

## CHANGING ATTITUDE OF THE SUPREME COURT IN IMPOSING DEATH PENALTY

After a new provision under section 354 (3) of the Criminal Procedure Code, 1973 was inserted the conviction for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reason for the sentence awarded and in the case of sentence of death, the special reasons for such sentence, which means that the normal sentence for murder under section 367 (5) of the old Code of Criminal Procedure 1898 is no longer a sentence of death but imprisonment for life under new provision.

Constitutionality of capital punishment was first challenged in Jagmohan Singh v. The State of U.P. where the constitutional Bench while upholding the constitutionality of death penalty whether total discretion can be conferred on the judges in awarding the death sentence, when the statute does not provide any guidelines on how to exercise the same. The decision in Jagmohan Singh (case) was rendered when the present Code of Criminal Procedure, 1973 was not in existence. However, the aforesaid position substantially changed with the introduction of a changed sentencing structure under the present Code of Criminal Procedure Code, 1973.

In Rajendra Prasad v. State of U.P. it was held that the special reasons necessary for imposing a death penalty must relate not to the crime but to the criminal. It could be awarded only if the security of the state and society, public order in the interest of the general public compelled that course.

Evolution of sentencing policy Capital punishment has been a subject matter of great social and judicial discussion and



catechism. From whatever point of view, it is examined, one undisputable statement of law follows and it is neither possible nor prudent to state any universal formula which would be applicable to all the cases of criminology where capital punishment has been prescribed. It shall always depend upon the facts and circumstances of the given case.

Doctrine of "rarest of rare" case (shifting focus from crime to criminal). In Bachan Singh v. State of Punjab another constitutional Bench, while upholding the constitutionality of death sentence observed that for a persons convicted of murder, life imprisonment is the rule and death sentence an exception. The principal question that falls to be considered in this case are; I whether death penalty provided for the offence of murder in section 302 IPC is unconstitutional. II if the answer to the foregoing question be in the negative, whether the sentencing procedure provided in section 354 (3) of the CrPC 1979 is unconstitutional on the ground that it invests the court with unguided and untrammelled discretion and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of murder or

any other capital offence punishable under the Indian Penal Code with death or, in the alternative, with imprisonment of life.

The conclusion of the constitutional bench was that the sentence of death ought to be given only in the rarest of the rare case and it should be given only when the option of awarding the sentence of life imprisonment is "unquestionably foreclosed". It laid down the framework law on this point. Bachan Singh effectively opened up Phase II of a sentencing policy by shifting the focus from the crime to the criminal, the Constitutional Bench in Bachan Singh looked at the suggestion given by learned counsel appearing in the case. This suggestion, if examined, indicate that insofar as aggravating circumstances are connected, they refer to the crime.



**MANSI JAGANI**  
(B.A.L.L. B 1st Sem,  
Indore Institute of Law)

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## BURDEN AND STANDARD OF PROOF IN MURDER CASES



To prove that the accused is the murderer is one of the most difficult tasks faced by a criminal lawyer. The mood of proof may take diverse forms, it may be by both direct evidence and circumstantial evidence. It may be through dying declaration, confession, evidence of near relations and so on. One or more modes of proof may be telescoped in a particular case. it may be borne in mind that burden of proving the case initially is on the prosecution which must prove it beyond reasonable doubt. However, if the other parameters of the offence stand established, then the plea of non-discovery of the dead body of the victim is of no consequence in proving the corpus delict in murder.

As stated by Phipson on Evidence in Criminal Cases the prosecution discharges their evidential burden by adducing sufficient evidence to raise a prima facie case against the accused. If no evidence is called for the defence the tribunal of fact must decide whether the prosecution has succeeded in discharging its legal burden by proving its case beyond a reasonable doubt. In the absence of any defence evidence, the chances that the prosecution has so

succeeded are greater. Hence, the accused may be said to be under an evidential burden if the prosecution has established prima facie case. Discharge of the evidential burden by the defence is not a pre-requisite to an acquittal. The accused is entitled to be acquitted "if at the end of and on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner." The principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. It's an essential principle of our criminal law that a criminal charge has to be established by the prosecution beyond reasonable doubt. The philosophy underlying this rule is the oft quoted maxim that it is better than ten guilty persons should escape than one innocent suffer.

The honoured expression that the court must be satisfied "beyond reasonable doubt" has been accepted in the Anglo Saxon world as the standard of proof in criminal cases. Since the decision in Woolmington's case the discretion to the jury has been that they must be satisfied of the prisoner's guilt beyond reasonable doubt if they want to convict him.

Lord Goddard suggested in England that this phrase should be abandoned. He had great experience in criminal matters. He suggested that the expression 'completely satisfied' or 'fully sure' should be accepted as substitutes.

The fourth edition of Halsbury's laws of England goes so far as to say that the phrase "reasonable doubt" should be avoided. No one has yet invented or discovered a mode of measurement for the intensity of human belief better than this formula of proof "beyond reasonable doubt".

What does the expression "beyond reasonable doubt" mean? For a doubt to stand in the way of conviction of guilt it must be a real doubt and a reasonable doubt. A doubt which after full and fair consideration of the evidence the judge rely on reasonable grounds entertained. If the data leaves the mind of the trier in equilibrium, the decision must be against the party having the burden of persuasion. If the mind of the adjudication tribunal is evenly balanced as to whether or not the accused is guilty, it is its duty to acquit.



**VANSHIKA SHARMA**  
(B.B.A.L.L. B 1st Sem,  
Indore Institute of Law)



## CURRENT AFFAIRS AUGUST 2021

- IIT Madras is working on e-Source, an online platform that will be utilised to deal with electronic garbage (e-waste). Facts to Remember E-Source will be utilised to combat e-waste by bringing together formal and informal sector stakeholders.
- In the Asian Youth Championship, Indian boxers won six gold medals, nine silver medals, and five bronze medals. Highlights Due to pullouts prompted by COVID-19 related travel restrictions, the women's competition was drastically reduced.
- On August 29, 2021, the Indian and Algerian fleets conducted their first-ever naval drill off the coast of Algeria. Highlights The exercise demonstrates the two countries' growing marine cooperation.
- Under the Presidency of India, the United Nations Security Council adopted a resolution on the situation in Afghanistan on Tuesday.
- On August 31, 2021, Chief Justice of India (CJI) NV Ramana will administer the oath of office to nine new judges, three of them are women.
- Shooter Avani Lekhara won India's first gold medal at the 2020 Tokyo Paralympics on August 30, 2021. Points to Remember In the women's 10m Air Rifle, Avani Lekhara won a medal. Standing.
- Russia has issued a warning about the risk of an increase in West Nile Virus infections this autumn, citing the optimal conditions for mosquitos carrying the virus as mild temperatures and heavy precipitation.
- In order to improve transparency, the Insolvency and Bankruptcy Board of India (IBBI) has proposed changes to the liquidation procedure under the Insolvency and Bankruptcy Code (IBC).
- PhonePe, India's fastest-growing Insurtech firm, has received an Insurance Broking licence from the Insurance Regulatory and Development Authority of India (IRDAI) and will now act as a Direct Insurance Broker.
- On August 26, 2021, the Indian construction giant AFCONS signed a contract for the Maldives' largest-ever infrastructure project. Points to Remember The Greater Male Connectivity Project is the name given to this initiative (GMCP).

# CAN A DIPLOMATIC AGENT WAIVE OR LOSE HIS IMMUNITY?

Article 29 of the Vienna Convention on the Diplomatic Relation, 1961 provides that the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take appropriate steps to prevent any attack on his person, freedom or dignity. But the diplomatic agents shave a duty not to interfere in the internal affair of the state. Moreover, the premises of the mission must not be used in any manner incompatible with the function of the mission as laid down in the present convention or by other rulers of general international law or by any special arrangements in force between the sending and the receiving state.

Article 21 of Vienna Convention on Diplomatic Relation, 1961 grants immunity to diplomatic agents from criminal jurisdiction of Courts. However, it is generally believed that they will not violate the provision of the law of the state where they are appointed. Beside this, it may be noted that there are conditions under which the diplomatic agents may lose their immunity. For example, they may lose the immunity if they are

guilty of conspiracy against state. The example of George Gyllenborg 1712 may be cited in this connection. He was an Ambassador of Sweden in England and he was arrested on the charge of conspiracy against George 1, the King of England. If a case is filed in a court against a diplomatic agent, then it is not necessary for him to present himself personally in the court. It is sufficient for him to send the message that he is a representative of a sovereign state and is outside the jurisdiction of the court. But if he does not take this ground and present himself personally and unconditionally in the court then it will be deemed that he has waived his immunity and he will then be deemed to be within the jurisdiction of the court.

Reference may also be made here to the case of arrest warrant of 11 April, 2000 (democratic Republic of Congo v. Belgium) [2002/04]. This case related to an international arrest warrant in absentia issued in April, 2000 by an investigating Judge of the Brussels Tribunal against Mr. AbdonlayeYerodia Md of having made certain speeches in the Congo in August, 1998 causing an incitement to racial hatred. He charged the Minister who was a Belgium national and was

neither a resident of Belgium not present in the capacity with (i) grave breaches of the 1949 Geneva Convention and of the Additional Protocols there to, and (ii) crimes against humanity. The International Court of Justice decided by 13 to 3 that the issue and the international circulation of the disputed arrest warrant had failed to respect the immunity from criminal jurisprudence and inviolability which Mr. Yerodia enjoyed under international law.

Duties of Diplomatic Agents are Duty to respect laws and regulations of the receiving state, duty not to interfere in the Internal Affairs of the State, Official business to be conducted with or through the Ministry of Foreign Affairs of receiving state or such other Ministry as may be agreed, Premises of mission not to be used in any matter incompatible with the function of the mission, Diplomatic agent not to practise for personal profit any professional or commercial activity.



**MEET PRIYA KHALSA**  
(B.A.L.L. B 3rd Sem,  
Indore Institute of Law)



There is no doubt that rape can be committed on a woman without her being aware of the act during catalepsy,

## CERTAIN ISSUES WITH EVALUATION OF EVIDENCE A LAWYER MUST KNOW

Decided cases are not of much use in evaluating evidence. Each case depends on its own facts. A close similarity between one case and another is not enough to warrant like treatment because a significant detail may alter the entire picture. One should avoid the temptation to decide cases by matching the colour of one case against the colour of another. The board resemblance between two cases is not at all decisive. A judgment is not to be read as a statute. It must be read reasonably in its entirety. The effect of the judgment must be found out from the language used and the attendant circumstances in which they had been used.

Observation of courts are to be read neither as Euclid's Theorems nor as provisions of statutes and that too taken out of their context. They must be read in the context in which they appear to have been made. Disposal of cases by blindly relying on a decision is not proper because an additional fact or a different fact may make a world of difference between conclusion inn two cases. Courts should not place reliance on decisions without discussion fact situation of the case on which reliance is placed.

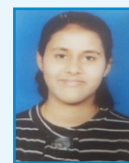
There is no hard and fast rule regarding evaluation of evidence. A witness can be disbelieved regarding some

syncope, epileptic coma or mesmeric or hypnotic trance, or during unconsciousness produced by the administration of narcotic and intoxicating or anaesthetic drugs. However, soon after the recovery of consciousness, a nubile virgin would feel pain, tenderness and dampness about her private parts, and would probably find her underwear soiled with blood or semen or with both. She is, therefore, hound to complain about her condition to her relatives or friend, but her story would be looked upon with suspicion if she complained after a lapse of some time that she was violated during the period of her unconsciousness.

When a women complains to the police that she was given a narcotic drug, such as opium, chloral hydrate or some other similar drug with the object of making her unconscious, she should be sent immediately to a medical officer, who should examine her to ascertain if she manifested any sign of the ingestion of the alleged drug, and her to ascertain if she manifested any sign of the ingestion of the alleged drug, and should inquire of her as to how it was given to her and the symptoms she developed after taking it.

Concerning the administration of an anaesthetic drug, such as chloroform, it must be remembered that it is impossible to anaesthetic a woman against her will while she is awake. Even a skilled anaesthetist requires the help of one or two assistants to hold a patient forcibly down on the operating table during the first stage of anaesthesia although the patient voluntarily inhales it for an operation. It is also impossible for an inexperienced man to anaesthetise a sleeping person without disturbance so as to substitute artificial sleep for natural sleep. Hence, the story often

published in the lay press, such as Times of India, of a woman having been rendered suddenly unconscious by a handkerchief soaked in chloroform held over her face and then raped, is not to be believed and often rejected in the court. It must be borne in mind that a woman, especially of an excitable and emotional temperament during the stage of anaesthesia, might get a dream or hallucination that she has been raped, and may insist on the belief after the effect of the anaesthesia have passed off, so that she brings an accusation of violation against her medical attendant. How surprising is that? So as a precautionary measure against such an accusation, the medical practitioner should never administer a general anaesthetic to a female without the presence of another person, preferable a near relation of hers. The supreme court held in Bhonri v state AIR 1955 NUC 473 that in the case of a married woman merely presence of spermatozoa indicating semen found on her genitals would not be enough evidence of rape, particularly when she admits of her recent intercourse with her husband, (Adbul Aziz v. Emperor AIR 1934 Nag 94, p 97), as also in the case of grown-up women used to sexual intercourse. (Inder Singh v. Emperor AIR 1927 Lah 876) the presence of blood in the vagina may be due to other local injuries or occurrence of the periodic bleeding (menses) in pregnant women right up to the sixth month of pregnancy. Spermatozoa indicating semen found in the woman's genitals or on her saree is not a conclusive proof of rape in the case of married woman. (Re Karichiappa Goundan, AIR 1942 Mad 285, 43 Cr Lj 576)



**AANSHI SINGH**  
(B.A.L.L. B 1stSem,  
Indore Institute of Law)



probative value of such evidence becomes eligible to be put into scale.

Culpability of each accused (in case and counter case) must be determined with reference to their individual overt acts. When witnesses are rustic persons, their behavioural patterns, perceptions and habits must be taken into consideration and appreciated. Approaches that are too sophisticated, based on assumptions about human conduct cannot be applied to people accustomed to ways of village, as they may not have keen sense of time. Fringe variations, discrepancies in details, contradictions in narration, and embellishments in non-essential part cannot militate against veracity of the core of testimony, if there is an impress of truth and conformity to probability in substantial fabric of prosecution story. Exaggeration in the prosecution's case about the commencement of the incident may not detract from the incident that was proved by eyewitness.



**ARUNEESH BHARDWAJ**  
(B.B.A.L.L.B.3rdSem,  
Indore Institute of Law)

## THE CONVERSION OF ISLAM WILL NOT IPSO FACTO DISSOLVE THE MARRIAGE

The word 'Islam' means 'peace and submission' which in its religious connotation means 'submission to the will of Allah'. The Muslim law permits more than one marriage during the subsistence of one. The plurality of marriage in Muslim law is not unconditionally conferred upon the husband. The capacity to do justice between the co-wives is the condition precedent before subsisting theother marriage. And, therefore, it would be injustice to Islamic law to urge that the convert is entitled to practice bigamy notwithstanding the continuance of his marriage under the law to which he belonged before the conversion. The Supreme Court in Lily Thomas v Union of India 2000 observed that the progressive

outlook and wider approach of Islamic law cannot be permitted to be squeezed and narrowed by unscrupulous litigants apparently found to be guilty of the offence under the law to which they belonged before their alleged conversion. The Supreme Court in answer to the question would second marriage without the first marriage being dissolved under law be valid marriage qua the first wife commits to be Hindu held that a marriage celebrated under a particular personal law cannot be dissolved by the application of another personal law to which one of the spouses converts and the other refuses to do so. Where a marriage takes place under the law governing the Hindu marriage

and of one of the parties is allowed to dissolve the marriage by adopting and enforcing the new personal law, it would then amount to destroy the existing rights of the other spouse who continues to be Hindu. The apex court therefore held that under the Hindu personal law as it existed prior to its codification in 1955, a Hindu marriage continued to subsist even



**ADV. PRINCE VERMA,**  
Advocate, Lucknow High Court