Suresh Kumar Gupta
27. Hon'ble Mr. Justice Rajesh Singh Chauhan	59. Hon'ble Mr. Justice Narendra Kumar Johari
28. Hon'ble Mr. Justice Irshad Ali	60. Hon'ble Mr. Justice Raj Beer Singh
29. Hon'ble Mr. Justice Saral Srivastava	61. Hon'ble Mr. Justice Ajit Singh
30. Hon'ble Mr. Justice Jahangir Jamshed Munir	62. Hon'ble Mr. Justice Ali Zamin
31. Hon'ble Mr. Justice Rajiv Gupta	63. Hon'ble Mr. Justice Vipin Chandra Dixit
32. Hon'ble Mr. Justice Siddharth	64. Hon'ble Mr. Justice Shekhar Kumar Yadav

65. Hon'ble Mr. Justice Deepak Verma
66. Hon'ble Dr. Justice Gautam Chowdhary
67. Hon'ble Mr. Justice Shamim Ahmed
68. Hon'ble Mr. Justice Dinesh Pathak
69. Hon'ble Mr. Justice Manish Kumar
70. Hon'ble Mr. Justice Samit Gopal
71. Hon'ble Mr. Justice Sanjay Kumar Pachori
72. Hon'ble Mr. Justice Subhash Chandra Sharma
73. Hon'ble Mrs. Justice Saroj Yadav
74. Hon'ble Mr. Justice Mohd. Aslam
75. Hon'ble Mrs. Justice Sadhna Rani (Thakur)
76. Hon'ble Mr. Justice Syed Aftab Husain Rizvi
77. Hon'ble Mr. Justice Ajai Tyagi
78. Hon'ble Mr. Justice Ajai Kumar Srivastava - I
79. Hon'ble Mr. Justice Chandra Kumar Rai
80. Hon'ble Mr. Justice Krishan Pahal
81. Hon'ble Mr. Justice Sameer Jain
82. Hon'ble Mr. Justice Ashutosh Srivastava
83. Hon'ble Mr. Justice Subhash Vidyarthi
84. Hon'ble Mr. Justice Brij Raj Singh
85. Hon'ble Mr. Justice Shree Prakash Singh
86. Hon'ble Mr. Justice Vikas Budhwar
87. Hon'ble Mr. Justice Om Prakash Tripathi
88. Hon'ble Mr. Justice Vikram D Chauhan
89. Hon'ble Mr. Justice Umesh Chandra Sharma
90. Hon'ble Mr. Justice Syed Waiz Mian
91. Hon'ble Mr. Justice Saurabh Srivastava
92. Hon'ble Mr. Justice Om Prakash Shukla
93. Hon'ble Mrs. Justice Renu Agarwal
94. Hon'ble Mr. Justice Mohd. Azhar Husain Idrisi
95. Hon'ble Mr. Justice Ram Manohar Narayan Mishra
96. Hon'ble Mrs. Justice Jyotsna Sharma
97. Hon'ble Mr. Justice Mayank Kumar Jain
98. Hon'ble Mr. Justice Shiv Shanker Prasad
99. Hon'ble Mr. Justice Gajendra Kumar
100. Hon'ble Mr. Justice Surendra Singh - I
101. Hon'ble Mr. Justice Nalin Kumar Srivastava

(2022) 8 ILRA 6
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.

Jail Appeal No. 153 of 2021

Sonu ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Rahul Jain

Counsel for the Opposite Party:
A.G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 363, 366 & 376D - The Protection of Children From Sexual Offences Act, 2012 - Section 5/6 - The Code of Criminal Procedure, 1973 - Section 161,164,313 - The Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 15 - The Juvenile Justice (Care And Protection Of Children) Act, 2007 - Juvenile Justice Rules 2007 - Rule 12 (3) Rule 12 (3) B , Rule 12 (3) (A) (i) to (iii) - consent of a minor prosecutrix does not matter if she was taken to separate places for making sexual intercourse away from her lawful guardians.(Para - 27)

(B) Criminal Law - sentence - rehabilitary & reformative aspects in sentencing - 'Proper Sentence' - sentence should not be either excessively harsh or ridiculously low - While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality' - Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account - Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically. (Para -34,36)

Victim kidnapped - transferred to several persons - beaten and subjected to physical, mental and sexual assault - later on was thrown - found minor by lower court – conviction – Hence appeal.**(Para - 16,26)**

HELD:-Proved beyond reasonable doubt that accused-appellant committed offence under Section 363 and 366 IPC .Committed offence under Section 376 IPC read with Section 4 of the POCSO Act. Not a case of gang rape. Not guilty of Section 376D and Section 6 of the POCSO Act. No accused person is incapable of being reformed, therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream. **(Para -32,36,38)**

Jail appeal partly allowed and partly rejected. (E-7)

List of Cases cited:-

1. Mahadeo Vs St. of Maha. & anr. (2013), 2014 SCC 637

2. Jernail Singh Vs St. of Har. (2013) 7SCC 263

3. Mukesh Vs St. for NCT of Delhi & ors., AIR 2017 SC 2161 (Three-Judge Bench)

4. Ashok Kumar Chaudhary Vs St. of Bihar, 2008 (61) ACC 972 (SC)

5. Rabindra Mahto Vs St. of Jhark., 2006 (54) ACC 543 (SC)

6. Ravi Kumar Vs St. of Punj., 2005 (2) SCJ 505

7. St. of H.P. Vs Shree Kant Shekari, (2004) 8 SCC 153

8. Munshi Prasad Vs St. of Bihar, 2002(1) JIC 186 (SC)

9. Ravindra Kumar Vs St. of Punj., 2001 (2) JIC 981 (SC)

10. Sheo Ram Vs St. of U.P., (1998) 1 SCC 149

11. St. of Karn. Vs Moin Patel, AIR 1996 SC 3041

12. St. of U.P. Vs Manoj Kumar Pandey, AIR 2009 SC 711 (Three-Judge Bench)

13. Santosh Moolya Vs St. of Karn., (2010), 5 SCC 445"

14. Mohan Das Survanshi Vs St. of M.P., 1999 Cr LJ 3451 (MP)

15. Manoj Mishra @ Chhotkau Vs St. of U.P., 2021

16. Mohd. Giasuddin Vs St. of AP, AIR 1977 SC 1926

17. Deo Narain Mandal Vs St. of UP, (2004) 7 SCC 257

18. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

19. Jameel Vs St. of U.P. (2010) 12 SCC 532

20. Guru Basavraj Vs St. of Karn., (2012) 8 SCC 734

21. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

22. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

23. Raj Bala Vs St. of Har., (2016) 1 SCC 463

(Delivered by Hon'ble Umesh Chandra Sharma, J.)

1. The appeal has been preferred against the conviction and sentence of the appellant Sonu S/o Late Phool Chand, under Section 363, 366, 376D I.P.C. & Section 5/6 of POCSO Act in Session Trial No. 8/2018 in Case Crime No. 111/2017, P.S. Kotwali, District Vindhyachal, U.P. By Special Judge POCSO Act / Additional Sessions Judge, Mirzapur on 14.10.2020.

2. The grounds of appeal are that there was no evidence on record to prove the alleged incident. No one had seen Sonu along with the victim on the date and time of incident. Though, it is stated that the victim was kidnapped at about 10:00 A.M from the nearby market place, no eye-witness saw the occurrence in day light makes the allegation improbable. No witness, neither father nor mother of the victim were aware about the date-of-birth of the victim as to whether at the time of occurrence she was minor or not. There was dispute between the father of the victim and the uncle of the appellant. The victim had relations with Dinesh and Sonu. Sonu has helped the victim to get married with Dinesh. Sonu has been made scapegoat in the matter. There are glaring contradiction between the statement and cross-examination of the witnesses P.W.-1, P.W.-2 & P.W.-3. The Trial Judge has not relied upon the medical age already framing mind to convict the appellant. In cross-examination, witness has stated that Sonu had done nothing and had not gone with the victim though at some places, victim has deposed against the appellant. There is no explanation of delay in lodging the F.I.R. after three months from the incident. The victim has stated to the I.O. that she was living in Bahraich with her husband Dinesh. There is no independent eye-witness. P.W.-1 and P.W.-2 have given heresay evidence. The charge is not proved from the evidence of sole witness, victim P.W.-3. Appellant has no previous criminal antecedent, therefore, the appeal be allowed and the conviction and sentence awarded by the learned Trial Court be quashed.

3. In brief, the case of the prosecution is this that informant/plaintiff PW1- Ram Ashrey father of the victim, moved an application for lodging the F.I.R. with the averment that on 27.10.2016, daughter of the informant P.W.- 1 aged about 17 years old left the house at about 10 A.M. for

school, appellant-Sonu with two unknown youngsters kidnapped and abducted her daughter. Even after prolong search, he could not find her daughter. He used to talk with his daughter from an unknown mobile no. 9565005779 provided by Sonu. Sonu informed P.W.-1 that on mobile no. 946763015, he will know about his daughter. Through that given mobile number, he contacted his daughter who informed that she was in Jammu & Kashmir.

4. On the basis of written FIR Ex. Ka-1, a case was registered under Section 363 IPC on 12.03.2017, S.I. Bhuval Singh, Virendra Yadav, Krishna Nand Rai, Jai Lal and lastly, S.H.O. Ashok Kumar Singh investigated the matter. The charge-sheet was submitted by the last I.O.. The victim was found in injured condition in a field near pitch road in P.S. Hardi, District Bahraich, U.P., for which another crime no. 0338/2017, under Section 307 IPC was registered on 05.03.2017. That case was transferred to District Mirzapur where investigation was completed against the appellant Sonu and charge-sheet was submitted under Sections 363, 366, 376, 307 IPC and ¾ POCSO Act. Investigation about rest accused persons remain pending.

5. The accused was charged under the above sections which he denied and sought trial. Prosecution submitted following documentary evidences:-

1. Tehrir FIR, Ex. Ka.-1.
2. Statement of victim under Section 164 Cr.P.C., Ex. Ka.-2
3. Medical Report Ex. Ka.-3.
4. G.D. regarding institution of case, Ex. Ka.-4.

6. Map of Case Crime No. 338/17, under Section 307 IPC, P.S. Hardi, District Bahraich. Ex-K-5 (Map of this Case Crime No. 3K/10 and chik FIR 3K/2 and also chik 3k/4 and 5 relating Section 307 IPC, P.S. Hardi, District Bahraich, have not been exhibited.)

7. Charge-sheet Ex-K-6

8. Following witnesses were examined to prove the prosecution case.

1.PW1 Ram Ashrey, informant, father of the victim.
2.PW2 Pankali, mother of the victim.
3. PW3 Victim herself.
4. PW4 Dr. Anuradha Mishra.
5. PW5 Ram Lallan Bajpai.
6. PW6 Haldhar @ Rakesh Yadav.
7.PW7 Head Constable Writer, Umakant Rai.
8. PW8 S.I. Suresh Kumar Singh, I.O.
9. PW9 S.I. Ashok Kumar Singh, I.O.

9. After completion of prosecution evidence, the statement of the accused-appellant was recorded under Section 313 Cr.P.C., wherein he said that due to enmity between his maternal uncle and the informant, he has falsely been implicated in this case. The appellant did not produce any oral or documentary evidence in his defence in the lower court. The Lower Court heard the argument of both the parties and came to the conclusion that the victim was aged about 17 years, at the time of occurrence. In this regard, Lower Court has referred to section 94 of Juvenile Justice Act 2015 and also relied on the case of ***Mahadeo vs. State of Maharashtra and another (2013), 2014 SCC 637***, in which principles have been laid down by the

Hon'ble Apex Court about Rule 12 (3) of Juvenile Justice Rules 2007 and Rule 12 (3) B and also Rule 12 (3) (A) (i) to (iii), and the same has been reiterated by the Hon'ble Supreme Court in the case of ***Jernail Singh Vs. State of Haryana (2013) 7SCC 263.*** In this regard the Lower Court has also examined educational certificates of the victim in which, her date of birth is mentioned as 20.10.2001. At the time of occurrence, the victim was studying in class 10 in Maharaja Pratap Inter College, Bihasara.

10. Victim's father and mother PW1 and PW2 and Victim herself as PW3 have supported the prosecution version. In their statement given on oath before the Court, informant PW1 has proved that aforementioned mobile numbers were provided by the accused Sonu, by which he could contact the victim. He also found mobile number of the accused in the book of victim. Accused also abused him and used unparliamentary language on asking about the victim.

11. The Lower Court has accepted the explanation given by the informant PW1 regarding non lodging of FIR promptly and accepted the explanation that to prevent propaganda, he did not lodge the FIR just after the incident. It is a common practice in the Indian society that when any offence is committed against female member of the family, firstly, family members try to solve the problem at their own end and upon failure, they take recourse of law. In this regard, following citations are relevant in which Hon'ble Supreme Court and High Courts have held that if delay is properly explained then lodging the delayed F.I.R. is not fatal to the prosecution case. In case of abduction, kidnapping and rape of female member of the family, people think over repeated times and try to solve the problem at their own end fearing social admonition and when they became helpless then they lodge the F.I.R.

About delayed FIR and delayed recording of statement of PWs by I.O. u/s 161 CrPC, Hon'ble Supreme Court has held that if causes are not attributable to any effort to concoct a version and the delay is satisfactorily explained by prosecution, no consequence shall be attached to mere delay in lodging FIR and the delay would not adversely affect the case of the prosecution. Delay caused in sending the copy of FIR to Magistrate would also be immaterial if the prosecution has been able to prove its case by reliable evidence: Hon'ble Supreme Court has in catena of cases held the above discussed law:-

1a. Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161 (Three-Judge Bench)

1. Ashok Kumar Chaudhary Vs. State of Bihar, 2008 (61) ACC 972 (SC)

2. Rabindra Mahto Vs. State of Jharkhand, 2006 (54) ACC 543 (SC)

3. Ravi Kumar Vs. State of Punjab, 2005 (2) SCJ 505

4. State of H.P. Vs. Shree Kant Shekari, (2004) 8 SCC 153

5. Munshi Prasad Vs. State of Bihar, 2002(1) JIC 186 (SC)

6. Ravindra Kumar Vs. State of Punjab, 2001 (2) JIC 981 (SC)

7. Sheo Ram Vs. State of U.P., (1998) 1 SCC 149

8. State of Karnataka Vs. Moin Patel, AIR 1996 SC 3041

Hon'ble Supreme Court has held that the normal rule is that prosecution has to explain delay and lack of prejudice does not apply per se to rape cases, vide.

(I) State of U.P. Vs. Manoj Kumar Pandey, AIR 2009 SC 711 (Three-Judge Bench)

(ii) Santosh Moolya Vs. State of Karnataka, (2010), 5 SCC 445"

12. PW2, mother of the victim has also deposed that at times accused Sonu and his friends used to come at her house. She further deposed that on 27.10.2016 when victim left the house for school, Sonu had come with two other friends who, took away her daughter. When PW1 and PW2, father and mother of the victim, came to know about the victim, they went to Bahraich and K.G.M.U. Lucknow, where, police had admitted the victim.

13. PW3, victim had narrated the whole story that on 27.10.2016, when she was going school, Sonu along with another person met her at Chauraha (crossing) and on their direction, she sat on their Motorcycle, where from she was taken to a mountain at Mirzapur, there she was raped by the accused-appellant Sonu. At the same place, she was made unconscious by Guddu and was taken away to Bahraich, where she was given to Dinesh, Guddu returned from there. Dinesh kept her for two-three months in his house, where he used to beat her. Dinesh at several occasions forcefully raped her and torn her clothes. Sonu wanted to marry her. According to her, she was married another person, Lalla Prasad, aged about 25 years, by Dinesh.

14. As per the evidence of P.W.-5 & P.W. 6, the Victim was found in naked and unconscious condition without clothes in the area of P.S. - Hardi, District-Bahraich. There was tube for passing urine on the body of the victim, her hymen was old torned. She was also subjected to physical and sexual assault when she was found in District Bahraich, there were marks of injuries at her body. The victim has proved her statement recorded under Section 164 Cr.P.C.

15. P.W.-5 Ram Lalla Bajpai and PW6 Haldhar @ Rakesh have deposed that victim was found in unconscious state. There were injuries on her body.

16. Thus, it is proved that the victim was kidnapped from Mirzapur and was transferred to several persons and was beaten and subjected to physical, mental and sexual assault and later on was thrown in the area of P.S. Hardi District Bahraich.

17. According to PW6 Haldhar @ Rakesh Yadav there were injuries upon both the eyes and nose of the victim. There was swelling on her face. There was dried blood at her nose face and cheeks.

18. P.W.-7 Constable Uma Kant Rai proved chik FIR and G.D. regarding institution of case. P.W.-7 S.I. Investigator Suresh Kumar Singh had started investigation of Case Crime No. 3311/17, under Section 307 IPC, P.S. Hardi, District Bahraich, which was transferred to P.S. Mirzapur after knowing that main offence had been committed under the jurisdiction of P.S. Vindhyachal, Mirzapur.

19. PW-8 Suresh Kumar Singh, S.I was appointed Investigating Officer of Case Crime No. 338/17 Section 307 IPC, PS Hardi, District-Bahraich, collected the articles received from the spot recording the statements, visited the spot, recorded the medical report in C.D. Parcha

and transferred the case P.S.- Vindhyachal, Mirzapur, for further investigation.

20. P.W.-9, S.I. Investigator, Ashok Kumar Singh had finally investigated the case and submitted the charge sheet in the afore-mentioned sections and proved the same. He has also proved the papers regarding acts done during the course of investigation.

21. On the basis of oral and documentary evidences, the Lower Court convicted the accused appellant under Sections 363, 366, 376D IPC and Section 6 POSCO Act and discharged the accused appellant under Section 307 IPC. After conviction Lower Trial Court sentenced the accused-appellant under Section 363 IPC for rigorous Imprisonment of five years and 10 thousand Rs. fine and in default of payment of fine three months additional imprisonment. The Lower Trial Court has also sentenced the appellant for seven years rigorous imprisonment and 10 thousand Rs. fine and in case of non-payment of fine he would undergo three months additional imprisonment under Section 366 IPC. The accused has been sentenced for life imprisonment and Rs. 50 thousand fine under Section 376D IPC equivalent Section 6 of POCSO Act and in case of non-payment of fine simple imprisonment of 1 year has been awarded.

22. As already noted that the appellant has not produced any evidence in his defence and there is not even an iota of the evidence in support of his false implication at the behest of plaintiff due to enmity with his maternal uncle. Even alleged enmity is not established.

23. Section 359 defines kidnapping which is as under:-

Kidnapping is of two kinds; kidnapping from India and kidnapping from lawful guardianship.

In this case the matter relates to kidnapping from the lawful guardianship.

24. Section 361 relates to kidnapping from lawful guardianship- whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

25. Section 363 relates to punishment for kidnapping whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

26. In this case, the victim has been found minor by the Lower Court, which is not rebutted by the accused-appellant. The Lower Court has given a categorical finding by referring to the concerned Section and Rules of Juvenile Justice Act, 2015. The Trial Court concluded that the date of birth 20.10.2001 of the victim as written in the progress report of year 2015-2016 in Jayanti Singh Lal Man Singh Ucchatar Madhyamik Vidhyalya, Jignapur is correct. The occurrence has taken place on 27.10.2016, thus, the victim was aged about 15 years 7 days old at the time of occurrence, which is below 16 years. The victim's mother PW2 has deposed that her daughter was about 17 years old at the time of occurrence. Thus, at the time of occurrence. Thus victim was a minor and was under the lawful guardianship of her parents where from she was kidnapped for which the accused-appellant has been rightly punished on the basis of evidence of P.W.-1, P.W.-2 and P.W.-3. The accused-

appellant has also been punished and sentenced under Section 363/366 IPC for kidnapping, abduction, inducing a woman to compel her from marriage, it is as under:-

Section 366 relates to kidnapping, abducting or inducing woman to compel her marriage, etc.-

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 tat 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; and whoever, by means of criminal intimidation as defined in this Code or abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid.

Section 375 relates to rape:-

A man is said to commit "rape" if he-

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other persons; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other persons; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

Under the circumstances falling under any of the following seven 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 thorough 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 eighteen years of age.

Sevently. - When she is unable to communicate consent.

Explanation 1.- For the purposes of this section, "vagina" shall also be include labia majora.

Explanation 2.- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only to

that fact, be regarded as consenting to the sexual activity.

Exception 1.- A medical procedure or intervention shall not constitute rape.

Exception 2. - Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

Section 376 relates to Punishment for rape:-

(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which1[shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine].

(2) Whoever,--

(a) being a police officer, commits rape--

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) 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 women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.--For the purposes of this sub-section,--

(a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b) "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;

(c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 (5 of 1861);

(d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

1[(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.]

27. In the case of **Mohan Das Survanshi Vs State of Madhya Pradesh, 1999 Cr LJ 3451 (MP)**, the Court held that consent of a minor prosecutrix does not matter if she was taken to separate places for making sexual intercourse away from her lawful guardians, her name different in FIR does not matter as it was her pet name, under such circumstances accused is guilty of kidnapping and raping a minor for days.

28. In this regard P.W.-1 and P.W.-2 have deposed that accused -appellant Sonu used to come at their house with one or two persons, and PW3 has deposed that she was on the way to school, when she was taken away by Sonu and another unknown person. On their direction, she sat on their Motorcycle but they did not leave her at her school and carried her to Mirzapur Mountain where, Sonu raped her and Guddu thereafter had taken her to Bahraich. Thus, when the victim was on the way to school even then she was under the lawful guardianship of her parents being minor girl. Later on, she has deposed that Guddu had given her in the custody of Dinesh who got her married to Lalla Prashad, who makes bricks in Delhi. The accused-appellant had knowledge about the consequences of kidnapping and abduction of a minor girl. Medical evidence of PW4 also corroborates the oral evidence of P.W.-1, P.W.-2 and P.W.-3. Doctor PW4 found the victim's hymen old torned. She opined that it might be due to injury or due to inter course. Thus, the Lower Trial Court has rightly convicted the appellant under Sections 363 and 366 IPC.

29. From the above discussed evidences, it is also proved that she was raped by Sonu and one Dinesh but Dinesh was not present in Mirzapur when she was raped on the Mountain at Mirzapur by Sonu. There is no evidence that Sonu was also present when Dinesh had raped her. It is also not established that who was another person and whether one Guddu named by the victim was also present when she was being raped by Sonu at the Mountain of Mirzapur. Therefore, it is clearly established from the evidence of the victim PW3 that at the time of rape she was alone raped by the accused-appellant Sonu. Therefore, Section 376D is not attracted as it is not established by any evidence that it is a case of gang rape. Though, it is established and proved beyond reasonable doubt that she was raped by two or three

persons at different locations and at different time. Therefore, this Court is of the opinion that Section 376D is not made out and the accused is not liable to be punished and sentenced under Section 376D IPC and the Lower Court has erred in coming to the above conclusion. Thus, the accused-appellant is proved to have committed the offence of rape with the minor prosecutrix of this case.

30. The Lower Trial Court has convicted and sentenced the accused-appellant under Section 6 of the POSCO Act. Section 6 POSCO Act was amended on 16.08.2019 and minimum sentence of 20 years imprisonment was added along with imposition of fine. Since, it is proved that it is not a case of gang rape as the victim was raped by more than one person at different time intervals and the trial is going on only for the accused -appellant Sonu, who kidnapped and abducted the victim from Mirzapur and committed penetrative sexual assault on her. Therefore, this case is covered under Section 4 of the POSCO Act. The offence was committed on 27.10.2016 and Section 4 was amended on 16.08.2019 and minimum sentence 07 years was amended and enhanced to minimum 10 years. By the same amendment, section 4 clause (2) of the POSCO Act was added and it was provided that if penetrative sexual assault has been committed upon a child below 16 years of age, the accused shall be punished with imprisonment for a term not less than 20 years which may extend to imprisonment for life. Before the date of occurrence i.e. 16.08.2019, sub-Section 2 of Section 4 was not part of the statute.

31. So far as Section 376 IPC is concerned, this Section was amended on 03.02.2013, earlier this Section was substituted by Act 43 of 1983 w.e.f. 25.12.1983. On 21.04.2018 the sentence clause was amended thereby incorporating, "shall not be less than 10 years but, which may extend to imprisonment of life and shall also be liable to fine". Before the aforesaid date minimum seven years sentence was provided. Earlier, it has been concluded by this Court that it is not a case of gang rape by the accused-appellant but the victim was subjected to rape by Sonu alone for which Sonu was tried by the lower trial Court and this appeal too.

32. In view of the above discussion, it is proved beyond reasonable doubt that accused-appellant Sonu has committed the offence under Section 363 and 366 IPC and also committed the offence under Section 376 IPC read with Section 4 of the POCSO Act. In this context the law laid down by the Hon'ble Supreme Court in **Manoj Mishra @ Chhotkau Vs State of Uttar Pradesh 2021,** is relevant wherein after rape of a minor girl, the Session Trial under Sections 363, 366, 376D and ¾ POCSO Act was conducted and the accused was convicted and sentenced and duly affirmed by the High Court, Lucknow Bench, as follows:-

(I) The Trial Court awarded 3 years RI and Rs. 3,000/- fine for the offence u/s 363 I.P.C.

(ii) The Trial Court awarded RI and Rs. 5,000/- fine for the offence u/s 366 I.P.C.

(iii) The Trial Court awarded RI and Rs. 25,000/- fine for the offence u/s 376 I.P.C.

(iv) The Trial Court awarded RI and Rs. 2,000/- fine for the offence u/s 506 I.P.C.

(v) The Trial Court awarded RI and Rs. 7,000/- fine for the offence u/s 4 POCSO Act.

The Supreme Court found that it was not a case of gang rape, therefore, confirmed the conviction and sentence awarded by the trial Court and confirmed by the High Court under Section 363 & 366 I.P.C. but converted the Section 376 D into Section 376 I.P.C and held that prior to the amendment w.e.f. 21.04.2018 the minimum sentence was 07 years which became 10 years minimum w.e.f. 21.04.2018 and since the accused has undergone sentence for more than 8 years, the appellant shall be released on payment of fine.

33. The Supreme Court held that appellant was father of five children and there was not apprehension that appellant would indulge in similar acts in future. He had no criminal antecedent. Section 376D was not made out therefore, the Hon'ble Supreme Court released the appellant for undergone sentence for more than 8 years and ordered to release him after payment of fine. The facts of the above cited case is similar to the case in hand.

34. In **Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926,** explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

34. The term, 'Proper Sentence', was explained in **Deo Narain Mandal Vs. State of UP, (2004) 7 SCC 257** by observing that sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

35. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166**, Supreme Court referred its earlier judgments rendered in **Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463],** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of

crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The Supreme Court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

36. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed, therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

37. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Supreme Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

38. In this case, the accused-appellant has no criminal antecedent. It is not a case of gang rape. He belongs to a poor family. He is about 24 years old, therefore, a lenient view regarding sentence may be adopted. Consideration may be given to the young age, future & financial condition of the accused. The appellant is not even financially able to arrange a private Advocate due to which, an amicus curiae has been provided to him. Considering the overall circumstances, this Court is of the opinion the punishment and sentence under Section 363 & 366 IPC is liable to be maintained and that the accused has not been found guilty of Section 376D and Section 6 of the POCSO Act instead he has been found guilty of Section 376 IPC and Section 4 POCSO Act. Therefore, adopting a reformative approach, the accused is liable to be punished for seven years rigorous imprisonment and Rs. 25,000/- fine under Section 376 I.P.C and Section 4 POCSO Act.

Order in Appeal.

1. The appeal is accordingly **partly allowed** and **partly rejected.** The punishment and sentence awarded by the Lower Court under Section 363, 366 IPC is maintained.

2. The conviction under Section 376D IPC and Section 6 POCSO Act is modified under Section 376 IPC and Section 4 of the POCSO Act and is awarded seven years rigorous imprisonment and fine of Rs. 50,000/-. In case of non-payment of fine under Section 376 and Section 4 of the POCSO Act, the accused-appellant shall undergo one year additional rigorous imprisonment. The fine imposed as above shall be given to the victim as amount of compensation. As the accused-appellant is already in jail the period of his incarceration in jail shall be adjusted as per rules. All the sentences shall run concurrently.

3. The Registry to return the lower court record along with the copy of this order.

(2022) 8 ILRA 18
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.08.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No. 1197 of 1984

Kehari & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri K.S. Chauhan, Sri Kunwar Bhadur Dixit, Sri Anurag Shukla

Counsel for the Respondent:
A.G.A.

Criminal Law- Indian Penal Code, 1860- Section 307/34-Injured sustained six pellet injuries-Injury No. 4 reported by Doctor to be fatal, as it was on vital part i.e. abdomen, however he further opined that there was no internal organ damage- To bring home the charges under section 307 I.P.C., the crime is to be committed with an intention or knowledge and under such circumstances that, if a death is caused, the accused will be guilty of murder, but in this case, the prosecution as per it's own admitted case in view of the statements of P.W.-1 and P.W.-2 could not prove that accused persons had any such intent to commit murder of the injured Ramesh, neither it has been proved that they had knowledge in the given circumstances that by such act of the accused, the death of the injured would have been caused. However, the fact that there is eyewitness testimony regarding the incident, the presence of the accused is admitted and the injury report have been proved.

Where the prosecution fails to establish that the accused had either the intention to commit the murder of the injured or the knowledge that his act will cause the death of the injured, then the accused cannot be convicted under Section 307 of the IPC.

Indian Penal Code, 1860- Sections 307 & 324- Evidence adduced by the prosecution has not been established beyond doubt, that the offence committed by the appellants falls under section 307 I.P.C. rather in my opinion and considering the nature of the injuries, it amounts to an offence under section 324 I.P.C. So far as the injuries are concerned there is nothing on record to show that these injuries could be fatal for the injured or the injuries were caused by these injured persons with the intention to kill the injured. The conviction under section 307 read with 34 I.P.C. is unsustainable, however the appellants in view of the

evidence on record are liable to be convicted for the offence under section 324 I.P.C.

As evidently, the injuries are neither fatal in nature and nor the accused had any intention to commit the murder of the injured, hence the offence will fall under the purview of Section 324 IPC instead of Section 307 IPC.

Probation of Offenders Act, 1958 - Section 4 - Code of Criminal Procedure, 1973- Section 360 - Considering the fact that appellant no. 3 has died and appellant no. 1 is 75 years old and appellant no. 2 is 80 years old and the appeal is of the year 1984 and so also the fact that the appellants are first offender, hence, benefit of section 4 Probation of Offender Act can be given to the appellant Nos. 1 and 2.

Since the appellants have been found to have committed the offence punishable under Section 324/34 of the IPC, and the same is their first offence as well as in view of the fact that the appellants are now advanced in age ,the appellants deserve the benefit of Section 4 of the Probation of Offenders Act as well as that of Section 360 of the Cr.P.C. (Para 16, 17, 20, 21, 24, 26)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case law relied upon:-

1. Sarju Prasad Vs St. of Bih, AIR 1965 SC 843

2. Ramesh Vs St. of U. P.,AIR 1992 SC 664

3. Merambhai Punjabhai Khachar & ors Vs St. of Guj.,AIR 1996 SC 3236

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard Shri Anurag Shukla, Advocate holding brief of Shri Kunwar Bhadur Dixit, learned counsel for the appellant, Shri V.K. Singh Parmar, learned AGA for the State and perused the record.

2. Appeal with respect to appellant no. 3 has already been dismissed as abated vide order dated 13.11.2018.

3. This appeal has been field by the appellants Kehari and Hori Lal against the judgement and order dated 29.03.1984 passed by VI Additional Sessions Judge, Mainpuri, whereby the appellants have been convicted under section 307 read with 34 I.P.C. and have been sentenced to undergo 3 years rigorous imprisonment.

4. The prosecution story in brief is that on 05th December, 1980 at around 3 p.m., informant and his real brother Ramesh alongwith Mohan Lal resident of village Baroli, Kanuji Singh resident of Hamlet Baley Khet and Layik Singh of the village went towards the field at Nagla Swamy for cutting the mustard crop. A litigation between Mohan Lal and accused persons Badan and Hori Lal was pending with regard to the mustard field. On the field, accused Hori Lal, Kehari and Tulsi Ram were present, who were armed with the illegal weapon, they exhorted Mohan Lal, who was with the informant and said that *"today the case will be decided and your gang will be finished'*. Accused Hori Lal, Kehari and Tulsi Ram who were armed with the country made pistol and *pauniya* (another form of country made pistol), with the intent to commit murder made indiscriminate firing, which resulted fire arm injury to brother Ramesh on his abdomen and left arm, who felt on the spot and somehow the informant and Mohan Lal were saved by the pellets. On hue and cry Ram Singh resident of Nagla Swami, Uma Shanker resident of Rustam Pur etc. came running with exhortation to the accused, on this, the accused persons ran away from the place of occurrence. Due to the serious condition of the brother Ramesh, he was

got admitted in the District Hospital Mainpuri.

5. A written report regarding the incident was given by the informant which is Ext.-Ka-1. Consequently, a chik F.I.R. in Case Crime No. 252 of 1980, under section 307 I.P.C. was registered. The chik F.I.R. is Ext. Ka-5. The injury report of the injured Ramesh is Ext.-Ka-6. The Investigating Officer after conducting the investigation and taking statement, submitted charge-sheet, which is Ext.-Ka-4. After committal charges were framed by the learned Sessions Judge vide order dated 21.08.1982 and the accused persons were charged under section 307 read with 34 I.P.C.

6. To bring home the charges the prosecution has examined P.W.-1 Suresh Chandra, brother of the injured, P.W.-2 Mohan Lal, eyewitness, P.W.-3 S.I. Sri Ameer Ulla, Investigating Officer and P.W.-4 Dr. S.C. Dubey, Medical Officer who examined the injuries of the injured.

7. Learned counsel for the appellants submits that cross case were lodged by both the sides. Appellants side have also been injured. The prosecution has not been able to prove it's case beyond reasonable doubt, in as much as the accused with intent to commit murder had fired on the injured. He further submits that injured has not been examined by the prosecution.

8. Per-contra, learned AGA has opposed and he has submitted that the presence of the accused is admitted in view of the cross version of the F.I.R. Prosecution has successfully examined the eyewitnesses P.W.-1 and P.W.-2 to show the complicity of the accused persons. As per the opinion of Dr. S.C. Dubey, the injury no. 4 was fatal which came to the accused.

9. Learned counsel for the appellants has further submitted that appeal is of the year 1984 and appellant no. 3 has already died, appellant no. 1 Hori Lal is 75 years old and appellant no. 2 Kehari is 80 years old, they do not have any criminal antecedents. Learned counsel for the appellants fairly submits that if the statement of the P.W.-1 and P.W.-2 who are only eyewitness of the prosecution, are considered, both eye witnesses have clearly stated that while they arrived at the field of Ram Sanehi, the accused persons armed with country made pistols fired at Mohan Lal P.W.-2, however, the shot came on the Ramesh the injured. The statement of P.W.-1 and P.W.-2 demolishes the prosecution case.

10. So far as section 307 I.P.C. is concerned, as per the admitted case of the prosecution in view of the statement given by P.W.-1 and P.W.-2 there was no intention to commit murder of the injured Ramesh, who has not been examined. The shot was fired rather on P.W.-2 and not on the injured and he accidentally got injured as he was infront of P.W.-2.

11. Perusal of the statement of P.W.-1 Suresh Chandra shows that he and injured Ramesh going to their field alongwith them Mohan Lal P.W.-2 was also there and as soon they reached to the field of Ramsanehi, then accused Hori Lal, Tulsi and Kehari came, who were armed with country made pistol and they shot on Mohan Lal, however the shot came to Ramesh and he received pellet injuries in his abdomen, leg and hand. General role of assault by fire arm has been attributed by P.W.-1 to all of the accused persons .

12. P.W.-2 Mohan Lal, though has made out statement in as much as he

assigned specific weapon to each of the accused persons. He assigned *Pauniya* to Hori Lal and Tulsi Ram and Tamancha to Kehari. However, he also made the same statement which has been made by P.W.-1 to the extent that accused persons fired on P.W.-2 Mohan Lal with intent to kill him, however the pellet did not came to P.W.-2 rather Ramesh was shot.

13. P.W.-4 Dr. S.C. Dubey had examined the injured, who sustained 6 injuries and out of 6 injuries, injury nos. 1 and 6 were pellet injuries. He opined that injuries would have came from the fire arm. He further opined that abrasion could have come from the pellets. He opined that injury no. 4 was fatal, as it was on vital part i.e. abdomen, however he further opined that there was no internal organ damage.

14. P.W.-3 the Investigating Officer was also examined before the trial court who had taken the blood stained cloths of the injured and prepared the recovery memo. He also proved the Ext.- Ka-5 chik F.I.R. He has prepared the site plan.

15. In view of the statements of P.W.-1 and P.W.-2, it is clear that the intention to commit murder was of P.W.-2 and not to the injured Ramesh. The testimony of P.W. 1 and P.W.-2 further shows that there was no motive for the accused who have committed this crime. The presence of the accused is admitted at the place of occurrence. In view of the cross F.I.R. lodged by one Badan Singh father of the accused which is exhibited as Ext. Kha-5.

16. To bring home the charges under section 307 I.P.C., the crime is to be committed with an intention or knowledge and under such circumstances that, if a death is caused, the accused will be guilty of murder, but in this case, the prosecution as per it's own admitted case in view of the statements of P.W.-1 and P.W.-2 could not prove that accused persons had any such intent to commit murder of the injured Ramesh, neither it has been proved that they had knowledge in the given circumstances that by such act of the accused, the death of the injured would have been caused. However, the fact that there is eyewitness testimony regarding the incident, the presence of the accused is admitted and the injury report have been proved.

17. I am of the view that evidence adduced by the prosecution has not been established beyond doubt, that the offence committed by the appellants falls under section 307 I.P.C. rather in my opinion and considering the nature of the injuries, it amounts to an offence under section 324 I.P.C. as the Supreme Court in the case of **Sarju Prasad Vs. State of Bihar : AIR 1965 SC 843** has held as under:-

"In this state of the evidence we must hold that the prosecution has not established that the offence committed by the appellant falls squarely under Section 307, I. P. C. In our opinion, it amounts only to an offence under Section 324, I. P. C".

18. In the case of **Ramesh Vs. State of U. P. : AIR 1992 SC** Page 664, where a single injury was found on the back of the injured, the appeal of accused-appellants who was tried along with two others was convicted u/s 307/34 IPC and sentenced to undergo rigorous imprisonment for four years, while the two others were acquitted, was partly allowed by the Apex Court. His conviction was altered into section 324 IPC and the sentence was reduced to the period already undergone with fine of Rs. 3000/-, which was to be paid to the complainant as compensation.

19. In the case of **Merambhai Punjabhai Khachar and others Vs. State of Gujarat : AIR 1996 SC Page 3236**, there was an attempt to commit murder by fire arm and a pellet hit the victim, however, the Apex Court held that Section 307 IPC cannot be held to have

20. So far as the injuries are concerned there is nothing on record to show that these injuries could be fatal for the injured or the injuries were caused by these injured persons with the intention to kill the injured. The conviction under section 307 read with 34 I.P.C. is unsustainable, however the appellants in view of the evidence on record are liable to be convicted for the offence under section 324 I.P.C.

21. Considering the fact that appellant no. 3 has died and appellant no. 1 is 75 years old and appellant no. 2 is 80 years old and the appeal is of the year 1984 and so also the fact that the appellants are first offender, hence, benefit of section 4 Probation of Offender Act can be given to the appellant Nos. 1 and 2.

22. Learned AGA, on the other hand, does not dispute the fact that the appellant nos. 1 & 2 are the first offender but he vehemently submitted that if the benefit of Section 4 of the Probation of Offenders Act be given to the appellant nos.1 & 2, some restrictions may be provided so that appellant nos. 1 & 2 may not repeat such a crime in future.

23. As to whether the appellants are entitled to get the benefit of Section 4 of the Probation of Offenders Act or not, I deem it appropriate to reproduce Section 4 of the Probation of Offenders Act, which reads as under:-

"4. Power of court to release certain offenders on probation of good conduct.-(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2)Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose

such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.

24. It is relevant to mention here that Section 360 Cr.P.C. also confers the powers on the Court to release the accused on probation for good conduct or after admonition.

25. For the reasons aforesaid, the appeal filed by the appellant no.1. Kehari and appellant no. 2. Hori Lal is partly allowed.

26. The conviction of appellant no. 1, namely, Kehari and appellant no. 2 Hori Lal under Section 307 read with Section 34 IPC and sentence awarded to them is set aside. However, both the appellants are found guilty for the offence punishable under Section 324 read with Section 34 IPC and are convicted thereunder. They shall get benefit of Section 4 of Probation of Offenders Act. They shall file two bonds to the tune of Rs.20,000/- each coupled with personal bonds to the effect that they shall not commit any offence and shall be of good behaviour and shall maintain peace during the period of one year. If they are in breach of any of the conditions, they shall subject himself to undergo one year rigorous imprisonment. The bonds aforesaid shall be filed by the accused/appellant nos.1 and 2 within two months from the date of judgement. The time for submitting the bail bonds shall not be extended on any ground whatsoever.

27. Let a copy of this judgment along with original lower Court record be sent to the Court concerned for compliance forthwith.

(2022) 8 ILRA 23
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.07.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 4904 of 2014

Vinod ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Chandrabhan Kushwaha, Sri Mahendra Pal Singh Gaur, Pradeep Kumar, Ms. Gunjan Sharma

Counsel for the Respondent:
Govt. Advocate

Criminal Law- Indian Penal Code, 1860- Sections 304B & 498-A- Dowry Prohibition Act,1961 - Section 4- Conviction- Sentence of Life Imprisonment- Appeal pressed only on the Quantum of Sentence-

Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream-'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. Perusal of record goes to show that there is no doubt that deceased had committed suicide- It is also pertinent to note that there were no injury marks on the body of the deceased, hence, undoubtedly it is a case of hanging and we are of the considered opinion that learned trial court has awarded very harsh and severe punishment, which is life imprisonment- sentence is reduced to the period of 10 years under Section 304-B I.P.C.

Settled law that punishment should not be either unduly harsh or ridiculously inadequate but it ought to be proportionate to the gravity of the offence as well as other factors. As the criminal jurisprudence of our country is reformative and not retributive, hence applying the doctrine of proportionality sentence reduced to a period of ten years. (Para 19, 20, 21, 22, 23)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case Law relied upon:-

1. Mohd. Giasuddin Vs St. of A.P., AIR 1977 SC 1926

2. Deo Narain Mandal Vs St. of U.P. ,(2004) 7 SCC 257

3. Ravada Sasikala Vs St.of A.P. AIR 2017 SC 1166

(Delivered by Hon'ble Ajai Tyagi, J.)

1. The appeal has been preferred by the appellant-Vinod against the judgment and order dated 15.11.2014, passed by learned Additional Sessions Judge, Court No.6, Badaun in Session Trail No. 172 of 2013 (State of UP vs. Vinod), arising out of Case Crime No. 547 of 2012, under Sections 498-A, 304B Indian Penal Code, 1860 (in short "I.P.C.') and Section 3/4 of Dowry Prohibition Act, Police Station-Kadarchowk, District Badaun whereby the appellant is convicted and sentenced for the offence under Section 304-B I.P.C. for life imprisonment, under Section 498-A I.P.C. for three years rigorous imprisonment with a fine of Rs.3,000/- and in default of payment of fine, further imprisonment for three months. Accused-appellant is also convicted and sentenced for the offence Section 4 of D.P. Act for one year rigorous imprisonment with a fine of Rs.1,000/- and in default of payment of fine, further imprisonment for one month.

2. Brief facts of the case giving rise to this appeal are that a written report was submitted by complainant Natthu Lal (father of the deceased) at police station Kadarchowk, District Badaun with the averments that marriage of his daughter Seema was solemnized with accused-Vinod before one and half year. He had given dowry as per his capacity. After marriage accused-Vinod and his family members demanding motorcycle, gold chain and ring as additional dowry and used to compel his daughter to bring the aforesaid articles. It is further averred that on 23.10.2012, appellant-Vinod and his family members had murdered his daughter, who is having injury marks on her neck and feet. It is also stated in written report that accused-Vinod himself informed him on phone that they have killed his daughter.

3. On the basis of above written report, a case crime no.547 of 2012 was registered at Police Station Kadarchowk, under Sections 498-A, 304-B I.P.C. and Section 3/4 of Dowry Prohibition Act. Investigation was taken up by Circle Office, who visited the spot, prepared the site plan and recorded the statement of witnesses. Inquest report was prepared and post-mortem of the dead body was conduced and its report was also prepared by doctor. After completion of investigation, I.O. submitted the charge sheet against accused-Vinod only, who is the husband of the deceased. Other accused named in the First Information Report were not charge sheeted. Case being exclusively triable by the court of session was committed to the court of session for trial, hence, trial taken placed against accused-Vinod.

4. Learned Sessions Court framed the charges against accused-Vinod under Section 3 r/w 4 of Dowry Prohibition Act, under Section 498-A and 304-B I.P.C. Charges were read over to the accused, who denied the charges and claimed to be tried.

5. To bring home the charges, the prosecution examined following witnesses:

1.	Natthu Lal	P.W.-1
2.	Satendra Pal	P.W.-2
3.	Mahendra Kumar Singh	P.W.-3
4.	Dr. S.K.Saxena	P.W.-4
5.	Jai Kesh	P.W.-5

6. In support of oral evidence, prosecution submitted following documentary evidence, which was proved by leading oral evidence:-

1.	FIR	Ex.ka-8
2.	Written report	Ex.ka-1
3.	Post-mortem report	Ex.ka-7
4.	Panchayatnama	Ex.ka-2
5.	Charge sheet Mool	Ex.ka-11
6.	Site plan with index	Ex.ka-10

7. After completion of prosecution evidence, the statement of accused was recorded under Section 313 of Criminal Procedure Code (Cr.P.C.), in which he denied his involvement in the crime and told that false evidence was led against him. The accused examined D.W-1 Ram Nath and D.W.-2 Satyapal in defence.

8. Heard Ms. Gunjan Sharma, learned Advocate holding brief of Mr. Pradeep Kumar, counsel for the appellant and Mr. N.K. Srivastava, learned counsel for the State. Record has been perused.

9. Perusal of record shows that occurrence of this case had taken place on 23.10.2012. As per the prosecution story, accused-appellant and his family members committed the offence but they were not charge sheeted because no sufficient evidence was found against them during the course of investigation.

10. Leaned counsel for the appellant has submitted that as per the F.I.R., family members of the appellant were also involved in the offence but no evidence was found against them, which goes to show that entire F.I.R. is fabricated and false averments were made by the complainant to rope in all the family members of the appellant. Such type of F.I.R. is highly suspicious and cannot be believed. It is further submitted that if the offence was committed by appellant, there could be no reason that he himself

informed the father of the deceased as is evident from the version of F.I.R.

11. It is next submitted by learned counsel for the appellant that prosecution has examined P.W.-1, Natthu Lal, father of the deceased and P.W.-2 Satendra Pal, brother of the deceased, as a witnesses of fact but their testimony has material contradictions, which go to the root of the case. Demand of additional dowry is not proved, even the F.I.R. does not mention any story of torture on the part of the appellant.

12. With regard to the medical evidence, learned counsel for the appellant has submitted that as per the post-mortem report, there is only ligature mark of injury was found on the neck of the deceased and doctor has also opined that deceased has committed suicide. No other mark of injury was found on the body of the deceased, hence, it is proved that deceased was not tortured or beaten up etc. which falsify the prosecution story.

13. After the aforesaid arguments, learned counsel for the appellant submits that he wanted to press the appeal only on the ground of quantum of sentence and it is also submitted that learned trial court has awarded very severe punishment of life imprisonment while there was no torture either mental or physical on the part of the accused-appellant is proved.

14. Learned A.G.A. for the State has vehemently objected to the submissions of learned counsel for the accused-appellant and submitted that death of deceased had taken place within 7 years of her marriage. P.W.-1 and P.W.-3 have proved the demand of additional dowry. It is also submitted that even the death by suicide is covered within the category of dowry death. Learned trial court has rightly convicted and sentenced the accused-appellant.

15. During the course of arguments, learned counsel for the appellant has submitted that he wants to press this appeal only on the ground of quantum of compensation and no merits. In this regard, we have to analyse the theory of punishment prevailing in India.

16. In ***Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926],*** explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

17. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP***

[(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

18. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166,*** the Supreme Court referred the judgments in ***Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463]*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

19. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

20. Since the learned counsel for the appellant has not pressed the appeal on its merit, however, after perusal of entire evidence on record and judgment of the trial court, we consider that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is upheld.

21. As discussed above, 'reformative theory of punishment' is to be adopted and

for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

22. Perusal of record goes to show that there is no doubt that deceased had committed suicide. Antemortem injury in post-mortem report show that there was only ligature mark around the neck above the thyroid cartilage obliquely. It was sized about 24 cm X 1 cm. Dr. S.K. Saxena, P.W.-4 has also opined that in the opinion of panel of doctors cause of death was hanging. It is also pertinent to note that there were no injury marks on the body of the deceased, hence, undoubtedly it is a case of hanging and we are of the considered opinion that learned trial court has awarded very harsh and severe punishment, which is life imprisonment.

23. Keeping overall facts and circumstances of this case, in our opinion, ends of justice would be met if the sentence is reduced to the period of 10 years under Section 304-B I.P.C. Sentence under Section 498-A I.P.C. and Section 4 of Dowry Prohibition Act has already been served. Fine imposed under Section 498-A I.P.C. and Section 4 of Dowry Prohibition Act is maintained and sentence in default of fine is also maintained.

24. Accordingly, the appeal is ***partly allowed***, as modified above.

25. Record be sent to trial court immediately.

(2022) 8 ILRA 28
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 6158 of 2008

Harish Kumar & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Raj Singh, Sri Devendra Swaroop, Sri R.D. Dauholia, Sri Siddharth Singh, Sri Vijendra Singh, Sri Sunil Kumar Upadhaya

Counsel for the Respondent:
Govt. Advocate

Criminal Law- Indian Penal Code, 1860- Sections 498-A & 304-B- Indian Evidence Act, 1872- Section 32- Dying Declaration- While going through the evidence of the witnesses, it cannot be said that Section 498A read with Section 304B of I.P.C is not made out qua the accused no. 1- Harish Kumar. This takes us to the evidence against the mother-in-law- Kashtoori Devi, while going through the oral testimony of P.W.-1, P.W.-2 and P.W.-3 we do not find any reason to believe that she was a party to the incident, her presence has not been proved. There is no overt act of mother-in-law even in the oral dying declaration. There are 40% burns. The investigation of the investigating authority qua the mother-in-law appears to be faulty. We, therefore, cannot uphold the conviction of the mother-in-law-Kashtoori Devi. We give benefit of doubt to the mother in law namely Kashtoori Devi.

As the mother-in- law of the deceased has not been assigned any overt act in the dying declaration and neither is there any evidence against her in the testimony of the prosecution witnesses, hence her conviction set aside.

Indian Penal Code, 1860- Sections 498-A & 304-B – Quantum of Punishment- As the accused has been in jail for more than 13 years i.e sufficient for him, hence he may set free if not required in any other offence. As far as Section 498A of I.P.C is concerned he has already undergone the punishment and if the fine is not paid the default sentence would also have been over by now which would began after the incarceration awarded by the trial court as over began from that date. As far as Section 304B of I.P.C. is concerned we punish him for 12 years and the default sentence is maintained. If the accused has served out his sentence he be released if not wanted in other offence.

Settled law that the criminal jurisprudence of our Country is reformative and not retributive, hence punishment should not be unduly harsh but proportionate to the gravity of the offence and other relevant factors. Accordingly, sentence reduced to 12 years. (Para 9, 12, 13)

Criminal Appeal partly allowed. (E-3)

Case Law/Judgements relied upon:-

1. Ganesh Babu @ Ganesh Vs St. of Kar. (2020 Lawsuit (Kar) 658 (cited)

2. Kashmira Devi Vs St. of U.K. & ors. AIR 2020 SC 652 (cited)

3. Mirza Iqbal @ Golu & anr. Vs St. of U.P & anr. 2021 0 Supreme (SC) 795

4. Criminal Appeal No. 2878 of 2013

5. St. of M.P. Vs Jogendra, (2022) 5 SCC 401

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. This appeal challenges the judgment and order dated 28.08.2008 passed by Additional Sessions Judge, Court No.10, Aligarh in Sessions Trial No. 597 of 2006 convicting accused-appellants under Section 304-B of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced him to undergo imprisonment for life and under Section 498-A of I.P.C three-three years rigorous imprisonment with fine of Rs.5,000/- and in default of payment of fine, further to undergo imprisonment for six months to all the appellants.

2. Factual scenario as culled out from the record and the judgment of the Court below is that the accused-appellant Harish Kumar is the husband of the deceased who died after seven days suffering out of septicemia. He is in jail since 2006 namely since the date incident occurred. The other co-accused namely the father-in-law- Naurangi Lal of the deceased breathed his last therefore qua him the appeal is abated, the third accused is minor and a juvenile, hence she was tried by Juvenile Board and as per the submission of the counsel for the appellant she has been acquitted, the mother-in-law- Kashtoori Devi who was in jail for two and a half year and thereafter she has been released on bail by this Court. The genesis of the incident occurred when the brother of the deceased was informed that his sister who had been sent to the matrimonial home on 05.12.2005, her body is seen to have been ablazed. Thereafter, she was shifted to the hospital with burn injuries, there was superficial to deep burn injuries and the injuries were 40% superficial to deep burn injuries, she was admitted in the hospital immediately on the date of the incident and after a period of about 7 days i.e on 13.12.2005 at about 6:50 p.m, she breathed her last. It is under these circumstances that the prosecution

was moved into motion. The investigation culminated into charge-sheet being laid against all the four accused.

3. The offence being triable by the court of Sessions. The learned Magisterial Trial Court committed the accused to the Sessions Court. The learned Sessions Judge, summoned the accused from jail those who are not on bail and after completing all the formalities the accused-appellants were charged on 28.08.2006 and an alternative charge on 16.01.2007 for commission of offence under Sections 323, 498A, 504 and 304-B I.P.C.

4. On being read over the charges, the accused pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined 9 witnesses who are as follows:

1	Deepu @ Deepak Kumar	PW1
2	Smt. Kamla Devi	PW2
3	Head Moharir-59 Ram Chandra Rathore	PW3
4	Dr. N.K.Tandon	PW4
5	Dr. Hansraj Singh	PW5
6	S.I. Raghuraj Singh Harij	PW6
7	Anand Kumar	PW7
8	S.I. Chiraunji Lal	PW8
9	Ratnesh Chaturvedi	PW9

And said witnesses tried to prove the documentary evidence produced by the prosecution. On prosecution the evidence been laid end after closing process Kashtoori, Naurangi Lal and Pinky are the accused whose statement were recorded under Section 313 Cr.P.C. The statement of Section 313 Cr.P.C is one of denial.

5. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.
2	Written Report	Ex.Ka.
3	Injury Report	Ex.Ka.
4	Postmortem Report	Ex.Ka.
5	Panchayatnama	Ex.Ka.
6	Site Plan with Index	Ex.Ka.

6. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Trial Court convicted the three accused for commission for offence under Section 304-B of I.P.C for life imprisonment and under Section 498-A of I.P.C three-three years imprisonment with Rs. 5000/- as fine. The State nor the private respondent preferred any appeal.

7. Heard Sri Sunil Kumar Upadhaya, learned counsel for the appellant, Sri Patanjali Mishra, learned A.G.A for the State and perused the record.

8. As far as father-in-law of the deceased is concerned as we have narrated herein above, the case has abated that takes us to the evidence against the mother-in-law. Even if we go the by the oral dying declaration which is submitted by the learned counsel for the State that the deceased orally confined to her brother which is borne out from the F.I.R that her husband Harish Kumar has set her ablaze. This dying declaration has been heavily relied by the Counsel for the State and has further submitted the name of all the accused which have been given by the deceased in dying declaration to the brother.

9. While going through the evidence of the witnesses, it cannot be said that Section 498A read with Section 304B of

I.P.C is not made out qua the accused no. 1-Harish Kumar. This takes us to the evidence against the mother-in-law-Kashtoori Devi, while going through the oral testimony of P.W.-1, P.W.-2 and P.W.-3 we do not find any reason to believe that she was a party to the incident, her presence has not been proved. There is no overt act of mother-in-law even in the oral dying declaration. There are 40% burns. The investigation of the investigating authority qua the mother-in-law appears to be faulty. We, therefore, cannot uphold the conviction of the mother-in-law-Kashtoori Devi. We give benefit of doubt to the mother in law namely Kashtoori Devi.

10. This takes us to the question of applicability of Section 304B of I.P.C to the facts of this case. The learned counsel for the appellant has relied on the following decisions so as to contend that punishment of life imprisonment pronounced by learned trial Judge is bad:-

i. Ganesh Babu @ Ganesh Vs. State of Karnataka (2020 Lawsuit (Kar) 658;

ii. Kashmira Devi Vs. State of Uttraakhand and Ors. (AIR 2020 SC 652);

iii. Mirza Iqbal @ Golu and Another Vs. State of Uttar Pradesh and Another [2021 0 Supreme(SC) 795]

11. It would be relevant for us to refer a recent judgment of this High Court in Criminal Appeal No. 2878 of 2013 :-

14. While coming to the conclusion that the accused is the perpetrator of the offence, whether sentence of life imprisonment and fine is adequate or the sentence requires to be modified in the facts and circumstances of this case and in the light of certain judicial pronouncements and precedents applicable in such matters. This Court would refer to the following precedents, namely, Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

15. 'Proper Sentence' was explained in Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding

sentence cannot be exercised arbitrarily or whimsically.

16. In Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166, the Supreme Court referred the judgments in Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

17. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

12. The facts that even the judgment of **Mirza Iqbal (Supra)** which is the recent judgment. As the accused has been in jail for more than 13 years i.e sufficient for him, hence he may set free if not required in any other offence. As far as Section 498A of I.P.C is concerned he has already undergone the punishment and if the fine is not paid the default sentence would also have been over by now which would began after the incarceration awarded by the trial court as over began from that date. As far as Section 304B of I.P.C. is concerned we punish him for 12 years and the default sentence is maintained. If the accused has served out his sentence he be released if not wanted in other offence.

13. By going through the evidence on record it is very clear that the act of the appellant Harish Kumar was not such which cannot be substituted by giving a lessor sentence than life imprisonment. The

period of 13 years which he spent is enough punishment in the facts of this case. The minor contradictions will have to be ignored and they cannot for the dent in the prosecution of the husband. Medical evidence is quite clear and corroborates the facts and circumstances. Punishment would be 12 years incarceration, the fine and default sentence are also maintained.

14. Recent judgment of State of **M.P Vs. Jogendra, (2022) 5 SCC 401.** Paragraph-20 of the said judgment can be followed, however, instead of seven years period undergone would be more than relevant the facts and circumstances of this case.

15. Accordingly, the appeal is partly allowed with the modification of the sentence as above. Record and proceedings be sent back to the Court below forthwith.

16. A copy of this order be sent to the jail authorities for following this order and doing the needful.

17. This Court is thankful to learned Advocates for ably assisting the Court.

(2022) 8 ILRA 33
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 7552 of 2008

Baru ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri Rajiv Kumar Saini, Sri Amit Kumar Chaudhary, Sri Brijendra Singh Khokher, Sri Chandra Shekhar Mishra, Sri G.S. Chaturvedi, Sri Harish Chandra Singh, Sri Noor Mohammad, Sri Onkar Singh, Sri Rajesh Ji Verma, Sri Vinod Tripathi

Counsel for the Respondent:
Govt. Advocate

Criminal Law- Indian Evidence Act, 1872- Section 106 - Burden of Proof - The impugned judgment of the Court below of Section 106 of Indian Evidence Act, 1872, which cannot be made applicable in the facts and circumstances of this case. The burden cannot be shifted on the accused to prove his innocence. This is a case of direct evidence that PW1 and PW2 are eye-witness and they saw the occurrence. Hence, this is not the fact which was in special knowledge of accused Baru. Hence, Section 106 of Indian Evidence Act has no applicability in this case.

Settled law that the prosecution can shift the burden on the accused only where the facts are especially within the knowledge of the accused in a case, which rests on circumstantial evidence, but Section 106 of the Evidence Act cannot be made applicable in a case of direct ocular evidence.

Indian Evidence Act, 1872 - Section 3 - If the trial court has disbelieved the recovery of iron rods on the pointing out of the accused persons, it has also broken the chain of circumstances because the prosecution based its case on the fact that the three accused persons inflicted blows to the deceased by iron rods.

Where the court proceeds on the premise that the case rests on circumstantial evidence and the recovery of the weapon is disbelieved then the chain of the circumstances stands broken.

Indian Evidence Act, 1872- Section 3 - Learned trial court has committed gross error and illegality by convicting the Baru

on the same set of evidence on which the other accused persons were acquitted.

Settled law that the conviction of an accused cannot be secured when on the same set of evidence the co-accused have been acquitted. (Para 11, 14)

Criminal Appeal allowed. (E-3)

Judgements/ Case law relied upon:-

1. Daulat Ram & Daulati Para 11, 14 Vs St. of Har., 2015 (2) AII JIC 446

2. Sharad Vs St. of Mah., AIR 1984 SC 1622

(Delivered by Hon'ble Ajai Tyagi, J.)

1. Heard Sri Noor Mohammad, learned counsel for the appellant and Sri N.K. Srivastava, learned A.G.A. for the State.

2. This appeal challenges the judgment and order dated 25.10.2008 passed by the Additional District & Sessions Judge, Saharanpur in Sessions Trial No.56 of 2008 convicting & sentencing Baru, appellant, for commission of offence under Sections 302 of Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.') to undergo rigorous imprisonment for life with fine of Rs.10,000/- and in case of default of payment of fine, further to undergo two years' imprisonment. The accused has undergone more than 14 years of incarceration. He is the sole convict of the above offence.

3. Brief facts of the case are that a first information report was lodged by complainant -Ashok Kumar, brother of the the deceased Brahm Dutt, averring that on 30.07.2007 deceased was siting in his village with his brother Mage Ram and complainant Ashok Kumar. At about 9:00 pm, Titu son of Pandit Om Prakash came there and asked Brahm Dutt that Baru and Vinod are calling him on the roof of Baru because he wants settlement with him, in this way Titu took away Bhram Dutt on the roof of Baru. After five minutes complainant and his brother Mage Ram heard the voice of Brahm Dutt, who was crying to save him. Complainant and his brother Mage Ram went on to the roof of Baru by having torch in their hands and in the light of torch they saw that Titu S/o Om Prakash, Baru S/o Thakur Ram Singh and Vinod were beating the deceased Brahm Dutt with iron rods in their hands by hitting on the head of the deceased. When these persons saw the complainant and his brother they ran away by jumping east wall. It is also averred that the dead body of the deceased is lying on the roof of Baru and in his murder Ex-Pradhan Pandit Ramesh was also conspirator.

4. On the basis of the aforesaid written report, a first information report was lodged and investigation was taken up by the I.O. During the course of investigation post mortem of deceased was conducted. I.O. recovered three iron rods on the pointing out of accused Baru, Titu and Vinod. Accused Titu, Baru and Vinod were charged under Section 302 read with Section 34 IPC. Accused Ramesh Pandit was charged of offence under Section 120B IPC. After the trial learned court below acquitted accused Titu, Vinod and Ramesh and convicted Baru for the offence under Section 302 of IPC.

5. This F.I.R. culminated into recording of statements of the witnesses and charge-sheet was laid against four accused-persons. The accused was alleged to have committed murder, hence, he was committed to the Court of Sessions. The

accused being summoned, pleaded not guilty and wanted to be tried.

6. The accused denied the charge and claimed to be tried. The prosecution so as to bring home the charge, examined seven witnesses, who are as under:-:

1	Ashok Kumar	PW1
2	Mage Ram	PW2
3	Brahma Singh	PW3
4	Dr. Krishna Kumar	PW4
5	Shravan Kumar	PW5
6	Shravan Kumar	PW6

7. In support of ocular version following documents were filed:

1	First Information Report	Ex.Ka.
2	Written Report	Ex.Ka.
3	Recovery Memo of blood-stained & plain earth	Ex.Ka.
4	Recovery Memo of Iron 'Bariya'	Ex.Ka.
5	Postmortem Report	Ex.Ka.
6	Site Plan	Ex.Ka.

8. On the witnesses being examined and the prosecution having concluded its evidence, the accused was put to questions under Section 313 Cr.P.C. On hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the accused-appellant only and acquitted the other three accused as mentioned aforesaid. Being aggrieved by and dissatisfied with the aforesaid judgement and order passed by the Sessions Court the appellant has preferred the present appeal.

9. Learned counsel for the appellant has placed heavy reliance on the decision of the Apex Court in **Daulat Ram & Daulati vs. State of Haryana, 2015 (2) AII JIC 446** and has contended that in similar facts, three named accused in the F.I.R. have been acquitted. Same role has been ascribed to the present appellant also. There is conviction only based on incriminating evidence given by the accused himself. There is no specific role ascribed to the appellant. The main two eye-witnesses, who according to the prosecution have witnessed the incident have not supported the prosecution case. P.W.1 and P.W.2 have not supported the prosecution case. P.W.5 has also not supported the prosecution case and has been declared person not supporting prosecution and has been cross examined by the learned counsel for the State.

10. Learned A.G.A. for the State has contended that the accused has been named in the F.I.R., the weapon of crime has been recovered at his instance and P.W.1 before declared hostile, has supported the prosecution case. Moreover, it is submitted by learned A.G.A. that the judgment of the Apex Court in **Daulat Ram & Daulati (Supra)** will not apply to the facts of this case.

11. Having considered the facts and submissions, three things emerges. One, there are three injuries as per postmortem report but none of the witnesses has deposed as to which injuries has been caused by the accused-appellant. Two, weapon (iron rods) have been used by three accused persons who got them required but the judgement is silent on the role of other two accused. Post mortem report has three ante mortem injuries. If all the three injuries are inflicted by Baru, then what was done by other two with iron rods which were recovered on their pointing out? Three, the impugned judgment of the

Court below of Section 106 of Indian Evidence Act, 1872, which cannot be made applicable in the facts and circumstances of this case. The burden cannot be shifted on the accused to prove his innocence. This is a case of direct evidence that PW1 and PW2 are eye-witness and they saw the occurrence. Hence, this is not the fact which was in special knowledge of accused Baru. Hence, Section 106 of Indian Evidence Act has no applicability in this case. If the evidence of this case is analysed with the angle of circumstantial evidence then the chain of circumstances should be completed while in this case, the only circumstance against the accused Baru is that the dead body of the deceased was found on the roof of his house. Learned trial court has stated in the judgement that the dead body of the deceased was found on the roof of the house of the accused Baru because the deceased was called upon by co-accused Titu to the roof of the house of Baru for some settlement, but this observation does not hold good because the contents of first information report were denied by PW2 as well as complainant and they have not supported the prosecution case. Hence, the first information report has itself become highly suspicious. This finding itself is perverse. We find that the judgment is based on what can be said to be moral conviction.

12. Recently the Apex Court has held that where there are no credible witnesses who deposed and the chain of circumstances is not complete to prove the offence of the accused, the accused cannot be convicted. Hence, if we analyse the evidence from the angle of circumstance also then following settled law is to be kept in mind. Three Judge Bench in the case of **Sharad Vs. State of Maharashtra,** [AIR 1984 SC 1622] held as under:

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (alias) Simmi v. State of Uttar Pradesh and Ramgopal v. State of Maharashtra. It may be useful to extract what Mahajan, J. has laid down in Hanumant case:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established: (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may

be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047] "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between `may be' and `must be' is long and divides vague conjectures from sure conclusions." (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

*154. These five golden principles, if we may say so, const*itute the panchsheel of the proof of a case based on circumstantial evidence."

13. In this case, motive is not proved by the prosecution. Recovery of so called weapon i.e. iron rod is also very doubtful and makes the prosecution case highly suspicious. Hence, chain of circumstances is not complete in a way which could point out that the offence is committed by the appellant only and none else.

14. Moreover, learned trial court has also stated that the so called eye-witness, namely, PW1 and PW2 had turned hostile. Hence, in such a situation the recovery of iron rods on the pointing out of the accused persons lost importance. We have failed to understand if the trial court has disbelieved the recovery of iron rods on the pointing out of the accused persons, it has also broken the chain of circumstances because the prosecution based its case on the fact that the three accused persons inflicted blows to the deceased by iron rods. Learned trial court has committed gross error and illegality by convicting the Baru on the same set of evidence on which the other accused persons were acquitted. The case of the prosecution is shattered by the eye-witnesses PW1 and PW2 with regard to all the accused persons. Hence, it cannot be altogether ignored by us that the other co-accused persons, with the similar role on the basis of the same evidence, have been acquitted from the charges of murder. The other witnesses are formal witnesses and their evidence is not incriminating against the appellant.

15. For the reasons, as discussed above, we are of the opinion that although this is the case of direct evidence and the case is not proved against the accused-appellant by the evidence led by prosecution and even if as we have analysed the evidence from the angle from circumstantial evidence also, we are of the view that the chain of circumstances is not at all completed to prove the charges levelled against the accused-appellant.

16. In view of the above, we have no other option but to reverse the conviction. The accused is acquitted. Judgment and order passed by the learned Sessions Judge is set aside. This appeal is **allowed**. As he has been already enlarged on bail, he need

not surrender and if the fine has been paid by him, the State shall refund the amount of fine.

17. Record and proceedings be sent back to the Court below forthwith.

18. This Court is thankful to both the learned Advocates for ably assisting the Court.

(2022) 8 ILRA 38
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.07.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 4470 of 2013

Nanak Chand Gautam ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rahul Chaturvedi, Sri Jitendra Kumar, Sri Prasoon Tomar

Counsel for the Respondents:
Govt. Advocate, Sri Suresh Chandra Pandey

A. Criminal Law - Criminal Procedure Code, 1973 – Section 256 & 302 – Complainant died in a complaint case filed u/s 138 N.I. Act – Effect – While legal heirs of the complainant sought permission u/s 302 to continue the prosecution, the accused moved application u/s 256 to dismiss the complaint – Application u/s 256 was rejected and permission u/s 302 was allowed – Validity challenged – In case of death of the complainant, the legal heirs of the complainant could be allowed to continue the prosecution and the complaint cannot be dismissed on the aforesaid ground – Chand Devi Daga's case relied upon – High Court found no error in the impugned order of the trial court in rejecting the application u/s 256 Cr.P.C. and allowing the legal heirs of the complainant to prosecute the complaint under Section 138 N.I. Act. (Para 13 and 14)

Application dismissed. (E-1)

Cases relied on :-

1. Ashwin Nanubhal Vyas Vs St. of Mah.; AIR 1967 SC 983

2. Jimmy Jahangir Madan Vs Bolly Cariyappa Hindley; (2004) 12 SCC 509

3. Balasaheb K. Thackeray & anr. Vs Venkat @ Babru; (2006) 5 SCC 530

4. Chand Devi Daga & ors. Vs Manju K. Humatani & ors.; (2018) 1 SCC 71

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Prasoon Tomar, learned counsel for the applicant, Mr. Suresh Chandra Pandey, learned counsel for the opposite party no.2 and Mr. Pankaj Kumar Srivastava and Amit Singh Chauhan, learned A.G.A for the State and perused the material available on record.

2. The present application under Section 482 Cr.P.C. has been filed to quash the impugned order dated 08.11.2012 by which the learned Magistrate has rejected the application No.115B U/s 256 Cr.P.C. in Criminal Case No.1336/IX/2008 (Radhey Shyam Agarwal Vs. Nanak Chand Gautam) U/s 138 N.I. Act, Police Station-Kotwali, Mathura, pending in the Court of VIth Judicial Magistrate, Mathura.

3. The records go to show that a complaint under Section 138 N.I. Act was filed by Late Radhey Shyam Agrawal