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The Legal Gauge

The latest news and announcements

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"No anticipatory bail to an absconder" - SC

AMISHA UPADHYAY

In the case of, Prem Shankar Prasad v. State of Bihar JT 2021 (10) SC 410, the Supreme Court opined that the prerequisite while granting anticipatory bail should be based on the nature of the accusation made rather than the allegations made arising out of a business transaction. In other words, a person deemed to be a proclaimed offender or absconder is not eligible for anticipatory bail.

In this case, an FIR was lodged against an absconder under S. 406, 407, 468, 506 of the Indian Penal Code, 1860. The Trial Court, while hearing the case, refused anticipatory bail on the grounds laid down in S. 82 and 83 of the Code of Criminal Procedure, 1973. However, when they approached the High Court, the High Court granted anticipatory bail to the absconder by merely looking at the aspect of a business transaction that was struck down by the Apex Court.

Rules on Video Conferencing of Court Proceedings Issued

AMISHA UPADHYAY

The Delhi High Court, in an attempt to facilitate accessibility and justice, has recently laid down the Rules for Video Conferencing for Courts, 2020. The rules primarily lay down the procedure of usage of video conferencing during court proceedings. Exercising its power U/A 225 and 227 of the Constitution, the Delhi High Court has become the first High Court to have issued rules on video conferencing of Courts.

The Protocol

The provisions of video conference will be applicable at every step of the judicial proceedings as conducted by the Court. All the prerequisites and protocols as followed for a physical hearing would still pertain to the virtual hearings. For example, the judges would be addressed as "Madam/Sir" or "Your Honour" and officers are to be referred to as "Bench Officer or Court Master" as the case may be. Furthermore, Advocates representing the concerned party are to be in their professional attire as under the Advocates Act, 1961.

For virtual streaming of the court proceedings, either the party or any witness may make such a request before the Court through a prescribed form. Upon reviewing the form and considering the viewpoints of concerned parties, and ascertaining whether such an application is for merely causing a delay in the proceeding, the Court may pass an order allowing the live streaming of the case. Rule 16 of the abovementioned notification permits the general public who is not a party to the concerned case to attend the proceedings virtually except in cases of any in-camera proceedings. Furthermore, the rule restricts any unauthorised recording of the proceeding, and if this rule is not adhered to, the concerned person will have to show their Government authorised identity proof. As per the notified rule, all participants attending the live streaming should maintain the decorum of the Court proceeding as would be done in a physical courtroom. The Civil Procedure Code, Criminal Procedure Code, Contempt of Courts Act, 1971, Indian Evidence Act, 1872, and Information Technology Act, 2000 shall apply to the Video Conferencing proceedings akin to the physical hearing of matters.

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Remote Representation

With video conferencing of the judicial proceedings, the Court has given an edge when it comes to representation of Advocates and concerned parties residing overseas, Court of Another state or UT of India, jail or prison, institutional facilities, forensic science lab and other such locations which otherwise make Courts inaccessible. For smooth functioning of the aforementioned, the rule mandates an appointment of coordinators on both sides- at the Court and the remote point from which the concerned person is required to be examined or heard. It further mentions the responsibilities of the coordinators to ascertain and comply with the proceedings.

Current Scenario

The Constitution gives the High Court wide discretion to prevent lower Courts and Tribunals under its jurisdiction from abusing or misusing the legal system. As a result, the prior assent of Delhi's Lieutenant Governor, under the proviso to Article 227(3), may need to be made public before the rules as mentioned above are applied to subordinate Courts and Tribunals. The absence of neither the Rules nor the notification indicates that the Lieutenant Governor's consent was sought prior to publication of the notification. It is worth noting that, in such a case, the notification's application and the Rules in their current form over Courts and Tribunals subordinate to the High Court of Delhi could be challenged on Constitutional grounds.

"Evidence in a Trial against the accused does not have any bearing upon a co-accused in a separate trial for the commission of the same offence"- SC

AMISHA UPADHYAY

In the recent case of AT Mydeen v. Assistant Commissioner, Customs Department LL 2021, (Cr. Appeal No. 1306 of 2021) the Supreme Court examined the scope of appellate Courts while reviewing the evidence as recorded by a trial court in matters related to a criminal appeal, which is otherwise made available, except in the event of any additional inquiry/evidence under S. 367 or S. 391 of the Criminal Procedure Code.

In this case, the trial court had, in two separate orders, acquitted all the six accused, following which the High Court allowed the appeal and convicted the accused. The parties approached the Supreme Court, where it was noted that the appeals arose out of two different judgements. However, the High Court, vide its judgement, while considering the appeal, pondered on the evidence of only one of the cases and failed to disclose from which case the evidence was examined while convicting the six accused. The question before the Supreme Court was whether the evidence recorded in a separate trial of co-accused could be read and considered by the appellate Court in a criminal appeal arising out of another separate trial conducted against another accused, albeit for the commission of the same offence.

The Apex Court observed that the evidence recorded in a trial could be held culpable only of that accused, and it does not have any bearing upon a co-accused who has been tried based on evidence recorded in a separate trial, though for the commission of the same offence.

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What amounts to an attempt to rape: A distinction between 'Preparation' and 'Attempt' to commit rape

HETAVI BARI

While upholding the conviction of a man accused of attempting to rape, the Bench comprising Justice Surya Kant and Justice Hima Kohli explained the distinction between 'Preparation' and 'Attempt' to commit rape.

In the recent State of Madhya Pradesh v. Mahendra 2021 SCC OnLine SC 965, the accused had lured minor girls aged 8 and 9, taken them inside the room and rubbed his genitals against the genitals of the survivors. The Supreme Court of India, on October 25, 2021, has held that the acts were done deliberately with a clear intention to commit the offence of rape and were reasonably proximate to the commission of the offence. The offender was convicted under Section 376(2)(f) of the Indian Penal Code in conjunction with Section 511. In this case, the offence was committed in 2005 when the POCSO Act and Criminal Law Amendment Act had not been enacted. The Court held that since the acts exceeded the stage beyond preparation and preceded penetration, he was guilty of attempting to commit rape.

What constitutes an "attempt" is a legal and de facto issue. After preparation is complete, an attempt is a direct move to the commission. One needs to provide evidence that the attempt was made with the intent to commit a crime. In this case, an interpretation of Section 375 IPC is that sexual intercourse with a woman under the age of 16 is equivalent to "rape" regardless of her consent, and mere penetration was sufficient to prove such an offence.

The Court explained the three stages of commission of a crime as:

1. Mens Rea,
2. Preparation, and
3. Attempt to commit it.

If the third stage is successful, only then the crime is complete, but law also penalizes the person for attempting the act.

'Attempt' is punishable because despite being unsuccessful, it contains mens rea, and its depraving impact on societal values is no less than the actual commission. Further, the stage of 'preparation' consists of deliberation, devising or arranging the methods required for the commission of the offence. Whereas an 'attempt' to commit the offence starts immediately after the completion of preparation. 'Attempt' begins where 'preparation' ends, though it falls short of the conduct of the crime. However, if the attributes are plainly beyond the level of preparation, the misdemeanours will qualify as an 'effort' to commit the principal offence, and such 'attempt' is a chargeable offence under Section 511 IPC. The 'preparation' or 'attempt' to commit the offence will be predominantly established by a review of an accused's act and conduct and whether or not the incident is tantamount to transgressing the thin line between `preparation' and 'attempt'.

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"In order to find an accused guilty of an attempt with intent to commit rape, the court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part," as was held in Koppula Venkat Rao vs. State of A.P, (2004) 3 SCC 602.

The accused may or may not be punished depending on the intent and scope of the criminal law when they cannot be attributed to performing the act, only rudimentary exercises are performed, and these preparatory acts allow a firm conclusion as to the possibility that the actual act will be performed. Even if the accused fails to commit the primary crime, an attempt is possible. Even if the crime attempt is unsuccessful, the crime is committed in every respect.

In Madan Lal vs the State of J&K, (1997) 7 SCC 677, the concerned High Court justified charging the accused under Section 376 read with Section 511 of the IPC by laying down that "the difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and to prove that an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation."

The overwhelming evidence on record, in this case, was enough to prove the respondent's deliberate overt steps. As it was only because the victims started crying, the accused was unable to succeed in his penultimate act, and there was a sheer providential escape from actual penetration. His act would have fallen within the contours of `Rape' under Section 375 IPC at that time had the respondent succeeded even in partial penetration.

This case is a landmark in differentiating between the attempt and the commission of rape and the punishment for the same, which has been heavily debated in the past. It also aids in directing an appropriate and stricter punishment to attempt without singling out rape itself. Overall, this judgement is a beacon in the determination of rape as a crime, for it laid down specific and clear guidelines as to the difference between rape and attempt to rape, which was much needed.

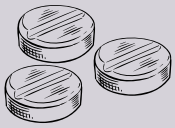
HIV+ Sex Workers likely to "pose danger to society": Bombay Sessions Court

P.Nivruthi

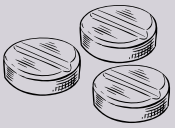
"The Bombay Sessions Court in XYZ Vs State of Maharashtra upheld the order of the Magistrate's Court for detaining a HIV+ Sex Worker for two years and remarked that HIV+ sex workers are likely to pose a danger to society. This decision has been heavily frowned upon and has wreaked havoc in the sphere of human rights. Delivered by a single judge bench comprising of Justice S.U Bhagele, the case was a criminal appeal by the father of the victim against an order passed by the lower court detaining the woman allegedly involved in sex trafficking under Section 17(4) of the Immoral Traffic (Prevention) Act, 1956, which allows the court to send a person to a protective home. The father contended that the court failed to appreciate the factual matrix of the case and that despite her having sufficient resources to fend for herself, she was forced to be detained.

Justice S.U Bhagele said that although the appellant submitted that she was not involved in sex trafficking, the FIRs and other evidence prima facie are to the contrary. He further said that Section 17(4) of PITA allows the Court discretion to detain someone who needs protection. He said that it is an indisputable fact that she is HIV+ and this detention will only enable a normal life for her because it is a sexually transmitted disease and that setting free of the victim will only pose an immense danger to society. He dismissed the appeal stating that the lower court's decision was not erroneous and that there is no substance in the submission of the victim.

DECRIMINALISE PERSONAL CONSUMPTION OF SMALL SCALE DRUGS, DECLARE CERTAIN NDPS SECTIONS UNCONSTITUTIONAL: PLEA IN SUPREME COURT



Hetavi Bari



Advocate Jai Krishna Singh filed a Public Interest Litigation in the Supreme Court seeking quashing/stopping of the immediate operation of the Sections 21, 27, 27A, 35, 37 and 54 of the Narcotic Drugs and Psychotropic Substances Act,1985 (NDPS Act), thereby declaring them as unconstitutional in their present form. The PIL seeks to set up an inquiry into the Rs 18 crore extortion racket run allegedly by NCB Zonal head, either by CBI or by a retired judge of the Supreme Court.

"The PIL further seeks direction to the Union Government: -
(i) to withdraw the cases instituted against the alleged drug users and those who are facing the charges of procuring drugs for the consumption of their associates having no commercial angle,
(ii) reframe above provisions of the NDPS Act in view of the submissions made in the present PIL, thereby decriminalise the purchase of certain drugs up to a certain level "small scale" for personal consumption or for one relative or dear or live-in partner or master encouraging side by side public health approach to drug users including recreational users,
(iii) undertaking identifying, counselling and treating drug users and not punish them by sending them to jail those who treat the drug users, and drug addicts with disdain."

The arrest of 23-year-old Aryan Khan based on a mere alleged/purported chat with contraband sellers and further on the allegation of conscious possession, as well as possession of contraband worth 6 grams even though it was recovered from his friend and not from him, was the basis for the PIL, raising serious legal and factual questions.

The goal of enacting the NDPS was to ensure the reintegration of alleged drug users into society while cracking down hard on drug traffickers. However, the spirit has waned over time, and alleged drug users have become primary targets of law enforcement, ignoring the need to focus on alleged drug users' rehabilitation. As a result, the petitioner claimed that the operation of the above-mentioned sections of the NDPS Act must be modified immediately until appropriate amendments are made, as it penalises both consumption and possession by users, as well as the distribution, manufacture, and sale of any narcotic or psychotropic substance, regardless of its quantity.

NCERT drops Transgender Inclusion Manual

HETAVI BARI

The National Council for Educational Research and Training (NCERT) put up a manual called 'Inclusion of Transgender Children in School Education: Concerns and Roadmap' on its website to educate and sensitise teachers towards the practices and strategies to make schools sensitive and inclusive for transgender and gender non-conforming students. However, on November 2, the National Commission for Protection of Child Rights (NCPCR) wrote to NCERT saying it had received complaints against the content of the teaching manual and took suo moto cognisance in the matter concerning deprivation and violation of child rights. This led to the removal of the manual.

The manual recognises that the sensitisation of school teachers to the issues faced by transgender, gender non-conforming and gender non-binary persons is crucial to improving access to school education for transgender children; considering that teachers may have internalised societal perceptions about gender roles, which they may end up bringing to their classrooms, which in turn may impact how they interact with transgender, gender non-conforming and gender non-binary students. It recommended the provision of gender-neutral infrastructure and uniforms, discontinuing practices that segregate children for various school activities based on their gender, inviting members of the transgender community to speak on campus, among others. Only 19 and 6 transgender students registered for class X and class XII exams, respectively, conducted by the CBSE in 2020.

Penultimately, the manual mentions several concrete steps to improve access to school education for transgender persons and suggests changes in school curricula for more holistic education.

Tribunals Reforms Bill, 2021: To be or Not to be

P. Nivruthi

"Rule of Law, access to justice, financial transparency happen by design, not by accident."
-Winnie Byanyima

The Tribunals Reforms Bill, 2021 was introduced in the Lok Sabha by the Finance Minister, Ms Nirmala Sitharaman, on August 2, 2021. The Bill seeks to dissolve certain existing appellate bodies and transfer their functions (such as adjudication of appeals) to other existing judicial bodies. The Bill replaces a Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance promulgated in April 2021.

The Bill abolishes five appellate Tribunals: Airports Appellate Tribunal, Film Certification Appellate Tribunal, Authority for Advance Rulings, Appellate Board, the Plant Varieties Protection Appellate Tribunal and Intellectual Property. It aims to amend the Finance Act of 2017, which earlier allowed the merging of tribunals based on the domain it catered to and allowed the Government to make several critical decisions such as the composition of selection-cum-search committee and qualifications of Tribunal members and terms and conditions of service. This Bill proposes to include provisions for the selection cum search committee while the Central Government will still have the power to notify the terms and conditions and the requisite qualifications.

1. The Chairperson and Members of the Tribunals will be appointed by the Central Government on the recommendation of a Search-cum-Selection Committee. The Committee will consist of the Chief Justice of India, or a Supreme Court Judge nominated by him, as the Chairperson (with casting vote),
2. Two Secretaries nominated by the Central Government,
3. The sitting or outgoing Chairperson, or a retired Supreme Court Judge, or a retired Chief Justice of a High Court, and
4. The Secretary of the Ministry under which the Tribunal is constituted (with no voting right).

The State Commissions shall have their respective selection Committees. The Bill specifies the minimum age requirement of the members of the selection committee to be 50 years and their term as 4 years.

The Bill has had mixed reactions ever since it was announced. On the one hand, it tackles issues plaguing adjudication such as increasing independence of Tribunals, creating uniformity between tribunals, providing an additional layer of appeal instead of direct appeal to High Courts or the Supreme Court thereby reducing the burden on these Courts, providing for ad-hoc regulation of Tribunals increasing accountability and efficiency, and by creating uniformity in qualifications, reducing the vacancies in the Tribunals. On the contrary, it is argued that this Bill will in fact increase the burden on Courts by rerouting the Cases which the Tribunals earlier heard. It is also argued that this Bill reduces access to the Judiciary. Directing citizens to approach Constitutional Courts instead of Tribunals will intimidate the people and make adjudication lengthy and costly.

Further, the bill also aims to enforce a minimum qualification of 50 years to be appointed to the Tribunal. This barrier has, time and again, been struck down by the Supreme Court and is frowned upon. The Apex Court has reiterated that so long as the nominated members have 10 years of relevant experience and are qualified to be appointed as a High Court judge, they are also qualified to be appointed to Tribunals and struck down the 4 year tenure provision mentioned in the Bill.

Some suggestions which could bridge the gap between both the sides could be to firstly standardise Tribunals instead of abolishing them and hold the creation of any new Tribunals until the pre-existing ones are dealt with, which will not only decrease pressure but will also create a new guideline for the working of Tribunals in the future. Secondly, 74th Parliamentary Standing Committee Report on 2015 also mentioned a single nodal agency for monitoring Tribunals, Appellate Tribunals and Other Authorities, thereby increasing efficiency and accountability and, lastly, experimenting with a merger model as the one in the UK which faced similar issues with Tribunals. The Supreme Court also highlighted this in the past.

The Tribunal Reforms Bill has sparked debate across the country. It is the Government's firm belief that the pros outweigh the cons while the judicial fraternity vehenmently disagrees. If there is suo moto cognisance by the apex court or a petition, the Bill is likely to be scrapped or will at least be directed to be modified by virtue of the aforementioned previous Supreme Court ruling. No such case has been filed as of the time of writing. The planning and organisation of an idea are vastly different from the execution of the same. It remains to be seen how the implementation of this Bill will affect the Indian Judiciary and if this Bill does hold up to its promises.

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