HIGH COURT OF ANDHRA PRADESH

TUESDAY ,THE NINETEENTH DAY OF APRIL

TWO THOUSAND AND TWENTY TWO

PRSENT

THE HONOURABLE SRI JUSTICE RAVI NATH TILHARI

CRIMINAL REVISION CASE NO: 1973 OF 2006

Between:

1. PALLA SUBBA RAO S/o Audiyya,
   Business
   R/o Vijayawada,
   Krishna Dist.

...PETITIONER(S)

AND:

1. THE STATE OF A.P. rep. by its Public Prosecutor,
   High Court of A.P., Hyderabad.

...RESPONDENTS

Counsel for the Petitioner(s): K SRINIVAS

Counsel for the Respondents: PUBLIC PROSECUTOR

The Court made the following: ORDER

HON'BLE SRI JUSTICE RAVI NATH TILHARI

CRIMINAL REVISION CASE No.1973 OF 2006

19.04.2022

Between:

Palla Subba Rao

....Petitioner.

And:

The State of A.P.,
rep. by Public Prosecutor,
High Court of Andhra Pradesh.
Amaravati.

....Respondent

DATE OF JUDGMENT PRONOUNCED:19.04.2022.

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/No
2. Whether the copies of judgment may be Marked to Law Reporters/Journals Yes/No
3. Whether Your Lordships wish to see the fair Copy of the Judgment? Yes/No

RAVI NATH TILHARI, J

***HON'BLE SRI JUSTICE RAVI NATH TILHARI**

+CRIMINAL REVISION CASE No.1973 OF 2006

%19.04.2022

Palla Subba Rao

....Petitioner.

And:

The State of A.P.,
rep. by Public Prosecutor,
High Court of Andhra Pradesh.
Amaravati.

....Respondent

! Counsel for the petitioner: Sri K. Srinivas

^ Counsel for the respondent/State: Sri S. Venkata Sai,
Special Assistant Public Prosecutor

< Gist:
> Head Note:
? Cases referred:
1.(2004) 8 Supreme Court Cases 146
2. (1974) 3 Supreme Court Cases 357
3. (2011) 2 SCC 47
4. (1974) 3 SCC 357
5. AIR 1961 SC 1698
6. (1872) 4 NWP 46
7. (2021) SCC OnLine SC 965.
8. (2004) 8 SCC 146
9. AIR 1953 SC 364
10. (2018) 1 SCC 222
11. (2012) 9 SCC 460
12. (2019) 14 SCC 151
13. 2019 SCC OnLine All 4962
14. 2022 SCC OnLine SCC 428

HON'BLE SRI JUSTICE RAVI NATH TILHARI

CRIMINAL REVISION CASE No.1973 OF 2006

ORDER:

1. Heard Sri K. Srinivas, learned counsel for the petitioner revisionist and Sri S. Venkata Sai, learned Special Assistant Public Prosecutor for the respondent/State.

2. The criminal revision under Sections 397/401 of the Code of Criminal Procedure,1973,("Cr.P.C") has been filed challenging the judgment dated 29.11.2006, passed by the I Additional Sessions Judge, Guntur, in Criminal Appeal No.175 of 2005 Palla Subba Rao vs. State filed against the judgment dated 30.03.2005, passed by the II Additional Judicial Magistrate of the First Class, Bapatla, in C.C.No.172 of 2004 State vs. Palla Subba Rao.

3. The facts of the case are that on 21.05.2004 at about 10.00 a.m, the accused approached Bodepudi Balasekhar (L.W.2) in C.S.D Canteen, Air-force Station, Suryalanka, styled himself as G. Krishna Rao, Ex-Servicemen, and forged Discharge Book bearing No.Ex.7764248-N with Rank NB/Sub., Identity Card with District Code No.AP-10/1345 and Canteen Transfer Certificate said to have been issued by the Station Head-quarters, Secunderabad and requested to issue fresh Canteen Card. Bodepudi Balasekhar (L.W.2) Manager, Air Force Canteen, Suryalanka verified all the said documents and came to the conclusion that those documents are forged documents. The accused was produced before R.K Vashistha, Flight Leftnant, Station Security Officer (L.W.1). A case in Crime No.30 of 2004 under Sections 419, 420 and 468 IPC was registered. The Sub Inspector of Police, visited the scene of offence, examined and recorded the statement of the witnesses. The Sub Inspector of Police addressed a letter to T.

Tirupathireddy, Zilla Sainik Welfare Officer (L.W.4) regarding the genuineness of the documents who issued a reply in Lr.No.A.3/794/2004 dated 16.06.2004, and further that the District Code No.AP.10 belongs to Krishna District whereas the Code Number of Prakasam District is A.P.13. Investigation further revealed that no Ex.Servicemen by name G. Krishna Rao was enrolled in the unit of Prakasam District. After completion of the investigation, the Investigation Officer filed the charge sheet that the accused with a *malafide* intention personated himself as G. Krishna Rao, created and produced the forged documents before the Air Force Station authorities at Suryalanka cheating them to get fresh canteen card to avail facilities of the canteen.

4. The case was taken on file of the Judicial Magistrate under Sections 419, 420, 468 IPC against the accused. On appearance, copies of documents were furnished to the accused as required under Section 207 Cr.P.C. The accused was examined under Section 239 Cr.P.C. He denied the offence. After hearing and on consideration of the material, charges under Sections 419, 420 and 468 IPC were framed, read over and explained to the accused to which he pleaded not guilty and claimed for trial.

5. The prosecution in all examined P.Ws.1 to 4 and got marked Exs.P.1 to P.7 and M.Os.1 to 7. After closure of prosecution evidence, the accused was examined under Section 313 Cr.P.C. The accused did not adduce any evidence or marked any documents on his behalf.

6. The Judicial Magistrate vide judgment dated 30.03.2005 convicted the petitioner under Sections 419, 420 and 468 IPC and sentenced him to undergo R.I for one year each, and to pay fine of Rs.1000 each, and in default, to suffer S.I for 3 months each. The

punishment was to run concurrently and the period undergone by the petitioner was set off.

7. The revisionst filed appeal in which the I Additional Sessions Judge, Guntur, vide judgment dated 29.11.2006 dismissed the appeal confirming the conviction for the offences under Sections 419 and 468 IPC, but the conviction under Section 420 IPC was set aside and instead, the appellant was convicted for the offence under Sections 420 read with 511 IPC. The sentence as imposed by the trial court was modified to the effect that the petitioner was to undergo R.I for a period of 6 months for each offence and to pay fine of Rs.1,000/- for each offence and in default to undergo three months S.I, for each offence.

8. Sri K. Srinivas, learned counsel for the petitioner has submitted that any independent witness is not examined and all the witnesses are the official witnesses. Mr. G. Krishna Rao, to whom, the petitioner is said to have impersonated, is not examined, and in the absence of any charge under Section 420 read with Section 511 IPC, the petitioner could not be convicted and sentenced by the appellate court under those Sections. There was no delivery of any property; only production of fake document and therefore the offence under Section 420 read with Section 511 IPC was not made out. He lastly submitted that considering the nature of charge and that the petitioner remained in jail for seven days, the sentence may be reduced to already undergone.

9. Sri S. Venkata Sai Nath, learned Special Assistant Public Prosecutor, submitted that in the nature of the charge, only the official witnesses were the material witnesses which were produced and non-examination of an independent witness is not fatal to the prosecution case. He further submitted that the appellate court having found that there was an attempt to commit the offence punishable under Section 420 r/w 511 IPC, has rightly convicted and sentenced the petitioner for

the offence under those sections. He has placed reliance on the judgment of the Hon'ble Supreme Court in **Hari Ram vs. State of U.P**[1] and **Sudhir Kumar Mukherjee and Sham Lal Shaw vs. State of West Bengal**[2]**.**

10. I have considered the submissions advanced by the learned counsels for the parties and perused the material on record.

11. The court proceeds to first consider the submission on the point of non-framing of specific charge under Section 420 r/w Section 511 IPC.

12. Section 221 Cr.P.C reads as under:

> "221. Where it is doubtful what offence has been committed.
> (1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.
>
> (2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it. Illustrations
>
> (a) A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.
>
> (b) In the case mentioned, A is only charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be), though he was not charged with such offence.
>
> (c) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never

[1] (2004) 8 Supreme Court Cases 146
[2] (1974) 3 Supreme Court Cases 357

> hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false."

13. Section 464 Cr.P.C provides as under:

> "464. Effect of omission to frame, or absence of, or error in, charge.
>
> (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.
>
> (2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-
>
> (a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommended from the point immediately after the framing of the charge;
>
> (b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:
>
> Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

14. In **Narwinder Singh vs. State of Punjab**[3], the Hon'ble Apex Court held that the nature of the offence under Section 304-B and 306 IPC are not distant and different categories. The Apex Court did not find substance in the submission of the appellant therein that there could be no conviction under Section 306 IPC in the absence of a charge framed under Section 306 IPC.

15. It is relevant to reproduce the paragraphs 19, 20, 21, 22 and 23 of **Narwinder Singh** (supra) as under:

> "19. In the present case, both the trial court and the High Court have held that the deceased had committed suicide. Therefore, the nature of the offence under Sections 304-B and 306 IPC are not distinct and different categories.
>
> 20. Again in the case of **Shamnsaheb M. Multtani** (supra), this court observed:

[3] (2011) 2 SCC 47

"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 this Court (K. Jayachandra Reddy and G.N. Ray, JJ.) has held in Lakhjit Singh v. State of Punjab1 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.

20. But without reference to the above decision, another two-Judge Bench of this Court (M.K. Mukherjee and S.P. Kurdukar, JJ.) has held in Sangaraboina Sreenu v. State of A.P. that it is impermissible to do so. The rationale advanced by the Bench for the above position is this:(SCC p.348, para 2) "It is true that Section 222 CrPC entitles a court to convict a person of an offence which is minor in comparison to the one for which he is tried but Section 306 IPC cannot be said to be a minor offence in relation to an offence under Section 302 IPC within the meaning of Section 222 CrPC for the two offences are of distinct and different categories. While the basic constituent of an offence under Section 302 IPC is homicidal death, those of Section 306 IPC are suicidal death and abetment thereof."

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. v. Deptt. of the Environment). 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."

We are of the considered opinion that the aforesaid observations do not apply to the facts of the present case.

21. The High Court upon meticulous scrutiny of the entire evidence on record rightly concluded that there was no evidence to indicate the commission of offence under Section 304-B IPC. It was also observed that the deceased had committed suicide due to harassment meted out to her by the appellant but there was no evidence on record to suggest that such harassment or cruelty was made in connection to any dowry demands. Thus, cruelty or harassment sans any dowry demands which drives the wife to commit suicide attracts the offence of `abetment of suicide' under Section 306 IPC and not Section 304-B IPC which defines the offence and punishment for `dowry death'.

22. It is a settled proposition of law that mere omission or defect in framing charge would not disable the Court from convicting the accused for the offence which has been found to be proved on the basis of the evidence on record. In such circumstances, the matter would fall within the purview of Section 221 (1) and (2) of the Cr.P.C. In the facts of the present case, the High Court very appropriately converted the conviction under Section 304-B to one under Section 306 IPC.

23. In our opinion, there has been no failure of justice in the conviction of the appellant under Section 306 IPC by the High Court, even though the specific charge had not been framed. Therefore, we see no reason to interfere with the judgment of the High Court."

16. Learned counsel for the petitioner could not point out as to what failure of justice was occasioned to the accused herein for omission to

frame the charge under Section 420 read with Section 511 IPC. The charge under Section 420 IPC was specifically framed. The nature of the offence under Section 420 IPC and read with Section 511 IPC, is not entirely distant and different. The offence if committed is punishable under Section 420 but if it falls short of commission and is at the stage of attempt, it falls under Section 420 read with Section 511. There being charge under Section 420 IPC, if on the same evidence, the appellate court was satisfied that the offence under Section 420 IPC was not made out but there was an attempt to commit the offence it did not commit any illegality in convicting the revisionst for the offence under Section 420 read with Section 511 IPC, I do not find any failure of justice to the accused merely because of non framing of a specific charge under Section 420 read with Section 511 IPC.

17. The court now proceeds to consider the submissions of the learned counsel for the revisionst that as there was no delivery of any property the offence under Section 420 read with Section 511 IPC was not made.

18. Section 420 IPC reads as under:-

> **"Section 420-** Cheating and dishonestly inducing delivery of property.
>
> Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is being capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

19. Section 415 IPC defines "cheating" which reads as under:

> "415. Cheating.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to

"cheat". Explanation.—A dishonest concealment of facts is a deception within the meaning of this section. Illustrations

(a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(b) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(c) A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby, dishonestly induces Z to buy and pay for the article. A cheats.

(d) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonored, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(e) A, by pledging as diamonds article which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money. A not intending to repay it. A cheats.

(g) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(i) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats."

20. Section 511 IPC reads as under:

> "S.511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.—Whoever attempts to commit an offence punishable by this Code with [imprisonment for life] or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express

> provision is made by this Code for the punishment of such attempt, be punished with [imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence], or with such fine as is provided for the offence, or with both. Illustrations
>
> (a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.
>
> (b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section."

21. In **Sudhir Kumar Mukherjee and Sham Lal Shaw vs. State of West Bengal[4],** the Hon'ble Supreme Court held that the dividing line between a preparation and an attempt is very thin, but the moment a person takes some step to deceive the person sought to be cheated, he has embarked on a course of conduct which is nothing less than an attempt to commit an offence as contemplated by Section 511 IPC. He does the act with the intention to commit the offence and the act is a step towards the commission of the offence.

22. Paragraph 5 of **Sudhir Kumar Mukherjee** (supra) is reproduced as under:

> "5. The dividing line between a preparation and an attempt is no doubt very thin, and though the principle involved is well established the difficulty arises in drawing the line in the particular circumstances of a case. The relevant portion of S. 511 is :
>
> > "Whoever attempts to commit an offence punishable by this Code . . . . or to cause such an offence to be committed and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished."
>
> The law on this point was elaborately discussed with reference to all the decided cases by this Court in its decision in **Abhavanand Mishra v. State of Bihar[5]**. We will confine ourselves to stating a few relevant extracts therefrom. It was pointed out in that decision

[4] (1974) 3 SCC 357
[5] AIR 1961 SC 1698

that "**The moment a person takes some step to deceive the person sought to be cheated, he has embarked on a course of conduct which is nothing less than an attempt to commit** the offence as contemplated by S. 51 1. He does the act with the intention to commit the offence and the act is a step towards the commission of the offence."

The -decision in **The Queen v. Ramsarun Chowbey**[6] was referred to and this Court specifically laid down that the act towards the commission of such an offence need not be an act which leads immediately (2) (1872) 4 N. W. P. 46 (1) [1 9621 (2) S. C. R. 241 to the commission of the offence. The decision In the matter of the petition of R. Mac Crea (l) was also referred to. The purport of that decision was explained to be that S. 511 was not meant to cover only the penultimate act towards the completion of an offence; acts precedent, if those acts are done in the course of the attempt to commit the offence, and were done with the intent to commit it and done towards its commission were also covered. In that decision Knox, J. said "Again, the attempt once begun and a criminal act done in pursuance of it towards the commission of the act attempted, does not cease to be, a criminal attempt, in my opinion, because the person committing the offence does or may repent before the attempt is completed."

This Court cited with approval the statement of Blair, J. "It seems to me that that Section 511 uses the word ,attempt' in a very large sense; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is, conducive to its commission, is itself punishable, and though the act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the section. It says expressly that whosoever in such attempt, obviously using the word in the larger sense, does any act, etc., shall be punishable. The term 'any act' excludes the, notion that the final act short of actual commission is alone punishable."

This Court also referred to certain other decisions and pointed out that any different view expressed has been due to an omission to notice the fact that the provisions of s. 511 differ from the English Law with respect to 'attempt to commit an offence', and that it is not necessary for the offence under s. 511, Indian Penal Code, that the transaction commenced must end in the crime or offence, if **not interrupted. This Court finally summarised its views about the construction of Section 511 thus:**

[6] (1872) 4 NWP 46

> **"A person commits the offence of 'attempt to commit a particular offence' when (i) he intends to commit that particular offence, and**
> **(ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission: such an act need not be the penultimate act towards the commission of that offence but must be an -act during the course of committing that offence.**
> **With respect we concur in this view....."**

23. In the **State of Madhya Pradesh vs. Mahendra Alias Golu[7],** the Hon'ble Apex Court held that in every crime, there is first *mens rea* i.e intention to commit, secondly preparation to commit and thirdly, attempt to commit it. Attempt is the execution of *mens rea* after preparation. Attempt starts where preparation ends, though it falls short of active commission of the crime. The preparation or attempt to commit the offence will be predominately determined on evaluation of the act and conduct of the accused and as to whether or not the incident tantamounts to trnassgrassing the thin space between preparation and attempt. Attempt itself is punishable offence in view of Section 511 IPC.

24. It is apt to refer paras 11 to 18 of **Mahendra Alias Golu** (supra) as under:

> "11. It is a settled preposition of Criminal Jurisprudence that in every crime, there is first, Mens Rea (intention to commit), secondly, preparation to commit it, and thirdly, attempt to commit it. If the third stage, that is, 'attempt' is successful, then the crime is complete. If the attempt fails, the crime is not complete, but law still punishes the person for attempting the said act. 'Attempt' is punishable because even an unsuccessful commission of offence is preceded by mens rea, moral guilt, and its depraving impact on the societal values is no less than the actual commission.
>
> 12. There is a visible distinction between 'preparation' and 'attempt' to commit an offence and it all depends on the statutory edict coupled with the nature of evidence produced in a case. The stage

[7] **(2021) SCC OnLine SC 965.**

of 'preparation' consists of deliberation, devising or arranging the means or measures, which would be necessary for the commission o f the offence. Whereas, an 'attempt' to commit the offence, starts immediately after the completion of preparation. 'Attempt' is the execution of *mens rea* after preparation. `Attempt' starts where `preparation' comes to an end, though it falls short of actual commission of the crime.

13. However, if the attributes are unambiguously beyond the stage of preparation, then the misdemeanours shall qualify to be termed as an 'attempt' to commit the principal offence and such 'attempt' in itself is a punishable offence in view of Section 511 IPC. The 'preparation' or 'attempt' to commit the offence will be predominantly determined on evaluation of the act and conduct of an accused; and as to whether or not the incident tantamounts to transgressing the thin space between `preparation' and 'attempt'. If no overt act is attributed to the accused to commit the offence and only elementary exercise was undertaken and if such preparatory acts cause a strong inference of the likelihood of commission of the actual offence, the accused will be guilty of preparation to commit the crime, which may or may not be punishable, depending upon the intent and import of the penal laws.

14. Section 511 IPC is a general provision dealing with attempts to commit offences which are not made punishable by other specific sections of the Code and it provides, inter alia, that, "whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one half of the imprisonment for life or, as the case may be, one half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both".

15. It is extremely relevant at this stage to brush up the elementary components of the offence of 'Rape' under Section 375 IPC, as was in force at the time when the occurrence took place in the instant case. The definition of 'Rape', before the 2013 Amendment, used to provide that "A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—xxx xxx xxx

Fourthly.— xxx
Fifthly.— xxx xxx xxx

Sixthly.—With or without her consent, when she is under sixteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

16. A plain reading of the above provision spells out that sexual intercourse with a woman below sixteen years, with or without her consent, amounted to 'Rape' and mere penetration was sufficient to prove such offence. The expression 'penetration' denotes ingress of male organ into the female parts, however slight it may be. This Court has on numerous occasions explained what 'penetration' conveys under the unamended Penal Code which was in force at the relevant time. In Aman Kumar (supra), it was summarised that: "7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see Joseph Lines, IC&K 893)."

17. Even prior thereto, this Court in Madan Lal vs. State of J&K2 opined that the degree of the act of an accused is notably decisive to differentiate between 'preparation' and 'attempt' to commit rape. It was held thus:

"12. The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her lie flat on the ground undresses himself and then forcibly rubs his erected penis on the private parts of the girl but fails to penetrate the same into the vagina and on such rubbing ejaculates himself then it is difficult for us to hold that it was a case of merely assault under Section 354 IPC and not an attempt to commit rape under Section 376 read with Section 511 IPC. In the facts and circumstances of the present case the offence of an attempt to commit rape by the accused has been clearly established and the High Court rightly convicted him under Section 376 read with Section 511 IPC."

> 18. The difference between `attempt' and `preparation' in a rape case was again elicited by this Court in Koppula Venkat Rao vs. State of A.P.3, laying down that: "10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in partexecution of a criminal design, amounting to more (2004) 3 SCC 602 Page | 13 than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt".

25. In view of the concurrent findings recorded by the court below based on the evidence on record, this Court finds that the act and conduct of the accused is indicative of his definite intention to commit the offence under Section 420 IPC. If the accused was successful in his attempt and had got the canteen card then there would have been the delivery of the goods as well. In that case the offence under Section 420 IPC would have been completed. The offence fell short of its commission under Section 420 IPC but there was an attempt to commit the offence under Section 420 IPC for which delivery of goods is not a condition precedent.

26. The court now deals with the submission of the learned counsel for the revisionst that there is no independent witness and as such offence is not proved.

27. In **Hari Ram vs. State of U.P[8],** the Hon'ble Supreme Court, on the point of non-examination of independent witnesses held as under in Paras 17 to 22 which are reproduced as under:

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[8] (2004) 8 SCC 146

"17. We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

18. **In Dalip Singh and Ors. v. The State of Punjab**[9] it has been laid down as under:-

> **"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely.** Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

19. The above decision has since been followed in **Guli Chand and Ors. v. State of Rajasthan** (1974 (3) SCC 698) in which **Vadivelu Thevar v. State of Madras** (AIR 1957 SC 614) was also relied upon.

20. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in **Dalip Singh's case** (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

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[9] AIR 1953 SC 364

> "25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in '**Rameshwar v. State of Rajasthan**' (AIR 1952 SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

21. Again in **Masalti and Ors. v. State of U.P.** (AIR 1965 SC 202) this Court observed: (p, 209-210 para 14):

> "But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

22. As observed by this Court in **State of Rajasthan v. Teja Ram and Ors.** (AIR 1999 SC 1776) the over-insistence on witnesses having no relation with the victims often results in criminal justice going away. When any incident happens in a dwelling house or nearby the most natural witnesses would be the inmates of that house. It would be unpragmatic to ignore such natural witnesses and insist on outsiders who would not have even seen any thing. **If the Court has discerned from the evidence or even from the investigation records that some other independent person has witnessed any event connecting the incident in question then there is justification for making adverse comments against non-examination of such person as prosecution witness. Otherwise, merely on surmises the Court should not castigate a prosecution for not examining other persons of the locality as prosecution witnesses. Prosecution can be expected to examine only those who have witnessed the events and not those who have** not seen it though the neighbourhood may be replete with other residents also. **(See Sucha Singh and Anr. v. State of Punjab** (2003 (7) SCC 643)

28. In **Krishan Chand vs. State of H.P[10],** the Hon'ble Supreme Court held that the evidence of the official witnesses cannot be rejected on the ground of non corroboration by an independent witness.

29. In the present case, it could not be shown nor even argued by the learned counsel for the revisionst that any witness, other than the official witness, witnessed the event nor that the official witnesses had the cause to falsely implicate the accused.

30. The plea of non examination of an independent witness therefore is of no substance particularly when the guilt of the accused has been proved by the official witnesses.

31. There is no person by name G. Krishna Rao. Consequently, the submission made by the learned counsel for the revisionst that G. Krishna Rao the person impersonated, was not examined has no substance.

32. The learned courts below have concurrently recorded finding that the accused himself produced Exs.P.3 to P.5 before P.W.2 by impersonating as G. Krishna Rao, Ex.Service Man in Prakasam District. The testimony of P.W.2 is that the accused introduced himself as G. Krishna Rao and produced the Ex.P.3 identity card Ex.P.4 discharge book, Ex.P.5 Canteen Transfer Certificate. Those documents were false documents and were produced with an intention to deceive the canteen authorities for wrongful gain by impersonation. The oral testimony of P.Ws.1 and 2 was fully supported by the oral testimony of P.W.3. The testimony of the Investigating Officer also fully supported the prosecution version. If the documents Exs.P.3 to P.5 had been accepted by the Canteen Authorities, the ultimate beneficiary was the accused. The finding is recorded that by examining P.Ws.1 to 4 and marking Exs.P.1 to P.7 and M.Os.1 to 7, the prosecution established the guilt of

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[10] (2018) 1 SCC 222

the accused for the offences under Sections 420 read with 511 IPC, 419 and 468 IPC, beyond all reasonable doubt.

33. The concurrent findings of guilt recorded by the courts below is based on evidence on record and it could not be shown that the finding suffers from any illegality or perversity or arbitrary exercise of judicial discretion or on such other ground so as to call for an interference in the exercise of revisional jurisdiction.

34. The scope of interference by the High Court in exercise of powers of revision under Sections 397/401 Cr.P.C. is very limited which cannot be exercised in a routine manner. In **Amit Kapoor vs. Ramesh Chander and another**[11] the Hon'ble Supreme Court held that "Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well- founded error and it may not be appropriate for the court to scrutinize the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits."

[11] (2012) 9 SCC 460

35. On the point of leniency in punishment, it is apt to refer the judgment in **State of Madhya Pradesh vs. Suresh[12],** wherein the Hon'ble Supreme Court held that awarding of just and adequate punishment to the wrongdoer in case of proven crime remains a part of duty of the court. Paras 11 to 14 reads as under:

> "11. In the case of State of M.P. v. Ganshyam : (2003) 8 SCC 13, relating to the offence punishable under Section 304 Part I IPC , this Court found sentencing for a period of 2 years to be to inadequate and even on the liberal approach, found the custodial sentence of 6 years serving the ends of justice. This Court underscored the principle of proportionality in prescribing liability according to the culpability; and while also indicating the societal angle of sentencing, cautioned that undue sympathy leading to inadequate sentencing would do more harm to the justice system and undermine public confidence in the efficacy of law. This Court observed, inter alia, as under:
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> > "12. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in Sevaka Perumal v. State of Tamil Nadu: (1991) 3 SCC 471.
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> > 13. Criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges, in essence, affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. 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

[12] (2019) 14 SCC 151

considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

14. Proportion between crime and punishment is a goal respected 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 for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then 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.

15. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in Dennis Councle MCGautha v. State of California: 402 US 183: 28 L Ed 2d 711 (1071) that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case is the only way in which such judgment may be equitably distinguished.

17. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other

offences involving moral turpitude or moral delinquency which have great impact on social order and public interest cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic a view merely on account of lapse of time in respect of such offences will be result-wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by a string of deterrence inbuilt in the sentencing system.

19. Similar view has also been expressed in Ravji v. State of Rajasthan: (1996) 2 SCC 175. It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". ....." (underlining supplied for emphasis)

12. In **Alister Anthony Pareira** (supra), the allegations against the appellant had been that while driving a car in drunken condition, he ran over the pavement, killing 7 persons and causing injuries to 8. He was charged for the offences under Sections 304 Part II and 338 IPC; was ultimately convicted by the High Court under Sections 304 Part II, 338 and 337 IPC; and was sentenced to 3 years' rigorous imprisonment with a fine of Rs. 5 lakhs for the offence under Section 304 Part II IPC and to rigorous imprisonment for 1 year and for 6 months respectively for the offences under Section 338 and 337 IPC . Apart from other contentions, one of the pleas before this Court was that in view of fine and compensation already paid and willingness to make further payment as also his age and family circumstances, the appellant may be released on probation or his sentence may be reduced to that already undergone. As regards this plea for modification of sentence, this Court traversed through the principles of penology, as enunciated in several of the past decisions1 and, while observing that the facts and circumstances of the case show 'a despicable aggravated offence warranting punishment proportionate to the

crime', this Court found no justification for extending the benefit of probation or for reduction of sentence. On the question of sentencing, this Court re-emphasised as follows:-

"84. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.
85. The principle of proportionality in sentencing a crime-doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime-doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

13. Therefore, awarding of just and adequate punishment to the wrong doer in case of proven crime remains a part of duty of the Court. The punishment to be awarded in a case has to be commensurate with the gravity of crime as also with the relevant facts and attending circumstances. Of course, the task is of striking a delicate balance between the mitigating and aggravating circumstances. At the same time, the avowed objects of law, of protection of society and responding to the society's call for justice, need to be kept in mind while taking up the question of sentencing in any given case. In the ultimate analysis, the proportion between the crime and punishment has to be maintained while further balancing the rights of the wrong doer as also of the victim of the crime and the society at large. No strait jacket formula for sentencing is available but the requirement of taking a holistic view of the matter cannot be forgotten.

14. In the process of sentencing, any one factor, whether of extenuating circumstance or aggravating, cannot, by itself, be decisive of the matter. In the same sequence, we may observe that mere passage of time, by itself, cannot be a clinching factor though, in an appropriate case, it may be of some bearing, along with other relevant factors. Moreover, when certain extenuating or mitigating circumstances are suggested on behalf of the convict, the other factors relating to the nature of crime and its impact on the social order and public interest cannot be lost sight of."

36. In **Radey Shyam vs. State[13],** the High Court of Judicature at Allahabad held that in the matter of awarding punishment multiple factors have to be considered. The law regulates social interests, arbitrates conflicting claims and demands. Security of individuals as well as property of individuals is one of the essential functions of the State. The administration of criminal law justice is a mode to achieve this goal. The inherent cardinal principle of criminal administration of justice is that the punishment imposed on an offender should be adequate so as to serve the purpose of deterrence as well as reformation. It should reflect the crime, the offender has committed and should be proportionate to the gravity of the offence. Sentencing process should be sterned so as to give a message to the offender as well as the person like him roaming free in the society not to indulge in criminal activities but also to give a message to society that an offence if committed, would not go unpunished. The offender should be suitably punished so that society also get a message that if something wrong has been done, one will have to pay for it in proper manner irrespective of time lag.

37. Recently in **State of Rajasthan vs. Banwari Lal and others[14],** on the point for awarding an appropriate sentence, the Hon'ble Apex Court held that merely because a long period has elapsed by the time the appeal is decided cannot be a ground to award the punishment which is inadequate.

38. The sentence as imposed by the trial court has already been reduced by the appellate court. I do not find any ground to interfere with the sentence as imposed by the appellate court, to reduce the sentence further or to limit it to already undergone as any valid ground

[13] 2019 SCC OnLine All 4962
[14] 2022 SCC OnLine SCC 428

for such reduction has not been raised by the learned counsel for the revisionst.

39. For all the aforesaid reasons, I do not find any illegality in the impugned order. The revision lacks merits and is dismissed.

40. The revisionst is on bail. The bail is cancelled. The trial court is directed to ensure that the revisionst is sent to the prison to serve the remaining sentence as imposed upon him by the appellate Court.

Let a copy of this judgment with the record of the court below be forthwith sent to the court below for compliance.

Consequently, the Miscellaneous Petitions, if any, shall also stand closed.

RAVI NATH TILHARI, J

Date:19.04.2022,
Gk

HON'BLE SRI JUSTICE RAVI NATH TILHARI

CRIMINAL REVISION CASE No.1973 OF 2006

19.04.2022

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