

IIIrd Workshop of Dhule District-Judicial
2016-17
Summary/Gist of the paper on the subject

1. *Punishment, Sentencing Policy with latest case laws*
2. *Cyber Crime, Investigation and Evidence*



I) Punishment, sentencing policy with latest case laws of Hon'ble High Court and Apex Court.

Introduction:-

1. It is well known that punishment is one of the oldest method of controlling crime and criminality. The history of early penal systems of most countries reveals that punishments were tortuous, cruel and barbaric in nature. It was towards the end of eighteenth century that humanitarianism began to assert its influence on penology emphasizing that severity should be kept to a minimum in any penal program. The common modes of punishment prevalent in different parts of the world included corporal punishment such as flogging, mutilation, branding, pillories, chaining prisoners together, stoning, amercement, fines, exile, solitary confinement, detention, house arrest, custodial sentence, imprisonment for life, capital punishment etc.

Types of punishment :-

- 2) Section 53 of the Indian Penal Code deals with the kinds of punishments which can be inflicted on the offenders. They are as follows:-
1. Death penalty,
 2. Imprisonment for life,
 3. Imprisonment, which may be (a) rigorous or (b) simple,
 4. Forfeiture of property and
 5. Fine.

3) The main objectives of the criminal justice system can be categorized as follows:

To prevent the occurrence of crime.

To punish the transgressors and the criminals.

To rehabilitate the transgressors and the criminals.

To compensate the victims as far as possible.

To maintain law and order in the society.

To deter the offenders from committing any criminal act in the future.

RELEVANT PROVISIONS

4) In case of an offender other than a Juvenile, a Magistrate, under section 29 of Cr.P.C., may pass a sentence of imprisonment for a term not exceeding 3 years or fine not exceeding ten thousand rupees (fifty thousand as per Mah. State amendment) or of both. Here it is important to note that under many categories of offences punishment prescribed is more than the above prescribed limit, however while passing sentence in such cases magistrate cannot exceed the sentencing limits but he has an option under S. 325 Cr.P.C. to forward accused to the Chief Judicial Magistrate. A sentence of imprisonment in default, as per S.30 Cr.P.C., should not be in excess of power u/s 29 Cr.P.C. and should not exceed 1/4th of the term of imprisonment which the magistrate is empowered to inflict. However, it may be in addition to substantive sentence of imprisonment for the maximum term awarded by the Magistrate u/s 29. In case of conviction of several offences at one trial, as per S.31 Cr.P.C., the court may pass separate sentences, subject to the provisions of S.71 of the I.P.C. The aggregate punishment and the length of the period of imprisonment must not exceed the limit prescribed by S.71 I.P.C. S. 71 I.P.C. provides (1) that where an offence is made up of parts each of which parts is itself an offence the offender

can be punished only for one of such offences. (2) That where an offence falls under two or more definitions of offences or where several acts, each of which is an offence, constitute when combined a different offence, then the punishment could be awarded only for any one of such offences. These are rules of substantive law whereas S.31 Cr.P.C. is a procedural law. In case of several sentences to run concurrently it is not necessary to send offender for trial before higher court only for the reason that aggregate punishment for several offences is in excess of punishment which the magistrate is competent to inflict on conviction of single offence. However, proviso to S.31 Cr.P.C. Provides that (a) in no case shall such person be sentenced to imprisonment for a longer period than 14 years (b) the aggregate punishment shall not exceed twice the amount of punishment which the court is competent to inflict for single offence.

(A) Sentencing policy in India :-

5) In India neither the legislature nor the judiciary has issued structured sentencing guidelines. Several governmental committees have pointed to the need to adopt such guidelines in order to minimize uncertainty in awarding sentences. In March 2003, the Committee on Reforms of Criminal Justice System (the Malimath Committee), a body established by the Ministry of Home Affairs, issued a report and emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences. The higher courts, recognizing the absence of such guidelines, have provided judicial guidance in the form of principles and factors that courts must take into account while exercising discretion in sentencing. Further In India no uniform sentencing policy exists and sentence awarded to an offender reflect the individual philosophy of the judges. This is evident from the following facts.

6) The following statements given by the three prominent judges of India shows the present condition of sentencing policy of India.

“Every saint has a past, every sinner has a future.” Krishna Iyer J

“Theory of reformation through punishment is grounded on the sublime philosophy that every man is born good, but circumstances transform him into a criminal.” K T Thomas J

“Reformative theory is certainly important but too much stress to my mind cannot be laid down on it that basic tenets of punishment altogether vanish”. D P Wadhwa J

SENTENCING POLICY AND DISCRETIONARY POWER

7) It is manifest from Section 427 (1) that the Court has the power and the discretion to issue a direction but in the very nature of the power so conferred upon the Court the discretionary power shall have to be exercised along the judicial lines and not in a mechanical, wooden or pedantic manner. It is difficult to lay down any straitjacket approach in the matter of exercise of such discretion by the courts. There is no cut and dried formula for the Court to follow in the matter of issue or refusal of a direction within the contemplation of Section 427(1). Whether or not a direction ought to be issued would depend upon the nature of the offence or offences committed, and the fact situation in which the question of concurrent running of the sentences arises.

8) In Anil Kumar v. State of Punjab 2017(1) Recent Apex Judgments (R.A.J.) 365" In terms of sub-section (1) of Section 427, if a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment, such subsequent term of imprisonment would normally commence at the expiration of the imprisonment to which he was previously sentenced. Only in appropriate cases, considering the facts of the case, the court can make the sentence run concurrently with an earlier sentence imposed. The investiture of such discretion, presupposes that such discretion be exercised by

the Court on sound judicial principles and not in a mechanical manner. Whether or not the discretion is to be exercised in directing sentences to run concurrently would depend upon the nature of the offence/offences and the facts and circumstances of each case.

9) In **Navnath Sadashiv Taras And Ors vs The State Of Maharashtra** At the same time, one will have to keep in mind that the object of legislature in enacting sub-section (3) to Section 8 of the Representation of the People Act, 1951, is to keep away the person convicted of offences and sentenced to suffer imprisonment for more than 2 years from contesting elections. This provision certainly deserves purposive interpretation and just because an accused convicted in respect of offences falling under the category provided by Section 8(3) of the Representation of the People Act, 1951, desires to contest the Municipal Election, conviction recorded against him cannot be stayed mechanically for fulfilling his wish.

10) In **Mohd. Arif @ Ashfaq Vs. The Registrar, Supreme Court of India, 2014 Cri.L.J. 4598**, the Hon'ble Apex Court observed thus-

Crime and punishment are two sides of the same coin. Punishment must fit to the crime. The notion of 'Just deserts' or a sentence proportionate to the offender's culpability was the principle which, by passage of time, became applicable to criminal jurisprudence. It is not out of place to mention that in all of recorded history, there has never been a time when crime and punishment have not been the subject of debate and difference of opinion. There are no statutory guidelines to regulate punishment. Therefore, in practice, there is much variance in the matter of sentencing.

SENTENCE - NO UNDUE SYMPATHY

11) In **State of Madhya Pradesh Vs. Surendra Singh, AIR 2015 SC 3980**, based on the theory of proportionality, it is laid down by Hon'ble Apex Court that,

“Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is 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. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meager sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter productive in the long run and against the interest of the society. One of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which commensurate with gravity, nature of crime and the manner in which the offence is committed. One should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime. The punishment should not be so lenient that it shocks the conscience of the society. It is, therefore, solemn duty of the court to strike a proper balance while awarding the sentence as awarding lesser sentence encourages any criminal and, as a result of the same, the society suffers. Imposition of sentence must commensurate with gravity of offence”.

12) In **Mohammed Jamiluddin Nasir versus State of West Bengal, AIR 2014 SC 2587** the Hon'ble Supreme Court has laid down six principles of the sentence.

1. The sentence to be awarded should achieve twin objectives
 - a) Deterrence and
 - b) Correction
2. The Court should consider social interest and consciousness of the society for awarding appropriate punishment

3. Seriousness of the crime and the criminal history of the accused is yet another factor.
4. Graver the offence longer the criminal record should result severity in the punishment.
5. Undue sympathy to impose inadequate sentence would do more harm to the public
6. Imposition of inadequate sentence would undermine the public confidence in the efficacy of law and society cannot endure such threats.”

13) Hon'ble Supreme Court in **State of M.P. v. Najab Khan & Ors. AIR 2013 Supreme Court 2997** held that

“In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. Undue sympathy to impose inadequate sentence would do more harm to the justice system and undermine the public confidence in the efficacy of law. It is 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. The Courts must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment.”

When extreme penalty of death can be imposed :-

14) In **Bachansing vs State of Punjab (AIR 1980 SC 898)** The hon'ble Apex court while interpreting S. 354(3) and 235(2) Cr.P.C. elaborated two aspects, firstly that the extreme penalty can be inflicted only in gravest cases of

extreme culpability and secondly, in making the choice of sentence due regard must be paid to the circumstances of the offender also. In **Machhi Singh v. State of Punjab [(1983) 3 SCC 470]**, The hon'ble Apex court while justifying the death sentence imposed on the appellants, recollected with approval the principles laid down in Bachan Singh and supplemented them with a few more elaborate guidelines regarding the test of 'rarest of rare' cases as given below :

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ? In the rarest of rare cases, when the collective conscience of the community is so shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, death sentence can be awarded.

15) In **Shankar Kisanrao Khade v. State of Maharashtra, [2013 Cri.LJ 2595(SC)]**, the Hon'ble Apex Court held that, an attempt was made to do away with the preparation of balance sheet of aggravating and mitigating circumstances for arriving at a decision on death sentence by substituting the said exercise with "Crime test", "Criminal test", and "PR test." While restating the "rarest of rare case" rule, Hon'ble Justice K.S.P. Radhakrishnan opined that to award death sentence the crime test has to be fully satisfied i.e. 100% and the criminal test shall be 0% and later it shall pass through "PR test." One doubts whether there can be any such cases where there will be 100% and 0% of crime test and criminal test respectively.

Sentencing in sexual assault cases :-

16) In recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the Legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 years old girl shakes our judicial conscience. The offence was inhumane. There are no extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the minimum prescribed by the Legislature under Section 376(1) of the Act."

17) In *Shyam Narain v. The State of NCT of Delhi*,(AIR 2013 SC 2209), the Hon'ble Apex Court while dealing with the imposition of sentence on a rape convict observed that

“the fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes.”

18) While dealing with the case in respect of offence of outraging modesty of woman punishable under Sec. 354 of I.P.C., The Hon'ble Bombay High Court in **Bhagwat Ganpat Taide V/s. The State of Maharashtra, (2006 (3), A.I.R. Bom. R. 250)**, observed that;

“The petitioner/accused was a teacher. Imparting knowledge is a noble profession. The petitioner was in a position of loco parentis to his pupil. Instead of imparting knowledge petitioner was indulging in molestations of young girls of tender age. If the conduct of the petitioner is considered this is not fit case for showing leniency.” In this case Trial Court convicted accused for this offence sentencing him to suffer Rigorous Imprisonment for three months and fine of Rs. 2,000/in default R.I. for 20 days. This sentence wa confirmed by the Hon'ble High Court.

19) In **State of Karnataka v. Raju [2007 (11) SCALE 114]**, where the facts of the case were that the Trial Court imposed custodial sentence of seven years after convicting the respondent for rape of minor under Section 376 of the Indian Penal Code; on appeal, the High Court reduced the sentence of the respondent to three and half years. The hon'ble Apex Court held that a normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years' rigorous imprisonment, though in exceptional cases "for special and adequate reasons" sentence of less than 10 years' rigorous imprisonment can also be awarded. It was, thus, opined that socioeconomic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. To what extent should the judges have discretion to reduce the sentence so prescribed under the statute has remained a vexed question.

Sentencing in Food Adulteration cases :-

20) In **Ishardas v/s St. of Punjab (AIR 1972 SC 1295)** the hon'ble Apex court observed that the prevention of food Adulteration Act is enacted with aim of eradicating antisocial evil against public health and court should not lightly resort to the provisions of probation of offenders Act. The 47th report of the Law Commission has recommended the exclusion of the probation Act to social and economic offences.

21) In **Pyarali K. Tejani vs Mahadeo Ramchandra Dange (1974 SCR (2) 154)** Five Judge bench of the hon'ble Apex Court held that "A successful prosecution for a food offence ended in a conviction of the accused, followed by a fleabite fine of Rs. 100/. Two criminal revisions ensued at the, instance of the State and the Food Inspector separately since they were dissatisfied with the magisterial leniency. (Why two revision proceedings should have been instituted, involving duplication of cases and avoidable expenditure from the public exchequer is for the authorities to examine and inhibit in future). The High Court heard the accused against the conviction itself but upheld the guilt and enhanced the punishment to the statutory minimum of six months imprisonment and one thousand rupees fine. The finale in every criminal trial is sentence. Let us take stock of the social and personal facts, the features of the crime and the culprit. The Prevention of Food Adulteration Act, 1954, is meant to save society, and Parliament has by repeated amendments emphasized the statutory determination to stamp out food offenses by severe sentences. Indeed, dissatisfied with the indulgent exercise of judicial discretion, the legislature has deprived the court of its power to be lenient. In the light of escalating food adulteration this is understandable. Even so, there are violations and violations. Scented supari is neither a staple deit nor popular 'With the poor, being an expensive item. Nor is saccharam poisonous but prohibited more as a

precaution. That may be the reason for the prosecution not leading evidence of its injurious properties. The circular bearing on saccharin in supari, though irrelevant to nullify the rule, suggests that it is not so grave a danger and may perhaps be permitted again. Cyclamate stands on a somewhat different footing, although in a practical sense, the menace to health from it is not too serious except where unusually massive doses are consumed. The accused's nonknowledge has been rejected by us but he alleges that he has retired from the firm. He has undergone a week in jail and is not shown to be a repeater. The Court has jurisdiction to bring down the sentence to less than the minimum prescribed in s. 16(1) provided there are adequate and special reasons in that behalf. The normal minimum is six months in jail and a thousand rupees fine. We find no good reason to depart from the proposition that generally food offenses must be deterrently dealt with. The High Court under the erroneous impression that the offence fell under S. 7 (i) read with s. 16 (1) (a) (i) actually it comes under s.7 (v) read with S. 16 (1) (a) (ii) did not address itself to the quantum of sentence. Even so the punishment fits the crime and the criminal.

22) The Hon'ble Supreme Court in ***Shimbu v. State of Haryana, AIR 2014 SC 739*** disapproved the reduction of sentence, than the prescribed minimum, in case of rape convicts, on the ground that the accused was "unsophisticated and illiterate citizen belonging to a weaker section of the society" that he was "a chronic addict to drinking" and had committed rape on the girl while in state of "intoxication" and that his family comprising of "an old mother, wife and children" were dependent upon him. These factors, the court said, did not justify recourse to the proviso to Section 376(2) of the I.P.C. to impose a sentence less than the prescribed minimum. In this judgment the court did not consider the compromise arrived between the victim and the accused as a ground for reduction of sentence.

23) In *Laxmi v. Union of India, (2013 (9) SCALE 291)* the Hon'ble Apex court has taken note of increasing acid attacks on women and the need for regulating of the sale of acid and issued directions to the government to take appropriate action. The court also has found disparity in compensation provided to the victims of acid attacks in different States and directed that a minimum of three lakh rupees shall be fixed as compensation in such cases.

24) In *Alister Anthony Pareira Vs. State of Maharashtra (AIR 2012 SC 3802)* and *State of Punjab v. Balwinder Singh and Ors. AIR 2012 Supreme Court 861*, the Hon'ble Apex Court have held that while considering the quantum of sentence to be imposed for the offence of causing death or injury by rash and negligent driving of automobiles, one of the prime considerations should be deterrence.

25) In *Sunil Dutt Sharma v. State (Govt of NCT of Delhi), (AIR 2013 SC (Cri) 2342)* the Hon'ble Apex Court has dealt with sentencing jurisprudence at length and opined that the principles of sentencing evolved by this Court over the years, though largely in the context of the death penalty, will be applicable to all lesser sentences so long as the sentencing Judge is vested with the discretion to award a lesser or a higher sentence.

26) The Hon'ble Apex court in **State of MadhyapradeshvsMehtab, (Cri. Appeal no. 290/2015, dated 13.02.2015)** has observed that, “we find force in the submission, it is the duty of the court to award just sentence to a convict against whom charge is proved. While mitigating and aggravating circumstance may be given due weight, mechanical reduction of sentence to the period already undergone cannot be appreciated. Sentence has to be fair not only to the accused but also the victim and the society.”

27) **In Gurubachan Sing Vs. Satpal Singh (AIR 1990 SC 209)**, the Apex Court cautioned saying that exaggerated devotion to rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion as they destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law.

28) **Aggravating Circumstances:**

The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

2. The offence was committed while the offender was engaged in the commission of another serious offence.

3. The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

4. The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

5. Hired killings.

6. The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

7. The offence was committed by a person while in lawful custody.
8. The murder or the offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Code of Criminal Procedure.
9. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.
10. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.
11. When murder is committed for a motive which evidences total depravity and meanness.
12. When there is a cold blooded murder without provocation.
13. The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

29) **Mitigating Circumstances:**

1. The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

2. The age of the accused is a relevant consideration but not a determinative factor by itself.

3. The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

4. The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

5. The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

6. Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

7. Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though prosecution has brought home the guilt of the accused. While determining the questions relateable to sentencing policy, the Court has to follow certain principles and those principles are the load star besides the above considerations in imposition or otherwise of the death sentence.

II) Cyber Crime, investigation and evidence

Introduction:

30) It today's digital world of science and technologies man have created another world for himself, which is easily accessible, user friendly, and faster but is virtual. This new amazing world is known as Cyber-world or Cyber-space. Cyber space (as defined by Oxford Learners Dictionary) is an imaginary world where electronic messages, mails, pictures, etc. exists connected with the Internet or other networking computers. However, as every coin has two flip ends, the cyber space too has, unfortunately, the other side. In the cyber space, akin to the natural world, there remains the presence of the A-factor i.e. the anti-factor. The anti factor comprises of thieves, robbers, terrorists, spies, invaders and many others just like the criminals of the natural world. These entities spy, invade or destroy users private or personal information or cause harm using these technologies. Even moral attacks are done manipulating these technologies. These very entities are known as cyber criminals and the illicit activities performed by them using the cyber space and technologies is referred as cyber crime. The Cambridge Dictionary defines Cyber Crimes as crimes committed with the use of computers or relate to computers especially through the Internet. The Cyber Crimes is an unlawful act wherein computer is either a tool or a target or both. Cyber crimes are crimes committed in electronic mediums where means rea is not a requirement. The word cyber is generally misunderstood as the work only and wholly concerned with the web and Internet, however it also includes other communication networks electronic networking devices e.g. cellular networks and devices, telephones and many other e-devices.

31) **Types of Cyber Crime :**

I) Hacking :-

Hacking is the unauthorized access to others computer system or networks. The Information Technology Act, 2000 discusses about hacking in section 66. Hacking is one of the most common cyber crimes committed mostly either for fun by the teenagers or to cause harm and earn some profit by stealing private information like credit card numbers, account numbers, confidential information stored either in e-mails or in the hard disk of computer, for terrorism etc.

II) Spamming :

Spamming is the abuse of electronic messaging systems to indiscriminately send unsolicited bulk messages. Spam messages are mostly harmless but are annoying, most of them having explicit vulgar images and advertisements.

III) Phishing :

Phishing is one the most committed cyber offences usually for gaining information, like credit card numbers, account numbers etc. through misrepresentation.

IV) Pornography and Obscenity:

One of the most typical problems of the cyber crime is pornography and especially child pornography. It is a crime under section 67 of the Information Technology Act 2000. Instead of the extremely punitive nature described for the contravention of this law, pornography is still carried on the large scale in the cyber world. The general law of obscenity in India can be found in Section 292 of the Indian Penal Code. This section applies to a variety

of matters and is comprehensive enough to cover all obscene publications. Section 67 of information Technology Act is the first statutory provisions dealing with obscenity on the internet. The Hon'ble Supreme Court in the case of K.A.Abdas..Vs..Union of India (1970) 2 SCC 780, has evolved few tests in order to judge "obscenity"

V) Virus Bombing :

Viruses are the most common threats that come across the regular netizens usually. Mostly they are through the internet sites and e-mails but sometimes may be transmitted through other secondary devices like CD's, floppies and other removable devices. One need to be very careful and vigilant as these can cause certain problems from slowing the processing speed to crashing the whole system down. Viruses are one of the evil inventions of the 'genius but tarnished' engineers. They do it for no other reasons but mostly for fun. Computer virus has been defined under section 43 (iii) of Information Technology Act, 2000.

32) The broad definition of computer provided in Information Technology Act encompasses every gadget we are using in our day to day life to make our life simpler as a computer. Mobile cell phones are just one of it. The common cyber crimes associated with mobile cell-phones are as follows :-

(a) **Bluebugging** : This is the attack on the mobile cell phone through Bluetooth. Bluebugging allows the hacker to take over complete control over your mobile phone. The victim cannot even realise that his mobile cell phone is attacked, because even if the Bluetooth device is disabled or turned off, the mobile cell phone can be victim of this attack. Bluebugging allows the hacker to read the information in your mobile cell phone, to make and listen calls and even send messages.

(b) **Vishing**: This is a tool for committing financial crime by using mobile. It includes identity theft like credit cards numbers and other secret information. Scammer calls the victim and by use of his voice tries to extract the confidential information of the victim. Therefore every mobile user must be vigilant towards these fooling calls of lucrative offers or schemes.

(c) **Malware** : It is a program (software) designed to perform malicious activities in the device infected. Malware enters the mobile cell phone of victim through sms, file transfer, downloading programs from internet etc... Malware enters and functions in the victim's mobile without his knowledge and perform several malicious activities like usage of talk time, etc...

(d) **Smishing** : SMS (Short Message Service) is a common term for sharing messages on mobile phone. Smishing is an security attack in which the user is sent an SMS posing as a lucrative service that indulges them into exposing their personal information which is later misused. In these attacks the criminal obtains the Internet Banking passwords, Credit Card details, email id and password, etc...

Prevention of offences under cyber laws :

33) India has enacted the Information Technology Act in the year 2000. The Act deals with the problems of the cyber crime such as hacking, publication of obscene information, breach of privacy, virus bombing, damage to computer system, etc. Noticing some loopholes in the Act, it came to be amended in the year 2008.

INVESTIGATION AND EVIDENCE

34) Section 78 of the Information Technology Act empowers the police officer not below the rank of Deputy Superintendent of Police to investigate notwithstanding anything contained in the Code of Criminal Procedure .

35) The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.

36) Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

37) The evidence relating to electronic record being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record.

38) Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. An electronic record by way of secondary evidence shall not be

admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible. **(Anvar vs. Basheer AIR 2015 SC 180).**

39) In the case **Ankur Chawla vs. CBI MANU/UE/2923/2014** Hon'ble Supreme Court summarise the conclusions on the various questions:

(i) As long as nothing at all is written on to a hard disc and it is subjected to no change, it will be a mere electronic storage device like any other hardware of the computer. However, once a hard disc is subject to any change, then even if it restored to the original position by reversing that change, the information concerning the two steps, viz., the change and its reversal will be stored in the subcutaneous memory of the hard disc and can be retrieved by using software designed for that purpose. Therefore, a hard disc that is once written upon or subjected to any change is itself an electronic record even if does not contain any accessible information at present. In addition there could be active information available on the hard disc which is accessible and convertible into other forms of data and transferable to other electronic devices. The active information would also constitute an electronic record.

(ii) Given the wide definition of the words 'document' and 'evidence' in the amended Section 3 read with Sections 2(o) and (t) IT Act, a Hard Disc which at any time has been subject to a change of any kind is an electronic record would Therefore be a document within the meaning of Section 3 EA....

(iii) The further conclusion is that the hard disc in the instant cases are themselves documents because admittedly they have been subject to changes with their having been used for recording telephonic conversations and then again subject to a change by certain of those files being copied on to CDs. They are electronic records for both their latent and patent characteristics.

(iv) In the instant cases, for the purposes of Section 207(v) read with Section 173(5)(a) CrPC, not only would the CDs containing the relevant intercepted telephone conversations as copied from the HDs be considered to be electronic record and Therefore documents but the HDs themselves would be electronic records and Therefore documents.

(v) In terms of Sections 207(v) read with Section 173(5)(a) CrPC, the prosecution is obliged to furnish to the accused copies of only such documents that it proposes to rely upon as indicated in the charge sheet or of those already sent to the court during investigation.

(vi) The trial court or this Court cannot, at the pre-charge stage, direct the prosecution to furnish copies of documents other than that which it proposes to rely upon or which have already been sent to the court during investigation;

(vii) At the pre-charge stage the trial court cannot direct that a copy of each and every document gathered by the prosecution must be furnished to the accused irrespective of what the prosecution proposes to rely upon.

(viii) The prosecution is bound to indicate in the charge sheet submitted to the Court the documents it is proposing to rely upon for persuading the court to frame a charge against the accused. If it fails to do so, the court will proceed

on the basis that whatever document is forwarded with the charge sheet is in fact proposed to be relied upon by the prosecution.

(ix) Where the accused insists that some other document apart from what is stated in the list of documents attached to a charge sheet should be taken as being proposed to be relied upon by the prosecution, and submits that this is evident from a reading of the charge sheet, the trial court will examine such submission and if it is satisfied that the charge sheet does in fact indicate that some other document is also proposed to be relied upon by the prosecution, then it can require the prosecution to furnish the accused a copy of such document as well.

(x) In the instant case, the scope of the examination by the APFSL was to find out whether the hard discs were properly functioning and whether the calls copied on to the CDs are true copies when compared with the corresponding files of original recording of those calls in the four HDs. Only to this extent can it be said that the HDs are being relied upon by the prosecution.

(xi) The certification in terms of Section 65B(4) Evidence Act does not obviate the statutory requirement under Section 207(v) of providing to the accused access to the original recording of the relevant intercepted telephone conversation as a relied upon document.

(xii) As far as the present cases are concerned, only those portions of the hard disc that relate to the files containing the original recording of the relevant intercepted telephone conversations would be 'documents' proposed to be relied upon by the prosecution in terms of Section 207(v) read with Section 173(5)(a) CrPC. Those files would be documents both as regards the file containing the

actual conversation so recorded as well as Constituting a record of any changes that such file may have been subject to thereafter.

(xiii) Therefore, only to the extent explained in (xii) above, the accused would have a right of inspection of the hard discs since making mirror image copies of the entire HDs is not called for in the circumstances explained in this judgment.

(xiv) As far as the Shameet Mukherjee case is concerned, in view of what is stated in para 21 of the charge sheet in that case, the court has to proceed on the basis that the CBI proposes to rely upon the 19 CDs containing 768 calls in addition to the documents listed by it in the annexure to the charge sheet. Therefore, each of the accused in the Shameet Mukherjee case is entitled to be provided with copies of the 19 CDs containing the 768 calls.

(xv) As long as the statutory requirements of Sections 207(v) read with 173(5)(a) Cr PC are strictly complied with, and in the absence of any challenge to their constitutional validity, the failure to furnish to the accused by the prosecution at the pre-charge stage all documents gathered during investigation will not be a violation of the right to a fair trial under Article 21 of the Constitution.

CONCLUSION:-

40) It is 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. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view the rights of the victim of the crime but also the society at large

while considering the imposition of appropriate punishment. Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter-productive in the long run and against the interest of the society.

The Information Technology Act is the sole savior to combat cyber crime in nature. Though offences where computer is either tool or target also falls under the Indian Penal Code and other legislation of the Nation, but this Act is a special act to tackle the problem of Cyber Crime. The Act was sharpend by the Amendment Act of 2008, yet the Act is still in its budding stage. There is grave underreporting of cyber crimes in the nation. Cyber Crime is committed every now and then, but is hardly reported. The cases of cyber crime that reaches to the Court of Law are therefore very few. There are practical difficulties in collecting, storing and appreciating Digital Evidence. Thus the Act has miles to go and promises to keep of the victim of cyber crimes. To conclude I would quote the words of noted cyber law expert in the nation and Supreme Court advocate Mr. Pavan Duggal, “While the lawmakers have to be complemented for their admirable work removing various deficiencies in the Indian Cyberlaw and making it technologically neutral, yet it appears that there has been a major mismatch between the expectation of the nation and the resultant effect of the amended legislation. The most bizarre and startling aspect of the new amendments is that these amendments seek to make the Indian cybesrlaw a cyber crime friendly legislation; - a legislation that goes extremely soft on cyber criminals, with a soft heart; a legislation that chooses to encourage cyber criminals by lessening the quantum of punishment accorded to them under the existing law; a legislation which makes a majority of cyber crimes stipulated under the IT Act asailable offences; a legislation that is likely to pave way for India to become the potential cyber crime capital of the world”
