



SJA NEWSLETTER

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Chief Patron

Hon'ble Mr. Justice
Barin Ghosh
Chief Justice

Judge-In-Charge

Hon'ble Mr. Justice
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MESSAGE

It gives me immense pleasure to know that Jammu & Kashmir State Judicial Academy, by publishing the State Judicial Academy (SJA) News Letter from January 2008, is providing a necessary tool to guide and improve the functioning of the Courts to ensure speedy disposal of cases.

I have gone through some of the News Letters which are rich with informations necessary for the Judges to play a pivotal role for rendering speedy, inexpensive and quality justice to the people of the State.

I feel that this News Letter should also be used as an instrument for exchanging experience the judges earn in course of day to day dispensation of justice. I would, therefore, through this message request the Judges for whom this News Letter is being published to exchange their experience at least once in a year.

I convey my best wishes for the continued success of the News Letter.

Jammu.
08th of February, 2009

(Barin Ghosh)
Chief Justice

“The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of “order” should meet the challenges confronting the society. Friedman in his “Law in Changing Society” stated that, “State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society”. Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organized crime or mass murders of innocent people would call for imposition of death sentence as deterrence”.

Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore,

the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.

The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each-case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Some times it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g where it relates to offences against women, dacoity, kidnaping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and *per se* require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter-productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

(Shivaji v. State of Maharashtra, AIR 2009 SC 56)

NEWS AND VIEWS

Hon'ble Shri Justice Barin Ghosh takes over as the new Chief Justice of the High Court of Jammu & Kashmir



Hon'ble Shri Justice Barin Ghosh took over as the new Chief Justice of the High Court of Jammu & Kashmir. Oath Ceremony, in this regard, was held at Raj Bhawan, Jammu on 3rd day of January, 2009 at 11:30 A.M. Oath of office was administered by

His Excellency Shri N.N. Vohra, Governor of the State of Jammu & Kashmir.



His Excellency the Governor administering Oath to Hon'ble Shri Justice Barin Ghosh as Chief Justice

The oath taking ceremony was attended among others by the former & sitting Hon'ble Judges of the High Court, the Advisors to Governor, several former Ministers, Legislators and high rank senior Judicial, Civil and Police Officers including the Chief Secretary.



His Excellency the Governor while greeting Hon'ble the Chief Justice

Hon'ble Shri Justice Barin Ghosh was born on June 05, 1952. Lordship was enrolled as an

Advocate on December 19, 1978, and practised in the High Court of Calcutta, mainly in matters of Civil, Company and Constitutional affairs. Lordship was appointed as a Permanent Judge of the Calcutta High Court on July 14, 1995 and was transferred to the Patna High Court, where His Lordship assumed charge on January 07, 2005. Lordship was appointed as the Chief Justice of High Court of Jammu & Kashmir on December 24, 2008 and took over as the Chief Justice of the High Court of Jammu and Kashmir on January 03, 2009.

Lok Adalat

In the month of November 2008, 554 cases were settled in the Lok Adalats held in different parts of the State of Jammu & Kashmir. Out of these, 149 cases were settled at pre-litigation stage. Compensation to the tune of Rs 64.59 lacs was awarded in Motor Accident Claim cases during the month. These Lok Adalats were organized by different District Legal Services Authorities/Tehsil Legal Services Committees of the State. Beside this, 48 eligible persons were given free legal aid during the month.

Evening courts to start hearing cases on dishonoured cheques

After the six evening courts proved a success at the Patiala House courts and the Karkardooma district courts, the Delhi High Court has decided to extend the concept to the remaining three district courts in the Capital. February 2 onwards, evening courts will become functional in 12 more magisterial courts - four each at the Rohini, Tees Hazari, and Dwarka district court complexes to reduce the overload of pending cases on dishonoured cheques.

Similar to the existing evening courts, the 12 new courts will be open for two extra hours between 5 and 7 in the evenings. The courts will first handle cases pertaining to the Negotiable Instruments Act and then move on to handling cases involving petty offences, said Mr. I.S. Mehta, Judge-in-charge, Dwarka District Court.

Metropolitan magistrates will be empowered to decide cases under the Negotiable Instruments Act on a rotation basis for bounced cheques up to an amount of Rs 25,000. These cases will be transferred to them from all magisterial courts of that complex. Cases will be referred to evening courts with the consent of the parties concerned, and if these courts fail to arrive at a solution for a particular matter, it will be returned to the referral court for routine adjudication.

(IE/29.01.2009)

ACADEMY NEWS

1. In terms of the approved training calendar for the year 2009, a one day Advance Course on “Criminal Justice Administration” for Sessions Judges was conducted by the State Judicial Academy at Jammu on 10-01-2009. About 13 Sessions Judges posted in different districts of Jammu province participated in the programme. Hon’ble Shri Justice J.P. Singh, Judge, High Court of Jammu and Kashmir and Hon’ble Shri Justice (Retd.) G.D. Sharma at present President, J&K State Consumer Commission were the Resource person.



Hon’ble Shri Justice J.P. Singh
while delivering lecture in the Advance Course

Hon’ble Shri Justice J.P. Singh spoke on the topic “Ways and Means for Speedy, Meaningful and Satisfactory disposal of Criminal Cases for advancement of Criminal Justice System. His Lordship enlightened the participants regarding the ways and means which they can adopt while dealing



Participants in the Advance Course

With criminal cases for meaningful and satisfactory disposal of the criminal cases. The participants evinced lot of interest in this session and they interacted with His Lordship. His Lordship in order to know the depth of knowledge of the participants in

criminal law and also their approach in appreciation of evidence gave them the facts of a case and asked every participant as to what would be his/her approach in the trial of the case and its disposal under law. The officers were tremendously benefitted from the discourse of His Lordship and this will go a long way in sharpening their professional techniques in dealing with criminal cases.



Hon’ble Shri Justice (Retd.) G.D. Sharma
while delivering lecture in the Advance Course

Hon’ble Shri Justice G.D. Sharma (Retd.) talked about the topic of “Menace of Terrorism - a challenge to the Criminal Justice System of our country and role of District Judiciary”. His Lordship had prepared a very exhaustive paper on the subject and mainly read out from the same. While addressing the participants, His Lordship narrated some incidents to the participants which His Lordship had come across during his judicial career. His Lordship also told the participants that the courts can also play very constructive role in dealing with this menace if courts deal with terrorists sternly without showing any kind of leniency towards them.

Advance Course concluded on a very successful note. All the participants were satisfied and claimed to have gained a lot while interacting with the resource persons.



Prof. (Dr.) V.P. Magotra,
H.O.D, Faculty of Law, University of Jammu
while delivering lecture in the Workshop

2. One day workshop on “Law of Precedent and Interpretation of Statutes & Deeds” was organized by the State Judicial Academy at Jammu on 24th of January, 2009 in which eighteen Judicial Officers including Leave Reserve Judicial Officers participated. Prof. (Dr.) V.P. Magotra, Head of Department, Faculty of Law, University of Jammu was the Resource person. He delivered a scholarly lecture on the topic and participants sought some clarification about the topic which were explained by



Participants in the Workshop

the Resource person. By and large, every participant was satisfied after the conclusion of the workshop and it was felt that the participants gained lot of knowledge about the topic from the Resource person.

LEGAL JOTTINGS

(Case No: Criminal Appeal No. 637 of 2006)
Samadhan Dhudaka Koli Appellant versus State of Maharashtra Respondent
Date of Decision : 18/12/2008.

Judge(s): Hon’ble Mr. Justice S.B. Sinha and Hon’ble Mr. Justice Cyriac Joseph.

Subject Index: IPC Section 302 — Indian Evidence Act, 1872 — alleged murder of a woman by her husband by setting her on fire — two different dying declarations by the deceased — one recorded by a police constable — another dying declaration recorded by Police head constable subsequently stated that husband of deceased, the accused-appellant, actually set her on fire after pouring kerosene — sessions judge convicted the appellant and the two other accused, husband’s parents, were acquitted — High Court negated contentions raised by appellant that prosecution should have brought on record statement made by the deceased before Executive Magistrate — appealed — Supreme Court disapproved prosecution’s action of suppressing the dying declaration recorded by the Judicial Magistrate — Held: State cannot suppress any vital document from the Court only because the same would support the case of the accused — Held: sessions judge and

High Court committed serious illegality — a judgment of conviction can be recorded on the basis of a dying declaration alone, but the Court must be satisfied that the same was true and voluntary — when contradictory and inconsistent stand is taken by the deceased herself in different dying declarations, they should not be accepted on their face value — the impugned judgment cannot be sustained, set aside — appeal allowed — appellant is directed to be set at liberty.

(Case No: Criminal Appeal No. 2067 of 2008)
Nagaraja Appellant versus State of Karnataka Respondent

Date of Decision : 18/12/2008.

Judge(s): Hon’ble Mr. Justice S.B. Sinha and Hon’ble Mr. Justice Cyriac Joseph.

Subject Index: IPC section 302 read with 34 — Trial Judge convicted all the three accused for offence punishable under section 302 read with section 34 — that due to previous ill-will in furtherance of their common intention, they had caused death of the deceased — appealed — High Court dismissed the appeal — appealed — Supreme Court issued a limited notice in respect of present appellant — Held: past enmity may not be a ground for inference of common intention amongst parties — appellant cannot be held guilty — appellant might be guilty for offence under sec. 323 of IPC and not for offence under sec. 302 read with sec. 34 — he is sentenced to the period already undergone — appeal allowed — as appellant is on bail, bail bonds shall stand discharged.

(Case No: Criminal Appeal No. 2060 of 2008)
State of M.P. Appellant versus Bablu Natt Respondent

Date of Decision : 18/12/2008.

Judge(s): Hon’ble Mr. Justice S.B. Sinha and Hon’ble Mr. Justice Cyriac Joseph.

Subject Index: IPC Section 366 and 376 — taking away of 13-year-old prosecutrix from the lawful custody of her lawful guardian — her father, with intention to force illicit sexual intercourse — sentenced to 7-7 years of rigorous imprisonment (for each offence) and with fine, by sessions judge — appealed — High Court upheld the judgment but interfered with quantum of sentence — jail sentence undergone by appellant till then, will be sufficient punishment — appealed — Supreme Court found that the accused got an affidavit affirmed by prosecutrix showing her age to be 18 years, which was found to be false — accused knew intricacies of law — doctrine of proportionality discussed — Held: power conferred on the Court to impose a sentence less than the minimum prescribed must not only be supported by any reason but adequate and special reasons — High Court decision does not lay down any legal

principle — set aside — sentence awarded by trial Court is restored.

(Case No: Criminal Appeal No. 162 of 2002)

The State of Tamil Nadu rep. by Secretary to Government Appellant versus Subair @ Mohamed Subair and others Respondents

Date of Decision : 18/12/2008.

Judge(s): Hon'ble Dr. Justice Arijit Pasayat and Hon'ble Dr. Justice Mukundakam Sharma.

Subject Index: IPC Sections 302, 120-B — Trial Court held the respondents guilty under section 302, IPC but said charge against all the five accused under section 120-B IPC was not established — 5th accused exonerated — appeal by four accused before High Court — directed their acquittal — appealed — Held: in the circumstances, dying declaration recorded by Judicial Magistrate deserves acceptance and in it, the deceased did not implicate accused nos. 1 to 4, as his assailants — analysis made by High Court to direct acquittal cannot be faulted — appeal dismissed.

(Case No: Civil Appeal No. 7407 of 2008)

Vinod Solanki Appellant versus Union of India and others Respondents

Date of Decision : 18/12/2008.

Judge(s): Hon'ble Mr. Justice S.B. Sinha and Hon'ble Mr. Justice Cyriac Joseph.

Subject Index: Indian Evidence Act, 1872 — section 24— Foreign Exchange Regulation Act, 1973, Sections 8(3), 9(1), 51, 50, 71(2) — appellant first confessed before Enforcement Directorate that he had imported goods and made foreign exchange remittances in dollars for the same — before Chief Metropolitan Magistrate, appellant retracted his confession saying his earlier statements recorded by threat and coercion — respondents served show-cause notice on appellant under sec. 8(3) of FERA — consolidated penalty of Rs. 10 lakh imposed on appellant — appeal before Appellate Tribunal for Foreign Exchange under provisions of Foreign Exchange Management Act, 1999 — penalty upheld — appeal before High Court — High Court said burden is on the person retracting the confessional statement to lead evidence as to why confessional statement be rejected — concurred with Tribunal — appealed — question — what is the effect of a retracted confession for the purpose of levying penalty under FERA, 1973? — Held: accused person is not expected to prove to the hilt that confession had been obtained from him by inducement, threat or promise — burden is on prosecution to show that confession is voluntary — impugned judgment and order cannot be sustained, set aside — appeal allowed — amount recovered from appellant shall be refunded within 4 weeks.

CASE COMMENTS

Ramadas v. State of Maharashtra AIR 2007 SC 155

The appellants had been convicted by the trial court for the commission of offence under section 376 RPC and same has been confirmed by the Hon'ble High Court of Bombay. Hon'ble Apex Court after careful scrutiny of the evidence on record was satisfied that the prosecution has not proved its case beyond reasonable doubt. The appeal was accordingly allowed and the conviction of sentences set aside.

The principles of law laid down by the Hon'ble Apex Court in the judgment is :-

1. The factual statements which find place in the first information report but not deposed by the informant or any other witness can not be treated as evidence in a case. An earlier report had been filed with one Police Station, giving first hand account of the occurrence. The fact was disclosed in the FIR lodged after a couple of days with next Police Station, but the earlier report about which, Police Sub-Inspector P. W6, stated, had revealed the commission of a non-cognizable offence only, had not been produced in the court, in the course of examination of first informant (prosecutrix) alleging the commission of rape on her person.
2. Delay in lodging the FIR was held fatal for the prosecution in view of the incoherence in the sequence of events quoted by the prosecutrix in her deposition, to justify the delay caused in approaching the Police. The rule that mere delay in lodging the FIR is not necessarily fatal to the case of the prosecution was reiterated and it emphasized that report lodged blatantly is a relevant fact, which court must take notice. This fact has to be considered in the light of facts and circumstances of each case.
3. Deviation from the facts projected in the FIR in the deposition of prosecutrix was noted and same considered alongwith the question of delay for appreciation of the deposition of P. W 5. P. W 5 Fakhad, one of the uncle of prosecutrix living in adjacent house was admitted by the prosecutrix did not come to her rescue, as he was threatened by the appellant, gave a version "somewhat different" regarding the fact that preceded the incident. He stated that in the evening his niece came to inform him that some one was concealing himself nearby. He went to verify the fact but no one was found concealing himself, However, appellant No. 1 was found behind the house, who dragged the prosecutrix and took her to Peripori field. He tried to rescue her but he was threatened. Next morning the prosecutrix

came to him and informed him about the incident. She had not told him how many persons were involved. He also admitted that he did not inform either the Police or 'Surpunch' of the village.

4. The Hon'ble Apex Court took notice of the facts :-

- the reference of P.W5 making an attempt to rescue the prosecutrix was not made in the FIR;

- there being omission in Para (2) of the statement that P.W5 made attempt to rescue her;

- prosecutrix omitted to mention that P.W5 was accompanying her to Police Station after 3 to 4 days of the incident;

- abstinence on the part of the PW.5 to divulge the incident to elders of the village.

5. The narration of P.W5 was found unworthy of belief being not corroborative of the deposition of prosecutrix and the conduct of P.W 5 being unnatural.

6. Note of caution was added regarding the proposition that conviction in case of rape is solely based on the testimony of the prosecutrix, as that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exists no circumstances which cast a shadow of doubt over her veracity. The evidence of the prosecutrix was not found above board and as such, the conviction of the appellants was held improper.

(Rashid Ali Dar)
2nd Addl. District Judge
Srinagar

State of H.P. v. Shree Kant Shekari
AIR 2004 SC 4404

Identity of the rape victim can not be indicated in the Judgment - Section 228-A RPC which corresponds to the same provisions in the IPC makes printing or publication of the name of any matter which may make known identity of any person against whom the offences under section 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed, punishable. Albeit the factum that explanation appended to the aforesaid provision does not render printing or publication of any judgment of the High Court or Supreme Court punishable within the meaning of said section, however, Hon'ble Apex Court of the Country in the case under comment has laid down that it would be appropriate not to disclose the identity and name of the victim in the judgment of Hon'ble Supreme Court, High Court and Lower Court. It has been hold by the Supreme Court that : "Section 228-A of RPC makes disclosure of identity of victim of certain offences

punishable. Printing or publishing name of any matter which may make known the identity of any person against whom an offence under sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is, the restriction, does not relate to printing or publication of judgment by High Court or Supreme Court but keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which section 228-A has been enacted, it would be appropriate that in the judgments be it of this Court, High Court or lower Court, the name of the victim should not be indicated."

The law laid down by Hon'ble Supreme Court in the above stated case is to be followed by all the courts across the Country.

(Rajesh Sekhri)
Addl. District and Sessions Judge
TADA/POTA, Srinagar

Hanuman Ram v. State of Rajasthan & Ors.
AIR 2009 SC 69

Section 540 Cr.P.C of J&K Code of Criminal Procedure, corresponding to Section 311 of the Central Code of Criminal Procedure, provides for the power of Courts trying the criminal cases, to summon material witnesses or to examine persons present or to recall and re-examine any witness for the just decision of the case. There had been some divergent views as to whether the provision is directory or mandatory, to what extent the power can be utilized and at what stage of trial power could be exercised.

The Hon'ble Supreme Court of India, in a case titled "Hanuman Ram v. State of Rajasthan & Ors" reported as AIR 2009 Supreme Court 69, has made very remarkable and enlightening observations which would settle the legal position as regards the conflicts in judicial opinions so far as Section 311 Cr.P.C (central) (Section 540 Cr.P.C of J&K Cr.P.C), is concerned.

It has been emphasised by the Hon'ble Supreme Court that there is a duty cast upon the Courts to arrive at the truth by all lawful means and one such means is the examination of witnesses of its own accord when for certain reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant fact. This observation of the Hon'ble Supreme Court not only puts an onerous duty on the Courts trying an accused to strive to find out truth, but also calls upon the Courts to be proactive and attentive to the need of the situation, so that justice is delivered not only from the point of view of the accused and prosecution but also

from the point of view of the orderly society. The following observations are worth taking note of:

“6. The Section is manifestly in two parts. Whereas the word used in the first part is 'may', the second part uses 'shall'. In consequences, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of enquiry, trial or proceeding under the Code (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case”.

“7. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case.”

“The Section is general Section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is “at any stage of enquiry or trial or other proceeding under this Code”. It is however, to be borne in mind that whereas the Section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wide the power the greater is the necessity for application of judicial mind”.

The judgment has further categorically settled the legal position that sometimes the examination of witnesses as directed by the Court may result in what is termed as “filling of loopholes”, which is purely a subsidiary factor and cannot be taken into account.

This Judgment will further strengthen the judicial will of the trying Judge to utilise all the available lawful resources, while dealing with the Criminal trial, in order to secure just conclusion.

(Rajeev Gupta)

Sub-Judge

*J&K State Judicial Academy
Jammu*

Vinay Kumar Rai & anr. v. State of Bihar
AIR 2008 SC 3276

A sort of uncertainty was prevailing as to whether the statements of relatives of deceased in a

murder case shall be relied upon and whether the evidence given by the relatives of the deceased warrants to be discredited on the allegation of interestedness on the part of the witnesses.

This controversy has been set at rest by the Apex Court in the above said case, Apex court has held that : “merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyses evidence to find out whether it is cogent and credible”.

“We may also observe that the ground that the witnesses being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh’s case, AIR 1953 SC 364”.

“The over insistence on witnesses having no relation with the victims often results in criminal justice going away. When any incident happens in a dwelling house the most natural witnesses would be the inmates of that house. It is unpragmatic to ignore such natural witnesses and insist on outsiders who would not have even seen anything. If the Court has discerned from the evidence or even from the investigation records that some other independent person has witnessed any event connecting the incident in question then there is justification for making adverse comments against non-examination of such person as prosecution witness. Otherwise, merely on surmises the Court should not castigate a prosecution for not examining other persons of the locality as prosecution witnesses. Prosecution can be expected to examine only those who have witnessed the events and not those who have not seen it though the neighbourhood may be replete with other residents also”.

(Gh. Mohi-ud-Din Dar)

Director

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