

GOVERNMENT OF INDIA

LAW COMMISSION OF INDIA

TWO HUNDRED AND SECOND REPORT

ON

PROPOSAL TO AMEND SECTION 304-B OF
INDIAN PENAL CODE



October, 2007

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Dear Dr. Bhardwaj,

I have great pleasure in presenting the 202nd Report of the Law Commission on the proposal to amend Section 304-B, Indian Penal Code, 1860 dealing with the offences of dowry death.

The question that has been examined by the Law Commission in this Report is whether Section 304-B of Indian Penal Code, 1960 should be amended to provide for more stringent punishment of death sentence to curb the menace of dowry deaths.

The circumstances in which the subject was taken up for consideration by the Commission are stated in Chapter I on Introduction of the Report. Briefly speaking, the Commission considered this subject pursuant to the Allahabad High Court's Order dated 31st January, 2003 in the matter of Nathu v. State of U.P. (Criminal Bail Application No.12466 of 2002) wherein Katju J. (as he then was) observed "In my opinion dowry death is worse than murder but surprisingly there is no death penalty for it whereas death penalty can be given for murder. In my opinion the time has come when law be amended and death sentence should be permitted in cases of dowry deaths". The Hon'ble Judge directed that a copy of the order be sent by the Registrar General of the Court to Hon'ble Law Minister and Hon'ble Home Minister with a request that they might consider introducing a Bill in the Parliament for such amendment or a Ordinance by the Central Government to the same effect.

While dealing with the subject, the Commission had to choose between two options available to it. The first was to comprehensively examine the subject of dowry death in all its related aspects such as definition of dowry administration and enforcement of the legal regulation, and accountability of the concerned agencies etc. and thereby endeavour to codify afresh the law on dowry death in its entirety. The second was to confine its consideration only to the point referred to it i.e. whether Section 304-B be amended to provide for death sentence? The Commission chose the second option. In its 91st report, the Commission has already examined the subject of 'Dowry Death and Law Reforms'. The existing law on the subject could be largely attributed to the recommendations made therein. Besides, the Commission was of the view that pointed focus would be necessary to clear certain doubts and misgivings associated with the cases of dowry death.

The Commission examined Section 304-B IPC in the light of various judicial pronouncements and critically dealt with the substantive as well as procedural aspects of the subject. The Commission finds that the offence of murder is not the same thing as the offence of dowry death. Though death of bride may be a common element in both the offences, the absence of direct connection between the husband and the death of wife distinguished the offence of dowry death from the offence of murder and is a strong mitigating factor. Besides, the presumptive character of the offence of dowry death and cardinal principle of proportionality as well as the underlying scheme of the Penal Code go against the proposed prescription of death sentence in case of dowry death. It may be pertinent to point out that where a case of dowry death also falls within the ambit of the offence of murder, awarding death sentence is legally permissible. Of course, the guidelines laid down by the Supreme Court for award of death sentence, especially, the dictum of 'rarest of rare case, may have to be adhered to in such cases as well.

Thus having given its careful consideration to the subject, the Commission reached the conclusion that there is no warrant for amending Section 304-B IPC to provide for death sentence. That being so, one may wonder as to what then has been the necessity for submitting such a report where only status quo is recommended to be maintained and no further change in the law is suggested. In other words, what is the utility of making a negative recommendation instead of a positive one. The Commission was seized of this aspect especially, having regard to the fact that the

present reference has been a fall out of a Court's Order. However, the Commission found a lot of misgivings and misapprehension associated with the subject of dowry death. Dowry death is quite often confused with the offence of murder. There may be instances where the two may overlap with each other. This gives rise to demand for parity in the matter of sentence in both these cases. Nevertheless, the two offences are distinct and independent offences. The Commission felt the finer nuances need to be spelt out clearly for their better understanding and appreciation. This will help in dispelling the ambiguity and confusion shrouded the notion of dowry death vis-à-vis murder. The utility of this Report lies in providing clarity on the subject for its correct understanding and appreciation and will help in effectively dealing with the cases of dowry deaths by the concerned authorities.

Yours sincerely,

(Dr. Justice AR. Lakshmanan)

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CHAPTER-1

INTRODUCTION

1.1 Scope of Inquiry

The question that the Law Commission is going to examine in this Report is whether Section 304B of Indian Penal Code, 1860, on dowry death, should be amended to provide for more stringent punishment of death sentence in order to curb the menace of dowry deaths.

1.2 Earlier Report of the Commission on the subject.

The question of “Dowry Deaths and Law Reforms” was suo motu taken up earlier by the Law Commission in its 91st Report. The existing laws on the subject may be viewed as the culmination of the Commission’s earlier efforts in this arena. Generally, where the facts in any incident of dowry related death, or for that matter any offence, are such which unambiguously satisfy and prove the legal ingredients of an offence already known to the law, say, murder in case of dowry death, the law can be resorted to for bringing the offender to book in such a case. In this regard the Law Commission noted in its earlier report referred to above, two impediments in connection with dowry death cases, namely, firstly the facts might not fully fit into any known offence; and secondly,

difficulties in having proof of directly incriminating facts in the peculiarities of the situation in cases of dowry related deaths. These difficulties have been sought to be redressed by amending the substantive as well as procedural laws. Thus, a new offence of dowry death has been created in Section 304B that has been inserted in the Indian Penal Code, 1860 with effect from November 19, 1986. The section provides for punishment of imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life. The section embodies a legal fiction whereby the husband or the concerned relative is deemed to have caused the dowry death in a case where the conditions prescribed in the section are present and then the onus shifts on the husband, or as the case may be, on the relative concerned to rebut the presumption enshrined in the section by cogent evidence to show that he has not caused such dowry death. Besides, Section 113A was inserted in the Indian Evidence Act in 1983 providing for presumption as to abetment of suicide by a married woman if the conditions specified in that section are satisfied.

1.3 Inadequacy of the existing law.

Notwithstanding the aforesaid legal amendments the incidents of dowry deaths have not shown any sign of significant decline. This gave rise to demands for capital

punishment/death sentence for the offence of dowry death in order to imbibe necessary deterrence in the law. On the other

hand, there are others who complain about misuse of dowry related provisions and plead for their abrogation. Before dealing with these conflicting views, it may be expedient to state as to how this matter has come up before the Commission.

1.4 Reference to the Commission.

This matter has come up for consideration of the Commission pursuant to the Order dated 31st January, 2003 of Allahabad High Court in Criminal Bail Application No.12466 of 2002 in the case of **Natthu Vs State of U.P.** In this case, it was alleged that Pritipal, son of Natthu was married to Urmila Devi about a year and half before her death. Pritipal and his father Natthu were not satisfied with the dowry given in marriage and were demanding a motorcycle in dowry which Urmila's father Sompal was unable to give. They did not allow Urmila to visit her parental house until motorcycle was given and when Ramveer, brother of Urmila, went to fetch her, they threatened to beat him and told him that Urmila would be sent on giving of a motorcycle. Next day information was received that they along with others have killed Urmila Devi. The postmortem report showed a continuous ligature mark on the neck below the thyroid cartilage as well as five continuous marks. One of them being on the neck, just below the chin, and others, on the other parts of the body. These were ante mortem

injuries and prima facie indicated that Urmila Devi was beaten before strangulation. It was also mentioned by the Doctor in the

postmortem report that the death of Urmila Devi was due to asphyxia as a result of ante mortem strangulation. Prime facie it seemed to be a case of brutal murder of Urmila Devi. While dealing with the bail application referred to above, Hon'ble Mr. M. Katju J., as he then was, inter-alia observed. "In my opinion dowry death is worse than murder but surprisingly there is no death penalty for it whereas death penalty can be given for murder. In my opinion the time has come when law be amended and death sentences should also be permitted in cases of dowry deaths". The Hon'ble Judge directed :

"Let a copy of this order be sent by the Registrar General of this Court to Hon'ble Law Minister of India and Hon'ble the Home Minister of India with the request that they may consider introducing a Bill in Parliament for such amendment as suggested above or an Ordinance by the Central Government to the same effect".

1.5 Culpable homicides and varied punishments.

All homicides are not murders, warranting capital punishment. There may be culpable homicide not amounting to murder, causing death by rash and negligence and death as a result of causing grievous hurt. Different punishments/sentences have been provided for different types of homicide, depending upon the nature and gravity of an offence in a given

case. The tenets of penology demands that punishment must be proportionate to the gravity of the offence, pragmatic and adequately deterrent, having due regard to its overall

implications from all relevant angles, social, political and economic etc. The question relating to the adequacy or otherwise of the punishment for dowry death may, therefore, have to be considered in this backdrop. The punishment for the offence of dowry death is imprisonment for not less than seven years that may extend to life imprisonment. Now the question is whether capital sentence be added to it as dowry deaths are certainly most abhorrent. If we carefully examine the provision of Section 304B, we will note that the offence there under is in a way fiction of law, whereby the offence of dowry death is deemed to have been committed if certain set of conditions are satisfied in a given case. These conditions are four in number, namely;

- (i) There is a death of a women caused by any burns or bodily injury or occurs otherwise than under normal circumstances,
- (ii) The death of the woman has taken place within seven years of her marriage,
- (iii) Soon before her death, the woman was subjected to cruelty or harassment by her husband or any relative of her husband,
- (iv) Such cruelty or harassment has been for, or in connection with, any demand for dowry.

1.6 **Question in issue.**

If all the four conditions stated above are present in a given case, then the husband or the relative concerned shall be deemed to have caused her death and such death will be called dowry death. The traditional criminal law dictum that an accused is presumed to be innocent unless proved guilty of the offence he is charged with, is not applicable on account of the legal fiction embodied in the provisions of Section 304B whereby he is deemed to have caused the death and the onus shifts on him to prove otherwise. Where there is evidence that the accused committed the murder of woman in terms of Section 300 defining the offence of murder, he will be charged with the commission of the offence of murder and liable to be proceeded against accordingly. If the conditions of Section 304B or, for that matter, any other section of the Penal Code are present in such a case, the accused will be charged with the commission of that offence also. The presence of such conditions pertaining to any other offence will not take out the case from the ambit of Section 300 dealing with the offence of murder. In view of the aforesaid, the Commission will consider in the succeeding chapters as to whether there is any warrant for appending capital punishment to Section 304B, for the reason that the offence of dowry deaths are highly despicable and shocks the conscience of the society.

CHAPTER-2

DOWRY DEATH AND THE LAW

2.1 Dowry - A social evil

2.1.1 Over the years, Dowry has grown as a deep-rooted social evil. It has become bane for our society. It is the cause of atrocity on woman and many unfortunate deaths of young ladies. It is an offence heinous, brutal and barbaric. The Hon'ble Supreme court in *Kamlesh Panjiyar Vs State of Bihar*, (2005)2 SCC 388 has made the observation :

“Marriages are made in heaven, is an adage. A bride leaves the parental home for matrimonial home leaving behind sweet memories therewith a hope that she will see a new world full of love in her groom's house. She leaves behind not only her memories, but also her surname, gotra and maidenhood. She expects not only to be daughter in law, but a daughter in fact. Alas! The alarming rise in the number of cases involving harassment to the newly wed girl for dowry shatters the dreams. In-laws are characterized to be outlaws for perpetrating terrorism which destroys the matrimonial home. The terrorist is dowry, and it is spreading tentacles in every possible direction”.

2.1.2 The offenders of death relating to demand of dowry always tries to give an impression that to be a suicidal or accidental death,

but it is always the bride who meets with the accident while cooking or doing household work.

2.1.3 In **Soni Devrabhai Babubhai Vs State of Gujarat and Others**, (1991) 4 SCC 298, the Supreme Court observed:

“Section 304B of the India Penal Code and the cognate provisions are meant for eradication of the social evil of dowry, which has been the bane of Indian society and continues unabated in spite of emancipation of women and the women’s liberalization movement. This all-pervading malady in our society has only a few exceptions in spite of equal treatment and opportunity to boys and girls for education and career. Society continues to perpetuate the difference between them for the purpose of marriage and it is this distinction, which makes the dowry system thrive. Even though for eradication of this social evil, effective steps can be taken by the society itself and the social sanctions of the community can be more deterrent, yet legal sanctions in the form of its prohibition and punishment are some steps in that direction. The Dowry Prohibition Act, 1961 was enacted for this purpose. The report of the Joint Committee of Parliament quoted the observations of Jawaharlal Nehru to indicate the role of legislation in dealing with the social evil as under:

“Legislation cannot be itself normally solve deep rooted social problems. One has to approach them in other ways

too, but legislation is necessary and essential, so that it may give that push and have those educative factors as well as the legal sanctions behind it which help opinion to be given a certain shape.”

The enactment of Dowry Prohibition Act, 1961, in its original form was found inadequate. Experience shows that the demand of dowry and the mode of its recovery take different forms to achieve the same result and various indirect and sophisticated methods are used to avoid leaving any evidence of the offence. Similarly, the consequence of non-fulfillment of demand of dowry meted out to the unfortunate bride take different forms to avoid any casual connection between the demand of dowry and its prejudicial effects on the bride. This experience has led to several other legislative measures in the continuing battle to combat this evil” (Paras 5 and 6 at pp.300-301).

2.2 Law to regulate dowry

2.2.1 The Government, from time to time, has come up with legislations to protect the women and to punish those committing atrocities on them. In 1961, the Dowry Prohibition Act (Act 28 of 1961) was passed prohibiting taking or giving dowry. By the Criminal Law (Second Amendment) Act 1983 (Act 46 of 1983) Chapter XXA was introduced in the Penal Code with Section 498A, creating a new offence of cruelty, which provides for punishment to the husband or relatives if they harass the women with a view to coerce her to meet any unlawful demand for

property. Section 174 Cr.PC was also amended to secure Post Mortem in case of suicide or death of a woman within seven years of her marriage. Section 113A has been introduced in the Evidence Act, 1872 raising a presumption of cruelty as defined under Section

498A, I.P.C. against the husband or his relative if the wife commits suicide within a period of seven years from the date of her marriage.

2.2.2. These provisions reflect the anxiety of the Government to deal firmly with the menace of dowry and to curb the offences for which the root-cause is dowry. The Government again made sweeping changes in the Dowry Prohibition (Amendment) Act, 1984. A new offence called “Dowry Death” has been inserted by introducing Section 304B in the Penal Code. Section 304, has been brought into force with effect from November 19, 1986. The relevant G.S.R. reads as follows:-

“G.S.R. 1185(E)-(New Delhi, the 5th Nov, 1986) – In exercise of the powers conferred by Section 1 of Dowry Prohibition (Amendment) Act, 1986 (43 of 1986) the Central Government hereby appoints the 19th day of November, 1986 as the date on which the Act shall come into force”.

2.3. Offence of dowry death

2.3.1 Section 304B, IPC, says:

- (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her

marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called

“Dowry death”, and such husband or relative shall be deemed to have caused her death.

Explanation: For the purpose of this sub-section “dowry” shall have the same meaning as in S.2 of the Dowry Prohibition Act, 1961 (28 of 1961).

- (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

2.3.2. In **Shanti Vs State of Haryana**, 1991 (1) SCC 371

the Hon’ble Supreme Court has stated that the term dowry is not defined in Indian Penal Code. However, it has been defined in the Dowry Prohibition Act, 1961 as “any property or valuable security given or agreed to be given either directly or indirectly –

- (a) by one party to the marriage to the other party to the marriage; or
- (a) by the parents of either party to a marriage by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties.”

2.3.3. In view of the aforesaid definition of the word “dowry” any property or valuable security should be given or agreed to be given either directly or indirectly at or before or any time after the marriage and in connection with the marriage of the said parties. Therefore, the giving or taking of property or valuable security

must have some connection with the marriage of the parties and a correlation between the giving or taking of property or valuable security with the marriage of the parties is essential. Being a penal provision it has to be strictly construed. Dowry is a fairly well known social custom or practice in India. It is well settled principle of interpretation of Statute that if the Act is passed with reference to a particular trade, business or transaction and words are used which everybody conversant with that trade, business or transaction knows or understands to have a particular meaning in it, then the words are to be construed as having that particular meaning. (See **Union of India Vs Garware Nylons Ltd.** AIR 1996 SC 3509 and **Chemicals and Fibres of India Vs Union of India** AIR 1997 SC 558). A demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a demand for dowry as the said word is normally understood. (See **Appasaheb & Anr. Vs State of Maharashtra**, AIR 2007, SC 763 at p. 767).

2.3.4. There are three occasions related to dowry. One is before the marriage, second is at the time of marriage and the third is “at any time” after the marriage. The third occasion may appear to be an unending period. But the crucial words are “in connection with the marriage of the said parties”. This means that giving or agreeing to give any property or valuable security on any of the above three stages should have been in connection with the marriage of the parties. There can be many other instances for

payment of money or giving property as between the spouses. For example, some customary payments in connection with birth of a child or other ceremonies are prevalent in different societies. Such payments are not enveloped within the ambit of “dowry”. Hence the dowry mentioned in Section 304-B should be any property or valuable security given or agreed to be given in connection with the marriage. (See **Satvir Singh and others Vs State of Punjab and another**, AIR 2001, SC 2828 at p. 2834).

2.3.5. It is not enough that harassment or cruelty was caused to the woman with a demand for dowry at some time, if Section 304-B is to be invoked. But it should have happened “soon before her death”. The said phrase, no doubt, is an elastic expression and can refer to a period either immediately before her death within a few days or even a few weeks before it. But the proximity to her death is the pivot indicated by that expression. The legislative object in providing such a radius of time by employing the words “soon before her death” is to emphasise the idea that her death should, in all probabilities, have been the

aftermath of such cruelty or harassment. In other words, there should be a perceptible nexus between her death and the dowry related harassment or cruelty inflicted on her. (See **Satvir Singh Vs State of Punjab, supra**).

2.3.6. In **Pawan Kumar Vs State of Haryana**, 1998 (3) SCC 309, the Hon'ble Supreme Court has laid down the ingredients necessary to attract section 304B, IPC which are as follows:

- 1) death of a woman is either by burns or by bodily injury or other wise than under normal circumstances;
- 2) it should be within seven years of marriage;
- 3) it should also be shown that soon before her death she was subjected to cruelty or harassment by husband or any relative of husband.
- 4) Such harassment or cruelty should pertain to demand for dowry.

2.3.7. The offence of dowry death punishable under Section 304B of the Indian Penal Code is a new offence inserted in the Indian Penal Code with effect from November 19, 1986 when Act 43 of 1986 came into force. The offence under Section 304B is punishable with a minimum sentence of seven years which may extend to life imprisonment and is triable by a Court of Sessions. The corresponding amendments made in the Code of Criminal Procedure and the Indian Evidence Act relate to the trial and proof

of offence. Section 304B is a substantive provision creating a new offence. (See **Soni Devrajbhai Babubhai Vs State of Gujarat and Others** (1991) 4SCC 298 at p. 303).

2.4. Present Scenario:

2.4.1 Now 21 years have been passed since the enactment of Dowry Prohibition (Amendment) Act, 1986. The question before us is:

- (1) whether the Government has succeeded in curbing the menace of ‘dowry death’? if not, then
- (2) Should death penalty be provided for the offence of dowry death?

2.4.2. The answer to the first question is in the negative. The sad affair of dowry deaths is still continuing. Large number of cases relating to dowry death is reported each year, which really is a matter of shame and cause for deep concern.

2.4.3. National Crime Records Bureau, Ministry of Home Affairs, GOI, East Block-7, R.K. Puram, New Delhi, published in report “Crime in India – 2005” (dated 31st July, 2006 – page 9). “Crime Clock of 2005” reported wherein one dowry death case is committed in every 77 minute in India. Further at page 242, table-5 (A), shows “Crime Head-wise Incidents of Crime Against Women during 2001-2005 and percentage variation in 2005 over 2004”; Sl.No. 3 reads.

Sl. No.	Crime Head	2001	2002	2003	2004	2005	Percentage variation
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3 Dowry Death 6851 6822 6208 7026 6787 -3.4
(Sec.302/304B IPC)

2.4.4. There are various implications of dowry in the society. Dowry has also a bearing for the female foeticide in our country. People do not want a baby girl considering the social situation that one-day they have to pay dowry. On the other hand, if there is birth of a baby boy, they will fetch some dowry. Unfortunately, in the Indian scenario, a girl is looked upon as a liability to her family. The need of the hour is to fight this menace of dowry in the best

possible way. But one thing goes without saying that merely by amending the Act and making it more stringent, it will not help unless the law enforcing agencies do their duty diligently and honestly. There is an argument within the law making agency that whether introduction of capital sentence for the offenders for causing dowry death would meet the ends of justice and would prove to be a deterrent. Before going further, it would be appropriate to mention that India is not only the land of Rama and Buddha, it is also the land of Balmiki and Angulimal, where dreaded criminals have reformed after relinquishing their dark past. There is another adage that every saint has a past and every criminal has a future. It is stated herein that in most of the countries capital punishment has been abolished. India has adopted a very balanced approach in this regard. It has capital punishment in its statute book but uses it rarely. In India there is a subtle shift

from the capital punishment to imprisonment for life and death sentence has been awarded only for the rarest of the rare cases. Thus, even if death penalty is provided, it cannot be awarded as a matter of routine. But the dictum of rarest of rare cases will still be applicable.

2.5. Sections in I.P.C which prescribe Capital Punishment:

Following are the Sections in the Indian Penal Code which prescribes for the capital punishment:-

- (1) Section 121 – waging or attempting to wage war, or abetting the waging of war, against Government of India;
- (2) Section 132 – Abetment of Mutiny, if Mutiny is committed in consequence thereof.
- (3) Section 194 – Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence provided if innocent person be thereby convicted and executed.
- (4) Section 302 – Murder.
- (5) Section 303 – Murder by a person under sentence for imprisonment for life (this section has been struck down by the Hon'ble Supreme Court as it has been held to be violative of article 21 of the Constitution of India)
- (6) Section 305 – Abetment of suicide committed by child or insane or delirious person or an idiot or a person intoxicated.

- (7) Section 307 – Attempt by life convict to murder, if hurt is caused.
- (8) Section 364A – Kidnapping for ransom, etc.
- (9) Section 396 – Murder in dacoity.

2.6 Death sentence : Code makers' view:

The authors of the Code stated:

“We are convinced that it ought to be very sparingly inflicted, and we propose to employ it only in cases where either murder or the highest offence against the State has been committed....To the great majority of mankind nothing is so dear as life. And we are of opinion that to put robbers,

ravishers and mutilators on the same footing with murderers is an arrangement which diminishes the security of life.... Those offences are almost always committed under such circumstances that the offender has it in his power to add murder to his guilt...As he has almost always the power to murder, he will often have a strong motive to murder, inasmuch as by murder he may often hope to remove the only witness of the crime which he has already committed. If the punishment of the crime which he has already committed be exactly the same with the punishment for murder, he will have no restraining motive. A law which imprisons for rape and robbery and hangs for murder, holds out to ravishers and robbers a strong inducement to spare the lives of those whom they have injured. A law which hangs

for rape and robbery, and which also hangs for murder, holds out, indeed, if it be rigorously carried into effect, a strong motive to deter men from rape and robbery, but as soon as a man has ravished or robbed, it holds out to him a strong

motive to follow up his crime with a murder.” (see Draft Penal Code, Note A, Page 93)

2.7 Death Sentence only in rarest of rare cases guidelines:

2.7.1 In *Lehna Vs State of Haryana, 2002 (3) SCC 76*, the Hon’ble Supreme Court has dealt with the case law whereby guidelines were laid down for awarding capital sentence. The

Hon’ble Court has further held that in Criminal Procedure Code, there is a definite swing towards life imprisonment.

2.7.2 The apex Court observed:

“Section 302 IPC prescribes death or life imprisonment as a penalty for murder. While doing so, the Code instructs to the Court as to its application. The changes which the Code had undergone in the last three decades clearly indicate that Parliament has taken note of contemporary criminological thought and government. It is not difficult to discern that in the Code, there is definite swing towards life imprisonment. “Death sentence is ordinarily ruled out and can only be imposed for “special reasons”, as provided in Section 354 (3). There is another provision in the Code which also uses the significant expression “special reason”. It is Section 361. Section 360 of the 1973 Code re-enacts, in substance, Section 562 of the Criminal Procedure Code, 1898 (in short “the old Code”). Section 361 which is a new provision in

the Code makes it mandatory for the court to record “special reasons” for not applying the provisions of Section 360. Section 361 thus casts a duty upon the court to apply the provisions of Section 360 wherever it is possible to do so and to state “special reasons” if it does not do so. In the context of Section 360, the “special reasons” contemplated by Section 361 must be such as to compel the court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. This is some indication by the legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. Section 361 and Section 354(3) have both entered the statute-book at the same time and they are part of the emerging picture of acceptance by the legislature of the new trends in criminology. It would not, therefore, be wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform

must necessarily play the most prominent role in determining the sentence to be awarded. Special reasons must have some relation to these factors. Criminal justice deals with complex human problems and diverse human beings. A Judge has to balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed.” (para 14).

2.7.3. The Hon’ble Supreme Court further observed:

“It should be borne in mind that before the amendment of Section 367(5) of the old Code, by the Criminal Procedure Code (Amendment) Act, 1955 (26 of 1955) which came into force on 1.1.1956, on a conviction for an offence punishable with death, if the court sentenced the accused to any punishment other than death, the reason why sentence of death was not passed had to be stated in the judgment. After the amendment of Section 367(5) of the old Code by Act 26 of 1955, it is not correct to hold that the normal penalty of imprisonment for life cannot be awarded in the absence of

extenuating circumstances which reduce the gravity of the offence. The matter is left, after the amendment, to the discretion of the court. The court must, however, take into account all the circumstances, and state its reasons for whichever of the two sentences it imposes in its discretion. Therefore, the former rule that the normal punishment for murder is death is no longer operative and it is now within the discretion of the court to pass either of the two sentences prescribed in this section; but whichever of the two sentences he passes, the Judge must give his reasons for imposing a particular sentence. The amendment of Section 367(5) of the old Code does not affect the law regulating punishment under IPC. This amendment relates to procedure and now courts are no longer required to elaborate the reasons for not awarding the death penalty; but they cannot depart from sound judicial considerations preferring the lesser punishment.

Section 354(3) of the Code marks a significant shift in the legislative policy underlying the old Code as in force

immediately before 1.4.1974, according to which both the alternative sentences of death or imprisonment for life provided for murder were normal sentences. Now, under Section 354(3) of the Code the normal punishment for murder is imprisonment for life and death penalty is an exception. The court is required to state the reasons for the sentence awarded and in the case of death sentence “special reasons” are required to be stated; that is to say, only special facts and circumstances will warrant the passing of the death sentence.”

2.7.4 In Allauddin Mian and others Vs State of Bihar (1989) 3 SCC 5, the Supreme Court laid down certain broad guidelines for determining choice of sentence by Courts. It will be useful to refer to them as under:

“In our justice delivery system several difficult decisions are left to the presiding officers, sometimes without providing the scales or the weights for the same. In cases of murder, however, since the choice is between capital punishment and life imprisonment the legislature has provided a guideline in the form of sub-section (3) of Section 354 of the Code of Criminal Procedure, 1973 (“the Code”) which reads as under:

When the conviction is 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 reasons for the sentence awarded, and, in the case of sentence of death, the special reason for such sentence.

This provision makes it obligatory in cases of conviction for an offence punishable with death or with imprisonment for life or for a term of years to assign reasons in support of the sentence awarded to the convict and further ordains that in case the judge awards the death penalty, “special reasons” for such sentence shall be stated in the judgment. When the

law casts a duty on the judge to state reasons it follows that he is under a legal obligation to explain his choice of the sentence. It may seem trite to say so, but the existence of the ‘special reasons clause’ in the above provision implies that the court can in fit cases impose the extreme penalty of death. Where a sentence of severity is imposed, it is imperative that the judge should indicate the basis upon which he considers a sentence of that magnitude justified. Unless there are special reasons, special to the facts of the particular case, which can be catalogued as justifying a severe punishment the judge would not award the death sentence. It may be stated that if a judge finds that he is unable to explain with reasonable accuracy the basis for selecting the higher of the two sentences his choice should fall on the lower sentence. In all such cases the law casts an obligation on the judge to make his choice after carefully examining the pros and cons of each case. It must at once be conceded that offenders of some particularly grossly brutal crimes which send tremors in the community have to be firmly dealt with to protect the community from the perpetrators of such crimes. *Where the incidence of a*

certain crime is rapidly growing and is assuming menacing proportions, for example, acid pouring or bride burning, it may be necessary for the courts to award exemplary punishments to protect the community and to deter others from committing such crimes (emphasis supplied). Since the legislature in its wisdom thought that in some rare cases it may still be necessary to impose the extreme punishment of death to deter others and to protect the society and in a given case the country, it left the choice of sentence to the judiciary with the rider that the judge may visit the convict with the extreme punishment provided there exist special reasons for so doing.

Even a casual glance at the provisions of the Penal Code will show that the punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs the punishments prescribed are strict whereas for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of the punishment is left to the discretion of the judge with only the outer limits

stated. There are only a few cases where a minimum punishment is prescribed. The question then is what procedure does the judge follow for determining the punishment to be imposed in each case to fit the crime? The choice has to be made after following the procedure set out in sub-section (2) of Section 235 of the Code. The sub-section reads as under:

If the accused is convicted, the judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the courts are generally required to make the choice from a wide range of discretion in the

matter of sentencing. To assist the court in determining the correct sentence to be imposed the legislature introduced sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality.

- 2.7.5 Sentences of severity are imposed to reflect the seriousness of the crime, to promote respect for the law, to provide just punishment for the offence, to afford adequate deterrent to criminal conduct and to protect the community from further similar conduct.

It serves a threefold purposes (i) punitive; (ii) deterrent; and (iii) protective. That is why the Court in **Bachan Singh case** (1980) 2 SCC 684 observed that when the question of choice of sentence is under consideration the court must not only look to the crime and the victim but also the circumstances of the criminal and the impact of the crime on the community. Unless the nature of the crime and the circumstances of the offender reveal that the criminal is a menace to the society and the sentence of life imprisonment would be altogether inadequate, the court should ordinarily impose the lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only. In the subsequent decision of **Machhi Singh Vs State**

of Punjab (1983) 3 SCC 470, the Court, after culling out the guidelines laid down in **Bachan Singh** case (supra), observed that only in those exceptional cases in which the crime is so brutal, diabolical and revolting as to shock the collective conscience of the community, would it be permissible to award the death sentence.

2.7.6 The following guidelines which emerge from **Bachan Singh** case [(1980) 2SCC 684] will have to be applied to the facts of each individual case where the question of imposition of death sentence arises, as given in **Machhi Singh case** (1983) 3SCC 470 at p. 489.

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

- (ii) Before opting for the death penalty the circumstances of the ‘offender’ also require to be taken into consideration along with the circumstances of the ‘crime’.

- (iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and

circumstances of the crime and all the relevant circumstances.

- (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

2.7.7 In rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community

may entertain such sentiment in the following circumstances as observed by the Supreme Court in **Lehna Singh** case (supra, at p. 86, paras 23-24):

- (1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.
- (2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-à-vis whom the

murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or *in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.* (emphasis supplied)

(4) When the crime is enormous in proportion; For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

2.7.8 If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test

for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

2.8 Some of the cases where the Hon'ble Supreme Court has commuted capital punishment to life imprisonment:

2.8.1 In **Machhi Singh Vs State of Punjab** (1983) 3 SCC 470, the three-Judge Bench of the Supreme Court considered the Constitution Bench decision **Bachan Singh Vs State of Punjab** and came to hold that where there is no proof of extreme culpability, the extreme penalty need not be given. The Supreme Court also further observed that the extreme penalty of death may be given only in the rarest of rare cases where aggravating

circumstances are such that the extreme penalty meets the ends of justice.

2.8.2 In **Suresh Vs State of U.P.**, 2001 Cr. L.J. 1462 (SC), the conviction was based upon the evidence of a child witness and Chandrachud, C.J. speaking for the Court held that it will not be safe to impose extreme penalty of death in a conviction based on the deposition of a child. It was further observed that the extreme sentence cannot seek its main support from the evidence of a child witness and it is not safe enough to act upon such deposition, even if true, for putting out a life.

2.8.3 In **Raja Ram Yadav Vs State of Bihar**, 1996 Cr. L.J. 2307: AIR 1996 SC 1631, the Hon'ble Supreme Court came to

hold that a gruesome and cruel incident did take place and yet did not think it appropriate to affirm a sentence of death and commuted to life imprisonment. The Hon'ble Apex Court held that:

“We feel that although the murders had been committed in a premeditated and calculated manner with extreme cruelty and brutality, for which normally sentence of death will be wholly justified, in the special facts of the case, it will not be proper to award extreme sentence of death.”

2.8.4 In “**Sheikh Abdul Hamid & Anr. Vs State of M.P.** (1998) 3 SCC 188” the Hon'ble Supreme Court has held that:

“Special reasons given by the trial court in awarding death sentence to the appellants and confirmed by the High Court, were that it was such a cruel act where the appellants have not even spared the innocent child and the motive being to grab the property. We have given our earnest consideration to the question of sentence and the reasons given by the High

Court for awarding death sentence to the appellants. Having regard to the guidelines stated above, it may be noticed that in the present case it was not pointed out by the prosecution that it was a cold-blooded murder. There is nothing on record to show how the murder has taken place. In the absence of such evidence, we do not find that the case

before us falls within the category of the rarest of rare cases, deserving extreme penalty of death.”

2.8.5 In “*Ronny Alias Ronald James Alwaris & Ors. Vs State of Maharashtra* (1998) 3 SCC 625” where there were more than one offender, it has been held by the Hon’ble Supreme Court that:

“The possibility of reform and rehabilitation, however, cannot be ruled out. From the facts and circumstances, it is not possible to predict as to whom among the three played which part. It may be that the role of one has been more culpable in degree than that of the others and vice versa. Where in a case like this it is not possible to say as to whose case falls within the “rarest of the rare” cases, it would serve the ends of justice if the capital punishment is commuted into life imprisonment.”

2.8.6 In “*Gurnam Singh & Anr. Vs State of Punjab* (1998) 7 SCC 722”. The Hon’ble Supreme Court while commuting the death sentence to imprisonment for life has said that:

“We are also of the view that in the absence of any evidence as regard the motive for abduction and as regards the accused who actually caused their deaths and the manner and circumstances in which they were caused, the Designated Court should not have imposed death sentence upon appellant Gurnam Singh.”

2.8.7 In “*Allauddin Mian & Ors. Vs State of Bihar* (1989) 3 SCC 5” The Hon’ble Supreme Court has said that:

“Having come to the conclusion that Allauddin Mian and Keyamuddin Mian are guilty of murder, the next question is what punishment should be awarded to them, namely, whether extinction of life or incarceration for life. Section

302, IPC casts a heavy duty on the court to choose between death and imprisonment for life. When the Court is called upon to choose between the convicts cry 'I want to live' and the prosecutor's demand 'he deserves to die' it goes without saying that the court must show a high degree of concern and sensitiveness in the choice of sentence."

2.9 Life Imprisonment means imprisonment for whole life:

2.9.1 In Section 304B, the maximum sentence that can be awarded is imprisonment for life.

2.9.2 In **Gopal Vinayak Godse Vs State of Maharashtra**, (AIR 1961 SC 600: 1961 Cr. L.J. 736: 1961 (3) SCR 440), the Constitution Bench of the Hon'ble Supreme Court held that the sentence of imprisonment for life is not for any definite period and the imprisonment for life must, prima facie, be treated as imprisonment for the whole of the remaining period of the convicted person's natural life.

2.9.3 In **Zahid Hussein Vs State of W.B.**, (2001) 3 SCC 750, the Hon'ble Supreme Court has observed that:

"4. The Supreme Court after examining the provisions of Article 161 of the Constitution, Cr.PC and IPC has consistently held that a sentence of imprisonment for life does not automatically expire at the end of 20 years of imprisonment including remission, as a sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to

exercise its discretion to remit either the whole or part of the sentence. (See *Gopal Vinayak Godse Vs State of Maharashtra*, AIR 1961 SC 600: 1961 Cr. L.J. 736: (1961) 3SCR 440; *State of M.P. Vs Ratan Singh*, AIR 1976 SC 1552: 1976 Cr. L.J. 1192: (1976) 3SCC 470: 1926 SCC (Cr.) 428; *Sohan Lal Vs Asha Ram*, (1981) SCC 106; and *Bhagirath Vs Delhi Admn.*, 1965 Cr. L.J. 1179 (1986) 2 SCC580: 1985 SCC (Cr.) 280.

5. We extract below sub-rules (4) and (29) of Rule 591 of the West Bengal Rules for the Superintendence and Management of Jails (for short ‘the Rules’).

“(4) In considering the cases of prisoners submitted to it under sub-rules (1) and (2), the State Government shall take into consideration – (i) the circumstances in each case, (ii) the character of the convict’s crime, (iii) his conduct in prison, and (iv) the probability of his reverting to criminal

habits or instigating others to commit crime. If the State Government is satisfied that the prisoner can be released without any danger to the society or to the public it may take steps for issue of orders for his release under Section 401 of the Code of Criminal Procedure, 1898.

(29) Every case in which a convict, who has not received the benefit of any of the foregoing Rules, is about to complete a period of 20 years of continued detention including remission earned, if any, shall be submitted three months before such completion by the Superintendent of the Jail in

which the convict is for the time being detained, through the Inspector General, for orders of the State Government. If the convict's jail records during the last three years of his detention are found to be satisfactory the State Government may remit the remainder of his sentence.”

6. These sub-rules do not provide for automatic release of a life convict after he has completed 20 years of the detention including remission. Under these sub-rules the only right which a life convict can be said to have acquired is a right to have his case put up by the prison authorities in time to the State Government for consideration for premature release and in doing so that the Government would follow the guidelines mentioned in sub-rule (4).

7. The Explanation to Section 61 of the Act is as follows:“Explanation .- For the purpose of calculation of

the total period of imprisonment under this section, the period of imprisonment for life shall be taken to be equivalent to the period of imprisonment for 20 years.”

8. The Explanation came for consideration by the Supreme Court in *Laxman Naskar (Life Convict) Vs State of W.B.* (2000) 7 SCC 626: 2000 SCC (Cr.) 280, and this Court held that the said Explanation is only for the purpose of calculation of the total period of imprisonment of a life convict under Section 61, which shall be taken to be equivalent to the period of imprisonment for

20 years and a `life convict would not be entitled to automatic release under this provision of law. We, therefore, find no substance in the submission made by Mr.Malik, the learned Senior Counsel. [Mr. Malik had submitted that in view of sub-rules (4) and (29) of Rule 591, all the petitioners were entitled to be released as of right as their total period of imprisonment was `more than 20 years].

11. Following guidelines were framed by the Government or the premature release of life convicts, namely:

- (i) Whether the offence is an individual act of crime without affecting the society at large.
- (ii) Whether there is any chance of future recurrence of committing crime.
- (iii) Whether there is any fruitful purpose of confining of these convicts any more.
- (iv) Whether the convicts have lost potentiality in committing crime.
- (v) Socio-economic condition of the convicts' families.

12. The Review Board refused to grant premature release of the petitioners on the following grounds: (1) police report is adverse; (2) the convicts are not overaged persons and as such have not lost the potentiality in committing crime; (3) since other co-convicts were trying to come out from jail, there was a possibility of regrouping for antisocial activities; (4) the offence was not an individual act of crime but was affecting society at large; (5) convicts were antisocial; and (6) the witnesses who had deposed at

the trial as well as local people were apprehensive of retaliation in the event of premature release.

14... The conduct of the petitioners while in jail is an important factor to be considered as to whether they have lost their potentiality in committing crime due to long period of detention. The views of the witnesses who were examined during trial and the people of the locality cannot determine whether the petitioners would be a danger to the locality, if released prematurely. This has to be considered keeping in view the conduct of the petitioners during the period they were undergoing sentence. Age alone cannot be a factor while considering whether the petitioners still have potentiality of committing crime or not as it will depend on changes in mental attitude during incarceration.”

2.9.4 In **Ravindra Trimbak Chouthmal Vs State of Maharashtra**, (1996) 4 SCC 148, Hon’ble Supreme Court commuted the sentence of death to imprisonment for life and further ordered that sentence passed under Section 201 to run not

concurrently but consecutively: While doing so, the Court observed:

“We have given considered thought to the question and we have not been able to place the case in that category which could be regarded as the “rarest of the rare” type. This is so because dowry death has ceased to belong to that species of killing. The increasing number of dowry deaths would bear this. To halt the rising graph, we, at one point, thought to

maintain the sentence; but we entertain doubt about the deterrent effect of death penalty. We, therefore, resist ourselves from upholding the death sentence, much though we would have desired annihilation of a despicable character like the appellant before us. We, therefore, commute the sentence of death to one of RI for life imprisonment.

But then, it is a fit case, according to us, where, for the offence under Sections 201/34, the sentence awarded, which is RI for seven years being the maximum for a case of the present type, should be sustained, in view of what had been done to cause disappearance of the evidence relating to the commission of murder – the atrocious way in which the head was severed and the body was cut in nine pieces. These cry for maximum sentence. Not only this, the sentence has to run consecutively, and not concurrently, to show our strong disapproval of the loathsome, revolting and dreaded device adopted to cause disappearance of the dead body.”

2.10 302 and 304 B of the I.P.C.:

2.10.1 Section 304B and Section 302 are clearly distinguishable. The court before framing of the charges should see and analyze that whether charge can be framed against the accused under

Section 302 or not. Charge under 304B is made out in those cases where what is not clear is the cause of the death. The Section says where death is caused due to burns or bodily injuries or caused otherwise than under normal circumstances. This shows that it may be clear that the death was due to burns or bodily injuries or is otherwise than under normal circumstances (courts say this covers suicide also) so what is not clear is whether those persons who

subject to cruelty or harassment are responsible for the cause of the burns or bodily injuries.

2.10.2 In *Hemchand Vs State of Haryana*, 1994 (6) SCC 727, the Hon'ble Supreme Court has held that Section 113B of the Evidence Act says that when the question is whether a person has committed a dowry death of a woman and it is shown that soon before her death, such woman has been subjected by such person to cruelty or harassment for, or in connection with any demand for dowry, the court shall presume that such person had caused the dowry death. The Hon'ble Supreme Court has further held that proof of direct connection of the accused with her death is not essential. The absence of direct connection of the accused with death has to be taken into consideration in balancing the sentence to be awarded to the accused.

2.10.3 In *Ashok Kumar Vs State of Rajasthan*, 1991 (1) SCC 166, the Hon'ble Supreme Court has laid down that motive for a murder may or may not be. But in dowry deaths, it is inherent. And hence, what is required of the court is to examine is as to who

translated it into action as motive for it is not individual, but of family.

2.11 Framing of charge - whether u/s 302 or 304 B:

2.11.1 In *Shamnsaheb M. Multtani Vs State of Karnataka*, (2001) 2 SCC 577 the Hon'ble Supreme Court has observed:

“The question raised before us is whether in a case where prosecution failed to prove the charge under Section 302 IPC, but on the facts the ingredients of Section 304-B have winched to the fore, can the court convict him of that offence in the absence of the said offence being included in the charge.

14. Sections 221 and 222 of the Code are the two provisions dealing with the power of a criminal court to convict the accused of an offence which is not included in the charge. The primary condition for application of Section 221 of the Code is that the court should have felt doubt, at the time of framing the charge, as to which of the several acts (which may be proved) will constitute the offence on account of the nature of the acts or series of acts alleged against the accused. In such a case the Section permits to convict the accused of the offence which he is shown to have committed though he was not charged with it.

15. Section 222(1) of the Code deals with a case “when a person is charged with an offence consisting of several particulars”. The Section permits the court to convict the accused “of the minor offence, though he was not charged with it”. Sub-section (2) deals with a similar, but slightly different situation.

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

16. What is meant by “a minor offence” for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the Section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-à-vis the other offence.

17. The composition of the offence under Section 304-B IPC is vastly different from the formation of the offence of murder under Section 302 IPC and hence the former cannot be regarded as minor offence vis-à-vis the latter. However, the position would be different when the charge also

contains the offence under Section 498-A IPC (husband or relative of husband of a woman subjecting her to cruelty).

18. So when a person is charged with an offence under Sections 302 and 498-A IPC on the allegation that he caused

the death of a bride after subjecting her to harassment with a demand for dowry, within a period of 7 years of marriage, a situation may arise, as in this case, that the offence of murder is not established as against the accused. Nonetheless, all other ingredients necessary for the offence under Section 304-B IPC would stand established. Can the accused be convicted in such a case for the offence under Section 304-B IPC without the said offence forming part of the charge?

19. A two-Judge Bench of the Supreme Court (K. Jayachandra Reddy and G.N. Ray, JJ.) 1994 SCC (Cr.) 235 has held in *Lakhjit Singh Vs State of Punjab*, 1994 supp. 1 SCC 173, that if a prosecution failed to establish the offence under Section 302 IPC, which alone was included in the charge, but if the offence under Section 306 IPC was made out in the evidence it is permissible for the court to convict the accused of the latter offence.

.....

21. The crux of the matter is this: Would there be occasion for a failure of justice by adopting such a course as to convict an accused of the offence under Section 304-B IPC

when all the ingredients necessary for the said offence have come out in evidence, although he was not charged with the said offence? In this context a reference to Section 464(1) of the Code is apposite:

“464. (1) No finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, *unless*, in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby”. (emphasis supplied)

22. In other words, a conviction would be valid even if there is any omission or irregularity in the charge, provided it did not occasion a failure of justice.

23. We often hear about “failure of justice” and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression “failure of justice” would appear, sometimes, as an etymological chameleon (the simile is borrowed from *Lord Diplock in Town Investments Ltd. Vs Deptt. Of the*

Environment, (1977) 1 All E.R 813: 1978 AC 359: (1977) 2 WLR 450 (HL). The criminal court, particularly the superior court should make a close examination to ascertain whether

there was really a failure of justice or whether it is only a camouflage.

....

25. We have now to examine whether, on the evidence now on record the appellant can be convicted under Section 304-B IPC without the same being included as a count in the charge framed. Section 304-B has been brought on the statute-book on 9-11-1986 as a package along with Section 113-B of the Evidence Act.

....

28. Under Section 4 of the Evidence Act “whenever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved”. So the court has no option but to presume that the accused had caused dowry death unless the accused disproves it. It is a statutory compulsion on the court. However it is open to the accused to adduce such evidence for disproving the said compulsory presumption, as the burden is unmistakably on him to do so. He can discharge such burden either by eliciting answers through cross-examination of the witnesses of the prosecution or by adducing evidence on the defence side or by both.

29. At this stage, we may note the difference in the legal position between the said offence and Section 306 IPC which was merely an offence of abetment of suicide earlier. The Section remained in the statute-book without any practical use till 1983. But by the introduction of Section 113-A in the Evidence Act the said offence under Section 306 IPC has acquired wider dimensions and has become a serious marriage-related offence. Section 113-A of the Evidence Act says that under certain conditions, almost similar to the conditions for dowry death the court *may presume* having regard to the circumstances of the case, that such suicide has been abetted by her husband etc. When the law says that the court may presume the fact, it is discretionary on the part of the court either to regard such fact as proved or not to do so, which depends upon all the other circumstances of the case. As there is no compulsion on the court to act on the presumption the accused can persuade the court against drawing a presumption adverse to him.

30. But the peculiar situation in respect of an offence under Section 304-B IPC, as discernible from the distinction pointed out above in respect of the offence under Section 306 IPC is this: Under the former the court has a statutory compulsion, merely on the establishment of two factual

positions enumerated above, to presume that the accused has committed dowry death. If any accused wants to escape from the said catch the burden is on him to disprove it. If he fails to rebut the presumption the court is bound to act on it.

31. Now take the case of an accused who was called upon to defend only a charge under Section 302 IPC. The burden of proof never shifts onto him. It ever remains on the prosecution which has to prove the charge beyond all reasonable doubt. The said traditional legal concept remains unchanged even now. In such a case the accused can wait till the prosecution evidence is over and then to show that the prosecution has failed to make out the said offence against him. No compulsory presumption would go to the assistance of the prosecution in such a situation. If that be so, when an accused has no notice of the offence under Section 304-B IPC, as he was defending a charge under Section 302 IPC alone, would it not lead to a grave miscarriage of justice when he is alternatively convicted under Section 304-B IPC and sentenced to the serious punishment prescribed there under, which mandates a minimum sentence of imprisonment for seven years.

31. The serious consequence which may ensue to the accused in such a situation can be limned through an illustration: If a bride was murdered within seven years of her marriage and there was evidence to show that either on

the previous day or a couple of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of Section 304-B IPC read with Section 113-B of the Evidence Act. But if the murder of his wife was actually committed either by a dacoit or by a militant in a terrorist act the husband can lead evidence to show that he had no hand in her death at all. If he succeeds in discharging the burden of proof he is not liable to be convicted under Section 304-B IPC. But if the husband is charged only under Section 302 IPC he has no burden to prove that his wife was murdered like that as he can have his traditional defence that the prosecution has failed to prove the charge of murder against him and claim an order of acquittal.

33. The above illustration would amplify the gravity of the consequence befalling an accused if he was only asked to defend a charge under Section 302 IPC and was alternatively convicted under Section 304-B IPC without any notice to him, because he is deprived of the opportunity to disprove the burden cast on him by law.

34. In such a situation, if the trial court finds that the prosecution has failed to make out the case under Section 302 IPC, but the offence under Section 304-B

IPC has been made out, the court has to call upon the accused to enter on his defence in respect of the said offence. Without affording such an opportunity to the accused, a conviction under Section 304-B IPC would lead to real and serious miscarriage of justice. Even if no such count was included in the charge, when the court affords him an opportunity to discharge his burden by putting him to notice regarding the prima facie view of the court that he is liable to be convicted under Section 304-B IPC, unless he succeeds in disproving the presumption, it is possible for the court to enter upon a conviction of the said offence in the event of his failure to disprove the presumption.

35. As the appellant was convicted by the High Court under Section 304-B IPC, without such an opportunity being granted to him, we deem it necessary in the interest of justice to afford him that opportunity. The case in the trial court should proceed against the appellant (not against the other two accused whose acquittal remains unchallenged now) from the stage of defence evidence. He is put to notice that unless he disproves the presumption, he is liable to be convicted under Section 304-B IPC”.

2.11.2 **In Shanti Vs State of Haryana** 1991(1) SCC 371, the Hon’ble Apex Court has held that Section 304B and 498A are not mutually exclusive. They deal with two

distinct offences. A person charged and acquitted under Section 304B can be convicted

under Section 498A without charge being framed, if such case is made. But from the point of view of practice and procedure and to avoid technical defects, it is advisable in such cases to frame charges under both the Sections. If the case is established against the accused he can be convicted under both the Sections but no separate sentence need be awarded under Section 498A in view of substantive sentence being awarded for major offence under Section 304B.

2.12 Summation

From the aforesaid, it may thus be seen that traditionally marriage has been a sacramental institution. It continues to be so even at present. However, over a period of time, dowry emerged as a social evil, leading to increasing number of deaths of innocent brides. This trend assumed alarming proportions and dimensions, which led the legislature to ponder over the issue and devise means to curb the menace of dowry deaths. Where the cases of bride deaths squarely meet the requirements of the offence of murder or any other offence under the Penal Code, the guilty persons can be proceeded against accordingly. The law provides for death penalty in case of murder. Here also the judicial trend has been to award death penalty in rarest of rare cases and not as a

matter of routine. The case law on the subject vividly brings out the judicial guidelines for determining as to whether a given case falls in the category of rarest of rare case. These are aptly reflected in the cases

where death sentence has been converted into life imprisonment. Generally, life sentence may extend to the whole life. The law, however, provides for release of life convicts upon completion of 20 years detention subject to certain conditions laid down in this regard. Inadequacies in the then existing laws were noted where cases of bride deaths for reason of dowry could not be clearly brought in Section 302. Nonetheless circumstances were found to be such which indicate the suspicious nature of death that warranted appropriate punishment in order to effectively curb the menace of dowry death. Accordingly, a new substantive offence of dowry death was created on presumptive basis, casting the onus to rebut the presumption on the accused. The Evidence Act too was amended to provide for certain presumptions in this regard. The offence of dowry death as provided in Section 304-B is not the same offence as murder in terms of Section 302. A case may or may not fall under both the sections. Where an accused is charged for one offence, he can be convicted for another offence if the charged offence is failed to be made out but the ingredients of another offence are satisfied on available evidence, provided it does not lead to miscarriage of justice. In spite of such provisions in the law, the incidents of dowry deaths are not showing any significant decline or abatement. Hence the demand for more stringent punishment of death for the offence of dowry deaths.

Whether such demand has any substance or not, will be discussed in the succeeding chapter.

CHAPTER-3

CONCLUSIONS AND RECOMMENDATIONS

3.1 Theoretical Perspective:

Different societies react differently to crimes and their perpetrators depending upon their respective value system and prevailing philosophy at a given time. Reasons for commission of crimes and the personality traits of criminals are so varied, complex and innumerable that these are not amenable to any exhaustive description and comprehension. Criminals are sometimes viewed as born criminal and psychopath and sometimes as victims of circumstances. This has been very aptly described by Elmer Hubart Johnson when he observed in *Crime, Correction and Society* at page 3 that a criminal may be described as a monster or be pictured as a hunted animal or as the helpless victim of brutality. Likewise, socio-economic reasons, among others, are quite often ascribed as explanation for commission of crimes. Over a period of time, social approaches and responses to crimes and their perpetrators have been generalized and classified into different theoretical profiles. Theories of criminality have a two-fold purpose: they help to organize existing information about criminal behaviour into a coherent, systematic framework, and they serve to point out directions for further research by indicating potentially fruitful leads to be explored. In addition, theories of criminality may help establish some rational basis for Programmes

aimed at controlling, reducing, eliminating or preventing crime and delinquency. (See *Criminology and Crime An Introduction* by Harold J. Vetter and Ira J. Silverman (1986) p. 235). Accordingly, we see the emergence of certain theories of penology which are imbibed in varied degrees and proportion in almost all the legal orders the world over. Thus, we have the punitive approach which is traditional in nature and universal in its import and application whereby the criminal is viewed as a bad guy and punishment is inflicted on the offender as retribution and also to protect the society by deterring members of the society from commission of crimes. Then, there is another approach called therapeutic approach. According to this, a criminal is a victim of circumstances. In this approach, a criminal is viewed as a sick person, requiring treatment. Thus, it may be seen that in the two approaches referred to above, criminal is the center of attraction and is viewed in two diametrically opposed perspectives and therefore, is meted out different treatment in each of these two approaches. There is yet another theory wherein the focus is not on the criminal but on the factors that lead one to become criminal and thrust is on removal of such factors with a view to prevent commission of crimes. This approach is thus called the preventive approach. Besides, certain other theories too have developed over the years dealing with different aspects of criminology. There are some who deals with the manner in which criminal should be dealt with. To mention some of these are classical and positivist theories, retribution theory, utilitarian theory, deterrent theory, corrective and reformative theory and rehabilitatory theory,

humanitarian theory, etc. Then there are some others which focus on the factors

that lead one to commit a crime. To mention, some of these theories are socio-economic theories, sociological theories, socio-psychological and psychiatric and biological and anthropological theories. A blend of all these approaches will be found in all the legal systems the world over though in different proportions and degrees. These approaches are, however, not mutually exclusive. Rather they supplement each others. All these approaches deal with different facets of criminology and are, as such, necessary for understanding and appreciating criminal jurisprudence, especially, penology in an integrated manner and helps in the formulation of public policy on crimes and punishment by way of prevention and correction.

3.2 Kinds of Punishments:

Various kinds of punishments are permissible under the law to punish persons found guilty of commission of different offences/crimes. To mention, some of these are corporal punishment, fines, forfeiture and confiscation of properties, banishment, externment, imprisonment, capital punishment or death sentence, corrective labour, compensation for injury by the offender, public censure, etc. Choice of appropriate sanction out of many that can be permissible under law may arise at two stages, one at the legislative stage and another at the stage of administration of justice in a given case. The first relates to the prescription of punishment for a given offence in the legislation.

That may lay down the maximum and the minimum punishment for an offence. The second stage relates to punishing an individual

criminal within permissible limits so prescribed in the law depending upon the facts and circumstances of a given case. We are concerned here with the first stage, that is to say, whether Section 304B of Indian Penal Code, 1860 should be amended to provide for death sentence for the offence of dowry death. The section presently provides for life imprisonment and a minimum sentence of seven years imprisonment. The subject of death sentence or capital punishment has generated endless debates the world over that failed to reach unanimous universal conclusions. India has retained death sentence on its statute book. However, in practice it is sparingly used in the rarest of rare cases. There is a distinct tendency to restrict its use to gravest offences committed in a diabolic way that shocks the conscience of the public at large.

3.3 Suggestions by the National Commission for Women

The issue relating to the deep-rooted evil of dowry was also taken up in the convention organized by the **National Commission for Women** on 22nd November, 2005 at Symposia Hall of NSC, Pusa, New Delhi. The Commission proposed an amendment to enhance the punishment for dowry deaths under Section 304-B, IPC for the following reasons.

- (a) To keep this offence at par with murder and by no stretch of imagination it is less grave an offence than the murder;

- (b) To create deterrence in the minds of the people indulging in such heinous crimes by now it is more

than clear that neither the Dowry Prohibition Act nor the amended provisions of IPC could deter the people and could not register the success. The Committee found that because of the above said discrepancies in the provision the law has failed in its objective. By incorporating the above changes law can be made effective.

- (c) Also the time limit of presumption may be increased because seven years is very short a time and often the offence is executed in a preplanned manner.

- (d) The minimum punishment should be increased from seven to ten years.

3.4 Capital Punishment:

Capital punishment, also known as the Death Penalty, is the execution of a convicted criminal by the state as punishment for crimes known as capital crimes or capital offences. It is the infliction by due legal process of the penalty of death as a punishment for crime. The idea of capital punishment is of great antiquity and formed a part of the primal concepts of the human race. This has been one of the most primitive and commonly used forms of inflicting punishment for criminals as well as political enemies. In the world-wide scenario prevalent now-a-days, countries like most European (all except Belarus), Latin American, many Pacific States (including Australia, New Zealand and East

Timor) and Canada have done away with capital punishment. Even among the non-Democratic nations, the practice is rare but not

predominant. The latest countries to abolish the death penalty for all crimes are Philippines in June 2006 and France in February 2007. Still many civilized nations continue to harbour this punitive tradition. Chief among them are United States, Guatemala, and most of the Caribbean as well as some democracies in Asia (e.g. Japan and India) and Africa (e.g. Botswana and Zambia).

3.5 The Indian Scenario

3.5.1 In India, the deliberated penal penalty can be imposed only within the ambits of Sections. 121 (Waging war against the State), 132 (abetting mutiny actually committed), 194 (giving or fabricating false evidence, upon which an innocent person suffers death), 302 (murder), 305 (abetment of suicide of a minor or insane, or intoxicated person), 307 (attempt to murder by a life convict), and 396 (dacoity accompanied with murder) of the Indian Penal Code. Further, cases of constructive liability leading to death penalty may arise under Sections 34 and 109-111 also. Besides the Penal code, there are many other laws like Explosive Substances Act, 1908; Narcotics Drugs and Psychotropic Substances Act, 1985; Prevention of Terrorism Act, 2002; Terrorist and Disruptive Activities (Prevention) Act, 1987 (since repealed); etc. which provide for imposition of capital punishment.

3.5.2 Hon'ble Supreme Court has ruled that death penalty per se isn't unconstitutional, although some of the modes of carrying out

the same may be otherwise. The Hon'ble Supreme Court held that delay in carrying out execution of capital sentence entitles its

commutation to life imprisonment, but later overruled its decision. Peculiarly, the deterrent value of this penal punishment has been recognized in several cases by various jurists. (See **Jagmohan Singh Vs State of Uttar Pradesh**, AIR 1973 SC 947; **Rajendra Prasad Vs State of Uttar Pradesh** AIR 1979 SC 916; **Bachan Singh Vs State of Punjab** AIR 1980 SC 898; **Machhi Singh Vs State of Punjab** AIR 1983 SC 957)

3.5.3 There are two conflicting views which can be broadly classified into two schools of thoughts, namely, the Retentionists (Pro-Capital Sentencing) and the Abolitionists (Anti-Capital Sentencing), Functioning under the Retentionists' perspective, Utilitarian school of thought advocates that capital punishment prevents the convict from replicating the offence and acts as a deterrent for future offenders. Correspondingly, Retributive theorists lay down that as a foundational matter of justice, crime deserves to be reprimanded, and that should be equivalent to the injury caused. More recently, the exponents of capital punishment are stressing that the death penalty discourages criminal conduct on the part of those who are aware of the existence and horrors of this mode of treating criminals.

3.5.4 Some of the famous Abolitionists like Montesquieu, Voltaire, Beccaria, etc. have argued that since the penalty is irrevocable, it should not be resorted to.

3.5.5 Most anti-death penalty organizations, most notably Amnesty International, base their stance on human rights

arguments. The anti-death penalty scholars claim that the society seeks an escapist attitude by taking away the life of an individual. However, in India, adequate safeguards shield penalizing powers, in this regard. Even if a High Court awards death sentence to the accused, on appeal against the Trial Court's acquittal of the same, the right of appeal to the Apex court is automatic. Additionally, a condemned prisoner retains the right to get his sentence commuted, suspended, remitted, reprieved, respited or pardoned by the Governor of the State concerned, followed by the President of India as provided in the Constitution of India.

3.5.6 Perhaps, recent trends of public sentiment against capital punishment represent a broader realization that correction is more important to society than punishment.

3.5.7 It may be pertinent to note that this Commission has dealt in details with diverse facets of capital punishment, in its 35th Report, September, 1967. The answer to the query under consideration herein may be found in principle in that report although the question was not specifically dealt with reference to dowry death. In para 77 of that Report, it was observed that at first sight, the capital offences (listed above in para 69) may not show any common element; but a close analysis reveals that there is a thread linking all these offences, namely, the principle that the sanctity of human life must be protected. It is the will or willful

exposure of life to peril that seems to constitute the basis for a provision for the sentence of death. The Commission applied this principle while considering the question whether any other offence under the

Indian Penal Code or any other law should be made capital offence. The following offences were considered by the Commission in this regard, namely, adulteration of food and drugs, offences against Army, arson, espionage, kidnapping and abduction, homicide by negligence, rape, sabotage, smuggling and treason (Paras 462 to 540 at pp.156-179). The Commission did not recommend that any other offences under the Indian Penal Code or any other law should be punishable with death (Para 3(b) of Summary of Main Conclusions and Recommendation at p.356). While reaching these conclusions, the Commission reiterated that the cardinal principle of willful disregard of human life, which is the foundation of the sentence of death for the existing capital offences would have to be borne in mind and the question examined whether the existing law was not adequate. If it was found to be inadequate, then before embarking on an amendment, it would have to be considered whether a precise formula could be evolved which, while conforming to this principle, could define clearly the scope of the acts of commission that were proposed to be made capital (see Para 476 at p.160). Thus, the Commission, inter alia, observed that where an act of adulteration or arson causes death and the conditions of Section 300 on murder, particularly as to mens rea, are satisfied the case could be dealt with under Section 300/302, IPC and death sentence could be awarded under the law. If not so, then making such an act as a

capital offence would not be in symmetry with the scheme of the Indian Penal Code (See paras 463 – 466 at pp.156-157). Applying the same analogy to cases of dowry related deaths, if the conditions of murder in Section 300 are satisfied, the offender can certainly be awarded death sentence

under Section 302 as per the norms laid down by the apex court in various cases for the award of death sentence, the most sacrosanct norm being the dictum of ‘rarest of rare cases’. If not, then making dowry related death as a capital offence may not be in symmetry with the schemes of the Indian Penal Code.

3.6 Dowry Death vis-à-vis Murder:

3.6.1 Dowry death may or may not be a case of murder. Where it is a case of murder, death sentence can be awarded in appropriate cases. But when it is not so, imposition of death sentence may not be in symmetry with the cardinal principle underlying the capital offences in the Indian Penal Code. It may be noted that even before insertion of Section 304B on dowry death in 1984, there have been cases of dowry deaths which were prosecuted for murder under Section 300, IPC. Thus, **State (Delhi Administration) Vs Laxman Kumar** and others (AIR 1986 SC 250) was a case of bride burning wherein the trial court accepted the prosecution case and considering it to be one of the atrocious dowry deaths, had sentenced each of the respondents to death, namely, the husband, the mother-in-law and brother-in-law. The High Court, however,

acquitted the respondents of the charge of murder of one Sudha by setting fire to her. On appeal, the Supreme Court partly allowed the appeal. In para 47 of the Judgment, the Court made the following observations.

“47. The next relevant aspect for consideration is what should be the proper punishment to be imposed. The

learned trial Judge had thought it proper to impose the punishment of death. Acquittal intervened and almost two years have elapsed since the respondents were acquitted and set at liberty by the High Court. *In a suitable case of bride burning, death sentence may not be improper* (emphasis supplied). But in the facts the case and particularly on account of the situation following the acquittal at the hands of the High Court and the time lag, we do not think it would be proper to restore the death sentence as a necessary corollary to the finding of guilt. We accordingly allow both the appeals partly and direct that the two respondents, Smt. Shakuntala and Laxman kumar shall be sentenced to imprisonment for life. Both the appeals against Subhash stand dismissed and his acquittal is upheld. Steps shall be taken by the trial Judge to give effect to this Judgement as promptly as feasible (at p.266).”

- 3.6.2 **Smt. Lichhamadevi Vs State of Rajasthan** AIR 1988 SC 1785 was another case of dowry death that arose before the insertion of Section 304B in the Indian Penal Code. In this

case, the trial Court acquitted the accused but High Court, reversing her acquittal, awarded death sentence. On appeal, the Supreme Court modified the death sentence to life imprisonment in view of the two opinions of the Courts below as to the guilt of the accused. It will be expedient to refer to the following observations made by the Court in this regard;

“15. The case before us is not an accidental fire causing the death. This is certainly a case “being put on fire by someone”. The deceased having been burnt is not in dispute. It is a case of bride burning. The Court in **State (Delhi Admn.) Vs Lakshman Kumar**, 1985 Supp (2) SCR 898 at p.931: (AIR 1986 SC 250 at p.266) has observed that *in the case of bride burning, death sentence may not be improper. We agree. The persons who perpetrate such barbaric crime, without any human consideration must be given the extreme penalty.* But in the present case, we do not think that the High Court was justified in awarding death sentence on the accused-appellant. In 1977 she was acquitted by the trial court. In 1985 the High Court reversed her acquittal and gave the extreme penalty. It was after a gap of eight years. When there are two opinions as to the guilt of the accused by the two Courts, ordinarily the proper sentence would be not death but imprisonment for life. Apart from that, there is no direct evidence that the appellant had sprinkled kerosene on Pushpa and lighted fire on her. There must have been other persons also who have combined and conspired together and committed the murder. It is unfortunate that they are not before the Court. From the Judgment of the High Court, it is apparent that the decision to award death sentence is more out of anger than on reasons. The Judicial discretion should not be allowed to be swayed by emotions and indignation.”

3.6.3 **State of Punjab Vs Amarjit Singh** AIR 1988 SC 2013 is another pre-Section 304B case of dowry death where the accused was convicted and sentenced for life imprisonment for his wife being put in fire for not satisfying his dowry demands.

3.6.4 **Subedar Tiwari Vs State of U.P. and others** AIR 1989 SC 737 is another case of bride burning where a highly educated wife died on unnatural death by burning within a short span of nine months of her marriage. Although it was not a dowry death, yet the case is relevant for the reason that the husband could be

prosecuted and sentenced to suffer imprisonment for life for such an unnatural death under Section 302 if both accident and suicide could be excluded on facts.

3.6.5 **Panakanti Sampath Rao Vs State of A.P.**, (2006) 9 SCC 658 is a case where the accused was charged with commission of offences under Sections 498A, 302 and 304B IPC and Sections 3 and 4 of the Dowry Prohibition Act. The trial court acquitted him of the offence of murder under Section 302 but convicted him on the remaining counts. He was sentenced to life imprisonment under Section 304B besides the punishment awarded under other charges. On appeal, the High Court found the accused guilty of the offence under Section 302 IPC. This was affirmed by the Supreme Court also.

3.6.6 **Wazir Chand and another Vs State of Haryana**, AIR 1989 SC 378 is another case of dowry death wherein the accused persons, the husband and the father-in-law were proceeded against

under Ss. 306 r/w 107 for abetting commission of suicide but were acquitted of the charge as suicide could not be proved. Yet they were convicted under Section 498A in view of the fact the harassment for dowry was proved.

3.6.7 **State of U.P. Vs Ashok Kumar Srivastava**, AIR 1992 SC 840 is another case of bride burning for dowry wherein a young woman aged about 25 years died of burns within less than a year of her marriage. The three accused were charged and convicted under Section 302/34 IPC by the trial court and were sentenced to

imprisonment for life. However, the High Court acquitted the accused as the trustworthiness of some of the prosecution witnesses was suspected. Though ordinarily the Supreme Court is slow to interfere in an acquittal while exercising power under article 136 but in this case the apex court found that the approach of the High Court had resulted in gross miscarriage of justice. The court, therefore, did not find it possible to refuse to interfere in such a case where gruesome crime was committed which resulted in the extinction of young mother to be. Accordingly, the Supreme Court allowed the appeal restored the order of conviction and sentence passed by the trial court.

3.6.8 The curse of dowry claimed another victim in **Kundula Bale Subrahmanyam Vs State of A.P.** (1993) 2 SCC 684 wherein the husband and mother-in-law of the deceased Kundula Koti Nagbani were convicted under Sections 302/34 IPC and sentenced to suffer imprisonment for life. It will be expedient to

refer the following observations made by the Supreme Court in this case.

“25. Of late there has been an alarming increase in cases relating to harassment, torture, abetted suicides and dowry deaths of young innocent brides. This growing cult of violence and exploitation of the young brides, though keeps on sending shock waves to the civilized society whenever it happens, continues unabated. There is a constant erosion of the basic human values of tolerance and the spirit of “live and let live”. Lack of education and economic dependence of women have encouraged the greedy perpetrators of the crime. It is more disturbing and sad that in most of such reported cases it is the woman who plays pivotal role in this crime against the younger woman, as in this case with the husband either acting as a mute spectator or even an active

participant in the crime, in utter disregard of his matrimonial obligations. In many cases, it has been noticed that husband, even after marriage continues to be ‘Mamma’s baby’ and the umbilical cord appears not to have been cut even at that stage.”

3.6.9 Kailash Kaur Vs State of Punjab (1987) 2 SCC 631 is yet another case of unfortunate instance of gruesome murder of a young wife by the barbaric process of pouring kerosene oil all over the body and setting her on fire as the culmination of a long process of physical and mental harassment for extraction of more dowry. The prosecution case was that the sister-in-law caught hold of the deceased and the mother-in-law poured kerosene oil on her and set her on fire. The Supreme Court observed that “whenever such cases come before the court and offence is brought home to the accused beyond reasonable doubt, it is the duty of the court to deal with it in most severe and strict manner and award the maximum penalty prescribed by the law in order that it may

operate as a deterrent to other persons from committing such anti-social crimes.”

3.7 Role of Courts in Dowry Death Cases

3.7.1 Awakening of the collective consciousness is the need of the day. Change of heart and attitude is what is needed. If man were to regain his harmony with others and replace hatred, greed, selfishness and anger by mutual love, trust and understanding and if woman were to receive education and become economically independent, the possibility of this pernicious social evil dying a natural death may not remain a dream only. The legislature, realising the gravity of the situation has amended the laws and

provided for stringent punishments in such cases and even permitted the raising of presumptions against an accused in cases of unnatural deaths of the brides within the first seven years of their marriage. The Dowry Prohibition Act was enacted in 1961 and has been amended from time to time, but this piece of social legislation, keeping in view the growing menace of the social evil, also does not appear to have served much purpose as dowry seekers are hardly brought to books and convictions recorded are rather few. Laws are not enough to combat this evil. A wider social movement of educating women of their rights, to conquer the menace, is what is needed more particularly in rural areas where women are still largely uneducated and less aware of their rights and fall an easy prey to their exploitation. The role of courts, under the circumstances assumes greater importance and it is expected that the courts would deal with such cases in a more

realistic manner and not allow the criminals to escape on account of procedural technicalities or insignificant lacunae in the evidence as otherwise the criminals would receive encouragement and the victims of crime would be totally discouraged by the crime going unpunished. The courts are expected to be sensitive in cases involving crime against women. The verdict of acquittal made by the trial court in this case is an apt illustration of the lack of sensitivity on the part of the trial court. It recorded the verdict of acquittal on mere surmises and conjectures and disregarded the evidence of the witnesses for wholly insufficient and insignificant reasons. It ignored the vital factors of the case without even properly discussing the same. (See in **Kundula Bale Subrahmanyam Vs State of A.P.** (1993) 2 SCC 684).

3.7.2 In **Kailash Kaur Vs State of Punjab** (1987) 2 SCC 631, Avtar Singh, the husband, Kailash Kaur, the mother-in-law and Mahinder Kaur, the sister-in-law were put in trial under Section 302 for setting Amandeep Kaur, the deceased, on fire. The trial court acquitted the husband giving him the benefit of doubt, but convicted Kailash Kaur and Mahinder Kaur under Section 302 and sentenced to undergo life imprisonment. On appeal, the High Court confirmed the conviction of Kailash Kaur but acquitted Mahinder Kaur giving her the benefit of doubt. When the matter came up before the Supreme court, it said, “we have very grave doubts about the legality, propriety and correctness of the decision of High Court insofar as it has acquitted Mahinder Kaur by giving her the benefit of doubt. But since the State has not preferred any appeal, we are not called upon to go into that aspect any further. As regards, conviction of Kailash Kaur, the Court expressed its

regret “that the Sessions Judge did not treat this case as a fit case for awarding maximum penalty under the law and that no steps were taken by the State Government before the High Court for enhancement of the sentence.

3.7.3 It will be expedient to refer to the editorial comments prefixed to this case, which read as follow:

[Ed.: This case is not the first time that the Supreme Court in unequivocal terms has commended death sentence to perpetrators of “gruesome murder of young wives ... as the culmination of a long process of physical and mental harassment and torture for extraction of dowry”. A three Judge Bench of the Court speaking

through Thakkar, J. in **Machhi Singh Vs State of Punjab**, (1983) 3 SCC 470; 1983 SCC (Cri.) 681, had clearly enunciated various circumstances which could be treated as ‘rarest of the rare’ cases in which the accused convicted under Section 302, IPC must be punished with death sentence. One of the circumstances mentioned under the category ‘Anti-social and socially abhorrent nature of the crime’ was the “cases of ‘bride burning’, and what are known as ‘dowry deaths’ or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation”. The Court felt that in such cases the “collective conscience” of the community “is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty”. (SCC pp. 487-88, paras 32 and 35).

Notwithstanding the consistent concern of the Court to award deterrent punishment to such bride killers, in the instant case the Sessions Court as well as the High Court preferred sentence of life imprisonment for the accused mother-in-law of the deceased victim. The Supreme Court confirmed the same even though the facts called for the extreme penalty. It is the socio-legal obligation of the Sessions Court and High Courts of the country to award capital punishment in such cases of bride killing so as to produce deterrent effect in consonance with the mandate of the Supreme Court.

Another disturbing feature in the present case is the acquittal of the abettor of the dastardly crime viz. the sister-in-law of the deceased who according to the dying declaration had caught hold of the deceased while the appellant-mother-in-law poured kerosene oil on her and set her on fire. Though the trial court had convicted her under Section 302 IPC the High Court acquitted her on ground of benefit of doubt. The Supreme Court expressed its “grave doubts about the legality, propriety and correctness of the decision of the High Court” in this regard but it was helpless since the State had not preferred any appeal against her acquittal. Thus an abettor of a serious crime escaped punishment due to sheer laxity on the part of the State administration. Again no appeal was taken against the acquittal of the husband by the trial court.

The prosecution must keep in mind the trend set by the Legislature with the enactment of Section 498-A, IPC and the recent amendments to the Dowry Prohibition Act, 1961.

Pathak, J., as he then was, speaking for the Court in **Bhagwant Singh Vs Commissioner of Police, Delhi**, (1983) 3 SCC 344 had made significant suggestions regarding creation of a special magisterial machinery for prompt investigation of such incidents, need for adoption of efficient investigative techniques and procedures taking into account peculiar features of such cases, association of a female police officer of sufficient rank and status with the investigation from its very inception, and extension of application of Coroners' Act, 1871 to other cities besides those

where it operates already. It is for the Government to implement these suggestions.]

3.8 Different offences arising from the same facts:

3.8.1 Offences under different Sections of the Indian Penal Code, 1860 are distinct offences. A person can be convicted under more than one Section if the conditions of the charged Sections are satisfied in a given case. Thus, in **Ravindra Trimbak Chouthmal Vs Stat of Maharashtra** (1996) 4 SCC 148, a case of dowry death, the accused husband was charged and convicted by trial court under Section 302 read with Section 120B, IPC for committing murder of his wife Vijaya. He was also found guilty under

Sections 201/34, Sections 498A/34 and Sections 304B/34 IPC. He was awarded the sentence of death for the offence under Section 302 read with Section 304B; to R1 for seven years for the offence under Sections 201/34; to R1 for three years and a fine of Rs.500/- in default R1 for three months for Sections 498A/34; and R1 for seven years for Sections 304B/34 offence, the same being the minimum sentence prescribed under the law. On appeal to High Court, conviction under Sections 304B/34 IPC was set aside. But conviction under other Sections were confirmed when the matter came up before the Supreme Court, the following observations were made which have material bearing on the issue under consideration. The Supreme Court thus observed:

“9. The present was thus a undermost foul, as pointed out by us in the opening paragraph. The motive was to get another girl

for the appellant who could get dowry to satisfy the greed of the father. Dowry deaths are blood-boiling, as human blood is spilled to satisfy raw greed, naked greed; a greed which has no limit. Nonetheless, the question is whether the extreme penalty was merited in the present case?

10. We have given considered thought to the question and we have not been able to place the case in that category which could be regarded as the “rarest of the rare” type. This is so because dowry death has ceased to belong to that species of killing. The increasing number of dowry deaths would bear this. To halt the rising graph, we, at one point, thought to maintain the sentence; but we entertain doubt about the deterrent effect of a death penalty. We, therefore, resist ourselves from upholding the death sentence, much though we would have desired annihilation of a despicable character like the appellant before us. We, therefore,

commute the sentence of death to one of R1 for life imprisonment.”

3.8.2 The conviction under Sections 201/34 was sustained but the sentence was directed to run consecutively and not concurrently to show Court’s strong disapproval of the loathsome, revolting and dreaded device adopted to cause disappearance of the dead body. Convictions under other Sections namely, Sections 316, 498A/34 were set aside.

3.8.3 On the other hand, merely because accused has been acquitted under Section 302, IPC, presumption as to dowry death does not stand automatically rebutted (See **Alamgir Sani Vs State of Assam**, AIR 2003 SC 2108). Furthermore, even if accusation under Section 304 B fails, a person can be convicted under Section 498A notwithstanding that cruelty is common essential to both the Sections. A person can also be convicted under Section 306 though

accusation under Section 304B fails. (See **Hira Lal and others Vs State (Govt. of NCT), Delhi**, AIR 2003 SC 2865, see also **Kaliyaperumal Vs State of Tamil Nadu**, AIR 2003 SC 3828.

3.8.4 Thus, it may be seen that the offence of murder is not the same thing as the offence of dowry death under Section 304B though death of bride may be a common element in both the offences. The absence of direct connection between the husband and the death of wife distinguished offence of

dowry death from the offence of murder. This is a strong mitigating factor as has been held by the Supreme Court in the case of **Hem Chand Vs State of Haryana** (1994) 6 SCC 727. It may be relevant to note that in this case, the Supreme Court has gone to the extent that even life imprisonment under Section 304B should not be awarded as a matter of routine in all cases of dowry deaths but only in rare cases. After quoting Section 304B, the Supreme Court observed:

“The point for consideration is whether the extreme punishment of life imprisonment for life is warranted in the present case. A reading of Section 304B, IPC would show that when a question arises whether a person has committed the offence of dowry death of a woman what all that is necessary is it should be shown that soon before her unnatural death, which took place within seven years of marriage, the deceased has been subjected, by such person, to cruelty or harassment for or in connection with demand for dowry. If that is shown, the Court shall presume that such person has caused the dowry death. It can, therefore, be seen that irrespective of the fact whether such person is directly responsible for the death of the deceased or not by virtue of the presumption, he is deemed to have committed the dowry death if there were such cruelty or harassment and that if the unnatural death has occurred within seven years from the

date of marriage. Likewise, there is a presumption under Section 113B of the Evidence Act as to the dowry death. It lays down that the Court shall presume that the person who has subjected the deceased wife to cruelty before her death caused the dowry death if it is shown that before her death, such woman had been subjected, by the accused, to cruelty or harassment in connection with any demand for dowry. Practically, this is the presumption that has been incorporated in Section 304B IPC also. It can, therefore, be seen that irrespective of the fact whether the accused has any direct connection with the death or not, he shall be

presumed to have committed the dowry death provided the other requirements mentioned above are satisfied. In the instant case, no doubt, the prosecution has proved that the deceased died an unnatural death namely due to strangulation, but there is no direct evidence connecting the accused. It is also important to note in this context that there is no charge under Section 302 IPC Therefore, at the most it can be said that the prosecution proved that it was an unnatural death in which case also Section 304B would be attracted. But this aspect has certainly to be taken into consideration in balancing the sentence to be awarded to the accused As mentioned above, Section 304B, IPC only raises presumption and lays down that minimum sentence should be seven years but it may extend to imprisonment for life. Therefore, awarding extreme punishment of imprisonment for life should be in rare cases and not in every case.”

3.8.5 From the aforesaid analysis, the following proposition emerges:

1. The offence of dowry death in Section 304B, IPC does not fall into the categories of the offences for which death penalty has been provided in the Penal Code.
2. Dowry death is different from the offence of murder. Death of a bride may fall under both the categories of

offences, namely, murder and dowry death, in which case, death sentence may be awarded for committing the offence of murder in appropriate cases depending upon the facts and circumstances of each case.

3. Dowry death per se does not involve the direct connection between the accused and the offence because of its presumptive character. Where the evidence in a given case clearly shows that the accused willfully put human life to peril, the case will attract the provisions of Sections 300 r/w 302 and it will no longer be a case of dowry death simpliciter.

In view of the aforesaid, there is no justification for amending Section 304B to provide for death penalty. Such penalty will also not be in conformity with the principle of proportionality.

3.8.6 During the course of deliberations in the Commission, suggestions were received that if the Section was not being amended to provide for death sentence, then at least the minimum imprisonment of seven years under the section should be raised to ten years. This has been also one of the recommendations of the National Commission for Women, and has been referred to earlier in this chapter. The reason ascribed for this is that a victim of dowry death is generally forced to undergo long and persistent torture before being killed. There seems to be much substance in this recommendation and we concur in it. The recommendations of

the National Commission for Women are already before the Government. It is for the Government to take an appropriate view on the above recommendation.

3.9 Principle of Proportionality in Prescription of Punishment:

3.9.1 The principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct has been very aptly elaborated by the Supreme Court in the case of **Lehna Vs State of Haryana** (2002) 3 SCC 76. It will be expedient to refer to the observations made by the apex court on this subject as under:

“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. Punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes 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.

The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hard less familiar or less important than

the principle that only the guilty ought to be punished indeed, the requirement that punishment not to be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e. the Judge that leads to determination of the lis.

Proportion between crime and punishment is a goal expected in principle, and in spite of errant notions it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies; but such a radical departure

from the principle of proportionality has disappeared from the law only in recent times. Even now a single grave infraction is thought to call for uniformly drastic measures. Anything less than a penalty of greatest severity for any serious crime is thought than to be a measure of toleration that is unwarranted and unwise. But, in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime uniformly disproportionate punishment has some very undesirable practical consequences.”

3.9.2 There is another important aspect that needs to be kept in view while dealing the subject under consideration, that is to say, the need for keeping emotional and sentimental feelings generated why incidence of dowry death within permissible bounds both while prescribing sentence for an offence and also while awarding a sentence in any case. It will be useful to refer the following observations made in the case of **State (Delhi Administration) Vs Laxman Kumar**, AIR 1986 SC 250:

“We appreciate the anxiety displayed by some of the women organizations in cases of wife burning crime to be condemned by one and all and if proved deserving the severest sentence. The evil of dowry is equally a matter of concern for the society as a whole and should be looked upon contemptuously both on the giver and the taker.

The Courts cannot allow an emotional and sentimental feeling to come into the judicial pronouncements. Once

sentimental and emotional feelings are allowed to enter the judicial mind the Judge is bound to view the evidence with a bias and in that case the conclusion may also be biased resulting in some cases in great injustice. The cases have to be decided strictly on evidence howsoever cruel or horrifying the crime may be. All possible chances of innocent man being convicted have to be ruled out. There should be no hostile atmosphere against an accused in court. A hostile atmosphere is bound to interfere in an unbiased approach as well as a decision. This has to be avoided at all costs.”

3.9.3 The Court further observed as follows:

We were, however, disturbed by the fact that the High Court took notice of publicity through the news media and indicated its apprehension of flutter in the public mind. It is the obligation of every court to find out the truth and act according to law once the truth is discovered. In that search for truth obviously the Court has to function within the bounds set by law and act on the evidence placed before it. What happens outside the Court room when the Court is busy in its process of adjudication is indeed irrelevant and unless a proper cushion is provided to keep the proceedings within the court room dissociated from the heat generated outside the court room either through the news media or through flutter in the public mind, the cause of justice is

bound to suffer. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical power of litigating individual or the might of the ruler nor even the opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations

are brought against the accused, the prosecutor is given an opportunity of supporting the charge and the accused is equally given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed mind of the Judge that leads to determination of the lis. If the cushion is lost and the Court room is allowed to vibrate with the heat generated outside it, the adjudicatory process suffers and the search for truth is stifled.

3.9.4 The above approach may be germane to judicial proceedings before a court determining the guilt of an accused. It is not so in respect of legislative proceedings concerning prescription of a sentence in law for any given offence. The legislature ought not be oblivious to public sentiments and demands. Laws are made to satiasfy the needs of the society in which they operate. Admittedly, having regard to the number and the manner of dowry deaths, there are widespread public demands for stringent legal measures to effectively curb this social evil. But, at the same time, the cardinal principles of penology, especially those relating to sentencing, have to be duly adhered to. It is important that legal sanctions must be appropriate, pragmatic and effective. Sentence must not be too less or too harsh and more than what is necessary. Both will be counter-

productive. A rational balance has to be made in prescribing punishment for dowry deaths.

3.9.5 It may be expedient to reiterate the word of caution sounded by this Commission in its 91st Report, viz;

Given all these circumstances of the usual ‘dowry death’, it will be conceded that even where there is in a particular case, moral certainty that the death is the result of murder, the circumstances would be hostile to an early or easy discovery of the truth. Punitive measures – such that can be pursued with the ambit of the existing law – may be adequate in their formal content. But their successful enforcement is a matter of difficulty. That is why there is need to supplement the punitive measures by appropriate preventive measures. This Report seeks to make a few modest suggestions as to what can be done in this regard. It is possible that the measures recommended here will be regarded as very mild by some persons or as radicals by others. But it is hoped that the discussion will at least give a new stance to the thinking on the subject. Some effective preventive measures whatever be their content and drift, are needed urgently. If this is not done soon, there is a grave risk

that the problem of bride burning will grow out of control and a stage will come when one of the two possibilities will become real. Either there will be no enthusiasm left for trying out concrete solutions or there will come to be adopted solutions that might be worse than the problem. It

will be the earnest endeavour of this Commission to see that neither of the two possibilities is materialized.

3.9.6 Keeping this in view, we are of the considered view that there is no warrant for prescribing death sentence for the offence of dowry death as defined in Section 304B IPC having regard to presumptive character of the offence, absence of direct connection in between the death and the offender and gravity of the culpable conduct as well as the object sought to be achieved thereby.

3.9.7 The reason for this is not for to seek Capital punishment has already been prescribed in Section 302 I.P.C (in a case of murder). There is no necessity to prescribe capital punishment for offence committed under Section 304B (dowry death). There is distinction between section 302 (murder), section 304B (dowry death) and Section 306 (abetment to suicide) of the Indian Penal Code. If charge is framed under Section 304B, but after recording and appreciation of evidence, the case proved to be a case under Section 302, the charge can be altered and the accused can very well be punished under Section 302 and if the court finds that the case under Section 302 to be a rarest of rare cases, then the offender can very well be awarded with capital punishment.

3.9.8 In *Panakanti Sampath Rao Vs State of A.P.*,(2006) 9 SCC 658 the Hon'ble Supreme Court affirmed the order passed by the High Court converting conviction u/s 304B and 398A to 302 I.P.C. the Hon'ble Supreme court held that:

“There is ample evidence which shows that the appellant has harassed and ill-treated the deceased for dowry and the circumstances point out that he has caused the death of the deceased. Therefore, we find the appellant (A-1) guilty of the offence under Section 302 IPC”

3.10 . **Recommendation.**

In view of the aforesaid, we do not recommend amendment of Section 304-B of the Indian Penal Code, 1860 to provide for death sentence as the maximum punishment in the case of a dowry death.

3.11 **Valedictory remark.**

Before parting, we would like to reiterate the rider enunciated by the Supreme Court in its judgment in the case of **K. Prema S.Rao Vs Yadla Srinivasa Rao** AIR 2003 SC 11 at p.11 (para 27) to the effect that “the Legislature has by amending the Penal Code and Evidence Act made Penal Law more strident for dealing with punishing offences against married women. Such strident laws would have a deterrent effect on the offenders only if they are so stridently implemented by the law courts to achieve the legislative intention”. We may add that the enforcement agencies too will have to be more sensitive and responsive to the needs of the situation arising from the incidents of dowry death. Dowry deaths are manifestation of socio-economic malady prevailing in the society. This has to be addressed at different levels so as to curb the menace of dowry deaths and not at the legal redressal level

alone. We will, however, refrain ourselves from entering into this arena as this does not strictly belong to legal realm.

(Dr. Justice AR. Lakshmanan)
Chairman

(Prof. (Dr) Tahir Mahmood)
Member

(Dr.D.P.Sharma)
Member-Secretary