

IN THE HIGH COURT OF TRIPURA
AGARTALA

CRL. A. No.36 of 2011

Smt. Monalisha Sarkar,
wife of Md. Rakesh Miah,
daughter of Sarkar Nausad
Amin of Khilpara, P.O. & P.S.
R.K. Pur, Udaipur, District –
South Tripura, now Gomati
Tripura

..... Appellant

V e r s u s

- 1. The State of Tripura**
- 2. Md. Rakesh Miah,**
son of Md. Sishu Miah
- 3. Md. Sishu Miah,**
son of late Felu Miah,

both the respondents No.2 and
3 are residents of Village –
Khilpara, P.O. & P.S. R.K. Pur,
Udaipur, District – South
Tripura, now Gomati Tripura

..... Respondents

BEFORE
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the appellant	:	Mr. D. Bhattacharji, Advocate Mr. S. Das, Advocate.				
For the respondents	:	Mr. A. Ghosh, P.P. Mr. Somik Deb, Advocate.				
Date of hearing	:	10.03.2015				
Date of delivery of Judgment & Order	:	27.05.2015				
Whether fit for reporting	:	<table border="1"><tr><td>Yes</td><td>No</td></tr><tr><td>√</td><td></td></tr></table>	Yes	No	√	
Yes	No					
√						

JUDGMENT & ORDER

The victim has filed this appeal under proviso to Section 372 of the Cr.P.C. questioning the legality of the judgment and order of acquittal dated 16.06.2011 delivered in Criminal Appeal No.14 (1) of 2011 by the Sessions Judge, South Tripura, Udaipur. According to her, the evidence recorded in the trial warrants conviction of the respondents No.2 and 3.

[2] The appellant (PW-1) lodged a complaint on 18.08.2009 disclosing that her marriage with Md. Rakesh Miah, the respondent No.2 herein was solemnized as per Mohammedan Customary Rites and Ceremonies. In the wedlock, a male child was born in the year 2004. After two months of the marriage, the accused persons namely, Rakesh Miah, Rahul Miah and Sishu Miah and even her mother-in-law, during her lifetime, used to torture her by keeping her confined in the house without providing food, for bringing cash to the extent of Rs.1,00,000/-, motor bike and golden ornaments as dowry. Her father on the face of such unlawful demand gave the respondent No.2 a motorbike worth Rs.45,000/-, the golden ornaments of Rs.25,000/-, one cot, sofa set, steel almirah and other articles in the year 2003 and in the middle of the year 2005, her father gave cash amounting to Rs.50,000/- for securing her peaceful marital life. For some time, they did not subject the appellant to any torture but again they started torturing her in the year 2006 for bringing the cash of Rs.1,00,000/- and a car from her

father. She had been threatened that if such demand was not fulfilled, they would kill her son. But that time her father expressed his inability. When she informed the inhuman behaviour of the accused to her in laws, she was subjected to further torture. A local women's body intervened in the matter on several occasions and the accused admitted their conduct to them. They assured the said women's body that they would not repeat their conduct again. But her husband continued to torture her physically. In the year 2007, two conciliatory meetings were held in Paribarik Sahayata Kendra. The accused persons admitted their guilt in those meetings and on assurance of humane behaviour, they took her back to the matrimonial home. But after a few days on insignificant pretext, they physically assaulted her and the appellant's husband in particular threatened to give her Talak (Divorce). On 13.03.2008, the accused persons had thrown her and her son out from the matrimonial home keeping her properties in their custody. The appellant had to take shelter in her parent's house. Within a few days, the respondent No.2 instituted a suit for restitution of conjugal rights being T.S.(R.C.R) 11 of 2008 in the Family Court, Udaipur, South Tripura. In the conciliation taken up by the Family Court, the respondent No.2 expressed his desire to take the appellant back and he had also assured that he would stay with the appellant in a rented house away from his parental residence. But the respondent No.2 had an ominous plan at the back of his mind.

The other accused started coming to that rented house and they started torturing her again. On 16.09.2009, the respondent No.2 instigated the other accused persons at night and they closing the door from inside tortured her. On registering her cries, local people rushed there and they compelled the respondent No.2 to open the door. The appellant in order to save her fled away from that house. When on getting the information her uncle and father appeared in that house, they informed the police. They could trace her out from the hiding. In the meanwhile, a police officer came to the spot and on hearing the statements, they took her to the police station. Forcibly the respondent No.2 took her son to his parental house. When the police took stern action, the respondent No.2 handed over her son on the following day.

[3] Based on the said complaint, R.K. Pur P.S. case No.188 of 2009 under Sections 498-A/109 of the I.P.C. was registered and taken up for investigation. After completion of the investigation, the charge sheet was filed against the respondents No.2 and 3 but not against the other accused, namely Rahul Miha, brother of the respondent No.2. The Chief Judicial Magistrate, South Tripura, Udaipur, now Gomati Tripura, Udaipur on taking the cognizance under Section 498-A of the I.P.C. read with Section 109 of the I.P.C. against the respondents No.2 and 3 framed the charge separately against both of them, to which they pleaded innocence and claimed to be tried.

[4] In order to substantiate the charge, the prosecution has adduced as many as 9(nine) witnesses including the victim, Monalisha Sarkar, her father Sarkar Naushad Ahmed (PW-6) and the Investigating Officer, Sri Tapash Bhowmik (PW-9). The prosecution has also introduced 3(three) documentary evidence (Exbts.1 to 3) including the written complaint (Exbt.1). Having recorded the evidence led by the prosecution, the accused persons were examined separately under Section 313 of the Cr.P.C., when they denied the incriminating materials surfaced in the evidence. On appreciating the evidence, the Chief Judicial Magistrate by the judgment dated 18.02.2011 delivered in G.R.416 of 2009 convicted the accused under Sections 498-A of I.P.C. and sentenced the respondents No.2 & 3 to suffer for 3 years and to pay a fine of Rs.50,000/-.

Being aggrieved thereby, the respondents No.2 and 3 filed an appeal under Section 374(3) of the Cr.P.C. in the court of the Sessions Judge, South Tripura, Udaipur. By the impugned judgment dated 16.06.2011, the Sessions Judge set aside the judgment passed by the trial court and acquitted the respondents No.2 and 3. The appellant has questioned that finding as returned by the appellate court, in this appeal. The appellate court having relied the testimony of PW-3, the landlord has observed that the conviction against the respondent No.3 cannot be sustained under Section 498-A read with Section 109 of the I.P.C. Having referred

to the decision of **Manju Ram Kalita vs. State of Assam**, reported in **(2009) 13 SCC 330**, the appellate court has observed that it is to be established that the women has been subjected to cruelty persistently and continuously or at least close proximity of time of lodging the complaint. With reference to **Girdhar Sankar Tawade vs. State of Maharashtra**, reported in **(2002) 5 SCC 177**, it has been observed that unless one of three specific situations, such as (i) to drive the woman to cause commit suicide (ii) to cause grave injury and (iii) to cause danger to life limb or health and in absence of physical injury there must be coercive harassment for realising unlawful demand is alleged, charged and proved beyond reasonable doubt, no one can be punished for committing offence of cruelty under Section 498-A of the I.P.C. Thereafter, it has been observed as under:

"20. The victim, as PW-1 on oath stated that, in the year 2008 the accused persons drove her out of her matrimonial home after assaulting her. Similarly, the victim stated that, on 16.08.2009 appellant Rakesh Miah assaulted her. The demand of dowry is not there, either in the alleged assault of the year 2008 or in the alleged assault of 16.08.2009. The episode of alleged assault of 2008 has not be substantiated by believable and cogent evidence although the alleged in the night of 16.08.2009 has been proved by the evidence of the victim, corroborated by the evidence of PWs.2 and 3, the land lady and land lord, respectively, in whose the victim was tenant."

[5] Mr. D. Bhattacharji, learned counsel appearing for the appellant has seriously criticised the impugned judgment for ignoring the relevant evidentiary materials in returning the finding

of acquittal. Mr. Bhattacharji, learned counsel has emphatically submitted that it is a saga of continuing offence of cruelty, within the meaning of Section 498-A of the I.P.C. Mere cessation by virtue of living separately for the time being under compelling circumstances cannot disjoint the continuity of the offence. The nature of the offence, for purpose of satisfying the test whether the offence is attracted by the explanation provided below Section 498-A of the I.P.C. requires to be appreciated. According to Mr. Bhattacharji, learned counsel oral testimony of the victim (PW-1) has been corroborated by PWs-2 and 3 on the material point. PW-6, father of the victim has also confirmed that he paid cash and gave motorbike and golden ornaments. Despite counselling, no change has been registered in the conduct of the respondent No.2. PW-5 has also supported the victim. PW-7, mother of the victim has also corroborated the victim's statement. Thus, Mr. Bhattacharji, learned counsel has submitted that the premises in which the order of acquittal has been delivered is ill conceived and not borne in the record.

[6] From the other side, Mr. Somik Deb, learned counsel appearing for the respondents No. 2 and 3 has raised a jurisprudential objection as to the maintainability of the appeal under Section 372 of the Cr.P.C. According to him, proviso to Section 372 of the Cr.P.C. cannot be given retrospective effect. Rather, that proviso will have the prospective effect from

31.12.2009 when the said proviso has been inserted below Section 372 of the Cr.P.C. by way of amendment. In **National Commission for Women vs. State of Delhi and another**, reported in **(2010) 12 SCC 599**, the apex court has observed as under:

8. Chapter XXIX of the Code of Criminal Procedure deals with "Appeal"(s). Section 372 specifically provides that no appeal shall lie from a judgment or order of a Criminal Court except as provided by the Code or by any other law which authorizes an appeal. The proviso inserted by Section 372 (Act 5 of 2009) w.e.f. 31st December, 2009, gives a limited right to the victim to file an appeal in the High Court against any order of a Criminal Court acquitting the accused or convicting him for a lesser offence or the imposition of inadequate compensation. The proviso may not thus be applicable as it came in the year 2009 (long after the present incident) and, in any case, would confer a right only on a victim and also does not envisage an appeal against an inadequate sentence. An appeal would thus be maintainable only under Section 377 to the High Court as it is effectively challenging the quantum of sentence.

Section 377 is reproduced below:

377. Appeal by the State Government against sentence: (1) Save as otherwise provided in Sub-section (2), the State Government may, in any case of conviction on a trial held by any Court other than a High Court, direct the Public Prosecutor to present an appeal against the sentence on the ground of its inadequacy—

(a) to the Court of session, if the sentence is passed by the Magistrate; and

(b) to the High Court, if the sentence is passed by any other Court.

(2) If such conviction is in a case in which the offence has been investigated by the Delhi Special Police Establishment, constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than the

Code, [the Central Government may also direct] the Public Prosecutor to present an appeal against the sentence on the ground of its inadequacy—

(a) to the Court of session, if the sentence is passed by the Magistrate; and

(b) to the High Court, if the sentence is passed by any other Court.

(3) When an appeal has been filed against the sentence on the ground of the inadequacy the Court of Session, or, as the case may be, the High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of the sentence.

[Emphasis supplied]

[7] Since in the instant case the last incident allegedly had taken place on 16.08.2009 the appeal is not maintainable in view of the interpretation provided by the apex court in **National Commission for Women vs. State of Delhi**.

[8] Mr. Deb, learned counsel appearing for the respondents No.2 and 3 has argued that these offences are not continuous in nature and quite distinct offences. The incident that occurred on 16.08.2009 does not have any link with the previous acts. There had been no allegation of unlawful demand on which the appellant was harassed or physically tortured on 16.08.2009. Thus, the last occurrence cannot be treated as the end episode in the continuous offence. Therefore, the cognizance as taken by the trial court is bad in law. In support of his contention, he has

referred to a decision of the apex court in **Arun Vyas and another vs. Anita Vyas**, reported in **(1999) 4 SCC 690**, where it has held that:

13. The essence of the offence in Section 498A is cruelty as defined in the explanation appended to that section. It is a continuing offence and on each occasion on which the respondent was subjected to cruelty, she would have a new starting point of limitation. The last act of cruelty was committed against the respondent, within the meaning of the explanation, on October 13, 1988 when, on the allegation made by the respondent in the complaint to Additional Chief Judicial Magistrate, she was forced to leave the matrimonial home. Having regard to the provisions of Sections 469 and 472 the period of limitation commenced for offences under Sections 406 and 498A from October 13, 1988 and ended on October 12, 1991. But the charge-sheet was filed on December 22, 1995, therefore, it was clearly barred by limitation under Section 468(2)(c) Cr.P.C.

14. It may be noted here that Section 473 Cr.P.C. which extends the period of limitation is in two parts. The first part contains non obstante clause and gives overriding effect to that section over Sections 468 to 472. The second part has two limbs. The first limb confers power on every competent court to take cognizance of an offence after the period of limitation if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and the second limb empowers such a court to take cognizance of an offence if it is satisfied on the facts and in the circumstances of the case that it is necessary so to do in the interests of justice. It is true that the expression 'in the interest of justice' in Section 473 cannot be interpreted to mean in the interest of prosecution. What the Court has to see is 'interest of justice'. The interest of justice demands that the Court should protect the oppressed and punish the oppressor/offender. In complaints under Section 498A the wife will invariably be oppressed, having been subjected to cruelty by the husband and the in-laws. It is, therefore, appropriate for the Courts, in case of delayed complaints, to construe liberally Section 473 Cr.P.C. in favour of a wife who is subjected to cruelty if on the facts and in the circumstances

of the case it is necessary so to do in the interests of justice. When the conduct of the accused is such that applying rule of limitation will give an unfair advantage to him or result in miscarriage of justice, the Court may take cognizance of an offence after the expiry of period of limitation in the interests of justice. This is only illustrative not exhaustive.

[Emphasis supplied]

[9] Mr. Deb, learned counsel in the backdrop of the case in hand has pointed out that at the time of taking cognizance even the delay has not been noticed and thus, there was no consideration on Section 473 of the Cr.P.C.

[10] To nourish his submission, Mr. Deb, learned counsel for the respondents No.2 and 3 has placed reliance on **Udai Shankar Awasthi vs. State of Uttar Pradesh and another**, reported in **(2013) 2 SCC 434** for illustrating distinction between 'continuous offence' and 'instantaneous offence'. In that decision it has been observed that continuous offence has not been defined in the Cr.P.C. because such expression cannot have a fixed connotation. While enunciating the distinction between the 'continuous offence' and 'instantaneous offence'. It has been held as under:

29. Thus, in view of the above, the law on the issue can be summarised to the effect that, in the case of a continuing offence, the ingredients of the offence continue, i.e., endure even after the period of consummation, whereas in an instantaneous offence, the offence takes place once and for all i.e. when the same actually takes place. In such cases, there is no continuing offence, even though the damage resulting from the injury may itself continue.

[11] On the aspect of limitation, Mr. Deb, learned counsel has relied few more decisions in **Srinivas Pal vs. Union Territory of Arunachal Pradesh**, reported in **AIR 1988 SC 1729**, where the apex court has assessed the very purpose of placing the bar of limitation and observed as under:

The High Court held, and in our opinion rightly, that Section 32 of the said Regulation should be guided by the spirit of the Code and it will be proper to throw out a complaint if there was inordinate or undue delay, which was not explained. Indeed, this Court in *State of Punjab v. Sarwan Singh*, (1981) 3 SCR 349 observed at page 351 : (AIR 1981 SC 1054 at p.1055) of the report that the object of the Criminal Procedure Code in putting a bar of limitation on prosecutions was clearly to prevent the parties from filing cases after a long time, as a result of which material evidence may disappear and also to prevent abuse of the process of the court by filing vexatious and belated prosecutions long after the date of the offence. this Court reiterated that the object which the statutes seek to subserve is clearly in consonance with this concept of fairness of trial as enshrined in Article 21 of the Constitution. Shri Raju Ramachandran submitted that the exercise of the power under Section 473 of the Criminal Procedure Code extending the period of limitation by condoning the delay in launching the prosecution, should precede the taking of cognizance of the offence. Reliance was placed on the Bench decision of the Madras High Court in *Kathamuthu v. Balammal* : [1987] Cri. L.J. 360. It was held by the Punjab and Haryana High Court in the case of *Ghansham Dass v. Sham Sundar Lal* : 1982 Cri LJ 1717 that cognizance taken by the Magistrate without deciding the point in limitation was beyond his jurisdiction. In this connection, reliance may be placed to the decision of this Court in *Surinder Mohan Vikal v. Ascharaj Lal Chopra* : (1978) 2 SCC 403 where at page 407 (AIR 1978 SC 986 at P.988) of the report, while dealing with the provisions of Section 468 of the Cr.PC, this Court observed that it is hardly necessary to say that statutes of limitation have legislative policy behind them. For instance, they shut out belated and dormant claims in order to save the accused from unnecessary harassment.

They also save the accused from the risk of having to face trial at a time when his evidence might have been lost because of the delay on the part of the prosecutor. As has been stated, a bar to the taking of cognizance has been prescribed under Section 468 of the CrPC and there is no reason why the appellant should not be entitled to it in the facts and circumstances of this case. Our attention was also drawn to the case of *Vijay Kumar Agarwalla v. State of Assam* : [1986] 1 GLR 421, where the Court held that taking of cognizance without condoning delay was bad and without jurisdiction.

[Emphasis supplied]

[12] In **State of Himachal Pradesh vs. Tara Dutt and Anr.**, reported in **AIR 2000 SC 297**, the apex court while appreciating the manner of exercising its special power of condoning the delay has observed as under:

7. Section 473 confers power on the Court taking cognizance after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and that it is necessary so to do in the interest of justice. Obviously, therefore in respect of the offences for which a period of limitation has been provided in Section 468, the power has been conferred on the Court taking cognizance to extend the said period of limitation where a proper and satisfactory explanation of the delay is available and where the Court taking cognizance finds that it would be in the interest of justice. This discretion conferred on the Court has to be exercised judicially and on well recognised principles. This being a discretion conferred on the Court taking cognizance, where-ever the Court exercises this discretion, the same must be by a speaking order, indicating the satisfaction of the Court that the delay was satisfactorily explained and condonation of the same was in the interest of justice. In the absence of a positive order to that effect it may not be permissible for a superior Court to come to the conclusion that the Court must be deemed to have taken cognizance by condoning the delay whenever the cognizance was barred and yet the Court took cognizance and proceeded with the trial of

the offence. But the provisions are of no application to the case in hand since for the offences charged, no period of limitation has been provided in view of the imposable punishment thereunder. In this view of the matter we have no hesitation to come to the conclusion that the High Court committed serious error in holding that the conviction of the two respondents under Section 417 would be barred as on the date of taking cognizance the Court could not have taken cognizance for the said offence. Needless to mention, it is well settled by a catena of decisions of this Court that if an accused is charged of a major offence but is not found guilty thereunder, he can be convicted of a minor offence if the facts established indicate that such minor offence has been committed.

[Emphasis supplied]

[13] In **Ramesh and others vs. State of Tamil Nadu**, reported in **(2005) 3 SCC 507**, the apex court had occasion to appreciate what would be the starting point of limitation so far the offence punishable under Section 498-A of the I.P.C. is concerned. In **Ramesh vs. State of Tamil Nadu**, the apex court has also observed that in all matters liberal approach that has been stressed in some cases may not be mechanically applied. But in appropriate cases benefit of Section 473 of Cr.P.C. should be extended having regard to the interest of justice.

[14] In **Sanapareddy Maheedhar and Anr. vs. State of Andhra Pradesh and Anr.**, reported in **AIR 2008 SC 787**, the apex court when considering whether the Magistrate could take cognizance of the offence punishable under Sections 498-A and 406 of I.P.C. read with Sections 4 & 6 of the Dowry Prohibition Act after

expiry of 3(three) years has examined the perspective and ambit of the provisions under Chapter XXXVI of the Cr.P.C. Section 468(1) of the Cr.P.C. creates a bar against taking cognizance of an offence after the lapse of period of limitation. Section 469 and 470 of the C.P.C. specify the point of time with reference to which the period of limitation is to be counted and for exclusion of time in certain cases. Section 472 of the Cr.P.C. deals with continuing offence and declares that in case of continuing offence a fresh period of limitation shall begin to run at every moment of time during which the offence continues. The episode gives rise new point of time for limitation to take cognizance of the preceding episodes of the offence. Section 473 of the Cr.P.C. which begins with non-obstante clause, empowers the court to take cognizance of an offence after expiry of the period of limitation, if it is satisfied that the delay has been properly explained and it is necessary to do so in the interest of justice. In that perspective, in **Sanapareddy Maheedhar vs. State of Andhra Pradesh**, the apex court has enunciated the law as under:

16. In *State of Punjab vs. Sarwan Singh* : (1981) 3 SCC 34 , this Court noted that the object of Section 468 Cr.P.C. is to create a bar against belated prosecutions and to prevent abuse of the process of the court and observed that this is in consonance with the concept of fairness of trial enshrined in Article 21 of the Constitution.

17. In *Venka Radhamanohari vs. Vanka Venkata Reddy* : (1993) 3 SCC 4 this Court considered the applicability of Section 468 to

the cases involving matrimonial offences, referred to the judgment in Sarwan Singh's case (supra) and observed:

It is true that the object of introducing Section 468 was to put a bar of limitation on prosecutions and to prevent the parties from filing cases after a long time, as it was thought proper that after a long lapse of time, launching of prosecution may be vexatious, because by that time even the evidence may disappear. This aspect has been mentioned in the statement and object, for introducing a period of limitation, as well as by this Court in the case of Sarwan Singh (supra). But, that consideration cannot be extended to matrimonial offences, where the allegations are of cruelty, torture and assault by the husband or other members of the family to the complainant. It is a matter of common experience that victim is subjected to such cruelty repeatedly and it is more or less like a continuing offence. It is only as a last resort that a wife openly comes before a court to unfold and relate the day-to-day torture and cruelty faced by her, inside the house, which many of such victims do not like to be made public. As such, courts while considering the question of limitation for an offence under Section 498A i.e. subjecting a woman to cruelty by her husband or the relative of her husband, should judge that question, in the light of Section 473 of the Code, which requires the Court, not only to examine as to whether the delay has been properly explained, but as to whether 'it is necessary to do so in the interests of justice'.

[Emphasis added]

18. The court then compared Section 473 Cr.P.C. with Section 5 of the Limitation Act and observed :

For exercise of power under Section 5 of the Limitation Act, the onus is on the appellant or the applicant to satisfy the court that there was sufficient cause for condonation of the delay, whereas Section 473 enjoins a duty on the court to examine not only whether such delay has been explained but as to whether it is the requirement of the justice to condone or ignore such delay. As such, whenever the bar of Section 468 is applicable, the court has to apply its mind on the question, whether it is necessary to condone such

delay in the interests of justice. While examining the question as to whether it is necessary to condone the delay in the interest of justice, the Court has to take note of the nature of offence, the class to which the victim belongs, including the background of the victim. If the power under Section 473 of the Code is to be exercised in the interests of justice, then while considering the grievance by a lady, of torture, cruelty and inhuman treatment, by the husband and the relatives of the husband, the interest of justice requires a deeper examination of such grievances, instead of applying the rule of limitation and saying that with lapse of time the cause of action itself has come to an end. The general rule of limitation is based on the Latin maxim : *vigilantibus, et non, dormientibus, jura subveniunt* (the vigilant, and not the sleepy, are assisted by the laws). That maxim cannot be applied in connection with offences relating to cruelty against women.

[Emphasis added]

[15] In **Sanapareddy Maheedhar vs. State of Andhra Pradesh**, the apex court has generously referred to **Arun Vyas vs. Anita Vyas** while considering applicability of Section 473 of the Cr.P.C., particularly in the cases relating to offences which fall under the ambit of Section 468 of the Cr.P.C., has observed that the first limb confers power on every competent court to take cognizance of an offence after the period of limitation if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and the second limb empowers such a court to take cognizance of an offence if it is satisfied on the facts and in the circumstances of the case that it is necessary so to do in the interests of justice. It is true that the expression 'in the interest of justice' in Section 473 cannot be interpreted to mean in

the interest of prosecution. What the court has to see is 'interest of justice'. The interest of justice demands that the court should protect the oppressed and punish the oppressor/offender. In complaints under Section 498A the wife will invariably be the oppressed, having been subjected to cruelty by the husband and the in-laws. It is, therefore, appropriate for the courts, in case of delayed complaints, to construe liberally Section 473 Cr.P.C. in favour of a wife who is subjected to cruelty if on the facts and in the circumstances of the case it is necessary so to do in the interest of justice. When the conduct of the accused is such that applying the rule of limitation will give an unfair advantage to him or result in miscarriage of justice, the court may take cognizance of an offence after the expiry of the period of limitation in the interests of justice. This is only illustrative, not exhaustive.

[16] In **State of H.P. vs. Tara Dutta**, reported in **(2000) 1 SCC 230**, a three Judges Bench of the apex court has considered whether there can be a presumption of condonation of delay under Section 473 Cr.P.C. and approvingly reproduced the relevant parts of **Sanapareddy Maheedhar vs. State of Andhra Pradesh**. It has been observed in **State of H.P. vs. Tara Dutta** that section 473 confers power on the court of taking cognizance after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and that it is necessary so to do in the interest of justice.

Obviously in respect of the offences for which a period of limitation has been provided in Section 468, the power has been conferred on the court for taking cognizance to extend the said period of limitation where a proper and satisfactory explanation of the delay is available and where the court taking cognizance finds that it would be proper in the interest of justice. This discretion conferred on the court has to be exercised judicially and on well-recognised principles. This being a discretion conferred on the court taking cognizance, wherever the court exercises this discretion, the same must be so exercised by a speaking order, indicating the satisfaction of the court that the delay was satisfactorily explained and condonation of the same was in the interest of justice. In the absence of a positive order to that effect it may not be permissible for a superior court to come to the conclusion that the court must be deemed to have taken cognizance by condoning the delay whenever the cognizance was barred and yet the court took cognizance and proceeded with the trial of the offence. But in that case, the offence did not fall in the category of the offences with the ambit of Section 468 of the Cr.P.C. and in this view of the matter, the apex court has expressed no hesitation to come to the conclusion that the High Court committed serious error in holding that the conviction of the two respondents under Section 417 was barred as on the date of taking cognizance the Court could not have taken cognizance of the said offence. Needless to mention, it is well

settled by a catena of decisions of the apex court that if an accused is charged with a major offence but is not found guilty thereunder, he can be convicted of a minor offence if the facts established indicate that such minor offence has been committed.

[17] In the context of Section 473 of the Cr.P.C. it has been as well observed in tune with **Arun Vyas vs. Anita Vyas** that the said provision being an enabling provision, whenever a Magistrate invokes the said provision and condones the delay, the order of the Magistrate must indicate that he was satisfied on the facts and circumstances of the case that the delay has been properly explained and that it is necessary in the interest of justice to condone the delay. But without such an order being there or in the absence of such positive order, it cannot in all occasions be said that the Magistrate has failed to exercise jurisdiction vested in law. It is no doubt true that in view of the fact that an offence under Section 498A is an offence against the society and, therefore, in the matter of taking cognizance of the said offence, the Magistrate must liberally construe the question of limitation but at the same time the Magistrate has to be satisfied, in case of period of limitation for taking cognizance under Section 468(2)(c) having expired that the circumstances of the case require delay to be condoned and further the same must be manifest in the order of the Magistrate itself. The apex court has thus stated that in their view, that is the correct interpretation of Section 473 of the Code of Criminal Procedure.

[18] On the point of limitation, the apex court is of the view that the prosecution cannot be nullified at the very threshold on the ground that the prescribed period of limitation had expired. The Magistrate should pause to consider the question of limitation before taking cognizance and he should address himself to the question whether there were grounds to extend the period of limitation.

What has been succinctly held is that at the time of taking cognizance of the offences within the ambit of Section 468 of the Cr.P.C., the Magistrate or the competent court shall not look into whether the evidence based on which the complaint or the police report has been filed would survive the scrutiny of the court or not and that shall not be the premise on which cognizance would depend. On the face of the record, the complaint or the police report, the Magistrate or the competent court would determine whether there are material for taking cognizance of a particular offence or offences or whether the cognizance is within the limitation as prescribed or not.

[19] By way of rejoinder, Mr. D. Bhattacharji, learned counsel appearing for the appellant has as well placed his reliance on **Arun Vyas and another vs. Anita Vyas**, reported in **(1999) 4 SCC 690**, where the apex court while observing the provisions relating to the limitation of taking cognizance of certain offences in

the new code, to demonstrate that the object of those provisions are to protect the accused person from prosecution based on stale grievances, which may turn out to be vexatious. The reason for engrafting the rule of limitation is that due to a long lapse of time, necessary evidence will be lost and the person prosecuted will confront prejudice. It would cause great mental anguish and hardship to them and may even result in miscarriage of justice. At the same time, it is the duties of the court to ensure that due to delays on the part of the investigating and prosecuting agencies and the application of rule of limitation, the criminal justice system is not rendered toothless and ineffective and the perpetrators of crime are not thus placed in an advantageous position. The Parliament has obviously taking note of various aspects, classified offences into two categories, having regard to the gravity of offences, on the basis of punishment prescribed for them. Grave offence for which the punishment of imprisonment has been prescribed for a term exceeding 3 years is not brought within the ambit of Chapter XXXVI. The period of limitation is prescribed only for offence, for which punishment specified is imprisonment for a term not exceeding 3 years, and even in such cases a wide discretion is given to the court in the matter of taking cognizance even after expiry of limitation. Section 473 provides that if any court is satisfied on the fact and in the circumstances of the case that the delay has been properly explained or that it is necessary so

to do in the interest of justice it may take cognizance of an offence after the expiry of the period of limitation. This section opens with a non-obstante clause with overriding effect over all other provisions of Chapter XXXVI. It has been appreciated in **Arun Vyas vs. Anita Vyas** that the essence of the offence punishable under Section 498-A of the I.P.C. is cruelty as defined in the explanation appended to that Section. It is a continuing offence on each occasion on which the respondent was subjected cruelty and hence, it would have a new starting point of limitation. The law has been culled out succinctly in **Arun Vyas vs. Anita Vyas** in the following term:

14. It may be noted here that Section 473 Cr.P.C. which extends the period of limitation is in two parts. The first part contains non obstante clause and gives overriding effect to that section over Sections 468 to 472. The second part has two limbs. The first limb confers power on every competent court to take cognizance of an offence after the period of limitation if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and the second limb empowers such a court to take cognizance of an offence if it is satisfied on the facts and in the circumstances of the case that it is necessary so to do in the interests of justice. It is true that the expression 'in the interest of justice' in Section 473 cannot be interpreted to mean in the interest of prosecution. What the Court has to see is 'interest of justice'. The interest of justice demands that the Court should protect the oppressed and punish the oppressor/offender. In complaints under Section 498A the wife will invariably be oppressed, having been subjected to cruelty by the husband and the in-laws. It is, therefore, appropriate for the Courts, in case of delayed complaints, to construe liberally Section 473 Cr.P.C. in favour of a wife who is subjected to cruelty if on the facts and in the circumstances of the case it is necessary so to do in the interests of justice. When the conduct of the accused is such that applying rule of limitation will give an unfair advantage to him or result in miscarriage of justice, the Court may take

cognizance of an offence after the expiry of period of limitation in the interests of justice. This is only illustrative not exhaustive.

[20] From the rival contentions what emerges for consideration of this Court is:

(i) Whether an appeal under proviso to Section 372 of the Cr.P.C. is maintainable as the offence has admittedly occurred on 16.08.2009 whereas the proviso to Section 372 of the Cr.P.C. has come into force w.e.f. 31.12.2009?

(ii) Whether the offence as allegedly committed on 16.08.2009 is in continuation of the previous acts of cruelty or it is an instantaneous culpable act?

(iii) Whether without any application by explaining the delay as occurred, the Magistrate can take cognizance of the alleged offence if it is not a continuing offence within the ambit of Section 472 of the Cr.P.C.? and

(iv) Whether by the impugned judgment, has it been correctly appreciated that from the evidence it cannot be held that there was continuous intimidating conduct or behaviour so as to convict the accused respondents?

[21] While returning finding of conviction by the judgment dated 18.02.2011 in GR No.416/2009, the trial court, the Chief Judicial Magistrate, South Tripura, Udaipur has observed under:

In Arabind Singh vs. State of Bihar, reported in AIR 2001 SC 2124 Their Lordship observed that the conduct of the husband or his relatives to the wife must be such that the same may be attributed to painful or distressing. The evidence of torture both mentally and physically upon the informant, in her matrimonial home as well as in the rented house at Rajnagar by the accused person following the demand of Rs.1,00,000/- and ultimately driving her out of her matrimonial home for non-fulfilment of his demand by the informant and since then not taking care of the informant and her child by the accused and

thereby causing her to lead a miserable life with her child are undoubtedly concrete ingredients of Sec. 498-A IPC and I find no reason to disbelieve the evidence of the prosecution witnesses since defence totally failed to bring anything against the evidence of the prosecution witnesses to disbelieve them.

In the light of the above authorities and the discussion and observation made here-in-above, I do hereby reach in the conclusion that the charge under Sec. 498-A IPC has been successfully proved beyond all reasonable shadow of doubt against the accused persons for the offence punishable under Section 498A and thus, the aforesaid points are decided in the affirmative against the accused persons.

[22] The appellate court has disagreed with the said finding holding that even though the prosecution has substantiated the assault on the victim by the respondent No.2 herein, on the night of 16.08.2009 by believable and cogent evidence but that assault cannot be brought within the meaning of cruelty in terms of *Explanation- A* or *Explanation-B* provided below Section 498-A I.P.C. On relying on **Manju Ram Kalita vs. State of Assam**, reported in **(2009) 13 SCC 330** and **Girdhar Sankar Tawade vs. State of Maharashtra**, reported in **(2002) 5 SCC 177**, the appellate court has observed that the cruelty has to be 'continued intimidating conduct and behaviour' or it would be such grave injuries or the culpable act that might drive the women to commit suicide, cause grave injury or danger to life, limb or health or in absence of physical injury, coercive harassment may amount to cruelty if it is so done with a view to fulfil any unlawful demand. According to the appellate court the nature of injury or the gravity

of the assault cannot be derived from the evidence and hence, the finding of the conviction was set aside.

[23] Before examining the questions as formulated above, this court has thoroughly scrutinized the records of evidence. The victim (PW-1) herself filed the written ejahar (Exbt.1) disclosing how she was tortured by the respondent No.2 aided by the respondent No.3. As she failed to bear such cruelty, she left the matrimonial home but on assurance that they would not inflict physical torture any further, she agreed to come back to the matrimonial home. But even thereafter, she was subjected to physical torture. The Family Counselling Centre had two sessions for bringing reproachment. But on 12.03.2008 the respondents No.2 and 3 had thrown her out from the matrimonial home. She again took shelter in her paternal house. The respondent No.2 instituted a suit being T.S. (RCR) 11 of 2008 for bringing the petitioner in the matrimonial home. At the intervention of the court they again started living together but on 16.08.2009, the respondent No.2 being instigated by the other accused persons physically assaulted her and when the local residents rushed to the spot, the respondent No.2 opened the door and she fled and hid in a jungle. This is the basis of registering the case being R.K. Pur case No.188 of 2009 under Section 498-A of I.P.C. on 18.08.2009.

In the trial, the complainant (PW-1) has briefly narrated what happened till the year 2008 and what happened after she joined the respondent No.2 in a rented house. She had joined the respondent No.2 at the intervention of the Family Court. But on 16.08.2009 again the victim fell prey to the matrimonial violence. She has stated as under:

On 16.08.2009 in the night at about 7.30/8 pm. my accused husband Rakesh Miah mercilessly assaulted me. On hearing my cry the neighbouring people came to my rented house. At the relevant time the door of our room was bolted by my husband. The neighbouring people compelled my husband to open the door. Out of fear I concealed myself by side of the bank of the pond. The neighbouring people informed the matter to the police as well as to my father and uncle. The police and my father and uncle arrived at the spot and they rescued me and brought me to the P.S. from where I was brought by my father and uncle to my paternal house. On the following day of the incident police recovered my baby from the house of my accused husband and handed over me at the father's house. Since then I am staying at my father's house. I lodged the instant case narrating all these facts to the O/C, R.K. Pur P.S.

It is apparent that the appellant has not complained of any unlawful demand on 16.08.2009 by the respondents No.2 and 3 connecting the same with the preceding assaults. But PW-2 Ratna Saha, the land lady and PW-6 Sarkar Naushad Amin, father of the victim have stated that the victim stated them that she was subjected to assault on demand of 'one house at Dakbangalow road'. Even PW-3 has stated to have heard of such demand from his wife (PW-2). PW-7, Jahanara Begam, mother of the victim, however has candidly stated that 'subsequently I heard that he

assaulted Monalisha but I cannot say for what reason'. The other witnesses are not very material for finding out the continuity or the context of the assault. Now this Court would examine the questions framed for purpose determining the appeal having regard to the law as developed and as applicable in the present context.

(i) Whether an appeal under proviso to Section 372 of the Cr.P.C. is maintainable as the offence has admittedly occurred on 16.08.2009 whereas the proviso to Section 372 of the Cr.P.C. has come into force w.e.f. 31.12.2009?

[24] In **National Commission for Women vs. State of Delhi**, the apex court though without much elaboration has determined that the proviso to Section 372 of the Cr.P.C. may not be applicable in a case where the occurrence took place prior to 31.12.2009. Thus, even though the proviso to Section 372 of the Cr.P.C. is a substantive procedural law creating right to appeal in favour of the victim of the crime, in view of this definite determination, this Court is bound to observe that this appeal is not maintainable under proviso to Section 272 of the Cr.P.C. as the last occurrence took place on 16.08.2009. However, the Court is not circumvented to convert such appeal into revision in the appropriate case.

(ii) Whether the offence as allegedly committed on 16.08.2009 is in continuation of the previous acts of cruelty or it is an instantaneous culpable act?

[25] In **Udai Shankar Awasthi vs. State of Uttar Pradesh**, the apex court had occasion to embark on the discourse on the continuing offence as referred in Section 472 of the Cr.P.C., in the perspective that once an offence is held to be a continuing offence, a fresh period of limitation begins to run at every moment of the time period during which the offence continues. The expression 'continuing offence' has not been defined in the Cr.P.C. because it is one of those expressions which cannot conform to a fixed connotation. It has been observed that there cannot be any formula of universal application to denote 'continuing offence'. In **Balakrishna Savalram Pujari Waghmare vs. Shree Dhyaneshwar Maharaj Sansthan**, reported in **AIR 1959 SC 798**, the apex court had occasion to deal with the same issue and observed that a continuing offence is an act which create 'a continuing source of injury' and renders the doer of the act responsible and liable for the continuation of the said injury. In case a wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the said act may continue. *If the wrongful act is of such character that the injury caused by it, itself continues then the said act constitutes a continuing wrong.* The distinction between the two wrongs therefore depends upon the effect from the injury. What transpires from the principle as culled out in **Balakrishna Savalram Pujari Waghmare vs. Shree Dhyaneshwar Maharaj Sansthan** is that

the offender must be the same. It is not the continuation of the damage but of the injury that may constitute continuing offence. In **Gokak Patel Volkart vs. Dundayaa Gurushiddaiah Hiremath**, reported in **(1991) 2 SCC 141**, the apex court has referred *Black's Law Dictionary (5th Edition)* to find out the meaning ascribed by it to 'continuing'. 'Continuing' according to the *Black's Law Dictionary* means enduring, not terminated by a single act or fact, subsisting for definite period or intended to cover or apply to successive similar obligation or occurrences. Continuing offence means type of crime which is committed over a span of time. The apex court having due regard to that meaning has observed that a continuing offence is that, which may consists of separate acts or a course of conduct but which arises from that singleness of thought, purpose or action which may be deemed a single impulse. A 'continuous crime' according to the *Black's Law Dictionary* as referred in **Gokak Patel Volkart vs. Dundayaa Gurushiddaiah Hiremath** means one consisting of a continuous series of act which endures after the period of consummation. As the offence of carrying concealed weapons in the case of instantaneous crimes, the statute of limitation begins to run with the consummation, while in the case of continuous crime it only begins with the succession of the criminal conduct or act.

[26] In **Gokak Patel Volkart vs. Dundayaa Gurushiddaiah Hiremath**, the apex court placed reliance on its

previous decision in **State of Bihar vs. Deokaran Nenshi**, reported in **(1972) 2 SCC 890**, where it has been held that:

"A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all.'

[27] Identical view has been expressed in **Bhagirath Kanoria vs. State of M.P.**, reported in **(1984) 4 SCC 222** and **Amrit Lal Chum vs. Devoprasad Dutta Roy**, reported in **(1988) 2 SCC 269**. In **Raymond Ltd. & Anr. vs. M.P. Electricity Board**, reported in **(2001) 1 SCC 534**, the apex court has further attempted to lend a definiteness in the meaning of continuous in the following terms:

"18. It cannot legitimately be contended that the word 'continuously' has one definite meaning only to convey uninterruptedness in time sequence or essence and on the other hand the very word would also mean 'recurring at repeated intervals so as to be of repeated occurrence'. That apart, used as an adjective it draws colour from the context too..."

[Emphasis supplied]

As such no simplified yardstick can be availed to determine whether an offence comes under the category of continuing offence or not. The expression 'continuous' cannot be restricted to mean uninterruptedness in the time sequence. It depends fundamentally upon 'the effect of injury' even if recurring at repeated intervals. If the resulting injury caused was complete at the date of occurrence it would not definitely be continuing offence. But if the effect continues by creating a continuing source of injury and renders the doer of the act responsible and liable for continuation of the said injury then the said offence would definitely be brought within the meaning of continuing offence. The apex court in **Venka Radhamanohari vs. Vanka Venkata Reddy**, reported in **(1993) 3 SCC 4**, while appreciating the ambit of Section 468 of the Cr.P.C. has observed that very object of Section 468 cannot be extended to matrimonial offences where the allegations of cruelty, torture and assault by the husband or other members of the family on the complainant. It is to be remembered from the common experience that the victim is subjected to such cruelty repeatedly and it is more or less like a continuing offence. It is only as a last resort that wife openly comes before a court to unfold and relate the day to day torture and cruelty faced by her, inside the house which many of such victim do not like to be made public. As such, it has been succinctly held that 'as such, courts while considering the question of limitation for an offence under

Section 498A i.e. subjecting a woman to cruelty by her husband or the relative of her husband, should judge that question, in the light of Section 473 of the Code, which requires the Court, not only to examine as to whether the delay has been properly explained, but as to whether 'it is necessary to do so in the interests of justice'.

Therefore, the pristine object is to ensure the interest of justice. What Mr. Deb, learned counsel appearing for the respondents No.2 and 3 has submitted is that the offence that occurred on 16.08.2009 is a distinct and instantaneous offence having no relation with the previous occurrences as stated by PW-1, the wife. This analogy has been accepted by the appellate court. For that purpose, the nature of offences punishable under Section 498-A of I.P.C. has been analysed having placed reliance on **Manju Ram Kalita vs. State of Assam**. **Manju Ram Kalita vs. State of Assam** which is a case where the apex court has interpreted the meaning of the word, cruelty with due regard to the explanation below Section 498-A of the I.P.C. Previously in **Girdhar Sankar Tawade vs. State of Maharashtra**, the apex court held that cruelty has to be understood on the specific statutory meaning provided in Section 498-A of the I.P.C. and there should be case of continuous state of affairs of torture. It has been also observed in **Manju Ram Kalita vs. State of Assam** as under:

"Cruelty" for the purpose of Section 498A I.P.C. is to be established in the context of Section 498A IPC as it may be a different from other statutory provisions. It is to be determined/inferred by considering the

conduct of the man, weighing the gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide etc. It is to be established that the woman has been subjected to cruelty continuously/ persistently or at least in close proximity of time of lodging the complaint. Petty quarrels cannot be termed as 'cruelty' to attract the provisions of Section 498A IPC. Causing mental torture to the extent that it becomes unbearable may be termed as cruelty.

Petty quarrels cannot be termed as cruelty within the ambit of Section 498-A of the I.P.C., but causation of mental torture to the extent that it becomes unbearable may be termed as cruelty. The way the appellate court has interpreted **Manju Ram Kalita vs. State of Assam** cannot be accepted by this Court. Its interpretation emanates from selective reading. The occurrence that took place on 16.08.2009 cannot be excluded from the meaning of cruelty even in terms of **Manju Ram Kalita vs. State of Assam**. Moreover, the offence that took place on 16.08.2009 is in the considered opinion of this Court a continuing offence of the previous culpable acts, even though those occurred and recurred at repeated intervals.

(iii) Whether without any application explaining the delay as happened, the Magistrate can take cognizance of the alleged offence if it is not a continuing offence within the ambit of Section 472 of the Cr.P.C.?

[28] Even though this question has been rendered of no consequence in this appeal as it has been observed that the occurrence that had taken place on 16.08.2009 is a continuing

offence. But the question that is of perennial interest is that whether the Magistrate can take cognizance of any offence, taking cognizance of which is otherwise barred by the limitation as provided under Section 468 of the Cr.P.C. without consideration of the explanation, if any, given by the prosecution by filing a written application or without consideration of the imperative reasons that may surface on the face of records in the interest of justice. Section 473 of the Cr.P.C. deals with extension of period of limitation in certain cases by empowering the courts in taking cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the fact and in the circumstances of the case that (i) the delay has been properly explained or (ii) it is necessary to condone the delay in the interest of justice. In **Arun Vyas vs. Anita Vyas**, the apex court has observed that the first limb confers power on every competent court to take cognizance of an offence after the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained. The second time, empowers such a court to take cognizance of an offence if it is satisfied on the fact and circumstances of the case that it is necessary to extend the period of limitation having regard to the interest of justice. The expression 'in the interest of justice' in Section 473 cannot be interpreted to mean 'in the interest of prosecution'. The interest of justice cannot be waived in order to protect the oppressed and to punish the oppressor/offender. For

having the benefit under the first limb, the prosecution must by filing a proper application explain the delay to the satisfaction of the court. Unless such application is filed, the court is not precluded from considering the fact and circumstances *ex-facie* to weigh whether in the interest of justice, the limitation be extended or not. Therefore, it is the statutory duty of the court taking cognizance to scrutinize whether the police report or the complaint has been filed within limitation for the offences covered under Section 468 of the Cr.P.C. If it is found that the complaint or the police report has been filed after the limitation then if there is any application from the prosecution it has to take the decision whether or not to extend the period of limitation on appreciating the explanation given in the application and thereafter it may direct its consideration towards the interest of justice. If there is no such application, the court shall consider whether the period of limitation should be extended in the interest of justice or not. No court without examining the aspect of limitation for the offences covered by Section 468 of the Cr.P.C. shall take cognizance of any of those offences. The discretionary power as conferred on the court in taking cognizance even after period of limitation under Section 473 of the Cr.P.C. shall be exercised by passing a speaking order, indicating the satisfaction of the court that the delay was satisfactory explained and or the condonation was warranted in the interest of justice.

The interplay of Section 472 and Section 473 of the Cr.P.C. has been considered in **Sanapareddy Maheedhar vs. State of Andhra Pradesh**. While considering the applicability of Section 468 to the complaint made by the victim of matrimonial offences, the court can invoke section 473 and can take cognizance of an offence after expiry of the period of limitation keeping in view the nature of allegation and the time taken by the police in the investigation and the fact that the offence of the cruelty is a continuing offence which affects the society at large. To put it differently, in cases involving matrimonial offences the court should not adopt a narrow and pedantic approach in refusing to take cognizance on the ground of limitation and should in the interest of justice liberally exercise the power as provided under Section 473 for extending the period of limitation. Therefore, while exercising the discretionary jurisdiction under Section 473 of the Cr.P.C. the court has to give its paramount consideration on the element of justice.

(iv) Whether by the impugned judgment, has it been correctly appreciated that from the evidence it cannot be held that there was continuous intimidating conduct or behaviour so as to convict the accused respondents?

[29] On appreciation of the evidence, this Court has already observed that the last culpable act that had taken place on 16.08.2009 is in continuance of the previous culpable acts as stated by the victim (PW-1). But in the last culpable act from the evidence

it appears clearly that there had been no participation or presence of the respondent No.3, Md. Sishu Miah and hence, he should not have been tried and hence, this Court is not inclined to interfere with the order of acquittal of the said accused, Md. Sishu Miah. So far the respondent No.2, namely, Md. Rakesh Miah is concerned, this Court finds sufficient materials for interference. For averting, a brazen failure of justice, this Court is of the view that this appeal be converted into a revision petition under Section 397 read with Section 401 of the I.P.C. on its own motion. But having regard to the provisions of Section 401(3) of the Cr.P.C. which stipulates that nothing in this section shall be deemed to authorize a High Court to covert a finding of acquittal into one of conviction, the case is remitted back to the first appellate court so far the respondent No.2, Md. Rakesh Miah is concerned for hearing and passing the judgment warranted in the fact and circumstances of the case within a period of 3(three) months from the date of the receipt of the records from this Court and having due regard to the observation and enunciation made herein above.

Accordingly, it is ordered.

The appeal, now a revision petition, is thus disposed of.

Send down the LCRs forthwith.

JUDGE

Sujay